221 A.D.3d 1095
Supreme Court, Appellate Division,
Third Department, New York.

Kathryn BRADLEY–CHERNIS, Respondent,

v.

Anthony J. ZALOCKI, Appellant.

535273, 535698

Calendar Date: September 13, 2023

Decided and Entered: November 2, 2023

**Synopsis**

**Background:** Motorist, who had been involved in head-on collision with state trooper, brought action against trooper, alleging accident was result of trooper's negligent, careless, and reckless driving and that it caused her to sustain serious injuries. Following denial of trooper's motion for summary judgment, the Supreme Court, Ulster County, James P. Gilpatric, J., in bench trial on liability, determined trooper was negligent and, in bench trial on damages, rendered verdict awarding motorist damages in amount of $400,000 for past pain and suffering, $432,000 for future pain and suffering, and $56,500 in economic losses. Trooper appealed from judgment entered upon such verdict and from denial of his subsequent motion to set aside verdict and hold new trial on issue of damages.

**Holdings:** The Supreme Court, Appellate Division, Egan, Jr., J., held that:

Appellate Division would exercise its power to grant judgment which upon evidence should have been granted by trial court, and

damages awarded to motorist did not deviate materially from what would be reasonable compensation.

Affirmed.

**Attorneys and Law Firms**

*822 Letitia James, Attorney General, Albany (Sean P. Mix of counsel), for appellant.

Basch & Keegan LLP, Kingston (Derek J. Spada of counsel), for respondent.

Before: Garry, P.J., Egan Jr., Aarons, McShan and Mackey, JJ.

MEMORANDUM AND ORDER

Egan Jr., J.

Appeals (1) from a judgment of the Supreme Court (James P. Gilpatric, J.), entered March 11, 2022 in Ulster County, upon a decision of the court in favor of plaintiff, and (2) from an order of said court, entered June 21, 2022 in Ulster County, which denied defendant's motion to set aside the verdict.

At 4:05 p.m. on August 2, 2018, defendant, a state trooper, was responding to a 911 call in a marked State Police K–9 vehicle in the Town of Ulster, Ulster County. Defendant was heading southbound on Hurley Avenue, a two-lane road, with his emergency lights activated when he sped up to pass vehicles that had not slowed down or moved to the right. He failed to negotiate a sharp curve in the road and crossed into the other lane of traffic, where he collided head-on with the 2015 Volvo being driven in the opposite direction by plaintiff.

Plaintiff commenced this action in December 2018, alleging that the accident was the result of defendant's negligent, careless and reckless driving and that it caused her to sustain serious injuries. Following joinder of issue and discovery, defendant unsuccessfully moved for summary judgment dismissing the complaint. Supreme Court proceeded to conduct a bench trial on the issue of liability and, at the conclusion of that trial, found that defendant was negligent and that his driving reflected a "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104[e]).

The matter proceeded to a bench trial on damages, where Supreme Court heard testimony from plaintiff and her husband and had before it videotaped testimony from physicians who had treated and/or examined plaintiff, as well as documentary evidence that included a variety of her medical records. The parties offered their posttrial assessments of plaintiff's damages at Supreme Court's

invitation, with plaintiff suggesting that, after taking inflation into account, she was entitled to $300,000 for past pain and suffering, $216,000 for future pain and suffering and $99,077.68 in economic damages. Supreme Court thereafter rendered a verdict finding that plaintiff had sustained serious injuries within the meaning of Insurance Law § 5102 and awarding her damages in the amount of $400,000 for past pain and suffering, $432,000 for future pain and suffering and $56,500 in economic losses. Defendant appeals from the judgment entered upon that verdict, as well as Supreme Court's denial of his subsequent motion to set aside the verdict and hold a new trial on the issue of damages.

We affirm. Defendant argues that that the damages awarded to plaintiff for past and future pain and suffering are excessive and "deviate[ ] materially from what would be reasonable compensation" (CPLR 5501[c]; *see Serrano v. State of New York,* 179 A.D.3d 1357, 1358, 117 N.Y.S.3d 748 [3d Dept. 2020], *lv denied* ***823** 35 N.Y.3d 914, 2020 WL 5415034 [2020]; *Fabiano v. State of New York,* 170 A.D.3d 1301, 1302, 95 N.Y.S.3d 608 [3d Dept. 2019]). As the award was made following a nonjury trial, "this Court's power is as broad as that of the trial court, and we may render judgment as warranted by the facts, though we take into account the trial court's advantage of having observed the witnesses" (*Augusta v. Kwortnik,* 161 A.D.3d 1401, 1405, 78 N.Y.S.3d 726 [3d Dept. 2018]; *accord Fabiano v. State of New York,* 170 A.D.3d at 1302, 95 N.Y.S.3d 608; *see Baba–Ali v. State of New York,* 19 N.Y.3d 627, 640, 951 N.Y.S.2d 94, 975 N.E.2d 475 [2012]; *Byung Choon Joe v. State of New York,* 203 A.D.3d 1258, 1258, 164 N.Y.S.3d 299 [3d Dept. 2022]).[1]

