

**Rogers v Five Star EL, Inc.**

2022 NY Slip Op 34868(U)

January 27, 2022

Supreme Court, Westchester County

Docket Number: Index No. 60117/2018

Judge: James W. Hubert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
JELANI R. ROGERS,

Plaintiff,

-against-

**DECISION & ORDER**

FIVE STAR ELEVATOR, INC. and THOMAS C.  
LEDDEN,

Index No.: 60117/2018

Defendants.

-----X

Hubert, J.S.C.

Before the Court is the Plaintiff's post trial motion pursuant to CPLR § 4404 (a). The Plaintiff was injured in a motor vehicle accident that occurred on May 31, 2018. Plaintiff seeks an order from the Court setting aside the verdict of the jury awarding Plaintiff the sum of \$93,600.00 for past pain and suffering. Plaintiff seeks an order of the Court granting *additur* in the amount of \$241,400.00 to the sum awarded by the jury for past pain and suffering, thus raising the award for past pain and suffering to the sum of \$335,000.00. The Plaintiff also seeks an order from the Court setting aside so much of the verdict of the jury that did not grant an award to Plaintiff for any damages for future pain and suffering, and thus seeks an order from the Court granting an award to the Plaintiff for future pain and suffering in the amount of \$300,000.00.

Trial of the above captioned matter was commenced on September 16, 2020 by way of jury selection. Presentation of evidence by the parties commenced on September 21, 2020 and was concluded on September 24, 2020. The jury heard testimony from the Plaintiff Jelani

Rogers, Defendant Thomas C. Ledden, Steven Klein, M.D., Arnold Wilson, M.D., and Jessica Berkowitz, M.D. The jury was charged that afternoon and commenced deliberations. The jury resumed deliberations the following day (September 25, 2020) and the verdict of the jury was returned that afternoon.

The first question on the verdict sheet asked the jury if the Defendant was negligent. The jury unanimously answered yes. The second question asked if the Defendant's negligence was a substantial factor in causing the Plaintiff's injuries. Again, the jury unanimously answered yes. The third question asked if as a result of the accident the Plaintiff sustained a significant limitation of use of a body function or system. The jury unanimously answered yes.

The fourth question asked if as a result of the accident the Plaintiff sustained a permanent consequential limitation of use of a body organ or member. The jury answered no by a five to one vote.

Question five asked if as a result of the accident did the Plaintiff suffer a medically determined injury or impairment of a non-permanent nature that prevented him from performing substantially all of the material acts that constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. The jury unanimously answered yes.

The sixth question addressed past damages (if any). The jury unanimously answered yes and awarded ninety-three thousand six hundred dollars (\$93,600) for past pain and suffering, and sixteen thousand eight hundred dollars (\$16,800) for lost wages.

On the last question (question seven), the jury was asked if there were damages covering the time from the date of the jury's verdict to a date in the future. The jury unanimously voted

“none” as to future pain and suffering and “none” to future medical expenses.

Prior to rendering awards of damages to the Plaintiff, the jury used its deliberation time productively and seriously to establish negligence on the part of the Defendant as well as injury and causation. During their deliberations, and at the end thereof, the jury sent three notes to the Court.

The first (Court Exhibit 4) requested the MRI pictures (in evidence) of the Plaintiff’s right knee. They also requested (and were given) a read-back of the testimony (direct and cross examination) of Dr. Arnold Wilson regarding the Plaintiff’s need for surgery and the MRI’s.

The second note (Court Exhibit 5) requested the written reports of Dr. Klein and Dr. Berkowitz. The reports were provided to the jury as requested.

A third note (Court Exhibit 6) requested “any answers that Dr. Klein provided during his testimony with regard to his interpretation of the first MRI conducted in July 2018.” The request was granted via read-back of testimony.

The last note from the jury (Court Exhibit 7), sent to the Court at 2:43 p.m., stated “We have reached a verdict.” The verdict was decided and rendered as previously stated.

In the instant case, the Defendant seeks an order from the Court setting aside the jury’s verdict on “weight of the evidence” grounds citing mostly Appellate Division cases that involved comparative negligence and the awards granted by the Appellate Divisions for past and future pain and suffering (*see*, Plaintiff’s Affirmation of Support, paragraphs 8 through 14).

