

NOT FOR PUBLICATION

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

**FLORENCE ROYER AND THE ESTATE OF
EDWARD ROYER,**

Plaintiffs,

v.

COASTAL AIR TRANSPORT,

Defendant.

SX-04-CV-515

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**SMYRNA HAMILTON AND THE ESTATE OF
ALPHA JOHNSON,**

Plaintiffs,

v.

COASTAL AIR TRANSPORT,

Defendant.

SX-05-CV-415

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant Coastal Air Transport's (hereinafter "Defendant") Renewed Motion for Judgment as a Matter of Law, filed on December 20, 2013. Plaintiffs Edward and Florence Royer (hereinafter "the Royers") filed their Opposition to Defendant's Motion on January 23, 2014. Plaintiffs Smyrna Hamilton (hereinafter "Hamilton") and Alpha Johnson (hereinafter "Johnson") have made no filings in response to Defendant's Motion. For the reasons set forth, Defendant's Motion shall be granted in part and denied in part.

I. FACTUAL AND PROCEDURAL HISTORY

On June 19, 2004, the Royers, Hamilton, and Johnson traveled from St. Croix to Dominica on Defendant's aircraft. The flight made a stop in Nevis, and shortly after taking off to Dominica, the top portion of the aircraft door flew open. In response, Mr. Royer got out of his seat and attempted to close the door but could not secure it, so he held on to it. His wife, fearful that her husband might fly out, got out of her chair and held on to him. Hamilton then proceeded to hold the chains of the lower part of the door to help Mr. Royer keep the door closed. Plaintiffs contend that they remained in these positions in an attempt to keep the door closed throughout the remainder of the flight from Nevis to Dominica.

The Royers initiated their negligence suit against Defendant on September 24, 2004. Hamilton and Johnson later filed suit in a separate action on June 21, 2005. The two cases were joined by Order entered February 3, 2006.

Trial commenced in this matter on November 18, 2013. On November 22, 2013, the jury returned a verdict. The jury found that Defendant was negligent as to all four defendants and its negligence was a proximate cause of the injuries sustained by the Royers and Hamilton. The jury did not find that Defendant's negligence was a proximate cause of Johnson's injuries, thus, he was not awarded any damages. As for the remaining plaintiffs, the damages were awarded as follows: (1) Mr. Royer was awarded \$30,000 in economic damages and \$75,000 in non-economic damages; (2) Mrs. Royer was awarded \$50,000 in economic damages and \$50,000 in non-economic damages; and (3) Hamilton was awarded \$20,000 in economic damages and \$10,000 in non-economic damages.

II. LEGAL STANDARD

A. Judgment as a Matter of Law

“A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury.” Fed. R. Civ. Proc. 50(a)(2). If the court denies the motion, the movant may file a renewed motion for judgment as a matter of law no later than 28 days after the entry of the judgment. Fed. R. Civ. Proc. 50(b). Because Rule 50(b) is essentially a notice provision, the motion must be preceded by a motion for a directed verdict that is specific enough to give the non-moving party the opportunity to cure any possible defect in proof that may make the party’s case legally insufficient. *Acosta v. Honda Motor Co.*, 717 F.2d 828, 831-32 (3d Cir. 1983).

Motions for judgment as a matter of law should be granted sparingly, and only when, viewed in the light most favorable to the non-moving party, the evidence is insufficient for a reasonable jury to find liability. *Chestnut v. Goodman*, 59 V.I. 467, 475 (V.I. 2012). The Court does not sit as a trier of fact when making its determination on a motion for judgment as a matter of law. *Id.* Hence, it is impermissible for the Court to weigh evidence, determine witness credibility, or substitute its own version of the facts for that of the jury. *Id.* The Court’s only concern is the sufficiency of the evidence.

B. Remittitur

Remittitur is a discretionary device used by the Court to reduce a jury’s award of damages that is determined to be grossly excessive. *Erysthee v. El Nuevo Lirio*, 25 V.I. 307, 312 (D.V.I. App. Div. 1990). A jury award is grossly excessive when “it is not rationally related to any evidence adduced a[t] trial.” *Id.* The following factors are considered to determine whether a damages award is so excessive that it shocks the judicial conscience:

- (1) the severity of the injury; (2) whether the injury is manifested by objective physical evidence or whether it is only revealed by the subjective testimony; (3)

whether the injury is permanent; (4) whether the plaintiff can continue with his or her employment; (5) the size of the out-of-pocket expenses; and (6) the amount of compensation demanded in the original complaint.