We accordingly turn to the awards for plaintiff's pain and suffering, which are "not subject to precise quantification" and require "an examination of comparable cases and such factors as the nature, extent and permanency of the injuries, the extent of past, present and future pain and the long-term effects of the injury" (*Serrano v. State of New* York, 179 A.D.3d at 1358, 117 N.Y.S.3d 748 [internal quotation marks and citations omitted]; *see Streit v. Katrine Apts. Assoc., Inc.,* 212 A.D.3d 957, 962, 183 N.Y.S.3d 171 [3d Dept. 2023]; *O'Connor v. Kingston Hosp.,* 166 A.D.3d 1401, 1404, 88 N.Y.S.3d 679 [3d Dept. 2018]). The proof at the damages trial reflected that plaintiff, who was 44 years old at the time of the accident, slammed on the brakes so hard prior to the accident that she injured her groin and further sustained injuries from the impact and the fact that the airbag deployed forcefully, shoved her arm into her chest and "pushed back" her shoulders, head and neck. Plaintiff further testified to what transpired in the aftermath of the accident. In particular, she related how she was sitting in her vehicle after the accident when defendant came over to her vehicle and began "yelling at [her]." Responding officers ordered her to get out of her car without making any effort to help her and directed her to sit on the curb, and she watched in a state of shock as one of the officers "rummage[d]" through her car and dumped the contents of her wallet onto the ground in an effort to find her insurance information. This and other behavior made plaintiff feel that the responding officers were trying to bully and harass her, and that feeling was reinforced when a State Police officer kept trying to question her about the accident despite her stating that she did not want to talk to him. Upon being transported to the hospital, plaintiff further described how defendant and another police officer were standing behind her while she was completing paperwork, after which she was wheeled into the emergency room and placed "six inches" away from defendant, the State ***824** Police officer harassed her and her husband about obtaining her medical records until she directed him to leave, and several troopers milled around outside of the room where she was being treated.

Plaintiff testified as to how she experienced wrist, shoulder, neck and groin pain after the accident that required regular visits to her chiropractor, a physical therapist and an acupuncturist to address. Plaintiff further described how her physical pain and emotional distress had impacts on her life, noting that her physical problems initially impaired her ability to work and describing how the conduct of law enforcement officers after the accident left her "terrified" and made her feel "unsafe." She also underwent surgery to repair a right shoulder rotator cuff tear in April 2019, and the postoperative care required her right arm to be immobilized for six weeks. Plaintiff made clear that she was continuing to suffer from chronic shoulder pain and intermittent back, neck, groin and knee pain at the time of trial, as well as that she was still regularly treating with a chiropractor, a massage therapist and an acupuncturist. Plaintiff added that she was also still engaging with a mental health professional to address the "mental anguish" caused by the accident, and she admitted that she had developed a drinking habit as a result of the accident and had four alcoholic beverages a day to deal with her pain and anxiety.

Plaintiff's husband further testified as to the impacts her injuries had on her activities, describing how the pain in her arm and difficulty lifting left him responsible for most of the chores around the house for the six months following the accident. He further stated that the "trauma" and "stress" of

the accident had impacted their marriage, and described how her ordeal had impacted her business for one or two years after the accident. Moreover, he testified that plaintiff remained physically active but had stopped doing a variety of activities that she had enjoyed before the accident, including skiing, snowshoeing and biking.

Plaintiff further presented the testimony of Luis Mendoza, an emergency medicine physician who examined her in July 2020 and reviewed medical records detailing her treatment from, among others, chiropractors, an acupuncturist, a massage therapist, a physiatrist and a licensed clinical social worker who was treating plaintiff for posttraumatic stress disorder. Mendoza detailed how the tests he performed during his examination revealed that plaintiff continued to have limited range of motion and tenderness in her neck, limited range of motion and spasm in her back and limited range of motion in her right shoulder. Mendoza opined that the injuries plaintiff had sustained in the accident included a torn right shoulder rotator cuff and right shoulder traumatic bursitis that were surgically repaired, a disk bulge in her neck, neck and back sprain or strain that caused back spasms and limited range of motion, and posttraumatic stress disorder.[2] Mendoza further ***825** testified that those injuries left plaintiff unable to perform substantially all of her usual and customary daily activities "for the first year [after the accident], maybe a little bit longer," and that the limited range of motion in her neck, back and right shoulder, as well as her posttraumatic stress disorder, would be permanent. He also stated that plaintiff would continue to require regular treatment for neck and back spasms and would likely need continued therapy to address her posttraumatic stress disorder, as well as that she would need to take over-the-counter pain medications for her discomfort.