Both Plaintiff and Defendants indirectly make reference to CPLR § 4404(a) and CPLR § 5501(c). For the sake of clarity, it is important to distinguish the two sections and their applicability to the motion before the Court.

CPLR §5501(c) sets forth, *inter alia*, the scope of review assigned to the Appellate Division, not the trial court. It states as follows: “[t]he appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court.” *Supra*. Empowered to review both questions of law and fact, it is principally the Appellate Division that determines on appeal whether a damage award is “. . . against the weight of the credible evidence” (*see Sow v. Arias*, 21 A.D.3d 317, 800 N.Y.S.2d 150 [1<sup>st</sup> Dep’t 2005]). The appellate court may independently weigh the probative force of conflicting inferences drawn from the testimony, and grant the judgment it concludes should have been granted by the trial court. *See, e.g., Jossel v. Filicori*, 235 A.D.2d 205, 652 N.Y.S.2d 12 (1<sup>st</sup> Dep’t 1997).

While a motion pursuant to CPLR § 4404 (a) is properly made before the trial court, the scope and standard of review is more constrained than that of the Appellate Division on an appeal. In determining, based on a review of the trial evidence, whether it should set aside a verdict, the trial court, unlike the Appellate Division, is confined to a determination that a verdict is “. . . not supported by legally sufficient evidence as a matter of law” and “. . . that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial.” *Sow, supra, citing Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282 (1978).<sup>1</sup> *See also Lang v. Newman*, 12 N.Y.3d 868, 883 N.Y.S.2d 153 (2009). As stated in *Cohen, supra*:

---

<sup>1</sup> While CPLR § 4404(a) does specifically use the phrase “. . . weight of the evidence . . .” it is clear from the case law that the scope and standards of review *under* CPLR § 4404(a) and CPLR § 5501(a) are different. *Sow, supra*.

This distinction is important because much of the Defendants' argument on the motion speaks to an assessment of the weight of the credible evidence (a question of fact), not an assessment of the legal sufficiency of the evidence (a question of law). Although these two inquiries may appear somewhat related, they actually involve very different standards and may well lead to disparate results. Whether a particular factual determination is against the weight of the evidence is itself a factual question. In reviewing a judgment of Supreme Court, the Appellate Division has the power to determine whether a particular factual question was correctly resolved by the trier of facts. If the original fact determination was made by a jury, . . . and the Appellate Division concludes that the jury has made erroneous factual findings, the court is required to order a new trial, since it does not have the power to make new findings of fact in a jury case.

*Cohen, supra* at 498, citing *Middleton v. Whitridge*, 213 N.Y. 499, 506-508, 108 N.E. 192, 495-96 (1914).

It is also well settled that the amount of damages to be awarded at trial for personal injuries is primarily a question of fact to be determined by the jury. Thus, in *McDermott, et al. v. Coffee Beanery, Ltd.*, 9 A.D.3d 195, 206, 777 N.Y.S.2d 103 (1<sup>st</sup> Dep't 2004), the Appellate Division, First Department recited:

[T]he court must cautiously balance “ ‘the great deference to be accorded to the jury's conclusion’ . . . against the court's own obligation to assure that the verdict is fair” (citations omitted) (*Fontana v. Kurian*, 214 A.D.2d 832, 833, 625 N.Y.S.2d 677, *lv. denied* 86 N.Y.2d 707, 634 N.Y.S.2d 441, 658 N.E.2d 219), and the court may not employ its discretion simply because it disagrees with a verdict, as this would “ ‘unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty’ ” (*Pena v. New York City Tr. Auth.*, 185 A.D.2d 794, 795, 587 N.Y.S.2d 331, quoting *Ellis v. Hoelzel*, 57 A.D.2d 968, 969, 394 N.Y.S.2d

91). *Id.* See also, *Nicastro v. Park*, 113 A.D.2d 129, 134, 495 N.Y.S.2d 184 (2d Dep't 1985)(Only where the jury's resolution of a factual issue is clearly at variance with the proffered testimony does the failure to set aside the verdict and direct a new trial constitute an abuse of discretion [*id.* at 136–137, 495 N.Y.S.2d 184]); and *Fisk v. City of New York*, 74 A.D.3d 658, 905 N.Y.S.2d 282 (1<sup>st</sup> Dep't 2010).