Feuerstein v. Simpson, CIVIL ACTION No. 04-134, 2013 WL 5431723 *2 (D.V.I. Sept. 30, 2013).

Economic damages are more concrete and may be evaluated by looking at lost wages or medical expenses. *Smith v. Katz*, Civil No. 2010-39, 2013 U.S. Dist. LEXIS 40804 *44 (D.V.I. Mar. 22, 2013). Non-economic damages, on the other hand, are based on intangible harm that is subjective. *Id.* at *46. Because the harm covered by the award of non-economic damages is subjective, the Court must review it with deference. *Id.*

III. DISCUSSION

Defendant believes that it is entitled to judgment as a matter of law because the evidence was insufficient to prove Defendant was liable for Plaintiffs' injuries. Specifically, Defendant argues that: (1) the question of who was responsible for the window opening in flight is unresolved; (2) Plaintiffs did not act reasonably under the circumstances; and (3) even if it was somehow liable for Plaintiffs' injuries, none of the injuries justified the award of damages. The Royers counter that Defendant's liability was clearly established at trial and the jury's award of damages was supported by the evidence. In their Opposition to Defendant's Motion, the Royers object to Defendant's failure to cite to a transcript. The Royers also argue that Defendant should not be allowed to assert new grounds in its Renewed Motion for Judgment as a Matter of Law that it did not raise in its original Motion. The Court will first address the Royers' arguments concerning Defendant's failure to cite to a transcript and the new grounds asserted in Defendant's renewed Motion. The Court will then address Defendant's arguments concerning the sufficiency of the evidence.

A. Defendant's Failure to Cite to a Transcript

The Royers cite Local Rule of Civil Procedure 7.1(b) for the contention that Defendant must cite to a transcript in his Rule 50(b) Motion. Local Rule of Civil Procedure 7.1(b) reads “[w]hen allegations of fact not appearing of record are relied upon in support of a motion, response or reply, all affidavits and other pertinent documents shall be filed before the hearing of the motion.” To support its interpretation of Local Rule 7.1(b), the Royers assert that this Court and other courts generally require a party challenging the sufficiency of the evidence to support factual statements with specific cites to the record or trial transcript. The Royers, however, fail to cite any binding rule that specifically requires a party to support factual assertions with specific cites to the record in a Rule 50(b) Motion.

Local Rule of Civil Procedure 7.1(b) requires a party to support an allegation of fact not on record with affidavits or any other pertinent documents. *Black's Law Dictionary* 1301 (8th ed. 2004), defines the term “record” as “the official report of the proceedings in a case, including the filed papers, a verbatim transcript of the trial or hearing (if any), and tangible exhibits.” In this instance, all of Defendant's factual assertions were derived from the trial proceedings in this case which the Court has a record of. Thus, Defendants were not required to support their allegations of fact with additional documents pursuant to Local Rule of Civil Procedure 7.1(b). Moreover, Local Rule of Civil Procedure 7.1(b) does not require a party to cite to the record to support the factual allegations included in its motions. Based on the foregoing, this Court finds that Defendant's failure to cite to a trial transcript in its Rule 50(b) Motion was harmless.

B. Sufficiency of Defendant's Rule 50 Motion

The Royers' second argument concerning Defendant's Motion is that Defendant has raised new arguments in its renewed motion for judgment as a matter of law, and it should not be

allowed to do so. As previously mentioned, Rule 50(b) is a notice provision. *Acosta*, 717 F.2d at 831-32. A Rule 50(b) motion must be preceded by a motion for directed verdict that is specific enough to give the non-moving party an opportunity to cure any legally insufficient defects in proof. *Id.*

In this case, Defendant has raised three issues in its Rule 50(b) Motion: (1) whether the evidence was sufficient to prove that Defendant was liable for the door popping open in flight; (2) whether Plaintiffs acted reasonably under the circumstances; and (3) whether Plaintiffs' injuries justified the award of damages. Defendant raised the first two issues during trial at the close of Plaintiffs' case. Although it does not appear that Defendant raised the issue regarding the damages award in his original motion for directed verdict, it is within the Court's discretion to use its remittitur power to reduce a jury award. *Erysthee*, 25 V.I. at 312. Hence, the Court will review the award of damages despite the fact that Defendant did not raise it in its original motion.

