

At a Civil Special Term of the  
Supreme Court, held in and for the  
County of Erie, State of New York, on the  
28<sup>th</sup> day of March 2018.

PRESIDING: HON. PAUL B. WOJTASZEK, J.S.C.

**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF ERIE**

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**JAYME A. MAST,**

Plaintiff,

**DECISION and ORDER**

vs.

Index #803977/2016

**GERARD A. DESIMONE,**

Defendant.

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**DECISION and ORDER**

On August 18, 2014 the plaintiff, Jayme A. Mast (hereinafter the “plaintiff”), was injured when she was involved in a motor vehicle accident involving the defendant, Gerard A. Desimone (hereinafter the “defendant.”). As a result of this incident, an action seeking damages for bodily injuries was commenced. The matter ultimately proceeded to trial on February 1, 2018, concluding on February 13, 2018.

**BACKGROUND:**

The plaintiff alleged that the defendant was negligent in the happening of the accident and that the accident resulted in a “serious injury” pursuant to New York Insurance Law 5102(d).

The plaintiff claimed entitlement to damages based upon the following three “serious injury” categories:

- Permanent consequential limitation of use of a body organ or member;
- Significant limitation of use of a body function or system; and
- A medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (Insurance Law 5102(d)).

Extensive litigation and motion practice was conducted in this action up to and during the time of the trial. The matter proceeded to trial, and on February 13, 2018 after due deliberation the jury unanimously found the defendant's negligence was a substantial factor in causing the plaintiff to sustain two categories of “serious injury.” The jury found the plaintiff sustained a qualifying injury under the significant limitation and 90/180 categories, but notably the jury determined that the plaintiff did not sustain a permanent consequential injury as a result of the accident. The only monetary award made by the jury was for past pain and suffering in the amount of \$120,000. The jury verdict was reported to the Court, and this concluded the trial proceedings.

**PROCEDURAL POSTURE:**

The plaintiff now moves pursuant to CPLR 4404(a) and 5501(c) for an Order setting aside the jury verdict and increasing the jury's award for both past and future pain and suffering as well as future economic loss. Alternatively, the plaintiff asks for a new trial on damages only. The plaintiff argues that the verdict is against the weight of the evidence.

In support of her motion, the plaintiff submitted the Attorney Affirmation of Nicholas J. Shemik, Esq. with attached exhibits sworn to on February 26, 2018 (hereinafter the “Shemik Affirmation”). The defendant’s opposition papers consist of the Attorney Affirmation of Leah A. Costanzo, Esq. with an attached exhibit sworn to on March 16, 2018 (hereinafter the “Costanzo Affirmation”).

Counsel for plaintiff and defendant personally appeared for oral argument on March 28, 2018 in further support of their respective positions.

### **CONCLUSIONS OF LAW:**

This Court has reviewed all submissions, and heard oral argument of all parties. A Court must be very methodical and selective when substituting its own judgment for that of a jury:

#### **CPLR § 4404(a). Post trial motion for judgment and new trial:**

Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law *or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence*, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court (CPLR § 4404(a)) (emphasis added).

The law in New York is very well-settled when it comes to disturbing jury verdicts. Where a party moves to set aside a jury verdict as against the weight of the evidence, as plaintiff does here, the motion should not be granted unless the preponderance of the evidence in the movant’s favor is so great that the verdict could not have been reached upon any fair interpretation of the evidence (*Lolik v. Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Ruddock v. Happell*, 307 AD2d 719, 720, 763 NYS2d 868 [4<sup>th</sup> Dept 2003]) (internal citation omitted). If “the verdict is one that

reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury” (*Ruddock*, 307 AD2d at 720).

Whether a particular factual determination is against the weight of the evidence is itself a factual question, and the question as to whether a verdict is against the weight of the evidence “involves what is in large part a discretionary balancing of many factors” (*Cohen v. Hallmark Cards*, 45 NY2d 493, 498, 499 [1978]).

The standard is clear and seemingly uncontested by the parties here, and this Court is very conscious of the importance of not invading the province of a clear-headed jury that has weighed the evidence, listened intently to clear and agreed upon jury instructions, deliberated, and then reached a unanimous verdict on all questions.

Clearly it is within the province of the jury to determine issues of credibility, and great deference should be given to the jury because it has the opportunity to see and hear the witnesses (*see Sauter v. Calabretta*, 103 AD3d 1220, 959 NYS2d 579 [4<sup>th</sup> Dept 2013]; *Kim v. New York City Transit Authority*, 87 AD3d 531, 928 NYS2d 315 [2d Dept 2011]). The jury in the present case saw and heard the testimony from the actors involved in the incident as well as experts who offered opinion testimony. The jury assessed their respective credibility, and then unanimously determined the case. Great deference should be given to this process generally, and this Court must afford such deference to the jury in this case because the evidence did not so preponderate in favor of the plaintiff that the jury verdict could not have been reached on any fair interpretation of the evidence (*see Sauter*, 103 AD3d at 1220). To invade the deliberative process and province of the jury under the facts in this case would be an abuse of discretionary power.

Plaintiff argues that the jury determination with respect to past pain and suffering, future pain and suffering, and future economic loss deviates materially from reasonable compensation

due to, among other arguments, the trial testimony of Dr. Fishkin, Dr. Landi, Robert Tremp, Dr. Lichtenstein, and the plaintiff herself. In succinct terms, the plaintiff argues that her evidence in the form of “testimony and documentary proof was in complete and absolute agreement on all issues regarding [plaintiff’s] injuries, their causation, and their severity” (Shemik Affirmation, ¶23). Specifically, that plaintiff suffered a permanent L5-S1 fusion secondary to a herniated disc and that her work-life expectancy will be limited by 50% (Shemik Affirmation, ¶23).

However, when questioned during oral argument in support of this motion, plaintiff’s counsel conceded that there was, in fact, conflicting proof regarding the likelihood, severity, and causation of plaintiff’s alleged future pain and suffering (*see Melnick v. Chase*, 148 AD3d 1589, 1590 [4<sup>th</sup> Dept 2017]) (holding that a jury verdict regarding future damages should not be disturbed as against the weight of the evidence where there is conflicting proof concerning the likelihood, severity, and causation of alleged future pain and suffering).

The jury in this case heard extensive proof from both parties as to all issues in dispute. Once deliberations began, the jury among other things asked the Court to read back the entire trial testimony of both the plaintiff as well as the defendant’s examining physician, Dr. Landi. During deliberations the jury also asked to review the plaintiff’s primary care records created in the days immediately after the accident – a key timeframe in this case because part of the defendant’s argument against damages was that the lower back injury that became the primary focus of plaintiff’s allegations was not a body part she complained of immediately after the accident.

The jury deliberations lasted over the course of two days, and the verdict was ultimately unanimous. As stated earlier, it is within the province of the jury to determine issues of credibility, and great deference should be given to the jury because it has the opportunity to see and hear the witnesses (*see Sauter v. Calabretta*, 103 AD3d 1220, 959 NYS2d 579 [4<sup>th</sup> Dept 2013]; *Kim v. New*

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