COPY

SUPREME COURT
STATE OF NEW YORK - MONROE COUNTY

THERESA A. LAMPHRON-READ,

Plaintiff,

- vs -

INDEX #2013/9584

DAVIS MONTGOMERY
AND
DESMOND J. MONTGOMERY,

DECISION

Defendants.

APPEARANCES ON SUBMITTED PAPERS:

Attorney for Plaintiff: *Nicholas B. Davis, Esq.*
Cellino & Barnes Firm
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Rochester, New York 14614

Attorney for Defendants: *Jeffrey Sendziak, Esq.*
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DECISION

Thomas A. Stander, J.

The Plaintiff, Teresa A. Lamphron-Read, submits a motion pursuant to CPLR 4404[a] and CPLR 5501[c] seeking an order from this Court setting aside the jury's verdict and ordering a new

trial, unless the defendants agree to an additur. The Plaintiff asks this Court to increase the damages awarded by the jury or, in the alterative setting aside the verdict and ordering a new trial.

The Defendants, Davis Montgomery and Desmond J. Montgomery (collectively "Montgomery") , oppose Plaintiff's motion.

This litigation arose from a motor vehicle accident that occurred on July 1, 2013. The Plaintiff was injured when the Defendant driver, Desmond Montgomery, lost control of his vehicle before striking the Plaintiff head-on in her own lane of travel.

I. PROCEDURAL BACKGROUND

Prior to trial, Plaintiff moved this Court for an order granting summary judgment on the issues of negligence, serious injury and proximate cause. Notwithstanding the clear facts of the case, Defendants vigorously opposed the Plaintiff's motion for summary judgment. In a Decision dated July 25, 2014 and an Order entered September 20, 2014, the Court granted summary judgment to Plaintiff on the issues of negligence, serious injury and proximate cause.

The matter was then set for a jury trial on damages only commencing on November 9, 2015. At trial, Plaintiff presented two (2) witnesses: Plaintiff testified in person and Dr. Peter Capicotto, M.D., testified by videotape. Since the treating neurosurgeon, Dr. Jason Huang, had relocated out of state and was unavailable for trial, the Plaintiff retained Dr. Peter Capicotto, a local orthopaedic spinal surgeon, who testified after an independent evaluation of the Plaintiff. The Defendants did not present any witnesses in defense of this action.

The jury verdict on November 9, 2015 was unanimous and awarded the following:

1) The amount awarded to Plaintiff for pain and suffering, including loss of enjoyment of life from the date of the injury on July 1, 2013 up to the date of the verdict was $25,000.

2) The amount awarded to Plaintiff for pain and suffering, including loss of enjoyment of life and permanent effect of the injury, to be incurred in the future was NONE.

The Plaintiff then brought this motion to set aside the jury's verdict.

II. TRIAL TESTIMONY

The testimony of Dr. Peter Capicotto, M.D. was presented by videotape at the trial. The testimony of Dr. Capicotto includes the following information, with direct quotes indicated:

Questioning by Plaintiff:

1) Plaintiff sustained "fractures of the transverse process, T-5 to T-9, and L-1 left-sided transverse process fracture." She sustained five broken bones in her back and a "transverse process fracture on the opposite side from her thoracic fractures. That was on the left side at L-1" and she sustained a broken bone at her neck at C-4. (Videotaped Trial Testimony of Peter N. Capicotto, p. 21-22 [11-9-2015]).

2) There are 12 vertebrae in the thoracic spine, and Plaintiff sustained fractures at five (5) of the twelve levels. (Videotaped Trial Testimony of Peter N. Capicotto, p. 23-24 [11-9-2015]).

3) The Plaintiff recounted that at the time she was in the hospital after the accident the pain was 8 out of 10, which is at the extreme end of the scale for causing pain. (Videotaped Trial Testimony of Peter N. Capicotto, p. 24-25 [11-9-2015]).

4) "There are other muscles in between the transverse processes called the rotatories" and when the transverse process is fractured there may be "some tearing of the muscle too. So I think that is where people

be "some tearing of the muscle too. So I think that is where people can have more chronic pain because that's scarring around the soft tissue." That sort of damage can result in a permanent impairment, including the chronic pain. (Videotaped Trial Testimony of Peter N. Capicotto, p. 30 [11-9-2015]).

5) Plaintiff sustained a transverse process fracture of L-1, in the lumbar region. This is more than likely in her case to be an avulsed fracture, where "the muscles associated with the hip flexor could have pulled the bone off." (Videotaped Trial Testimony of Peter N. Capicotto, p. 31 [11-9-2015]).

