SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 11**

RONI KOTA,

Plaintiff,

-against-

NASSAU COUNTY and ERIN M. REILLY,

Defendants.

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INDEX # 606719/15
Mot. Seq. 2, 3
Mot. Date 12.12/12.17.18
Submit Date 12.17.18

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The following papers were read on this motion: Documents Numbered

Notice of Motion/Cross Motion, Affidavits (Affirmations), Exhibits Annexed..... 48, 55
Answering Affidavit 58
Memorandum of Law..... 60

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Defendant Erin M. Reilly moves by notice of motion for an order pursuant to CPLR 4404(a)(1) setting aside the jury's damages awards for past and future pain and suffering (Seq. No. 2). Defendant County of Nassau moves by notice of motion to set aside the verdict on both liability and damages (Seq. No. 3).

This action arises out of a motor vehicle accident that occurred on October 27, 2014 on Shore Road at its intersection with Harbor Road in Port Washington, New York. Plaintiff testified that he was operating his motorcycle north along the "S" curved roadway of Shore Road within the applicable speed limit when he was struck by Reilly's vehicle.

Defendant Reilly testified that she was waiting in the southbound left-hand turn lane in anticipation of turning east onto Harbor Road. After two vehicles headed north on Shore Road passed her, she looked in the northbound lanes and saw vehicle headlights well ahead of her position. As she proceeded to turn, she felt a light force and then observed plaintiff's motorcycle on the ground. As a result of the accident, plaintiff underwent four surgeries, resulting in a below knee amputation of his left leg.

Upon trial of this action, the jury returned a liability verdict as against both defendants, apportioning 80% fault to the defendant County and 20% fault to defendant Reilly. The jury found no comparative liability on the part of the plaintiff. Following the damages trial, the jury awarded plaintiff $4,000,000 for past pain and suffering and $15,000,000 for future pain and suffering from the time of the verdict to the time the plaintiff could be expected to live. With regard to the latter, the jury determined that plaintiff's life expectancy was 24 years.

On this motion, the County contends that based upon the trial testimony, the jury's apportionment of liability was against the weight of the evidence. Both plaintiff and Reilly were long-time residents of Port Washington and were well-familiar with the subject intersection. The County posits that Reilly testified that she was stopped for approximately 20 seconds and could see some 500 feet away prior to the accident but she failed to see the plaintiff's motorcycle. The County also argues that the documentary evidence shows that of the 115 accident reports contained in the Nassau County Department of Public Works (DPW) files from 1977 to 2009, only seven, rather than forty as alleged by plaintiff, involved vehicles in the process of making left turn onto Harbor Road.

The County thus maintains that the facts adduced at trial establish that it was not negligent in the design of the roadway but rather that the collision was caused solely by driver negligence because Reilly failed to see what was to be seen and failed to yield the right of way in violation of VTL § 1141 . Moreover, the County argues that it was not a proximate or concurring cause of this accident, and the jury was asked to improperly speculate as to whether the presence of a traffic control device would have altered Reilly's actions.

Defendant Reilly does not contest the jury's liability determination. Rather, she argues that the damages awards are excessive in light of the plaintiff's injuries and awards issued in comparative cases.

CPLR 4404 (a) provides that "[a]fter a trial . . . 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 . . . where the verdict is contrary to the weight of the evidence, in the interest of justice . . . . ." "[A] jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (*Lolik v Big V Supermarkets*, 86 NY2d 744, 745-746 [1995]; *Nicastro v Park*, 113 AD2d 129, 130 [2d Dept 1985])." (*Vittiglio v Gaurino*, 100 AD3d 987, 988 [2d Dept 2012]). Likewise, apportionment of fault should not be set aside unless it could not have been found on a fair interpretation of the evidence. (*Fruendt v. Waters*, 164 AD3d 559 [2d Dept 2018]).

A motion for a new trial "encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise (*Matter of De Lano*, 34 AD2d 1031, 1032 [3d Dept 1970], aff'd 28 NY2d 587 [1971]; *Rodriguez v City of New York*, 67 AD3d 884, 885 [2d Dept 2009]; *Gomez v Park Donuts*, 249

AD2d 266, 267 [2d Dept 1998])" (*Allen v Uh*, 82 AD3d 1025, 1025 [2d Dept 2011]). "The trial court must decide whether substantial justice has been done, and must look to common sense, experience, and sense of fairness in arriving at a decision (*see, Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 [1976]; *Bush v International Bus. Machs. Corp.*, 231 AD2d 465 [1st Dept 1996])" (*Allen*, 82 AD3d at 1025).

"The State has a nondelegable duty to keep its roads reasonably safe (*Friedman v State of New York*, 67 NY2d 271, 283 [1986]), and the State breaches that duty 'when [it] is made aware of a dangerous highway condition and does not take action to remedy it' (*id.* at 286)." (*Brown v. State of New York*, 31 NY3d 514, 519 [2018]; *see also* Highway Law §§ 12, 102, 139). A municipality may be deemed negligent in connection with a dangerous traffic condition where the municipality is aware of the condition and (1) performs a plainly inadequate traffic safety study, or (2) there is no reasonable basis for the decision undertaken by the municipality. (*See Affleck v. Buckley*, 96 NY2d 553 [2001]; *Bresciani v. County of Dutchess*, 62 AD3d 639 [2d Dept 2009]). "[S]omething more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function." (*Affleck*, 96 NY2d at 557 [citing *Weiss v. Fote*, 7 NY2d 579 [1960]).

