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880 N.Y.S.2d 628

63 A.D.3d 403, 880 N.Y.S.2d 628, 2009 N.Y. Slip Op. 04269

(Cite as: 63 A.D.3d 403, 880 N.Y.S.2d 628)

Supreme Court, Appellate Division, First Department, New York.

Carolyn Thomas FRENCH, Plaintiff-Appellant,

v.

Alfred L. SCHIAVO, et al., Defendants-Respondents.

June 2, 2009.

**Background:** Disability claimant appealed from an order of the Supreme Court, New York County, John E.H. Stackhouse, J., denying claimant's motion to increase award for past medical expenses and granting defendants' motion for collateral source offset.

**Holding:** The Supreme Court, Appellate Division, held that trial court providently exercised discretion in granting post-verdict discovery and a collateral source hearing.

Affirmed as modified.

Recalling and vacating 58 A.D.3d 475, 870 N.Y.S.2d 339.

#### West Headnotes

#### Damages ↪205

#### 115k205 Most Cited Cases

Trial court providently exercised discretion in granting defendants post-verdict discovery and a collateral source hearing on claimant's award of past medical expenses, past lost earnings, and future lost earnings, in light of fact that claimant did not become eligible for disability payments from Social Security and insurer until after the first trial of action and the limited discovery afforded defendants regarding the subsequent post-traumatic occipital lobe epilepsy diagnosis. McKinney's CPLR 4545(c).

\*\*628 Ronemus & Vilensky, Garden City (Lisa M. Comeau of counsel), for appellant.

Mauro Goldberg & Lilling LLP, Great Neck (Barbara D. Goldberg of counsel), for respondents.

ANDRIAS, J.P., NARDELLI, MOSKOWITZ, RENWICK, FREEDMAN, JJ.

\*404 Judgment, Supreme Court, New York County (John E.H. Stackhouse, J.), entered December 28, 2007, in plaintiff's favor, bringing up for review an order, same court and Justice, entered on or about June 29, 2007, which, upon a jury verdict \*\*629 awarding plaintiff, inter alia, \$94,000 for past medical expenses, \$176,000 for past lost earnings, and \$3,100,000 for future lost earnings, denied plaintiff's motion, inter alia, to increase the award for past medical expenses, pursuant to stipulation, to \$166,371.63, and granted defendants' motion for a collateral source offset to the extent of reducing the award for past medical expenses from \$94,000 to \$38,559, reducing the award for past lost earnings from \$176,000 to \$0, and reducing the award for

future lost earnings from \$3,100,000 to \$1,133,016, unanimously modified, on the law, to increase the award for past medical expenses to \$166,371.63, and otherwise affirmed, without costs.

The parties' stipulation to the fair and reasonable value of past medical expenses in the amount of \$166,371.63 should be enforced (*see Sanfilippo v. City of New York*, 272 A.D.2d 201, 708 N.Y.S.2d 17 [2000], *lv. dismissed* 95 N.Y.2d 887, 715 N.Y.S.2d 378, 738 N.E.2d 782 [2000] ).

In light of the fact that plaintiff did not become eligible for disability payments from Social Security and Aetna until after the first trial of this action and the limited discovery afforded defendants regarding the subsequent post-traumatic occipital lobe epilepsy diagnosis (9 A.D.3d 279, 780 N.Y.S.2d 131 [2004] ), the trial court providently exercised its discretion in granting defendants post-verdict discovery and a collateral source hearing pursuant to CPLR 4545(c) (*see Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 A.D.3d 18, 37-38, 852 N.Y.S.2d 148 [2008], *lv. denied* 11 N.Y.3d 705, 866 N.Y.S.2d 608, 896 N.E.2d 94 [2008]; *Hoffmann v. S.J. Hawk, Inc.*, 273 A.D.2d 200, 709 N.Y.S.2d 448 [2000], *affg.* 177 Misc.2d 305, 676 N.Y.S.2d 448 [1998] ). Contrary to plaintiff's evidentiary objections and the conflicting testimony of the parties' expert as to the possibility that plaintiff's present disability benefits might be reduced or discontinued, the transcript of the post-verdict hearing reflects that defendants carried their burden of demonstrating "with reasonable certainty" that plaintiff's past medical expenses and past and future lost earnings were or would be replaced from collateral sources (CPLR 4545[c]; *see generally Oden v. Chemung County Indus. Dev. Agency*, 87 N.Y.2d 81, 637 N.Y.S.2d 670, 661 N.E.2d 142 [1995] ).

We have not considered plaintiff's remaining argument regarding the accrual of interest on the judgment, which is not properly before us.

The Decision and Order of this Court entered herein on January 13, 2009 is hereby recalled and vacated (*see* M-769 decided simultaneously herewith).

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