6) Plaintiff was in the hospital for about a week. "She was released wearing, with a collar, and she was to keep that in place full-time for about 12 weeks. She was also released with a, what they call a TLSO, which is a Thoracic-Lumbar-Sacral Orthosis, which is basically a stiff rigid brace extending from her chest region all the way down to her sacral region. That was provided for comfort, which it did give her comfort while in it and she used that for about the same period of time." This TLSO brace was intended to provide stability and support. (Videotaped Trial Testimony of Peter N. Capicotto, p. 32-33 [11-9-2015]).

7) "Reading through her notes and all, I believe the cervical collar was full-time, 24/7." The TLSO was "on a PRN basis, although I believe for the first six weeks to eight weeks she actually wore it, it sounds, full-time. She was actually sleeping with it because it did provide her comfort." (Videotaped Trial Testimony of Peter N. Capicotto, p. 33 [11-9-2015]).

8) The brace affects a persons mobility a bit and it is "very difficult to operate a vehicle because you have restricted motion." (Videotaped Trial Testimony of Peter N. Capicotto, p. 34 [11-9-2015]).

9) On examination of Plaintiff's spine "it was most notable that she was tender to deep palpation from approximately T-2 all the way down to about T-12." Complaints more than a year after the accident included "ongoing thoracic pain which was primarily activity related, limiting her activities around the house and recreational activities;" difficulty doing housework and yard work; and pain being aggravated by prolonged standing, prolonged sitting and prolonged walking. This type of pain was described as consistent with a patient who fractured

five bones in her thoracic spine and one in her low back. (Videotaped Trial Testimony of Peter N. Capicotto, p. 34-36 [11-9-2015]).

10) The doctors report described it as "chronic, unrelenting pain." "I would say it's more of an activity related pain syndrome." This type of activity related pain syndrome could be caused by the soft tissue damage discussed. (Videotaped Trial Testimony of Peter N. Capicotto, p. 36-37 [11-9-2015]).

11) The doctor's opinion was that the seven fractures sustained in her spine were due to the motor vehicle accident on July 1, 2013. The doctor opined that the cause of the activity related pain syndrome is "the result of post fracture injury to the paraspinal muscles that travers the transverse processes, . . . T-5 to T-9." The doctor opined that he believes the pain she is experiencing two years after the accident, the activity related pain is permanent at this point; and that there is no treatment that he is aware of that could fix that problem. (Videotaped Trial Testimony of Peter N. Capicotto, p. 37-38 [11-9-2015]).

Questioning by Defense:

12) "[T]he radiologist defined the fracture at C-4 as a small, non-displaced fracture" and the Plaintiff at doctor's visits immediately after the accident denied having neck pain. And there were no limitations in the movement of her neck and had normal strength when she was examined by Dr. Capicotto. Agrees that the cervical fracture healed and no future treatment was needed. (Videotaped Trial Testimony of Peter N. Capicotto, p. 40-43 [11-9-2015]).

13) Upon examination of the lumbar spine Plaintiff had full range of motion, normal strength, and no pain. The fracture at L-1 had healed and she needs no further treatment. (Videotaped Trial Testimony of Peter N. Capicotto, p. 43-44 [11-9-2015]).

14) The home health care providers records show that on the pain scale during the weeks after being in the hospital Plaintiff rated her pain in the 2-4 range; and that she stopped taking pain medications the end of July (Videotaped Trial Testimony of Peter N. Capicotto, p. 44-47 [11-9-2015]).

15) There was no neurological injury to the spinal cord that runs through the thoracic areas. The Plaintiff did not have surgery and none is

recommended; and has not had treatment since the fall of 2013. (Videotaped Trial Testimony of Peter N. Capicotto, p. 48 [11-9-2015]).

16) Dr. Report indicated that "this chronic, activity related thoracic pain was altering [Plaintiff's] lifestyle significantly." This information came from the Plaintiff. (Videotaped Trial Testimony of Peter N. Capicotto, p. 49-50 [11-9-2015]).

17) Dr.agrees that the chronic pain syndrome that has been talked about is activity related, so there would be periods of time where she had pain and other times she would not have pain. (Videotaped Trial Testimony of Peter N. Capicotto, p. 53-54 [11-9-2015]).

18) Thoracic fractures do heal. Dr. would have put in his report if Plaintiff told him she slipped and fell in January 2014; and there is no information in his report about this. (Videotaped Trial Testimony of Peter N. Capicotto, p. 54 [11-9-2015]).

