

Kestenbaum v Khiyaev
2011 NY Slip Op 31466(U)
May 23, 2011
Supreme Court, Queens County
Docket Number: 11920/06
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

----- Index No. 11920/06

NADIA KESTENBAUM, a minor, by her
mother and natural guardian, NATALIE
ROMERO and NATALIE ROMERO, individually,
Plaintiffs,

-against-

SHLOMO KHIYAEV, et al.,
Defendants.

After inquest held on July 27, 2010, and based upon the credible testimony and admissible evidence adduced therein, the court finds as follows:

I. INTRODUCTION

This is a personal injury action in which plaintiff, Nadia Kestenbaum ("plaintiff") seeks money damages from Remsen Auto Mall, Inc., L.T. Motors Auto Sales, Inc., L.T. of Queens, Inc. d/b/a L.T. Motors, T.L.C. Motors, Inc., and Maxim Fuzailov a/k/a Maxim M. Fuzailov ("defendants") for serious injuries she sustained on May 2, 2006, as a result of a car accident in which plaintiff was a passenger in the back-seat of a car driven by a school mate, Shlomo Khiyaev, with the permission of his father, Boris Khiyaev. Defendants failed to appear, plead or answer the complaint warranting motions for Default Judgment against them. Thereafter, the court granted plaintiffs' default motions without opposition as to the liability issue only. On July 27, 2010, the court proceeded to inquest.

At the inquest, plaintiff, Nadia Kestenbaum, was the sole witness. She testified and submitted into evidence various certified medical records of Jamaica Hospital Medical Center describing her alleged injuries and medical treatment and her affidavit dated December 20, 2008. After the inquest, the court directed plaintiff to submit a post-trial memorandum by October 21, 2010. Plaintiff demands damages in the total amount of \$900,000.00: \$300,000.00 for past pain and suffering and

\$600,000.00 for future pain and suffering.

II. FINDINGS OF FACT

Plaintiff, who was 17-years old at the time of the accident, was a passenger in the back-seat of a car driven by school mate, Shlomo Khiyaev, who drove the vehicle at an excessive rate of speed, lost control of it, and struck a police box stanchion on Grand Avenue, near 79th Street, in Queens, New York. She testified that her injuries consisted of nine (9) pelvic fractures, four to five (4-5) broken ribs on her left side, two (2) collapsed lungs, and a brain hemorrhage at her left temple. She further testified that she spent seventeen (17) days in the hospital, first in the Intensive Care Unit and later confined to bed; when she was released she stayed at her uncle's house, in bed, only starting to walk with a walker in July; she could not walk without the walker until the end of August, 2006; she could not go out alone until November of 2006; she felt pain this entire time; she did not attend her senior year of high school during this time; she never returned to high school after the accident; she realized that the only job she could do is one that would require the employee to be sitting, almost exclusively, and so she had to change her career objective; she has nightly restlessness and sleep interrupted by pain; she becomes aware of her physical limitations immediately upon waking when she awakens stiff and achy; activities of any vigorous nature are not possible for her; she cannot stand up for more than a short period of time without sitting due to the pain involved; she cannot walk more than a short distance at a time now due to the pain it causes; the cold weather and rainy or humid weather are now very painful for her; she now has severe cramping and heavy bleeding; she has extreme anxiety about driving in a car; she can no longer participate in the significant number of sporting activities she had engaged in prior to the accident due to the pain they cause and the difficulty breathing she experienced when she tried; a heavy meal can cause her pain; gas is particularly painful; almost any type of physical exertion gets her winded; she cannot stand long enough to prepare meals and cook; she does laundry less frequently due to the pain involved in going to the laundry room; she cleans her apartment in short bursts; dog walking is now very painful for her; wearing high heel shoes is very painful for her; she cannot dance at a school dance; she was advised by her doctors not to go on rides at amusement parks; she "lives on aspirin;" and she was advised by her doctors that due to her pelvic fractures, her pregnancies will be difficult, involving pain and high risk.

III. DISCUSSION

Under CPLR 4518(c), medical records are admissible as evidence as long as they are duly certified, sworn or affirmed (*Grasso v. Angerami*, 79 NY2d 813, 814 [1991]; *Laguerre v. Chavarria*, 41 AD3d 437 [2d Dept 2007]). Here, plaintiff submitted certified medical records of Jamaica Hospital Medical Center, which records reveal the injuries of: bilateral acute fractures to both inferior and superior pubic rami, bilateral sacral ala fractures, left iliac crest fracture, right medial iliac fracture, left and right sided pneumothorax, left temporal hematoma, fracture of the right posterior innominate bone extending to the articular surface of the sacral-iliac joint, bilateral fractures of the sacral alae, multiple left side rib fractures, and paranchymal hemorrhage, left temporal lobe.

