

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
MARTIN GLYNN,

Plaintiff,

-against-

DECISION & ORDER
Index No: 50517/2015
Seq# 4 & 5

THOMAS J. ALTOBELLI

Defendant.
-----X

Plaintiff Martin Glynn and Defendant Thomas J. Altobelli both move this Court pursuant to CPLR 4404 to set aside the liability and damages verdicts directing judgment as a matter of law or in the alternative, for new trials as to liability and damages.

The following papers were read on Plaintiff Martin Glynn's and Defendant Thomas

J. Altobelli's motions:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation in Support/Exhibits A-F	1-8
Affirmation in Opposition/Exhibits A-H	9-16
Memorandum of Law in Opposition	17
Notice of Motion/Affirmation/Exhibits A-H	18-27
Memorandum of Law in Support	28
Exhibit 1	29

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Martin Glynn ("Glynn") commenced this action to recover damages arising from a motor vehicle/bicycle accident with Defendant, Thomas J. Altobelli ("Altobelli") alleging that Defendant Altobelli was negligent in operating his motor vehicle causing a

collision with Plaintiff Glynn on his bicycle resulting in personal injuries. On December 4, 2013, Plaintiff Glynn was travelling via bicycle on Batton Road, which runs north-south intersecting with Route 129, which is a two-way road traveling east-west. Batton Road is governed by a stop sign where it intersects with Route 129. What happened next is highly contested, but Plaintiff Glynn claims that before entering the road he came to a stop and looked left to make sure there was no oncoming traffic so he could safely enter the two way intersection. There is a dispute as to whether or not Plaintiff Glynn came to a proper stop before proceeding into the intersection, but at some point in the process of the Plaintiff entering the intersection, Defendant Altobelli's vehicle approached the intersection while speeding. Defendant crossed the double yellow line into oncoming traffic, and Plaintiff's bicycle collided with the passenger side of the Defendant's vehicle resulting in the Plaintiff sustaining a fracture to the thumb. The Plaintiff had to have two surgeries to repair the fracture (one to insert pins and the other to remove them), he had to wear a cast for several weeks, and he underwent physical therapy. Plaintiff filed this action to recover for past and future pain and suffering as well as lost earnings for the period he was unable to work to his fullest capacity due to the injury.

Defendant Altobelli moved for summary judgment, pursuant to CPLR 3212, which was denied by the Court (Lubell, J.), finding that Plaintiff raised some material questions of fact warranting the denial of the motion including, but are not limited to, whether Plaintiff came to a stop at the subject intersection before proceeding." (See Decision and Order dated Sept. 22, 2016 [Lubell, J.]).

The case proceeded to a bifurcated trial before this Court. On the issue of liability, the jury found both Plaintiff and Defendant to be negligent, but found that only Defendant's

negligence was a proximate cause and substantial factor in causing the accident. Regarding the issue of damages, the jury awarded Plaintiff \$67,000 for loss of earnings, \$24,000 for past pain and suffering and \$334,000 for future pain and suffering.

Defendant now files the instant motion pursuant to CPLR 4404 to set aside both the liability verdict and damages verdict directing judgment in favor of Defendant Altobelli as a matter of law or in the alternative, for a new trial as to liability and damages. Defendant argues that a finding that Plaintiff's negligence was not a proximate cause of the accident is inconsistent and contrary to the weight of the evidence; that the damages verdict should be set aside as excessive, inconsistent and contrary to the weight of the evidence; that the damages verdict should be set aside since Plaintiff's attorney used inflammatory and highly prejudicial language during opening statements; and that the award for lost earnings should be reduced by amounts awarded by no fault benefits, and reduced to \$10,962.

Plaintiff argues that Defendant is not entitled to judgment as a matter of law due to there being issues of fact for the jury to resolve; that the jury verdict for liability is consistent with the weight of the evidence; that the jury award for damages was appropriate and consistent; that Plaintiff's comments do not warrant a new trial; and that the award for lost earnings should not be reduced.

Plaintiff also files his own motion pursuant to CPLR 4404 to set aside the award for past pain and suffering because it materially deviates from what would be reasonable compensation and argues that the Court erred in precluding the testimony of Glynn and his wife Kate with respect to mental and emotional suffering. Defendant opposes, arguing that Plaintiff's motion was made in bad faith, that Plaintiff's motion with respect to

admissibility of testimony must be raised on appeal, and the award for past pain and suffering was a reasonable compensation.

DISCUSSION

CPLR 4404(a) states, in relevant part, that:

[a]fter 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.

"A motion pursuant to CPLR 4404(a) to set aside a jury verdict and for judgment as a matter of law will be granted where there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial." (*Doobay v Girardi*, 104 AD3d 726, 728 [2d Dept. 2013], quoting *Vittiglio v Gaurino*, 100 AD3d 987, 987-988). In order to establish entitlement to relief, the proponent of a motion to set aside the jury verdict as not supported by legally sufficient evidence must demonstrate this. (*Rosenfeld v Baker*, 78 AD3d 810, 811 [2d Dept. 2010]). Indeed, the prevailing party is "entitled to the benefit of every favorable inference which can reasonably be drawn from the facts." (*Taype v City of New York*, 82 AD2d 648, 651 [2d Dept. 1981]). The standard for determination is whether a verdict could not have been reached on any fair interpretation of the evidence." (*Lolik v Big V Supermarkets, Inc.*; 655 NE2d 163, 165 [N.Y. 1995]).

Upon review of the facts and the relevant case law, the Court holds that judgment as a matter of law for Defendant on liability is denied request for new trial on liability is

denied because the jury's verdict on liability is consistent with the weight of the evidence. However, the jury verdict is set aside and new trial is granted as to the past pain and suffering as well as the future pain and suffering damages awards because the future pain and suffering award was excessive and inconsistent with the weight of the evidence. Defendant's request to reduce the award for lost earnings is denied.

Judgment as a Matter of Law on Liability

Defendant argues that Plaintiff's alleged violation of the Vehicle and Traffic Law constituted negligence per se making Defendant entitled to judgment as a matter of law. Upon reviewing the facts and applicable case law, this Court finds that Defendant has not met the burden required to establish entitlement to judgment as a matter of law. Defendant relies on four cases to support his argument; however, these cases are distinguishable from the present case because there were no issues of fact to be decided by the jury in those matters.

The Court's determination that upon review of the evidence there were still issues of fact to go before the jury is part of the doctrine of law of the case. The Second Department has stated,

The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding (see *Bellavia v Allied Elec. Motor Serv.*, 46 AD2d 807). The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision (see *Gay v. Farella*, 5 AD3d 540). The doctrine may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence (see *Foley v Roche*, 86 AD2d 887; *Brownrigg v New York City Housing Authority*, 29 AD3d 721, 722 [2d Dept. 2006]).

Here, Defendant moved for summary judgment based on the depositions of Plaintiff and Defendant, and the Court made a determination based on the evidence and papers submitted that there were still issues of material fact as to whether or not Plaintiff

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