C. Sufficiency of the Evidence at Trial

1. Liability

Defendant denies liability for the Plaintiffs' claims.¹ According to Defendant, the evidence presented at trial did not prove that Defendant was responsible for the window opening in flight. Defendant also asserts that the Plaintiffs did not act reasonably under the circumstance.

The case at bar is an action for negligence. The elements of a negligence claim are: "(1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff." *Machado v. Yacht Haven U.S.V.I., LLC*, S. Ct. Civ. No. 2012-0137, 2014 WL 5282116 at *2 (V.I. Oct. 16, 2014).

¹ Because the Royers were the only parties who responded to Defendant's Motion and because their award of damages was significantly higher than that of Plaintiff Smyrna Hamilton, the Court will limit its discussion to the claims of the Royers.

In this case, the parties do not dispute the fact that Defendant owed Plaintiffs a duty. The main issue at trial was whether Defendant breached its duty to the Plaintiffs. The Court instructed the jury that they may infer negligence on the part of Defendant when:

(a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the Plaintiffs and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the Defendant's duty to the Plaintiffs.

(Jury Instructions at 36).² The jury was also instructed on the law of contributory negligence and comparative negligence pursuant to Title 5, Section 1451 of the Virgin Islands Code which allows the trier of fact to diminish a plaintiff's damages award in proportion to the amount of negligence attributable to him. The jury was instructed, as follows, on the law of contributory negligence:

The defense is that the Plaintiffs failed to use due care to look out for their own safety . . . A Plaintiff is negligent if the Plaintiff does something, which a reasonably prudent person would not have done under similar circumstances; or fails to do that which a reasonably prudent person would have done under similar circumstances.

(Jury Instructions at 32-33). The jury was further instructed, as follows, on the law of comparative negligence:

If you find that negligence on the part of BOTH parties was a substantial factor in causing the incident, then the law is that the Plaintiffs can recover damages from Defendant only to the extent of Defendant's fault and may not recover damages to the extent that they themselves were at fault.

(Jury Instructions at 34).

The evidence presented at trial was sufficient to prove that Defendant breached its duty to the Plaintiffs. During trial, Mrs. Royer testified that Foster was the last person to touch the door before the plane took off for Nevis. Mrs. Royer also testified that no one had been near the door

² This trial was held before the Supreme Court of the Virgin Islands' ruling in *Gov't of the V.I. v. Connor*, S. Ct. Civ. No. 2013-0095, 2014 WL 702639 (V.I. Feb. 24, 2014) which held that in the absence of binding precedent the Superior Court must perform a three-part analysis when determining the common law.

from the time the plane took off until the door popped open. Defendant suggests that because Mr. Royer was sitting next to the door of the plane he “must have unintentionally moved the locking mechanism while talking to Plaintiff Hamilton” who was seated in front of him (Def.’s Renewed Mot. for Judgment as a Matter of Law at 7). There was, however, no evidence of this presented at trial. Although Hamilton stated that, before the door popped open, she asked Mr. Royer whether he could hear a funny sound, Hamilton never indicated that she saw Royer move from his seat or touch the door prior to it opening. Mrs. Royer also repeatedly testified that her husband could not reach the door from his seat. According to Mrs. Royer, in order to talk to Hamilton and Johnson, her and her husband would have had to get up from their seat to do so, but neither of them did. Furthermore, the question of who was liable for the door popping open during flight was a question for the jury to decide. Because there was sufficient evidence presented at trial to prove that none of the Plaintiffs were at fault, this Court will not disturb the jury’s determination.

Defendant also argues that the injuries suffered by the Plaintiffs were a result of their failure to follow Foster’s briefing instructions. Again, the issue of the Plaintiffs’ own negligence and whether or not their negligence was a proximate cause of their injuries was for the jury to decide. There was sufficient evidence presented at trial to support the jury’s finding that Plaintiffs were not negligent. When asked whether she heard Foster give out any instructions when the door popped open, Mrs. Royer replied that she never heard Foster tell them anything. Hamilton, on the other hand, testified that she could see and hear Foster from where she was on the plane and that he never told them to stay seated or to remain calm. Although Foster testified that he gave the passengers safety instructions, it was up to the jury to decide what testimony to

believe. The evidence presented at trial supports the jury's determination that the Royers acted reasonably under the circumstances. That determination will also not be disturbed by this Court.

