

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4<sup>th</sup> day of September, 2014

HONORABLE FRANCOIS A. RIVERA

-----X  
JESSICA IOVINO,

Plaintiff,

**DECISION & ORDER**  
Index No. 142/12

- against -

LYNNE KAPLAN,

Defendants.  
-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on plaintiff, Jessica Iovino's (hereinafter Iovino) motion filed on March 11, 2014, under motion sequence number four, for an order pursuant to CPLR 4404 (a): (1) additur for past and future pain and suffering; or (2) a new trial for damages on the grounds that the verdict rendered by the jury is contrary to the weight of the evidence and/or unreasonable; or (3) to set aside the verdict on the grounds that the damages were inadequate; or (4) for a new trial for damages on the grounds that the court wrongfully vacated its order granting plaintiff's motion *in limine*.

- Notice of Motion
- Attorney Affirmation
- Exhibits 1-2
- Affirmation in Opposition
- Exhibit A-B
- Reply Affirmation

**BACKGROUND**

On January 4, 2012, Iovino commenced the instant action by filing a summons and

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verified complaint with the Kings County Clerk's office. This is an action to recover damages for personal injury sustained in a motor vehicle accident that occurred on October 3, 2011 (hereinafter the subject accident).

On January 8, 2014, during the trial on liability, the court found the defendant to be the sole proximate cause of the subject motor vehicle accident and directed a verdict of liability in favor of the plaintiff and against the defendant. The court advised the jury that the issue of liability had been decided by the court and the trial of damages would begin.

The damage phase of the trial began before the same jury. On January 14, 2014, the jury returned a verdict finding that Iovino did not sustain a permanent consequential limitation or a significant limitation of use of her left shoulder because of the subject accident. The jury found that she did sustain a medically determined injury or impairment of a non-permanent nature that prevented her from performing substantially all of the material acts constituted by her usual and customary activities for not less than ninety days during the first one hundred and eighty days immediately following the subject. The jury awarded the plaintiff \$25,000.00 for past pain and suffering and nothing for future pain and suffering.

On January 15, 2014, the court ordered a briefing schedule for post verdict motions which the parties substantially complied with.

#### **LAW AND APPLICATION**

Rule 4404 provides for post-trial motions and specifically states:

(a) 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.

### *Setting Aside a Verdict*

To set aside the verdict as against the weight of the evidence, the court must determine “whether the jury could have reached their conclusion upon any fair interpretation of the evidence” (*Kennedy v New York City Health & Hosps.*, 300 AD2d 146, 147 [1st Dept 2002], quoting *Bernstein v Red Apple Supermarkets*, 89 NY2d 961 [1997]). A jury verdict should not be set aside as contrary to the weight of the evidence unless the evidence so preponderates in favor of the losing party that the verdict could not have been reached on any fair interpretation of the evidence (*Siddiqui v Anarella*, --- NYS2d ---, 2014 WL 421 [2nd Dept 2014]; citing, CPLR 4404[a]; *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Nicastro v Park*, 113 AD 2d 129 [2nd Dept 1985]).

It is for the trier of fact to make determinations as to the credibility of the witnesses, and great deference is accorded to the fact-finders, who had the opportunity to see and hear the witnesses, especially where conflicting medical testimony is adduced at trial (*Saber v 69th Tenants Corp.* 107 AD3d 873 [2nd Dept 2013] citing *Fekry v New*

*York City Tr. Auth.*, 75 AD3d 616, 617 [2nd Dept 2010] *see also Vaval v NYRAC, Inc.*, 31 AD3d 438 [2nd Dept 2006]). Although a trial court has the discretionary power to set aside a verdict and grant a new trial (*Kaplan v Miranda*, 37 AD3d 762, 830 NYS2d 755 [2nd Dept 2007]); the court may not set aside a verdict, merely because the court disagrees with it (*Nicastro v Park*, 113 AD2d 129, 133 [2nd Dept 1985]). To do so, would be to usurp the fact-finding role of the jury (*id.*). Courts have been repeatedly cautioned to sparingly exercise their discretion to set aside a jury verdict in order to avoid usurping the jury's role and depriving a successful litigant of an otherwise favorable verdict.

The Court should not set aside the verdict unless it could not be reached upon any fair interpretation of the evidence, with consideration given to the credibility of the witnesses and the drawing of reasonable inferences therefrom (*Wertzberger v City of New York*, 254 AD2d 352 [2nd Dept 1998]). A court must review the evidence in the light most favorable to the prevailing party in determining whether the jury's verdict was against the weight of the credible evidence (*Zieker v Town of Prchard Park*, 75 NY2d 761 [1989]).

#### ***Judgment Notwithstanding the Verdict***

The motion for a judgment notwithstanding the verdict is a higher standard than granting a motion for a new trial. A court must find that the jury decision is unsupported by sufficient evidence, thus requiring judgment for the adversary (*Soto v New York City*

*Transit Authority*, 6 NY3d 487, 492 [2006]). A court is charged with deciding whether there is any 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 (*Id.*). If the verdict is not irrational, the court may not conclude that the verdict as a matter of law is not supported by the evidence (*Id.*).

***Plaintiff's Testimony***

Iovino testified that she was a pedestrian who was involved in a car accident in which she injured her left shoulder. She went to the hospital the next day where she was prescribed painkillers and anti-inflammatory medications. She sought medical treatment from Dr. Capiola, an orthopedic surgeon, and received physical therapy for approximately one month, three to four times a week. She then began to see Dr. Berkowitz, an orthopedic surgeon, and switched her treatment and care to Brooklyn Bay Medical. She missed over a week from work. She further testified that as a result of the accident she was let go from her position because she would come in late. On December 28, 2011, she underwent arthroscopic surgery of her left shoulder. She complained of intense pain that limited her abilities to complete her everyday activities. She is currently employed as an executive assistant but complains of lasting pain.