A jury verdict should not be set aside as against the weight of evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence. Great deference must be given to the fact-finding function of the jury, which had the opportunity to see and hear the witnesses. Moreover, the evidence must be viewed in the light most favorable to the nonmoving party. *Bello v. New York City tr. Auth.*, 50 A.D.3d 511, 856 N.Y.S.2d 577 (1<sup>st</sup> Dep't 2008).

Significant examination by the jury of evidence of injury in the matter before the Court is found to have arisen from the first three notes that the jury delivered to the Court during their deliberations. The MRIs were of particular importance to the jury in their efforts to evaluate the extent of the Plaintiff's injury on the date of accident. That the jury voted "no" on the fourth question of the verdict sheet, it may be inferred and concluded that the Plaintiff did not sustain a permanent consequential limitation of use of a body organ or member (the right knee joint). It can be further concluded on question seven that there was no permanent effect of the Plaintiff's injuries; the jury thus voted not to award damages for future pain and suffering. It cannot be implied or inferred that the jury simply ignored future pain and suffering rather than undertaking review of the relevant evidence and testimony.

There was the request by the jury of the testimony and cross examination of the Plaintiff's

physician Dr. Wilson as to the Plaintiff's need for surgery and the MRI's. The jury also asked for, and was given, the written reports of the Drs. Klein and Berkowitz as well as Dr. Klein's testimony with regard to interpretation of the July, 2018 MRI.

The MRI's taken of the Plaintiff's right knee were shown to the jurors by the Defendant's expert, Jessica Berkowitz, M.D., who specialized in diagnostic radiology. The MRI's were shown via video screen. One was a video of an MRI of the Plaintiff's right knee taken in June of 2018. The other was taken in January of 2020. The expert showed how the MRI was able to film the right knee and cruciate ligaments and show what the MRI revealed as to traumatic injury or degenerative injury.

Dr. Berkowitz found intact ligament fibers, and no meniscal tears were shown in the MRI's. However, knee cartilage breakdown was shown to be occurring and "mucoid degeneration" was also shown. There was no evidence of knee fracture, or so-called bone marrow edema, which meant that the findings on the MRI examinations were not the result of trauma occurring as a result of an accident. The degenerate conditions were the result of time, not trauma. *Berkowitz trial testimony*, pp. 11-13.

It can readily be interpreted that the evidence expressly asked for by the jurors during deliberation was important and helped them resolve the question of future pain and suffering as well as future medical and surgical expenses. As such, it may readily be concluded that the weight of the evidence heard, viewed and reviewed by the jury at trial was fully regarded by the jury and led to its verdict concluding that there was the absence of "permanent consequential limitation of use of [the Plaintiff's] body organ or member." It may also be inferred that only

past pain and suffering was deemed appropriate by the jury; and not future pain, suffering and medical expenses.

Such inference may well have also been drawn from Dr. Klein's report, and from the answers he gave during his testimony as requested in the note from the jury. Dr. Klein, being an orthopedic surgeon and expert engaged by the Defendant, examined the Plaintiff on August 7, 2019, in order to determine the condition of his right knee roughly one year after the accident and one year after the arthroscopic surgical treatment of Plaintiff by Dr. Wilson.

Dr. Klein undertook tests to compare the right knee with the left knee which was not damaged in the accident. The range of motion in both the left and right knee joints was comparatively tested. The range of motion was the same in each.

Muscle strength was also tested in the legs and thighs. The Plaintiff's muscle strength showed knee stability left and right and stable walking gait. He did not exhibit pain or gaited limp. There was no swelling or tenderness in the right knee, and no effusion (fluid). *Dr. Klein trial testimony*, pp. 10-14.

Dr. Wilson was the Plaintiff's treating physician. Their first meeting was on July 3, 2018. Dr. Wilson interviewed the Plaintiff and also viewed radiological studies of the right knee that were taken on June 17, 2018. The studies were brought to the Doctor on July 3, 2018 by the Plaintiff. Dr. Wilson's conclusion was that the Plaintiff had sustained significant injuries to that knee as a result of the vehicle accident: specifically injury to the menisci (traumatic tears) and the anterior cruciate ligament (traumatic disruption). *Dr. Wilson trial testimony*, pp. 7-8.

