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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Della Hough-Scoma

Plaintiff,

v.

Wal-Mart Stores, Inc.

Defendant.

Hon. Hugh B. Scott

96CV0707

**Decision
&
Order**

Before the Court is the defendant's motion for a judgment as a matter of law, or in the alternative, a new trial (Docket No. 26).

Background

The plaintiff brought this law suit claiming that she was injured on November 18, 1995 while shopping at the defendant's Wal-Mart store in Lakewood, New York. The plaintiff alleges that a rolled-up carpet, standing on its end, fell and hit her on the back of the head. After a four-day trial starting on September 21, 1998, the jury found in favor of the plaintiff and awarded damages totaling \$1, 054,077.00. The damages were attributed as follows: \$150,000.00 for past pain and suffering; \$350,000.00 for future pain and suffering; \$41, 802.00 for past lost wages; and \$512,275.00 for future lost wages.

The defendant seeks a judgment as a matter of law, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, asserting that the proof adduced at trial was insufficient to establish negligence, future damages or permanency of the injury. (Affidavit of Cheryl Meyers, Esq.

dated October 2, 1998 [“Meyers’ Affidavit] at ¶ 6.)

Rule 50(b) Standard of Review

In ruling on a motion under Rule 50(b), the court is required to consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in her favor from the evidence. Concerned Area Residents for Environment v. Southview Farm, 34 F.3d 114, 120 (2d Cir. 1994); Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363, 367 (2d Cir.1988). To grant a judgment as a matter of law, the court must find that there is “such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or ... such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against [it].” Song v. Ives Lab., Inc., 957 F.2d 1041, 1046 (2d Cir.1992) (quoting Mattivi v. South African Marine Corp., 618 F.2d 163, 168 (2d Cir.1980)). The court “cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury.” Lightning Bolt Prods., 861 F.2d at 367 (quoting Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966, 970 (2d Cir.1987) (quoting Mattivi, 618 F.2d at 167)).

Negligence

The defendant argues that the plaintiff failed to adduce at trial proof of negligence on its part, causing the injury to the plaintiff. Wal-Mart does not dispute that it owed a duty to the plaintiff, as a shopper in one of its stores, to maintain the store, including merchandise displays,

in a safe condition. It argues, however, that the “plaintiff merely proved that one or more carpets were standing on end and fell over.” (Meyers’ Affidavit at ¶ 10.) The testimony of Paul Coxford, a Wal-Mart employee, reflected that the defendant had installed fixtures that were used to hold the vertically-stored carpets in place. It was undisputed that at the time of the accident, the carpet that fell and hit the plaintiff was not restrained in one of those fixtures. The plaintiff asserted, and the jury was free to conclude, that Wal-Mart was negligent in displaying large carpets standing on end without any mechanism to ensure that they do not fall over and hit shoppers.

To the extent the instant motion seeks to set aside the jury verdict finding negligence on the part of Wal-Mart, the motion is denied.

Permanency of Injury

The defendant also argues that the evidence is insufficient to support a finding that the plaintiff suffers from a permanent injury. In this regard, the defendant asserts only that the plaintiff’s medical expert, Dr. Steven Rynick, “specifically said that he did not know if the plaintiff’s condition would be permanent; nor did he say whether plaintiff’s claimed condition would last for any specified period of time into the future.” (Meyers’ Affidavit at ¶ 14.) At trial in this matter, Dr. Rynick did not testify in person. Instead, a video-tape of his deposition was introduced by the agreement of both parties. In that deposition, Dr. Rynick was asked:

Doctor, do you have a opinion based upon a reasonable degree of medical certainty what the permanency is with regard to Della Hough-Scoma?

To which, Dr. Rynick replied:

I feel that the current status is permanent, and I don't anticipate significant improvement in the foreseeable future, meaning at least the next two years.

August 28, 1998 Deposition Transcript of Dr. Steven Rynick ["Rynick Deposition"] at page 35.

Later, Dr. Rynick was again asked if the plaintiff would have "permanent restrictions." Again, he answered in the affirmative, once more stating that he expected the restrictions to last a "minimum of two years." Although Dr. Rynick stated that he would not rule out "gradual improvement over many years" he opined that he "would not anticipate that [the plaintiff] would ever have a cervical range of motion that was approaching normal." Rynick Deposition at page 67.

Based upon the testimony of Dr. Rynick, considered in its entirety and drawing all inferences in favor of the non-moving party, there is sufficient evidence to support the jury's conclusion regarding the permanency of the plaintiff's injuries.

To the extent the instant motion seeks to set aside the jury verdict finding that the plaintiff suffered permanent injury, the motion is denied.