Questioning by Plaintiff:

19) During the time immediately after Plaintiff went home and was being visited by home health care providers and indicating pain was between 0 and 4, Plaintiff was immobilized by the TSLO brace and cervical collar and would not engage in strenuous activity wearing the brace and collar (Videotaped Trial Testimony of Peter N. Capicotto, p. 55 [11-9-2015]).

The Plaintiff also testified at the trial. She stated she was 65 at the time of the accident and was not limited in any way prior to accident, and had never injured her neck or back. (Trial Testimony of Plaintiff, p.28 [11-9-2015]). She enjoyed taking care of her mom, her home, the physical being, the people and activities connected to them; she had done plumbing work, painted walls and ceilings, done landscaping; and she traveled to visit grandkids once a year and they came to visit her once a year. (Trial Testimony of Plaintiff, p.28-30 [11-9-2015]). She was given the TLSO that she wore for 3 months, which goes from the abdomen to the top of the chest; and the neck brace to wear 24/7. (Trial Testimony of Plaintiff, p.35-36 [11-9-2015]). It was "just about impossible" to sleep with the neck brace on (Trial Testimony of Plaintiff, p.36 [11-9-2015]). She was in the hospital for 7 days

because she couldn't get in an upright position by herself; and her pain was at the 10 level (Trial Testimony of Plaintiff, p.37 [11-9-2015]).

When she went home she did very little; sitting, walking to the bathroom, or sleeping for a couple of weeks; she didn't leave the house at all the first couple of weeks.(Trial Testimony of Plaintiff, p.38 [11-9-2015]). She wore the braces for 3 months (Trial Testimony of Plaintiff, p.39 [11-9-2015]). She was given pain medications which she took, but they never really worked so she "didn't bother taking it anymore. I'd take Advil and just modify, modify, modify whatever I was doing." (Trial Testimony of Plaintiff, p.39 [11-9-2015]). During the first 3 months after the accident Plaintiff didn't drive, she didn't try to do a lot of different things; she could make lunch and stand at the sink (Trial Testimony of Plaintiff, p.40 [11-9-2015]). The therapist had her face the issue of being afraid of the car (Trial Testimony of Plaintiff, p.41 [11-9-2015]). Plaintiff testified that she fell in December 2013 and hit her head while walking the dog (Trial Testimony of Plaintiff, p.44 [11-9-2015]).

Her flight to see her grandson for his birthday was uncomfortable because you cannot walk around (Trial Testimony of Plaintiff, p.45 [11-9-2015]). Sitting and walking aggravate her back pain; it is still there, but some days not as noticeable (Trial Testimony of Plaintiff, p.45 [11-9-2015]). She pushes through, but its not easy; has trouble sleeping; the typical activity related pain is a 4 out of 10; and she experiences the pain any day when she's not careful (Trial Testimony of Plaintiff, p.45-46 [11-9-2015]). Walking, sitting, mowing can bring on the pain (Trial Testimony of Plaintiff, p.46 [11-9-2015]). She visited a physical therapist in August 2014 because she was having a lot of back pain and wanted to get an exercise program (Trial Testimony of Plaintiff, p.46-47 [11-9-2015]). She won't paint and be on a ladder; she does projects in segments; she does home maintenance that she can and asks for help; she doesn't travel to see her kids and grandkids (Trial Testimony of Plaintiff, p.47-48 [11-9-2015]). Carrying groceries is taxing and mowing the grass brings on the pain (Trial Testimony of Plaintiff, p.48 [11-9-2015]).

The defense also questioned the Plaintiff and pointed out that she told Dr. Capicotto that she didn't have any neck or lower back pain (Trial Testimony of Plaintiff, p.55 [11-9-2015]). The defense points out through testimony that Plaintiff saw a therapist in August 2014; that pain was a 3 out of 10 and comes and goes; that she hasn't traveled to see family; that she can clean, bathe, go shopping, walk the dog, and is independent in activities of daily living. (Trial Testimony of Plaintiff, p.55-57 [11-9-2015]).

At the trial, the Defendants did not put on any witnesses in support of their position. A missing witness charge was given to the jury as to the Defendants' expert doctor:

> In this case the defendant did not call Dr. Daniel Carr, who is the defendant's expert examining witness. The defendant offers the explanation that the testimony of Dr. Daniel Carr would have been duplicative and there was nothing new that would have been offered had he testified other than the plaintiff's witness.