However, on cross-examination, Dr. Wilson admitted that the June 17, 2018 MRI was

“interpreted as demonstrating degeneration of a part of the medial meniscus.” Dr. Wilson also agreed with the finding that the degenerative condition was not caused by trauma. *Dr. Wilson trial testimony*, p. 40.

Dr. Wilson’s report also noted the presence of chondromalacia in the right knee. He further agreed that chondromalacia is a degenerative condition associated with degeneration. As to the meniscus, Dr. Wilson agreed there was fraying of the medial meniscus and it was caused by degeneration. *Dr. Wilson trial testimony*, p. 45.

Surgery was performed on the Plaintiff’s right knee by Dr. Wilson on July 16, 2018. Prior to engaging Dr. Wilson as his orthopedic surgeon, the Plaintiff had seen other physicians, including an orthopedic surgeon, a chiropractor, and a physical therapist. The Plaintiff was given non-operative treatment by the physicians he met prior to July 3, 2018.

At the July 3d meeting with Dr. Wilson, the Plaintiff was advised to have surgery to address a torn menisci and a torn anterior cruciate ligament in the right knee. The Plaintiff agreed and Dr. Wilson performed arthroscopic surgery.

As part of the surgery, a “graft” (a ligament harvested and sterilized from another person) was used by Dr. Wilson to reconstruct the Plaintiff’s anterior cruciate ligament (ACL). A quarter to half an inch of bone from the femur was removed from the Plaintiff by Dr. Wilson and the entire old ACL was replaced by the graft. The graft was secured by medical screws that become a permanent part of Plaintiff’s body. *Dr. Wilson trial testimony*, pp. 16-20.

After the surgery, Plaintiff was moved to the recovery room. He was advised to ice his knee for three weeks to reduce swelling and pain. Physical therapy was also directed to help the

Plaintiff regain movement of the knee. *Dr. Wilson trial testimony*, p. 22.

The Plaintiff was seen by Dr. Wilson for follow-up treatment on July 26, 2018. Plaintiff's wounds were examined. Dr. Wilson noted that Plaintiff's pain was controlled. There were no signs of infection. X-rays were taken to confirm that the medical screws attached during surgery were still in the correct place. According to Dr. Wilson, the Plaintiff was "compliant with [his] directions." The Plaintiff was noted to be recovering well. *Dr. Wilson trial testimony*, p. 23.

The next visitation to Dr. Wilson by the Plaintiff occurred on August 15, 2018. Plaintiff was again noted to be recovering well. He was using a brace prescribed after surgery and was regaining appropriate range of motion of the right knee. Plaintiff was advised that use of the brace was not required further, and the same applied to crutches. *Dr. Wilson trial testimony*, p. 24.

September 21, 2018, was the date of the Plaintiff's third follow-up treatment. He was making normal progress participating in therapy and was approaching the point where he could return back to employment full time. *Dr. Wilson trial testimony*, p. 24.

The fourth follow-up visit to the Doctor's office by the Plaintiff occurred on November 8, 2018. Satisfactory progress continued. The Plaintiff was able to return to walking. He was not using a brace or crutches and pain was well controlled. The range of motion in the right knee was 120 degrees, but was not measured against the left knee (which was not injured in the accident).

The Plaintiff's next visit was on December 5, 2019. He noted that he was working

without limitation but was experiencing some pain and was feeling unstable. However, the Plaintiff did not have any significant tenderness in the right knee.

The radiologist performed an MRI, and concluded that there may be some graft impingement rubbing against the femur bone. The bone, it was noted, may have grown back causing a consistent source of inflammation. It was regarded as a significant finding and if the Plaintiff were to have continued discomfort he might need further surgical intervention. The Plaintiff was asked to return in January, 2020. However, the Plaintiff did not return to Dr. Wilson for further evaluation. The Plaintiff did not seek further surgical intervention, or conference on the issue, and did not return for future follow-up treatment. *Dr. Wilson trial testimony*, pp. 29-30, 49-50.

It is patently clear from the evidence heard by the jury and reviewed by the jury during their deliberations, that the inferences to be drawn from the verdict sheet is that while there was liability and causation of injury on the part of the Defendant, the damages noted by Dr. Wilson and by Dr. Berkowitz were mostly degenerative damages and the amounts awarded to the Plaintiff by the jury were reasonably and fairly set forth in the verdict sheet.