2. Damages

The final issue before the Court is whether the Royers' injuries justified the award of damages. Dr. Jett, one of the doctors who treated the Royers for the injuries they sustained during the airplane incident, was certified as an expert witness and testified that the pain the Royers were experiencing and the injuries they were suffering from were a result of the 2004 plane incident. He also testified that both Mr. and Mrs. Royer complained about feeling depressed as a result of the incident. This was confirmed by the testimony of Dr. Copemann, the Royers' psychologist, who was also certified as an expert witness.³ Defendant did not present any expert witness testimony rebutting the evidence presented by Dr. Jett and Dr. Copemann.

The jury awarded Mr. Royer \$30,000 in economic damages and \$75,000 in non-economic damages. Mrs. Royer was awarded \$50,000 in economic damages and \$50,000 in non-economic damages. In order to determine the economic damages, the Court must evaluate the evidence regarding the Royers' medical expenses presented at trial. The evidence indicates that Mrs. Royer has accrued over \$12,000 in medical expenses. Although Dr. Jett's expert report from 2011 includes a calculation for Mrs. Royer's future medical expenses, the 2011 expert report was not admitted as evidence during trial and was only attached as an exhibit to the Royers' Opposition to Defendant's Renewed Judgment as a Matter of Law. The trial record also does not indicate that Dr. Jett testified about the cost of Mrs. Royer's future medical expenses.

³ During trial, Attorney Webster, counsel for the Defendant, objected to Dr. Copemann's psychological fees being calculated as medical damages. Dr. Copemann's testimony described the pain, suffering, and emotional distress the Royers experienced. This type of harm is covered by non-economic damages, thus the Royers' psychological fees will be calculated as part of the award for non-economic damages.

As a result, the Court will reduce Mrs. Royer's economic damages to \$12,156, the amount supported by the evidence adduced at trial.

Mr. Royer died in 2012 and, although the evidence indicates that his injuries were more serious than that of the other Plaintiffs, his death cut off any award for future medical expenses. By the time he died, Mr. Royer had accrued close to \$13,000⁴ in medical expenses as a result of the plane incident. This amount is less than half of what the jury awarded him for economic damages, thus the Court will exercise its remittitur power and adjust Mr. Royer's economic damages appropriately.

The issue regarding the excessiveness of a non-economic damages award is more difficult to resolve. "A mainstay of the excessiveness determination is comparison to awards for similar injuries." *Smith*, 2013 U.S. Dist. LEXIS 40804 at *46 (quoting *Salinas v. O'Neill*, 286 F.3d 827, 830 (5th Cir. 2002)). In this case, the amount awarded to the Royers for non-economic damages is in accord with the amount awarded to plaintiffs in other cases who suffered from similar injuries. According to the expert witness testimony, Mr. Royer suffered from cervical and lumbar disc disease, bilateral shoulder rotator cuff disease and bilateral carpal tunnel syndrome. Mrs. Royer's final diagnosis was lumbar disc disease and internal derangement of the left knee. Mr. and Mrs. Royer both suffered from back injuries (lumbar disc disease) as a result of the plane incident. A review of the case law indicates that the award for non-paralytic back injuries, alone, range from \$ 100,000 to approximately \$285,000, based on the circumstances involved in each case. See *Simpson v. Betterroads Asphalt Corp.*, Civil No. 2011-056, 2013 U.S. Dist. LEXIS 133162 *41 (D.V.I. Sept. 18, 2013).