(Trial Transcript, p.75 [11-9-2015]). The Defendants' doctor agreed with the determinations of the Plaintiff's doctor.

III. MOTION TO SET ASIDE THE VERDICT

The Plaintiff makes a motion to set aside the verdict and order a new trial on past pain and suffering and on future pain and suffering, unless the Defendants agree to increase the sum awarded to the Plaintiff for past pain and suffering to $50,000.00 and increase the sum awarded for future pain and suffering to $100,000.00.

The Court has authority to "set aside a verdict or any judgment entered thereon and . . . 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, [or] in the interest of justice . . ." (CPLR Rule 4404[a]). The Court has reviewed the transcript of the entire trial testimony of Dr. Capicotto and Plaintiff Teresa A. Lamphron-Read.

A. Law On Setting Aside a Jury Verdict

The Courts have established the generally accepted principles for setting aside a jury verdict:

> The standard for determining whether a verdict should be set aside is whether "the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence" [*citation omitted*]. Thus, a verdict should not be set aside unless it is 'palpably irrational' [*citation omitted*] or 'palpably wrong' [*citations omitted*]. "To conclude as a matter of law that a jury verdict is not supported by sufficient evidence, there must be 'no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" [*citation omitted*]. We also note that, in evaluating a jury verdict, we accord "great deference . . . to the fact-finding function of the jury, [which] is in the foremost position to assess witness credibility" [*citation omitted*].

(*Sanchez v Dawson*, 120 AD3d 933-34 [4th Dept. 2014]; *see McMillian v Burden*, __ AD3d __, 4th Dept. Decision #1364, CA 15-00057 [2-5-2016]). "A verdict should not be set aside as contrary to the weight of evidence unless it could not have been reached under any fair interpretation of the evidence" (*Quigley v Sikora*, 269 AD2d 812 [4th Dept. 2000]; *see Campopiano v Volcko* , 82 Ad3d 1587,1589 [4th Dept. 2011]; *Clause v E.I. du Pont de Nemours & Co.*, 284 AD2d 966 [4th Dept. 2001]; *Corsaro v Mt. Calvary Cemetery, Inc.*, 258 AD2d 969 [4th Dept. 1999]). The Court must set forth its reasoning for setting aside the verdict; and give due deference to a jury verdict (*see McMillian* at 4th Dept. Decision #1364 [2-5-2016]).

"A court "may direct a new trial on damages only unless the plaintiff agrees to entry of judgment in a specific amount, but does not have the authority to [change] the verdict directly" [*citation*

omitted"] (*Doyle v City of Buffalo*, 56 AD3d 1134,1136 [4th Dept. 2008]). A damages award by the jury must be set aside when the award "deviates materially from what would be reasonable compensation [*citations omitted*]" (*Quigley* at 813; *see Wojeski v DelFavero*, 17 Ad3d 1024,1025 [4th Dept. 2005]; *Deans v Pittman*, 15 AD3d 944 [4th Dept. 2005]). Depending on the evidence presented, a verdict that awards no damages for future pain and suffering may be contrary to the evidence (*Hixson v Cotton-Hanlon, Inc.*, 60 AD3d 1297 [4th Dept. 2009]; *Corsaro* at 969). A Court may "set aside the verdict as against the weight of the evidence with respect to the award of damages" when "[i]n light of [the] evidence, [the Court] conclude[s] that the award [of damages] is inadequate and could not have been reached upon any fair interpretation of the evidence" (*Inzinna v Brinker Restaurant Corp.*, 302 AD2d 967,968 [4th Dept. 2003]; *see Silver v Tops Markets, Inc.*, 273 AD2d 887 [4th Dept. 2000]).

B. Reasoning

The Plaintiff seeks to set aside the verdict on the damage award of $25,000 for past pain and suffering as inadequate and against the weight of the evidence; and for the jury's failure to award damages for future pain and suffering as against the weight of the evidence. The only witnesses to submit evidence are the Plaintiff and the Plaintiff's expert doctor. The Defense conceded that their doctor made the same conclusions as the Plaintiff's doctor, so such testimony would be cumulative. A missing witness charge was given to the jury regarding the Defendants' doctor.