On the evidence before the Court it was proper for the jury to award past pain and suffering in the amount of \$93,600.00 and lost wages in the amount of \$16,800. It was also proper for the jury to decide in its verdict that there was no permanent effect from the Plaintiff's injuries that would mandate an award of future pain and suffering from the date of the verdict to the year that the Plaintiff was expected to live. And, as previously stated, the Plaintiff did not seek further surgical intervention from his treating surgeon and did not return to his treating

doctor for more follow-up treatment.

The evidence adduced at the trial clearly and reasonably showed that the injuries sustained by the Plaintiff did not permanently and consequentially limit the Plaintiff's use of a body organ or member. While the Plaintiff did sustain a medically determined injury or impairment of the knee, it was an impairment "of a non-permanent nature" that, ultimately, did not require further surgery. Both sides agreed that at the time of the Plaintiff's consideration of surgery, there was degeneration in and around the right knee. The presence of chondromalacia in the right knee was acknowledged by all of the experts who agreed that the presence of chondromalacia in the knee was evidence of a degenerative condition in the right knee. It was admitted by the Plaintiff's surgeon that the June 17, 2018 MRI was "interpreted as demonstrating degeneration of a part of the medial meniscus." Dr. Wilson agreed that the degenerative condition was not caused by trauma.

In summary, postoperatively, the Plaintiff's follow-up treatment, which spread over the time between July 26, 2018 and December 5, 2019, continually showed progress by the Plaintiff as to range of motion, stability, pain and a return back to full time employment. While there was also a discussion between the Plaintiff and Dr. Wilson about the possibility of undertaking renewed surgical intervention at the knee if there was some graft impingement rubbing against the femur bone, the Plaintiff did not seek further surgical intervention and did not pursue further follow-up treatment on December 5<sup>th</sup> or at any time thereafter. In addition the Plaintiff, as of December 5, 2019, was working full time and without limitation.

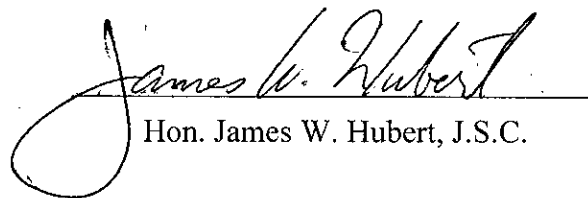
Accordingly, the jury's award for past pain and suffering in the amount of \$93,600.00 and

lost wages in the amount of \$16,800.00 (\$110,400.00 in total) for the period of time starting the day of the accident on May 31, 2018 and ending December 5, 2019 is not disproportionate with other awards. See, *Donatiello v. City of New York*, 301 A.D.2d 436, 754 N.Y.S.2d 9 (1<sup>st</sup> Dep't 2003); *Harrison v. New York City Tr. Auth.*, 113 A.D.3d 472, 978 N.Y.S.2d 194 (1<sup>st</sup> Dep't 2014)(award of \$150,000 for past pain and suffering involving ankle fracture does not deviate materially from reasonable compensation); *Sienicki v. 760 W. End Ave. Owners, Inc.*, 23 A.D.3d 271, 803 N.Y.S.2d 567 (1<sup>st</sup> Dep't 2005)(\$100,000 was reasonable compensation for past pain and suffering where plaintiff sustained an ankle fracture and torn ligaments and underwent two surgical procedures); *Grant v. City of New York*, 4 A.D.3d 158, 772 N.Y.S.2d 39 (1<sup>st</sup> Dep't 2004)(\$100,000 was reasonable compensation for plaintiff who suffered a trimalleolar fracture and right ankle dislocation, resulting in two surgical procedures); *Perez v. New York City Transit Authority*, 289 A.D.2d 119, 735 N.Y.S.2d 38 (1<sup>st</sup> Dep't 2001)(upholding award of \$140,000 for past pain and suffering due to cuneiform fracture of left foot where Plaintiff underwent tarsal exostectomy and five additional surgeries).

For all of the reasons set forth herein, Plaintiff's motion for an order of the Court granting *additur*, and/or to set aside the verdict is denied. The verdict will stand. The decision and ruling of the Court is so ordered. The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York

January 27, 2022

  
Hon. James W. Hubert, J.S.C.