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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

ROMEO MARSHALL and JUDENE MARSHALL,

Plaintiffs,

-against-

M.T.A BRIDGES AND TUNNELS, TRIBOROUGH BRIDGES AND TUNNELS AUTHORITY, METROPOLITAN TRANSIT AUTHORITY AND THE CITY OF NEW YORK,

Defendants.

MEMORANDUM DECISION/ ORDER

Index No.6705/04

HON. MARK FRIEDLANDER:

This matter was tried before the undersigned from October 1st through October 21st, 2009. Plaintiff Romeo Marshall had sustained injuries in a fall, while servicing an EZ Pass machine at the toll plaza of the Bronx Whitestone Bridge. He attributed the fall to a defect in the roadway at the toll plaza and brought the instant action against defendants Metropolitan Transit Authority and Triborough Bridges and Tunnels Authority (collectively, "the TBTA") to recover for his injuries.

Following trial, the jury rendered a verdict finding the TBTA one hundred per cent responsible for the accident, and awarding plaintiff $450,000 for past pain and suffering, and $1, 400,000 for future pain and suffering. In making the award for the future, the jury accepted the life expectancy figure for plaintiff that was available from the statistical table, to wit: 36 years. The accident occurred just before plaintiff's 34th birthday, on June 10, 2003. At the time of trial, six years later, plaintiff was 40. The jury also made an award to plaintiff for lost earnings, and an award to his former spouse for loss of consortium during the years between the accident and their separation, but those awards are not the subject of this motion.

Immediately after the recording of the verdict, defendant sought leave to submit briefs challenging various portions of the award as excessive. The undersigned denied such leave and deemed all motions to reduce the verdict as having been made and denied, with the exception of the award for future pain and suffering

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(hereinafter "PS"). As to future PS, the Court allowed written motions. As to the various other awards made by the jury, the Court indicated familiarity with existing decisions upholding or changing awards for injuries of this type, and told the parties that this jury's awards for past PS and loss of consortium were, in its view, not so excessive as to justify extensive briefing. The Court therefore, in the interest of conserving judicial resources and avoiding unnecessary expense to counsel and parties, upheld both of those jury awards from the bench, as of the conclusion of trial, and withheld judgment only on the award for future PS until hearing further from the parties.

TBTA now moves to reduce the jury's award for future PS, and points to the following factors in support of such reduction: Plaintiff's left ankle fracture was not so severe as to require hospitalization, or internal hardware; plaintiff did not have medical treatment during the three years immediately preceding trial; the limitations on activity which plaintiff articulated related mostly to sports; and defendant's physician contradicted the opinion of plaintiff's doctor that there was evidence of post-traumatic arthritis in plaintiff's ankle x-ray. As to plaintiff's claim of lumbar injury, defendant argues that plaintiff did not make a complaint of this injury immediately following the accident; there was no treatment for this condition either in the two years following the accident or in the three years preceding trial, but only on six occasions in 2005-2006; plaintiff did not relate any limitations of activity to his back condition, only to his ankle condition. With regard to both injuries, plaintiff was not continuing to take medication, receive treatment, or make appointments for future care. Thus, according to the TBTA, the award of $1.4 million for future PS was excessive.

Plaintiff, in opposition, offers, as one might expect, a vastly different perspective on the ankle and back injuries. Plaintiff points to the totality of the testimony, invoking not only the words of plaintiff but those of his physician as well. These accounts include: Plaintiff's scarring, permanent constant pain, intermittent swelling of the ankle, severe lumbar radiculopathy radiating down both legs, and the possibility of future spinal surgery. Further, plaintiff's physician testified that these conditions will continue to get worse throughout

plaintiff's life. Plaintiff notes that even the physician retained by defendant to examine plaintiff found significant limitation in plaintiff's ranges of motion of the spine and ankle.