Future Damages

The defendant also argues that there is an insufficient basis in the record to support the admission of testimony from the plaintiff's vocational expert, Dr. Allen Winship, to the effect that the plaintiff's injuries will require that she retire several years early. Without this testimony, Wal-mart argues, there is no basis in the record to support the award of future lost wages.

It is undisputed that less than one year after the accident the plaintiff, a registered nurse, went back to work at the same hospital where she worked prior to the accident. The plaintiff

testified that although she is working full time, she is not performing the same duties that she performed prior to the accident. The plaintiff testified that her restrictions resulting from her sustained injury prevent her from performing the full range of duties normally required of a registered nurse. She testified that her employer has made accommodations to address her limitations. There is no claim that her salary has decreased as a result of these accommodations. Finally, there is no claim that the plaintiff's employer is threatening to terminate her employment or to take other actions against her as a result of her limitations.

As discussed above, Dr. Rynick testified that the plaintiff's injury was to some extent permanent in that he did not believe the plaintiff would ever regain a normal cervical range of motion. However, nowhere in his testimony does the plaintiff's treating physician testify that the plaintiff's symptoms will worsen or that her residual functional capacity will degenerate. Dr. Rynick does not give a medical opinion that the plaintiff is unable to perform her current job responsibilities, or that her injuries will render her unable in the future.

Notwithstanding this testimony, Dr. Winship testified that the plaintiff will be required to retire several years early as a result of the injuries she sustained at Wal-Mart.

The court is called upon to play the role of a "gatekeeper" in determining the admissibility of expert testimony. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court held that rule 702 of the Federal Rules of Evidence imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony ... is not only relevant, but reliable." Daubert, 509 U.S., at 589. In Kumho Tire Company v. Carmichael, 1999 WL 142455 (1999), the Supreme Court recently extended this basic gatekeeping obligation to apply to *all* expert testimony.

The factors identified in Daubert, which were not intended to be exclusive, include:

Whether a "theory or technique ... can be (and has been) tested";
Whether it "has been subjected to peer review and publication";
Whether, in respect to a particular technique, there is a high
"known or potential rate of error" and whether there are "standards
controlling the technique's operation"; and
Whether the theory or technique enjoys "general acceptance"
within a "relevant scientific community."

Kumho, 1999 WL 142455 at * 9 citing Daubert, 509 U.S. at 592-594.

According to Dr. Winship, his opinion that the plaintiff will have to retire early is based on certain "work-life expectancy" tables. (See transcript of Dr. Winship's September 21, 1998 testimony at pages 8-17). Again, according to Dr. Winship, the tables were generated by Anthony Gamboa, Ph.D. using census material. (Id. at 17). The tables were never admitted into evidence. Although the plaintiff asked the Court to take judicial notice of the tables (Id. at 16), the defendant objected citing the lack of foundation (Id. at 17). Although the Court reserved decision (Id. at 17), it does not appear that the matter was ever resolved or that the tables were ever admitted into evidence.

In any event, the record is insufficient to establish that these tables are applicable under the circumstances present in this case, or that they are regularly relied upon by vocational experts. None of the other factors identified in Daubert have been established to weigh in support of the reliability of this testimony. Although the tables purport to classify individuals into three categories-- non-disabled; moderately disabled or severely disabled (Id. at 9)-- the criteria and definitions used in making those classifications has not been presented. The statistical validity of the tables has not been established. Absent in the record is any evidence that the tables have been subjected to peer review to determine whether a statistically valid

sample was used in their compilation. The date the tables were compiled or the age of the data upon which they were based is not in the record.

Further, as noted above, the plaintiff's medical expert made no findings that the plaintiff could not perform her current job responsibilities, or that her condition would worsen to the point that she would no longer be able to work. As a vocational expert, and not a medical expert, Dr. Winship was not competent to render a medical assessment of the plaintiff's residual functional capacity. However, Dr. Winship did just so, stating that "[t]he job that [the plaintiff's] performing and the symptoms that she's having and the medical reports per Dr. Rynick are not consistent with each other. She's working in excess of what I think is reasonable given her symptomatology (sic)." (Id. at 13). Dr. Winship's own testimony in this regard cannot serve as a basis for his opinion that the plaintiff will suffer future lost wages.

Thus, there is no proper basis in the record for Dr. Winship's opinion that the plaintiff will have to retire early because of the sustained injuries. For these reasons, and pursuant to Daubert and Kumho, the Court concludes that Dr. Winship's testimony as to future lost wages was improperly admitted. Absent Dr. Winship's testimony, even considering all inferences in favor of the plaintiff, there is no basis in the record to support the award of future lost wages.