To establish proximate case in such a case, the plaintiff must show that "the absence of safety measures contributed to the happening of the accident by materially increasing the risk, or by greatly increasing the probability of the occurrence." (*Brown* at 520 [quotations omitted] [finding liability where there was a pattern of similar accidents and a failure to complete a traffic safety study or implement additional safety measures at the subject intersection]). Indeed, "'[t]he most significant inquiry in the proximate cause analysis is often that of foreseeability'" (*Hain v Jamison*, 28 NY3d 524, 530 [2016])." (*Id.*).

Here, the record supported the jury's determination that the County had been put on notice of an unreasonably dangerous condition at the subject intersection and failed to adequately complete a safety analysis. The numerous letters complaining about the lack of a signal and difficulty in executing a left turn at the subject intersection alerted the County to a situation warranting a study. (*Affleck*, 96 NY2d at 557). Further, Harold Lutz, the County's engineer, agreed that during the period from 1987 through 2014, there were approximately 148 accidents at the intersection, of which 40 were left turn accidents. He testified that the County conducted a number safety studies at the subject intersection. Each of the safety studies resulted in the denial of a traffic signal at the intersection.

Mr. Lutz testified that the County based its safety review on the Manual on Uniform Traffic Control Devices (MUTCD). When gathering basic data, the MUTCD dictates that eight hours of data should be collected, but the County never collected eight hours in any given study. Indeed, the County collected two hours or less of data during each study. Mr. Lutz agreed that it is usually necessary to collect more than eight hours of data to determine the eight critical hours. Additionally, of the eight-hour collection time, four hours should encompass times when traffic is at its peak, i.e. when there is the most "intersectional conflict." Also, there was no indication

in the County's records of car counts having been taken during the observation periods and no gap analysis was conducted. Nonetheless, on two occasions, County employees recommended installation of a traffic light.

Mr. Lutz testified that the County did consider less restrictive remedies than a traffic light at that intersection and installed a left turn lane to shorten the crossing distance and to give the driver a place of refuge to wait before executing a turn. However, Mr. Lutz conceded that this also encouraged left turns at the intersection, which remained uncontrolled.

Plaintiff's expert opined that the County wholly failed to consider the correct factors in the safety studies that it conducted and that the studies departed from the requirements of the MUTCD and good engineering practice. He characterized the studies as "grossly" inadequate with respect to the amount of data collection in particular.

On this record, there was ample evidence to support the jury's resolution of the factual issues surrounding liability, including that of proximate cause–findings that the Court will not disturb. Contrary to the County's contention, that the jury found defendant Reilly partially negligent does not indicate that the evidence did not support a finding of liability against the County as well. (*Brown*, 31 NY3d at 521). These are not mutually exclusive propositions. In short, the jury's apportionment of liability was amply supported by the evidence presented

Addressing the issue of damages, a jury's award with respect thereto is considered excessive "if it deviates materially from what would be reasonable compensation." (CPLR § 5501[c]). "The amount of the award of damages . . . is primarily a question for the jury [citations omitted] whose determination is entitled to great deference [citations omitted] ." (*Crockett v Long Beach Med Ctr*, 15 AD3d 606 [2d Dept 2005]). While the provisions of CPLR §5501(c) specifically refer to the "appellate division," the standard of review is equally applicable to the trial courts. (*See Barthelemy v. Spivack*, 41 AD3d 398 [2d Dept 2007]; *Shurgan v Tedesco*, 179 AD2d 805, 805 [2d Dept 1992]; *Ramos v City of New York,* 169 AD2d 687, 687 [1st Dept 1991]).

Within the context of reviewing an award for pain and suffering, it is appropriate to compare the dollar amount comprising the challenged award to other prior appellate-reviewed and approved sums awarded to plaintiffs with similar injuries. (*Vatalaro v. County of Suffolk*, 163 AD3d 893 [2d Dept 2018]; *Donlon v City of New York*, 284 AD2d 13, 15 [1st Dept 2001]; *see also Turuseta v Wyassup-Laurel Glen Corp.*, 91 AD3d 632, 634 [2d Dept 2012]; *Kayes v Liberati*, 104 AD3d 739, 741[2d Dept 2013]). When the trial court determines that an award is excessive, proper procedure mandates a new trial be conditionally ordered as to damages unless the plaintiff consents to a reduction. (*Barthelemy*, 41 AD3d at 399; *Zukowski v Gokhberg,* 31 AD3d 633, 634 [2d Dept 2006]; *McNeil v MCST Preferred Transp. Co.*, 301 AD2d 579, 580 [2d Dept 2003]).

Here, plaintiff acknowledges that the jury verdict exceeds all previously reported verdicts for similar injuries. The court has carefully reviewed the arguments and cases referenced by the parties herein and finds that the sum of $4,000,000.00 for past pain and suffering where the plaintiff sustained four surgeries, including a foot amputation followed by a below knee amputation necessitated by a subsequent infection is not excessive. However, the sum of $15,000,000.00 for future pain and suffering deviates materially from that which would currently constitute reasonable compensation, thus requiring a *remittitur* (CPLR §5501[c]).

For these reasons, it is hereby

ORDERED, that the County's motion to set aside the verdict on the issue of liability and apportionment of fault is denied; and it is further

ORDERED, that the applications by both defendants seeking a new trial as to damages or granting a *remittitur* as to the $4,000,000.00 for past pain and suffering are **denied**, and the applications by both defendants seeking a new trial as to damages or granting a *remittitur* as to the $15,000,000.00 for future pain and suffering are **granted to the extent** that a new trial as to future pain and suffering damages is ordered unless, within 30 days after service of a copy of this decision and order with notice of entry, the plaintiff shall execute a written stipulation consenting to a decrease in the jury's verdict as to future pain and suffering from the sum of $15,000,000.00 to $7,000,000.00.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
Jan. 29, 2019

ENTER:

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