The evidence presented at trial supports the jury's verdict for non-economic damages. Dr. Jett testified that when he first examined Mr. Royer, he complained about having difficulty

⁴ This amount includes the amount charged by Dr. De Armas converted from East Caribbean dollars to U.S. dollars.

gripping things with his hands, was unable to lift anything overhead, and could not even put on his shirts. Mr. Royer also had difficulty sleeping due to the pain, had difficulty with sexual performance, and was unable to sleep on his shoulder. In order to help Mr. Royer recover Dr. Jett recommended certain restrictions, including: (1) no lifting more than 30 pounds; (2) no bending; (3) no twisting of the waist; and (4) no work at all over the shoulder level. By Mr. Royer's third visit in December 2006, Dr. Jett had formed an opinion that Mr. Royer would permanently have limitations in the function of his shoulder and would also have permanent difficulty and loss of function in his ability to use his right hand. In July 2008, Dr. Jett diagnosed Mr. Royer with cervical and lumbar disc disease, bilateral shoulder rotator cuff disease and bilateral carpal tunnel syndrome.

Surgical repair for Mr. Royer's elbow injury was recommended by Dr. De Armas in 2004, however Mr. Royer never had surgery. According to Dr. Jett, a patient who suffers from a ruptured bicep and does not get surgery will lose significant strength in elbow flexion which the bicep contributes to.

Mr. Royer was retired at the time of the incident, and there was no evidence of loss of income presented at trial. The testimony of his doctors, wife, and other relatives, however, indicated that Mr. Royer's social life deteriorated after the incident. Because of the injuries Mr. Royer sustained during the incident, he was unable to enjoy his hobbies. He could no longer fish or go swimming. He had to sell his fishing boat. He also could no longer help his wife with household chores. His wife had to drive him everywhere because he could not grip the steering wheel of the car. Mr. Royer often had flashbacks and nightmares about the plane incident and was depressed and frustrated because of how his life had changed since June 19, 2004.

Although, Mrs. Royer was able to continue working after the incident, her testimony indicated she was still in a lot of pain. She testified that she kept her job as a cashier at Schooner Bay Market, because she did not have the money to quit, but that she cannot stand at the register as long as she used to and has trouble lifting heavy objects and climbing the stairs. This testimony is in accordance with the limitations Dr. Jett set for her.

Dr. Jett originally diagnosed Mrs. Royer with lumbar strain and internal derangement of the left knee in 2006. As a result of her injuries, Dr. Jett restricted her from lifting anything over 20 pounds, and advised her not to do any frequent bending, twisting, climbing, or standing. He testified that Mrs. Royer's injuries were caused by pulling or pushing in a way that the body is not supposed to be used. By 2008, Dr. Jett changed Mrs. Royer's diagnosis from lumbar strain to lumbar disc disease because strains do not usually last that long. In addition, Dr. Jett testified that Mrs. Royer was having some indications of irritation of her disc.

In addition to continuing work, Mrs. Royer also had to care for her husband and perform all of the household chores on her own. She began seeing Dr. Copemann because she was depressed and stressed out. Mrs. Royer testified that before the incident she could do everything, but now she has to limit herself. She cannot go swimming as often because her legs give out on her, and she cannot stand as long as she used to, bend too deep, or walk as fast. She also has to limit the work she does around the house.

Based on the trial testimony regarding the nature of the Royers' injuries, the pain and suffering they endured as a result of their injuries, and the lifestyle changes they had to make after the plane incident, this Court finds that the amount awarded by the jury for the Royers' non-economic damages is rationally related to the evidence adduced at trial. A comparison of awards

for similar injuries supports the Court's finding. Therefore, the Court shall uphold the jury's award of non-economic damages.

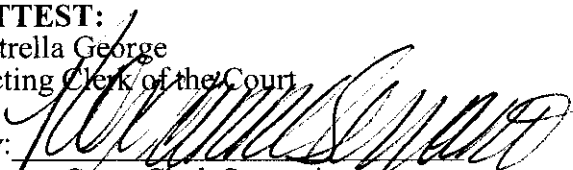
IV. CONCLUSION

The foregoing analysis indicates that the evidence was sufficient to sustain the jury's finding of negligence on the part of Defendant. However, the Court finds that the jury's verdict awarding \$30,000 in economic damages to Mr. Royer and \$50,000 in economic damages to Mrs. Royer is not supported by the evidence presented at trial. Hence, the Court will exercise its remittitur power and reduce Mr. Royer's economic damages to \$13,000 and Mrs. Royer's economic damages to \$12,156. An Order and Judgment consistent with this Opinion shall follow.

Dated: 2-18-15


Harold W.L. Willocks
Administrative Judge of the Superior Court

ATTEST:
Estrella George
Acting Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 2/23/15