

2019 WL 138592

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

Nicholas C. AVISSATO, Appellant,  
v.

Andrew MCDANIEL, et al., Respondents.

2017-11549

|  
(Index No. 100144/15)

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Submitted—September 17, 2018

|  
January 9, 2019

### Synopsis

**Background:** Driver brought action against owner and operator of rear vehicle, seeking to recover damages for injuries sustained in rear-end collision. After summary judgment was granted to driver on issue of liability, and after jury returned verdict on damages, the Supreme Court, Richmond County, Orlando Marrazzo, Jr., J., denied driver's motion to set aside verdict and for new trial. Driver appealed.

The Supreme Court, Appellate Division, held that jury's determination that driver was not entitled to damages for future pain and suffering was contrary to weight of the evidence.

Reversed and remitted.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Richmond County (Orlando Marrazzo, Jr., J.), dated September 26, 2017. The order, insofar as appealed from, denied the plaintiff's motion pursuant to CPLR 4404(a) to set aside so much of a jury verdict as awarded him damages in the principal sum of only \$12,500 for past pain and suffering and failed to award any damages for future pain and suffering as contrary to the weight of the evidence or inadequate and for a new trial on the issue of those damages.

### Attorneys and Law Firms

Krentsel & Guzman LLP, New York, N.Y. (Steven E. Krentsel and Julie T. Mark of counsel), for appellant.

Correia, King, Fodera, McGinnis & Liferiedge, New York, N.Y. (Michael Deguida–Derise of counsel), for respondents.

ALAN D. SCHEINKMAN, P.J., RUTH C. BALKIN, SYLVIA O. HINDS–RADIX, HECTOR D. LASALLE, JJ.

### DECISION & ORDER

\*1 ORDERED that the order is reversed insofar as appealed from, on the law, on the facts, and in the exercise of discretion, with costs, the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages for past pain and suffering and future pain and suffering as contrary to the weight of the evidence and for a new trial on the issue of those damages is granted, and the matter is remitted to the Supreme Court, Richmond County, for a new trial on the issue of damages for past pain and suffering and future pain and suffering.

On January 17, 2015, the plaintiff was stopped at a red light located on Hylan Boulevard in Staten Island when his vehicle was struck in the rear by a vehicle operated by the defendant Andrew McDaniel and owned by the defendant Maria Rahman–Khalifa. The plaintiff commenced this action against the defendants to recover damages for personal injuries. After issue was joined, the plaintiff successfully moved for summary judgment on the issue of liability. Thereafter, a jury trial was held on the issue of damages. The jury returned a verdict finding, inter alia, that the subject accident was a substantial factor in causing the plaintiff's injuries, and that the plaintiff sustained a permanent consequential limitation of use of a body organ or member as a result of the accident. The jury awarded the plaintiff the principal sums of \$12,500 for past pain and suffering and \$12,500 for past medical expenses. However, the jury did not award him any damages for future pain and suffering. The plaintiff moved pursuant to CPLR 4404(a) to set aside the verdict on the issue of damages for past pain and suffering and future pain and suffering, and for a new trial on the issue of those damages, arguing that the verdict was contrary

to the weight of the evidence and that the awards for past pain and suffering and future pain and suffering materially deviated from reasonable compensation. The Supreme Court denied the motion, and the plaintiff appeals.

A jury verdict should be set aside as contrary to the weight of the evidence only if the jury could not have reached the verdict by any fair interpretation of the evidence (*see Lolik v. Big V Supermarkets*, 86 N.Y.2d 744, 631 N.Y.S.2d 122, 655 N.E.2d 163; *Nicastro v. Park*, 113 A.D.2d 129, 495 N.Y.S.2d 184). Here, the Supreme Court should have granted the plaintiff's motion pursuant to CPLR 4404(a) to set aside the verdict on the issue of damages for past pain and suffering and future pain and suffering, as the verdict with respect to those damages was contrary to the weight of the evidence. The jury's determination that the plaintiff was not entitled to damages for future pain and suffering was inconsistent with the jury's finding that his injuries were permanent in nature and were proximately caused by the accident (*see Santana v. Western Beef Retail, Inc.*, 132 A.D.3d 837, 18 N.Y.S.3d 154; *Ramos v. Nouveau Indus., Inc.*, 29 A.D.3d 555, 814 N.Y.S.2d 251; *Evers v. Carroll*, 17 A.D.3d 629, 794 N.Y.S.2d 398; *Ciatto v. Lieberman*, 1 A.D.3d 553, 769 N.Y.S.2d 48; *Califano v. Automotive Rentals*, 293 A.D.2d 436, 740 N.Y.S.2d 117; *Shaw v. Jacobs*, 279 A.D.2d 624, 719 N.Y.S.2d

709). Furthermore, whereas the jury was presented with conflicting evidence and theories as to the cause of the plaintiff's injuries, and the jury's award for past pain and suffering was inexplicably low, it appears that the verdict with respect to damages for past pain and suffering may have been the result of an impermissible compromise (*see Ciatto v. Lieberman*, 1 A.D.3d at 557, 769 N.Y.S.2d 48; *Roseingrave v. Massapequa Gen. Hosp.*, 298 A.D.2d 377, 751 N.Y.S.2d 218; *Rivera v. City of New York*, 253 A.D.2d 597, 677 N.Y.S.2d 537). Accordingly, we remit the matter to the Supreme Court, Richmond County, for a new trial on the issue of damages for past pain and suffering and future pain and suffering.

\*2 In light of our determination, the plaintiff's remaining contention has been rendered academic.

SCHEINKMAN, P.J., BALKIN, HINDS–RADIX and LASALLE, JJ., concur.

#### All Citations

--- N.Y.S.3d ----, 2019 WL 138592, 2019 N.Y. Slip Op. 00084