Accordingly, based upon plaintiff's testimony and affidavit, and the admitted hospital records, the court finds that plaintiff has suffered a permanent injury as a result of the accident on May 2, 2006.

IV. DAMAGES

Having determined plaintiff suffered a permanent injury, the court must next determine an appropriate measure of damages. "An unwarranted and excessive award after inquest will not be sustained, as to do otherwise 'would be tantamount of granting the plaintiff an 'open season' at the expense of a defaulting defendant' (citations omitted)" (*Newman v. Greenblatt*, 260 AD2d 616 [2d Dept 1999]).

The measure of damages for pain and suffering is the fair and reasonable compensation in light of all evidence in the case (*Tate v. Colabello*, 58 NY2d 84 [1983]). A fair interpretation of the evidence presented in this case and a review of the range of damages awarded in cases in which similar or comparable injuries were sustained support a damages award of \$300,000.00 for past pain and suffering and \$600,000.00 for future pain and suffering (see, *Hensley, et ano. v. Lawrence* [where a 13-year old plaintiff who sustained a laceration of the liver, fractures of several ribs, a pneumothorax, and a fracture of her superior rami in a boating accident, was awarded \$3,000,000.00 by the jury, which award was reduced by Appellate Division, Third Department to \$1,000,000.00 for past pain and suffering and \$250,000.00 for future pain and suffering; see, *Bradbury et. ano. v. Churchill, et al.*, [where a 53-year old plaintiff who sustained a comminuted fracture of her left

(nondominant) shoulder's clavicle, five fractured ribs, a pneumothorax and four (4) fractures of her pelvis from a motor vehicle accident was awarded a total of \$1,475,304.00 by a jury]; see, *Lekaj v. Varela de Pachay et. ano.*, [where 18-year old plaintiff who sustained a comminuted fracture of her left iliac wing with inward displacement, a comminuted fracture of the left anterior column of her left acetabulum, a displaced comminuted fracture of the proximal left inferior pubic ramus, and fractured ribs which caused a pneumothorax and a nerve damage that caused a residual foot drop from a motor vehicle accident was awarded \$6,073,659.00 by Justice Duane A. Hart of Queens County]; see, *Williams, et ano. v. Suffolk County Police Department, et. al.* [where a 19-year old plaintiff who sustained a fractured rib with pneumothorax, lacerated liver, comminuted fracture of the cuboid bones of the foot, concussion, lacerated forehead and psychological injuries from a motor vehicle accident was awarded by a jury \$950,000.00; \$600,000.00 for past pain an suffering and \$350,000.00 for future pain and suffering]; see, *Turano v. Pierce and Dinitto*, [where a 32-year old plaintiff who sustained compound fractures of the pubic rami and iliac crest, compound fractures of the acetabulum, dislocated left elbow, and underwent insertion of hardware in his pelvis and femoral head from a motor vehicle accident was awarded by a jury \$1,940,000.00; \$300,000.00 for past pain and suffering and \$1,500,000.00 for future pain and suffering, with the remainder being past lost earnings and future medical expenses]; *Frederick v. Macro Tool, Inc.*, [where a 51-year old plaintiff who sustained a fracture of the pelvis and undisplaced fracture of the superior and inferior rami was awarded \$1,279,754.00 by a jury which award was reduced to \$63,988.00 for comparative negligence of plaintiff with \$500,000.00 for past pain and suffering and \$750,000.00 for future pain and suffering with the reminder being past medical expenses and past lost earnings]; *Roth v. Sandifer ad Anurhadappura Corp.*, [where a 45-year old plaintiff who sustained fractures of her inferior and superior rami, displacement of pubic symphysis, and fractured feet was awarded by a jury \$1,486,930.00 which award was subsequently reduced to \$1,189,544.00 due to the comparative negligence of plaintiff]; and see, *D'Angelo v. Ferlisi et. al.*, [where a 93-year old plaintiff who sustained fractures of the inferior and superior rami, fracture of the right scapula, multiple rib fractures, pneumothorax, bruised kidneys and other lesser injuries from a motor vehicle accident settled for \$1,179,000.00]).

V. CONCLUSION

Accordingly, after inquest, this court awards damages in the total amount of \$900,000.00 which represents the sum of

\$300,000.00 for past pain and suffering and \$600,000.00 for future pain and suffering.

The County Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

A courtesy copy of this order is being mailed to counsel for plaintiffs.

Dated: May 23, 2011

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Howard G. Lane, J.S.C.