Based on the above, the defendant's motion to set aside the jury verdict and for a judgment as a matter of law with respect to future lost wages is granted. The future lost wages as awarded by the jury in the amount of \$512,275.00, is to be set aside and removed from the judgment in this matter.

Excessive Jury Verdict

The defendant also attacks the amount of damages awarded for past and future pain and suffering as being excessive.¹

The calculation of damages is generally within the province of the jury. Ismail v. Cohen, 899 F.2d 183, 186 (2d Cir.1990); Paolitto v. John Brown E.&C., Inc., 151 F.3d 60, 66 (2d. Cir. 1998). The trial Court has “discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence.’ ... This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner’s refusal to agree to a reduction (remittitur).” Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 433 (1996) (quoting Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 540 (1958)). The Court has authority to enter a conditional order of remittitur, compelling a plaintiff to choose between reduction of an excessive verdict and a new trial, in at least two distinct kinds of cases:

- (1) where the court can identify an error that caused the jury to include in the verdict a quantifiable amount that should be stricken; and
- (2) more generally, where the award is “intrinsicly excessive” in the sense of being greater than the amount a reasonable jury could have awarded, although the surplus cannot be ascribed to a particular, quantifiable error.

Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 165 (2d. Cir. 1998) quoting Trademark Research Corp. v. Maxwell Online, Inc., 995 F.2d 326, 337 (2d Cir.1993) (quoting Shu-Tao Lin v.

¹ In their motion papers, the defendant also challenged the amount of the award for past wages arguing that this amount was subject to a set-off pursuant to Article 50-B of the New York State Civil Practice Laws and Rules (“CPLR”). At oral argument on the instant motion, the parties advised the Court that they had stipulated to an amount to be used for this purpose. Thus, the calculation of past wages is no longer at issue.

McDonnell Douglas Corp., 742 F.2d 45, 49 (2d Cir.1984)). Where there is no particular discernable error, we have generally held that a jury's damage award may not be set aside as excessive unless "the award is so high as to shock the judicial conscience and constitute a denial of justice." O'Neill v. Krzeminski, 839 F.2d 9, 13 (2d Cir.1988) (quoting Zarcone v. Perry, 572 F.2d 52, 56 (2d Cir.1978)). Where the court has identified a specific error, however, the court may set aside the resulting award even if its amount does not "shock the conscience." Kirsch, 148 F.3d at 165.

Wal-Mart objects to the jury award of \$150,000 for past pain and suffering on the grounds that the plaintiff "has been able to remain employed and continues to engage in ... her normal and usual activities of daily living." (Meyers' Affidavit at ¶ 22). However, to the contrary, the record contains sufficient evidence from which the jury could conclude that the plaintiff suffered from restrictions related to the injury which prevented her from engaging in her normal and usual activities of daily living. Among other things, for example, the plaintiff testified that she requires assistance in maintaining her personal hygiene. This testimony was corroborated by members of the plaintiff's family.

Similarly, the defendant objects to the jury award of \$350,000 for future pain and suffering on the grounds that there is "absolutely no proof as to the likely continuance of plaintiff's symptoms... ." (Meyers' Affidavit at ¶ 26). Again, as discussed above, the record does include evidence that the plaintiff's injury is permanent and that it is not expected that she will ever regain a full range of motion in her cervical spine. Further, the jury found that the plaintiff will continue to have pain and suffering caused by this injury for an additional 31 years. Thus, the jury award is less than \$12,000 per year over this period.

In any event, the defendant has not established any specific error which may have mislead the jury in calculating these awards. Thus, the jury's damage award may not be set aside as excessive unless the award is so high as to shock the judicial conscience and constitute a denial of justice. The Court does not believe that the jury awards for past and future pain and suffering shock the conscience or constitute a denial of justice. The Court has considered the defendant's other arguments and finds that they lack merit.

Based on the above, the defendant's motion for a new trial based on the excessiveness of the jury verdict is denied.

Conclusion

Based on the above, it is recommended that the defendant's motion for a judgment as a matter of law, setting aside the award of damages, or in the alternative, a new trial (Docket No. 26), is **GRANTED** to the extent that the future lost wages as awarded by the jury in the amount of \$512,275.00, is to be set aside and removed from the judgment in this matter. The motion is otherwise **DENIED**.

In light of the foregoing, the status conference previously scheduled for April 20, 1999 is canceled.

So ordered.

Hon. Hugh B. Scott
United States Magistrate Judge

Dated: Buffalo, New York

April 15, 1999