

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRECEDENT.

Index Number : 105882/2007

PART 40c

SOURIFAN, ALYSSA L.

vs

AMIE CAB

Sequence Number : 004

VACATE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION

FILED

JAN 27 2011

NEW YORK
COUNTY CLERK'S OFFICE


KIBBIE F. PAYNE
J.S.C.

Dated: 20 JAN 2011

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

E. J. Beck
1/27/11

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 40C

-----X
ALYSSA L SOURIFMAN,

Plaintiff,

-against-

Index No 105882/07
ORDER/DECISION

AMIE CAB CORPORATION d/b/a
AMIE CAB CORP AND
IBRAHIMA BAH,

Defendants.

-----X
AMIE CAB CORP AND IBRAHIMA BAH,

Third-Party Plaintiff,

-against-

NYC TRANSIT AUTHORITY AND
MELCHEBEDEC BROWN,

Third-Party Defendant.

-----X
KIBBIE F. PAYNE, J.:

Plaintiff moves pursuant to CPLR 4404 (a) to set aside the jury verdict returned on April 27, 2010 after trial in the instant personal injury action. Defendant cross-moves for an order setting aside the verdict for past and future medical expenses on the ground that the amount awarded fails to meet the threshold for basic economic loss set forth in Insurance Law § 5104 (a).

The uncontroverted testimony at trial established that plaintiff was involved in a collision between a taxi operated by Amie Cab Corporation and a bus owned by the New York City Transit Authority. As a result of that accident, plaintiff Alyssa L

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Sourifman suffered blunt force trauma to the head, a malposed jawline, and multiple malposed and fractured teeth. The jury unanimously found the defendants' negligence to be the proximate cause of Ms. Sourifman's injuries and awarded her \$8,000 for past pain and suffering, \$5,000 for future pain and suffering, \$8,700 for past medical expenses, and \$10,000 for future medical expenses.

The determination of the jury must be accorded great respect and should not be disturbed when supported by any fair interpretation of the evidence (see *Day v Hosp. for Joint Diseases orthopaedic Inst.*, 15 AD3d 606; *Quackenbush v Gar-Ben*, 2 AD3d 824; *Borden v. Capital Dist. Transp. Authority*, 307 AD2d 1059). Where sufficient evidence exists in the record, the verdict will be sustained even where other evidence, if credited, would support a contrary result (*In re Daniel XX*, 53 AD3d 819). The court, therefore, approaches the plaintiff's motion to set aside the jury's verdict on the issues of future medical expenses, and plaintiff's past and future pain and suffering with due regard to the jury's findings, resolving all credibility determinations in the light most favorable to the jury's determination.

"A verdict should be set aside as against the weight of the evidence only where it seems palpably wrong and it can be plainly seen that the preponderance is so great that the jury could not

have reached their conclusion upon any fair interpretation of the evidence" (Bernstein v Red Apple, 227 AD2d 264 lv dismissed 89 NY2d 961; see also, Jamal v New York City Health and Hosp. Corp., 280 AD2d 421, citing Niewleroski v National Cleaning Contractors, 126 AD2d 424, lv denied 70 NY2d 602). Counsel for the plaintiff citing, Atkinson v Buch, 17 AD3d 222; Wojeski v Defarero, 17 AD3d 1024, maintains that the jury's verdict with respect to past and future conscious pain and suffering materially deviated from reasonable compensation.

In Atkinson v Buch, supra, the Supreme Court Appellate Division, First Department determined that a \$10,000 award for past pain and suffering to a defendant who "sustained a broken jaw while undergoing a tooth extraction performed by defendant oral surgeon" was insufficient as a matter of law, and set aside the award with additur of \$65,000. The court was careful to note that "[p]laintiff was under local anesthesia during the extraction, and therefore did not experience pain at the moment his jaw was fractured, or while his mouth was being wired." In contrast, Ms. Sourifman's perception was in fact at the time of the accident, and the unchallenged testimony was that she experienced excruciating pain during the resetting, which was necessary to restore her ability to close her mouth.

In Wojeski v Del Favero, supra, the Supreme Court Appellate Division, Fourth Department found that an "award of \$5,000 for

past pain and suffering could not have been reached upon any fair interpretation of the evidence" where evidence established that plaintiff "sustained cartilage displacement in her jaw, causing frequent, significant pain, inflammation, limitation of motion, and difficulty speaking and eating." The court set aside the verdict with additur of \$20,000.

Under the totality of the circumstances, and giving great deference to the jury's determination on the issue of past and future pain and suffering this court agrees with the plaintiff's counsel to the extent that the awards for past and future pain and suffering deviate materially from what would be reasonable compensation. However, where, the jury returns a verdict the court finds to be palpably insufficient, the court may not raise or lower the damages directly, but may order new trial unless the defendant stipulates to a higher sum, which the court determines to be the minimum warranted by the weight of the evidence (Siegel, NY Prac § 407 [4th ed]). The court finds that there was ample evidence in the record to support the jury's findings with respect to future medical expenses, as the defense expert testified that crowns are less expensive and less frequently need replacement than the plaintiff's calculations indicate. However, the portion of the award constituting past and future pain and suffering was insufficient as a matter of law, and is not supported by any fair and reasonable interpretation of the

evidence.

With respect to the defendants Amie Cab Corporation and Ibrahima Bah's cross-motion seeking to set aside the jury's entire verdict as against the weight of the evidence, the cross-motion is, in all respects denied. Counsel argues that the jury's award for past and future medical expenses should be denied as the plaintiff has no right to recover for basic economic loss. The defendants themselves anticipating a much larger award, declined to raise this issue in their contentions submitted to the court and read to the jury following summations. Additionally, the defendants failed to raise a timely objection to either the jury instructions or the verdict sheet, neither of which addressed this issue. Counsel is reminded that a post-trial motion to set aside a jury verdict will not lie because of improper instructions given to the jury in the absence of a proper and timely exception (8B Carmody-Wait 2d § 62:35; Wonsch v Snyder, 53 AD2d 1031). Additionally, the trial court lacks the jurisdiction to set the verdict aside based on legal principles that it later decides should have been included in its charge (Kroupova v Hill, 242 AD2d 218).

Accordingly, the plaintiff's motion to set aside the jury's verdict and setting aside the award of damages for past and future pain and suffering, and granting a new trial on that issue of damages is granted unless the defendants, within 20 days of

service of a copy of this order with notice of entry, stipulate to increase the award of past pain and suffering to \$65,000.00 and the award of future pain and suffering to \$20,000.00. Additionally, the cross-motion is, in all respects, denied for reasons stated above. The foregoing constitutes the decision and order of this court.

Dated: January 20, 2011



KIBBIE F. PAYNE
J.S.C

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