

COPY

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Ervin Jordan, Jr.,

Plaintiff,

-against-

County of Suffolk and Stephen Johnson,

Defendants.

Motion Sequence No.: 001; MG

Motion Date: 6/6/08

Submitted: 7/2/08

Index No.: 24626/2004

Attorney for Plaintiff:

Kenneth S. Feraru
200 Old Country Road, Suite 2 South
Mineola, NY 11501

Attorney for Defendant:

Christine Malafi
Suffolk County Attorney
By: Diana T. Bishop
Assistant County Attorney
County of Suffolk
100 Veterans Memorial Highway
Hauppauge, NY 11788

This action for damages for personal injuries arose from an automobile accident. A bifurcated trial was held. At the conclusion of the trial of the issue of damages, which was conducted on March 4 through March 6, 2008, the jury returned a verdict awarding the plaintiff \$50,000 for past pain and suffering and \$50,000 for future pain and suffering.

By notice of motion dated May 16, 2008, the plaintiff moved to modify and increase the verdict for damages, denominating the motion as one made under CPLR §5501(c). Defendants opposed the motion. In reply, plaintiff acknowledged that the relief sought is provided for under CPLR §4406(a) (after defendants asserted same) and, indeed, this additur motion is properly considered under §4406(a) (see, Siegel, McKinney's Laws of NY, "Practice Commentaries", Book 7B, CPLR C4404;4).

The proof adduced at the damages trial demonstrated that the plaintiff, age 24 at the time of trial, sustained the following injuries in the subject accident, which are not disputed: bilateral tib/fib fracture treated with insertion of a rod and four screws and complication to the injury called compartment syndrome which required two further surgeries (the rod and screws remain in plaintiff's leg, except for one screw which had to be removed in a separate operation); skin graft on both legs due to the compartment syndrome; permanent loss of sensation to the skin at the graft sites; 28 centimeter scar on the outside of both legs with diminished sensation over the area of the scars; scars next to plaintiff's knees from the incisions; the screws remain palpable to the touch both at the top and especially at the lower portion of the leg; bony prominence caused by scar tissue forming over the remaining bony fragments; stitches placed on his plaintiff's chin and under his neck left him with permanent scars; scar on the right hand. Plaintiff had three surgeries and spent a month in a rehabilitation facility. Defendants' examining doctor confirmed plaintiff's lack of range of motion 2 years after the accident. At the time of trial plaintiff still had screws and a rod in his leg. It is not disputed upon this motion that plaintiff is restricted in his normal activities, which included participation in sports and physical play with his children, and that his pain continues. Plaintiff also has scarring on his legs, chin, neck and right hand. Plaintiff's counsel specifically suggests that an appropriate award based on the injuries sustained by plaintiff and case law pertaining would be \$300,000 for past pain and suffering and \$500,000 for future pain and suffering.

First, the Court rejects defendants' assertion that this motion, made 7 days after the March 6, 2008 verdict, should be denied as untimely under CPLR §4405. Although said section does contain a 15 day period within which to make a motion "under this article . . ." (*id.*), the plaintiff made its motion at the time (day of) the verdict, at which time this Court denied the motion with leave to renew on papers without limiting plaintiff's time to do so; further, this Court understood plaintiff wished to obtain the transcript for the motion and recognizes that it would be either not possible or prohibitively expensive to both obtain such transcript and make the motion in such a short period. Additionally, this Court finds that good cause exists for any perceived or actual delay. Therefore, the Court deems the motion timely interposed under the particular procedural circumstances and the factual circumstances of this case.

With respect to the merits, and even taking into account the defendants' contention that in the First Department of this State and the counties comprising it, jury awards may tend on average to exceed those in Suffolk County, this Court believes the jury award herein was inadequate as to the awards for both past pain and suffering and future pain and suffering. The Court finds and concludes that the award under the subject verdict deviated materially from what is reasonable compensation for the injuries sustained by plaintiff in the accident (see, Brandwein v. New York City Transit Authority, 14 AD3d 396 [1st Dept., 2005]; Kane v. Coundorous, 11 AD3d 304 [1st Dept., 2004]; Fischl v. Carbone, 199 AD2d 463 [2nd Dept., 1993]; Shurgan v. Tedesco, 179 AD2d 805 [2nd Dept., 1992]).

Jordan v. County of Suffolk and Johnson

Index No.: 02462/2004

Page 3

Accordingly, the plaintiff's motion, in effect, for additur is determined as follows: a new trial on damages is awarded unless within 30 days of the date hereof the defendant stipulates to the increased amounts, to wit, the increase of the award for past pain and suffering from \$50,000 to \$250,000 and the increase of the award for future pain and suffering from \$50,000 to \$500,000 (see, Rajeev Sindhvani, M.D., PLLC. V. Coe Business Svc., Inc., 52 AD3d 674 [2nd Dept., 2008]).

The Court has considered defendants' remaining contentions and they are without merit.

Settle judgment (see, 22 NYCRR §202.48).

Dated: September 15, 2008


HON. WILLIAM B. REBOLINI, J.S.C.