There was, to be sure, conflicting proof in the record as to the extent of plaintiff's injuries and their impact upon her. The orthopedic surgeon who repaired plaintiff's rotator cuff tear testified that the surgery had gone well and that, when the surgeon last saw plaintiff six months after the surgery, plaintiff had regained full range of motion, albeit with some lingering weakness, in her shoulder. Defendant further presented the videotaped testimony of Brian Gordon, an orthopedic surgeon who conducted an independent medical examination of plaintiff in September 2020 and found that she was in "very good shape" and "essentially normal" by that point. Gordon made clear that, in his view, plaintiff's right rotator cuff tear was the only injury connected to the accident and that none of her other complaints were attributable to it. He added that the surgical repair of that rotator cuff tear "had a great outcome" and that his examination revealed that plaintiff's range of motion and strength in that shoulder were normal, noting that whatever discomfort she continued to have was being addressed by over-the-counter medication and that she remained quite physically active and worked out with a personal trainer.

Supreme Court had the foregoing evidence before it and, given its verdict, obviously credited the proof offered by plaintiff to establish that she had sustained serious injuries that significantly impaired her ability to work and engage in chores and recreational activities for years after the accident and, in the case of her torn rotator cuff, required surgery to repair. Moreover, that proof reflected that the accident had caused injuries resulting in permanent deficits in her neck, back and right shoulder which would cause her pain, as well as mental distress, for which she would require ongoing medical treatment. We accord deference to that assessment and, having done so, are satisfied that the amounts of $400,000 for past pain and suffering and $432,000 for future pain and suffering over a period of 36 years did not deviate materially from what would be reasonable compensation (*see Streit v. Katrine Apts. Assoc., Inc.*, 212 A.D.3d at 962–963, 183 N.Y.S.3d 171; *Thompson v. Toscano*, 166 A.D.3d 446, 447, 88 N.Y.S.3d 11 [1st Dept. 2018]; *Peterson v. MTA*, 155 A.D.3d 795, 798–799, 64 N.Y.S.3d 266 [2d Dept. 2017]; *Robles v. Polytemp, Inc.*, 127 A.D.3d 1052, 1055, 7 N.Y.S.3d 441 [2d Dept. 2015]; *see also Morales v. Manhattan & Bronx Surface Tr. Operating Auth.*, 106 A.D.3d 459, 459–460, 965 N.Y.S.2d 864 [1st Dept. 2013]).

Garry, P.J., Aarons, McShan and Mackey, JJ., concur.
ORDERED that the judgment and the order are affirmed, with costs.

**All Citations**

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Footnotes

1 We note that Supreme Court did not issue a decision in which it set forth "the facts it deem[ed] essential" for its award of damages and only completed the verdict sheet agreed to by the parties (CPLR 4213[b]). The fact "[t]hat there was a waiver of findings and conclusions of law does not dispense with the necessity of a decision" under CPLR 4213(b) (*Sager v. Sager,* 21 A.D.2d 183, 186, 249 N.Y.S.2d 467 [3d Dept. 1964]; *see Weckstein v. Breitbart,* 111 A.D.2d 6, 7, 488 N.Y.S.2d 665 [1st Dept. 1985]). The evidence in this case is nevertheless "sufficient as a matter of law to support a dispositive determination" and, as neither party requests remittal for Supreme Court to articulate the factual basis for its verdict, we exercise our "power to grant the judgment which upon the evidence should have been granted by the trial court" (*Maisto v. State of New York,* 154 A.D.3d 1248, 1253, 64 N.Y.S.3d 139 [3d Dept. 2017] [internal quotation marks and citation omitted]; *compare State Bank of Texas v. Kaanam, LLC,* 170 A.D.3d 1498, 1498, 94 N.Y.S.3d 515 [4th Dept. 2019]; *Mason v. Lory Dress Co.,* 277 App.Div. 660, 666, 102 N.Y.S.2d 285 [1st Dept. 1951]).

2 Defendant correctly observes that Mendoza was not a mental health specialist and did not conduct a mental health assessment of plaintiff in offering a diagnosis of posttraumatic stress disorder, instead relying upon plaintiff's own statements as to her mental health and records of her mental health treatment that were not placed into evidence at trial. Assuming, without deciding, that Mendoza's diagnosis of a specific mental condition was improper as a result, the fact remains that "[m]ental suffering is an element of the pain and suffering experienced by injured parties" and plaintiff herself testified to the mental distress she had suffered as a result of the accident (*Lamot v. Gondek,* 163 A.D.2d 678, 679, 558 N.Y.S.2d 284 [3d Dept. 1990]; *see McDougald v. Garber,* 73 N.Y.2d 246, 257, 538 N.Y.S.2d 937, 536 N.E.2d 372 [1989]; *Ferrara v. Galluchio,* 5 N.Y.2d 16, 21–22, 176 N.Y.S.2d 996, 152 N.E.2d 249 [1958]).

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