Plaintiff argues that his injuries caused him to have to cease working for two and a half years, during which time he lost his job, that he required over 200 sessions of physical therapy during this time, that, despite initial efforts to repair his ankle with external fixation, he thereafter required surgery to remove a loose piece of bone from his ankle and to re-attach a ligament. Plaintiff also still wore an ankle brace at the time of trial, and needed a larger shoe size on his left foot co accommodate swelling. Although plaintiff now is employed in a related area, he no longer does the kind of field work in which he was engaged at the time of the accident. Plaintiff places great emphasis on the testimony of his physician that the conditions from which he suffers will get progressive worse throughout his life, and that the limitations on activity, as well as the frequency and severity of pain, will continue to increase correspondingly.

Both sides have cited appellate decisions sustaining, or reducing, jury verdicts for various injuries. Of course these precedents are of limited value, because human injuries come in infinite variety and it is rare that the injury described in one proceeding can said to be precisely congruent with the injury in another. Defendant is correct in pointing out that some of the ankle injuries which it cites seem objectively more severe than that sustained by the instant plaintiff. Plaintiff is correct in pointing out that the ankle cases cited by defendant do not take into account that the instant plaintiff suffered both a back and an ankle injury.

Movant points to decisions which have allowed awards for future PS of between $150,000 and $290,000, and urges that the ankle injuries in those cases were more severe (although, again, those cases do not include back injuries). In one case of ankle injury, involving multiple surgeries, the appellate court permitted future PS of $600,000, and movant contends that the unusual severity of that situation shows clearly that $600,000, which is less than half the instant jury award, should be far above the upper limit sustainable here.

Plaintiff, in opposition, cites the latter case above, without detailing the severity of the ankle injury in

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that case, and suggests that the $600,000 award, when added to an additional award for the back injury, would justify the instant verdict. In addition to the above, plaintiff points to awards of $375,000 and $500,000 for ankle injuries, and of between $300,000 and $750,000 for spinal injuries, and contends that those awards need to be adjusted upward because plaintiff here has a longer life expectancy, and because he suffered both types of injuries.

In reply, defendant points to the more extensive records of treatment, including surgeries, found in the cases of those whose awards are cited by plaintiff. It is particularly difficult, though, to compare back injuries of various plaintiffs, because the description by professionals as to the nature and extent of the same back injury can vary so greatly.

In the final analysis, the jury here observed plaintiff and heard from his mouth the manner in which he described his pain and his limitations. It is difficult to substitute for that kind of evaluation. Further, plaintiff's physician provided the description of plaintiff's prognosis, which the jury obviously thought more persuasive than the less dire views of defendant's expert. It cannot be said that the jury's choice was irrational. Further, a jury verdict should be overturned only with great care. There is thus a vast difference between sustaining a lower verdict which a jury has rendered, and reducing to that same number a higher jury verdict.

Despite the foregoing, it cannot be said that plaintiff has provided a persuasive case for allowing the award to stand as is. It cannot be denied that plaintiff sustained two separate injuries to different parts of his body, and that both of those will have permanent effects. However, the ankle cases cited by plaintiff do seem more severe than this one, and defendant is correct in arguing that it is overly simplistic to merely add ankle verdict amounts to spinal verdict amounts, in order to arrive mechanically at a sum of the two.

Based on all the evidence adduced herein, the Court finds that the appropriate award for future PS, for the 36 years life expectancy of plaintiff, should not exceed $800,000. Therefore, the instant motion is granted to the sole extent of ordering a new trial as to damages, unless within 30 days of service upon plaintiff's counsel

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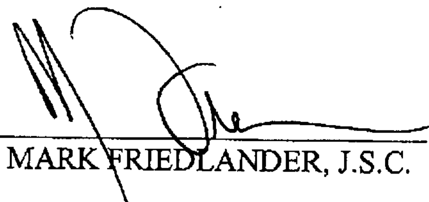
of a copy of this Decision and Order, with notice of entry, plaintiff serves and files a written stipulation consenting to reduce the verdict as to future PS from $1,400,000 to $800,000.

This constitutes the Decision and Order of the Court.

Dated: 6/7/10



MARK FRIEDLANDER, J.S.C.