***Dr. Berkowitz's Testimony***

Dr. Berkowitz began to see the plaintiff on November 14, 2011. He noted that she was asymptomatic prior to the accident and presented with radiating pain in her shoulder

down through her arm. The MRI report showed that she had a subacromial or subdeltoid bursitis shoulder. Range of motion testing showed loss of range of motion in her arm. Plaintiff also had a positive Neer's test which shows an impingement and a positive O'Brian's test which showed a high chance of labral tearing. He recommended a cortisone injection several times which the patient refused. Approximately three months after her accident he recommended arthroscopic surgery. He performed the arthroscopic surgery of plaintiff's left shoulder on December 28, 2011. Plaintiff then followed up with him complaining of pain but had an increased range of motion.

*Dr. Edward Toriello's testimony*

Dr. Toriello, an orthopedic surgeon, reviewed the operative report of her arthroscopic surgery, the intraoperative films, Dr. Berkowitz's reports, reports from Dr. Hannan, and hospital records from Coney Island Hospital. He conducted a physical examination of her on February 6, 2013. Dr. Toriello testified that to a reasonable degree of medical certainty, the plaintiff sustained a resolved shoulder strain and bursitis and that there was no traumatically induced labrum tear or other injury caused by the accident. The MRI films that he reviewed were normal except for very mild bursitis, most likely from repetitive use rather than trauma. He also testified that the intraoperative photographs show minimum fraying of the labrum and that there was no evidence of traumatically induced injury to the shoulder.

*Plaintiff's motion for additur and to set aside for inadequacy*

With respect to damages, if a jury award deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]), a trial court may order a new trial limited to the damages only (CPLR 4404 [a]; *see Inyu v Hyundai, Inc.*, 209 AD2d 1015 [4th Dept 1994]). The trial court uses the same material deviation standard as an Appellate Court in reviewing damage verdicts. It is not necessary for a moving party to prove to the court that the damage award shocks the conscience, either in terms of adequacy or inadequacy. The current standard of material deviation from reasonableness provides courts with more flexibility in the analysis of damage verdicts. Hence, since personal injury awards, especially those for pain and suffering, are not subject to precise quantification, courts look to comparable cases to determine at what point an award deviates materially from what is considered reasonable compensation (*Po Yee So v Wing Tat Realty, Inc.*, 259 AD2d 373 [1st Dept 1999]). Although courts have reviewed awards in other cases involving similar injuries, any given award depends on a unique set of facts and circumstances (*see Miller v Wetzel*, 15 AD3d 458 [2nd Dept 2005]).

In the instant trial the medical experts offered conflicting opinions as to the plaintiff's injuries. The plaintiff's expert opined that plaintiff suffered a traumatically induced tear that resulted in surgery. However, defendant's experts opined that the plaintiff suffered a sprain and bursitis which did not necessitate surgery and had since resolved. The jury was entitled to credit the defendant's expert (*see, Saber v 69th Tenants Corp.* 107 AD3d 873 [2nd Dept 2013]). In the light most favorable to the non-movant,

the jury was permitted to determine that the plaintiff only sustained a sprain and bursitis. Those injuries while satisfying the serious injury threshold, have currently resolved (*Licari v Elliott*, 57 NY2d 230 [1982] see also *Gleissner v Lo Presti*, 135 AD2d 494 [2nd Dept 1987]).

The plaintiff has submitted five cases in support of the instant motion. None of the verdicts that the plaintiff submitted have been sustained. The injuries alleged in the cited cases are similar to the injury that Dr. Berkowitz' claimed that the plaintiff sustained. They are not similar to the injury Dr. Toriello claimed she sustained of a resolved strain and bursitis. Therefore, they are distinguishable. Accordingly, the plaintiff has failed to establish that the jury award was inadequate or against the weight of the evidence and that portion of the motion is denied.

***Plaintiff's motion set aside the verdict based on evidentiary rulings***

Plaintiff asserts that the court erred in vacating its order granting plaintiff's motion *in limine*. Prior to the commencement of the trial, plaintiff moved to preclude the defendant from introducing evidence of plaintiff's prior injuries to her right shoulder, neck and back stemming from a prior accident. However, during the trial, the court vacated that prior determination and permitted testimony regarding the prior injuries. The rationale for vacating the prior order was plaintiff's claim that her damages caused her a loss of enjoyment of life.

It is well established that the nature and severity of the plaintiff's pre-existing

medical conditions are material and necessary to the issue of damages, if any, recoverable for a claimed loss of enjoyment of life due to current injuries (see *Vodoff v Mehmood*, 92 AD3d 773 [2nd Dept 2012][*internal citations omitted*]). The plaintiff does not include a verified bill of particulars in support of the motion, nor does plaintiff assert that loss of enjoyment of life was not alleged. The trial record reflects that loss of enjoyment of life was alleged and accordingly, it was appropriate for evidence of pre-existing injuries to be introduced.

**CONCLUSION**

Plaintiff's motion for additur for past and future pain and suffering is denied.

Plaintiff's motion to set aside the verdict on the grounds that the award was inadequate is denied.

Plaintiff's motion for a new trial based on evidentiary rulings is denied.

The foregoing constitutes the decision and order of this Court.

Enter:

*Francis A. Rivera*  
J.S.C.

**FRANCIS A. RIVERA**  
**J.S.C.**

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Page 9 of 9