i. Past Pain and Suffering

The jury awarded $25,000 for past pain and suffering. Before trial, the Plaintiff was granted summary judgment on liability and serious injury. The Plaintiff presented uncontroverted medical and non-medical proof that she sustained 5 fractures in her back in the thoracic area, a cervical fracture in her neck, and a fracture in her lumbar spine area. The uncontroverted medical testimony is that the type of compression needed to cause these fractures would be capable of causing damage

to the soft tissue structures of the spine. The evidence demonstrates, without contradiction, that the Plaintiff was in the hospital for seven (7) days after the accident with pain in the range of 8 to 10 out of 10; and that she was discharged with a cervical collar to be worn 24/7 and a TLSO brace which went from her abdomen to her chin. Plaintiff wore the collar and TLSO brace for three (3) months, during which time she did not drive, could do limited activities, and had difficulties sleeping with the brace. Plaintiff testified that the braces helped the pain, which she described to home nurses as between 2-4 on a scale of 10; and that she stopped taking pain medication because it didn't help. After the braces stopped being worn Plaintiff testified that she has pain come and go depending on her level of activity; that her activities prior to the accident were now limited by the activity induced pain; and that she no longer was able to paint, climb ladders to do projects, or garden and mow the grass without taking breaks. Plaintiffs uncontroverted evidence shows that she sustained painful injuries to her back.

In a case where Plaintiff sustained injuries to his cervical and lumbar spinal cord, which caused chronic neck pain, chronic headaches, weakness and numbness in one arm and hand, limited range of motion and inability to sit for long periods; depression, difficulty sleeping, and inability to enjoy many of the pre-accident activities such as snowmobiling, drumming, and plowing; and Plaintiff was unable to return to work as a truck driver; the Court determined that the award of $125,000 for past pain and suffering did not deviate materially from what would be reasonable compensation (*Ellis v Emerson*, 57 Ad3d 1435,1436-37 [4th Dept. 2008]). The Court found that a jury award to a woman who sustained painful injuries to her ankle, wrist and shoulder; surgical procedures to her wrist; and painful physical therapy for her injuries, in the amount of $25,000 for past pain and suffering was inadequate and could not have been reached upon any fair interpretation of the evidence (*Inzinna* at 968).

Although conflicting medical expert testimony may raise issues of credibility for the jury to determine, there is no conflicting medical expert testimony presented in this trial (*see Dennis v Massey*, 2015 NY Slip Op 09737; 2015 N.Y. App. Div. LEXIS 9714 [12-31-2015]). The Defendants' did not present any testimony because their expert came to the same medical

conclusions as the Plaintiff's doctor. In the transcript, during a discussion of counsel with the Judge outside the hearing of the jury, the Attorney for the Defendants represented that he "didn't call Dr. Carr because his findings were virtually identical to the finding of Dr. Capicotto" (Trial Testimony, p.58 [11-9-2015]. The Defendants do not present any medical evidence refuting the medical testimony of Dr. Capicotto, the number of fractures in Plaintiff's back, the pain experienced by Plaintiff, the length of time the collar and brace were worn, or the pain experienced by activity.

In light of all the evidence presented, including the uncontroverted medical testimony and testimony of the Plaintiff, and giving due deference to the jury verdict, this Court determines that the award of $25,000 for past pain and suffering could not have been reached upon any fair interpretation of the evidence and that the award deviates materially from what would be reasonable compensation (*see Wojeski* at1026; *Quigley* at 812; *Campo v Neary*, 52 AD3d 1194,1198 [4th Dept. 2008]). The Plaintiff was in a neck brace collar and TLSO brace for 3 months; she was in pain; she was extremely limited in activities due to the braces; she was not able to drive; and when she stopped wearing the braces she continued to be in pain, especially activity related pain. The amount awarded of $25,000 deviates materially from reasonable compensation for the past pain and suffering and the loss of enjoyment of life for her injuries due to the Defendants' negligence. Further any fair interpretation of the evidence could not conclude that $25,000 was an appropriate award.

The motion of the Plaintiff to set aside the jury verdict award for past pain and suffering and for a new trial is GRANTED.

Based upon similar cases and upon review of all the evidence, reasonable compensation for Plaintiff's past pain and suffering, including loss of enjoyment of life, is **$65,000**. The jury verdict is set aside as inadequate and contrary to the weight of the evidence and a new trial is ordered on this damage claim unless the Defendants stipulate to increase the award of damages for past pain and suffering to $65,000.

ii. Future Pain and Suffering

The Plaintiff moves to set aside the jury verdict for future pain and suffering and seeks a new trial. The jury award to Plaintiff for future pain and suffering, including loss of enjoyment of life and permanent effect of the injury, was nothing. The Court understands the deference given to a jury verdict and does not take lightly the request to set aside a verdict. However, where the evidence is uncontroverted as to future pain and suffering, and loss of enjoyment of life and permanent effect of the injury, a "verdict insofar as it awards no damages for future pain and suffering is contrary to the weight of the evidence" (*Hixson* at 1298).

The Court may take into account evidence showing range of motion limitations, chronic and severe pain, weakness and numbness, inability to sit for long periods, and loss of enjoyment of life by inability to perform activities (*see Doyle* at 1137; *Ellis* at 1437). Future damages may reflect loss of enjoyment of life, *e.g.* even though "plaintiff is able to perform the activities of her daily life, she is unable to enjoy many activities that she had previously enjoyed, such as skiing and gardening, and she has had trouble sleeping" or where Plaintiff "was unable to enjoy many of the activities that he had previously enjoyed, such as snowmobiling, drumming, and plowing his driveway" (*Doyle* at1137; *Ellis* at 1437).

Here the uncontroverted medical evidence of the doctor is that the type of compression causing the break of 5 thoracic transverse processes can result in damage to the soft tissue structures of the spine and that this type of damage can result in a permanent impairment. The doctor testified that the Plaintiff was tender throughout the thoracic spine. The doctor described Plaintiff's symptoms as stemming from an activity related pain syndrome caused by soft-tissue damage. The doctor opined that the seven (7) fractures in Plaintiff's back and neck was caused by the accident; and that the activity related pain syndrome is caused by post-fracture injury to the paraspinal muscles in the thoracic area. The testimony of the doctor more than two years after the accident, is that in his opinion the Plaintiff's activity related pain is permanent; and there is no treatment to fix this problem. The doctor testified that the chronic pain syndrome that has been talked about is activity

related, so there would be periods of time where she had pain and other times she would not have pain. The Defendants did not put on any witnesses to rebut the Plaintiff's doctor's testimony.

The Plaintiff testified that she still experiences back pain and that it has never gone away completely. The pain is aggravated by sitting, walking and standing; and she still has difficulty falling asleep due to the pain. When active the Plaintiff described the pain as difficult and would rate the pain at 4 out of 10. Plaintiff averred that due to her injuries and pain she breaks activities into segments to complete them, or avoids them. She needs help maintaining her home; she no longer travels to see her children and grandchildren as much as prior to the accident; and she experiences pain when carrying groceries and mowing.

The medical evidence demonstrates that the activity related pain Plaintiff experiences is permanent and there is no way to fix this problem. The uncontroverted evidence shows that Plaintiff will continue to have activity related pain. The evidence cannot be viewed in any way to reach a jury verdict award of nothing for future pain and suffering. The award of nothing cannot be construed to be reasonable compensation for future pain and suffering and loss of enjoyment of life.

In light of the evidence presented, this Court determines that the failure of the jury verdict to award damages to Plaintiff for future pain and suffering, including loss of enjoyment of life, is against the weight of the evidence (*see Inzinna* at 968; *Hixson* at 1298; *Quigley* at 813). Further "the failure to award any damages for future pain and suffering . . . is contrary to a fair interpretation of the [uncontroverted] evidence and deviates materially from what would be reasonable compensation (*see Silver* at 887; *Beh v Jim Willis & Sons Builders, Inc.*, 28 AD3d 1227,1228 [4th Dept. 2006]).

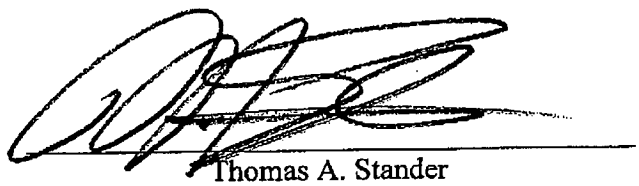
The motion of the Plaintiff to set aside the jury verdict award for future pain and suffering and for a new trial is GRANTED.

Based upon similar cases and upon review of all the evidence, reasonable compensation for Plaintiff's future pain and suffering, including loss of enjoyment of life, is **$65,000.** The jury verdict of "None" for future pain and suffering is set aside as contrary to the weight of the evidence and deviates materially from reasonable compensation. A new trial is ordered on the damage claim for future pain and suffering unless the Defendants stipulate to increase the award of damages for future pain and suffering to **$65,000.**

SUBMIT ORDER

Counsel for the Plaintiff, Theresa A. Lamphron-Read, shall submit an Order, with this Decision attached, upon approval of all Counsel.

Dated: March 2, 2016
Rochester, New York



Thomas A. Stander
Supreme Court Justice

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