CLE

WEDNESDAY,
JULY 29, 2020
6:00 - 7:00 PM

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DANY DEFENSE ASSOCIATION OF NEW YORK

DEFENSE ASSOCIATION OF NEW YORK WILL PRESENT THE FOLLOWING SEMINAR IN CONCERT WITH ABOTA, NYC CHAPTER:

DEFENSE OF THE SPINAL FUSION PERSONAL INJURY CASE – MEDICAL AND LEGAL PERSPECTIVES

1.0 CLE CREDIT WILL BE GRANTED IN SKILLS

TO JOIN THE SEMINAR:

HTTPS://US02WEB.ZOOM.US/J/86375504233?PWD=ACTDDLVXU1A4ALZCSM9IWLVYTWXKUT09

MEETING ID: 863 7550 4233

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MEET THE PANELISTS:

Leon Kowalski, Esq.

Managing Attorney,
Kowalski & DeVito

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Orthopedic Spine Surgeon
White Plains Hospital
Physician Associates

Defense Association of New York has been granted CLE accreditation by the Office of Court Administration

CLE COMMITTEE:
Teresa A. Klaum and Bradley J. Corsair, Chairs; Colin Morrissey, Steven R. Dyki, Heather Wiltshire Clement, and Eileen E.Buholtz

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Teresa A. Klaum, Esq.
President Elect:
Bradley J. Corsair, Esq.

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Defense of the Spinal Fusion Personal Injury Case – Medical and Legal Perspectives

I. Introduction

For the thorough, aggressive defense attorney, the defense of a case involving spinal fusion is not that much different than that of a non-surgical back or neck disc case, however, what does change is the level of exposure and in any high-exposure case, a misstep or a missed opportunity can be costly. This is all about the damages component of the case. So in order to defend a case involving a spinal fusion surgery we need to understand what the underlying injury is, what anatomy is involved, why it is done, how it is done, what treatment is prescribed, and what the expected recovery is.

A. Widespread these days

B. Increases the value of case
   i. Jury verdict value v. Sustainable value
   ii. Increases all categories of recoverable damages both past and future
      Pain and Suffering
      Lost Wages
      Medical Expenses

It is said that the purpose of an award of damages is to restore the aggrieved party to the position that he or she held prior to the injury. See, *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989). Under the law, this is accomplished by awarding a sum of money that compensates the party for the actual loss sustained as well as those items that will be sustained in the future. Aside from their general experience, there is no legal criterion to guide jurors in translating into money values such intangibles as pain, suffering.

Each category can be sectioned into awards for both past and future depending on the proof adduced at trial. Past damages are calculated from the date of the alleged accident to the date of the jury's verdict. Future damages compensate for future loss. The cornerstone damages in any personal injury case naturally are past and future pain and suffering. Commonly, lost wages and medical expenses are also sought; however the evidence in a given case will dictate whether these categories are recoverable. Future damages can be significant when dealing with alleged catastrophic injuries. Key factors in determining future damages include:

Age of the Plaintiff
Life Expectancy
Future Work Life
Nature of Plaintiff's Employment (or Lack Thereof)
Benefits - Union v. Non-Union
Future Care Needed by Plaintiff (or Not)

Please keep in mind that under New York law, an award for damages is excessive or inadequate if it deviates materially from what would be reasonable compensation. See, *CPLR* §5501(c).

II. Anatomy of the spine.

An overview of the structures and components that make up the spine and the intervertebral discs.

III. The injury.

A. Disc injury
B. Destabilization
C. Radiculopathy
D. The mechanism of injury
    i. How did the accident occur?
    a. Motor vehicle accident (majority)
    b. Trip and Fall
    c. Fall from a height
    d. Assault – Blunt force trauma

IV. Diagnosis of a Spinal Injury

A. Clinical Diagnosis
B. Radiological Testing
    i. MRI
C. Electrodiagnostic Testing
    i. EMG/NCV

V. Treatment of a Spinal Injury

A. Conservative treatment
B. Injections
C. What treatment should be done before a decision on surgery is made?
D. Surgical options

VI. Causation

A. The cause of the injury
    i. Degeneration v. Trauma
B. The need for the surgery

VII. The surgery

A. What is the fusion surgery?
B. When is it recommended?
C. What does it consist of?
D. How is it done?
E. Recovery time
F. Alternatives
G. Complications
H. Success rate
I. The good recovery. Evidence to use at trial. Cut off P&S.
J. Post-surgical treatment

VIII. Proposed future surgery

DANY and ABOTA, NYC present:

Defense of the Spinal Fusion Personal Injury Case – Medical and Legal Perspectives

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If you would like a copy of the information presented during today's CLE, please e-mail SoniAndrews@imedview.com .

We thank you for attending and hope that you find tonight's presentation useful and informative.

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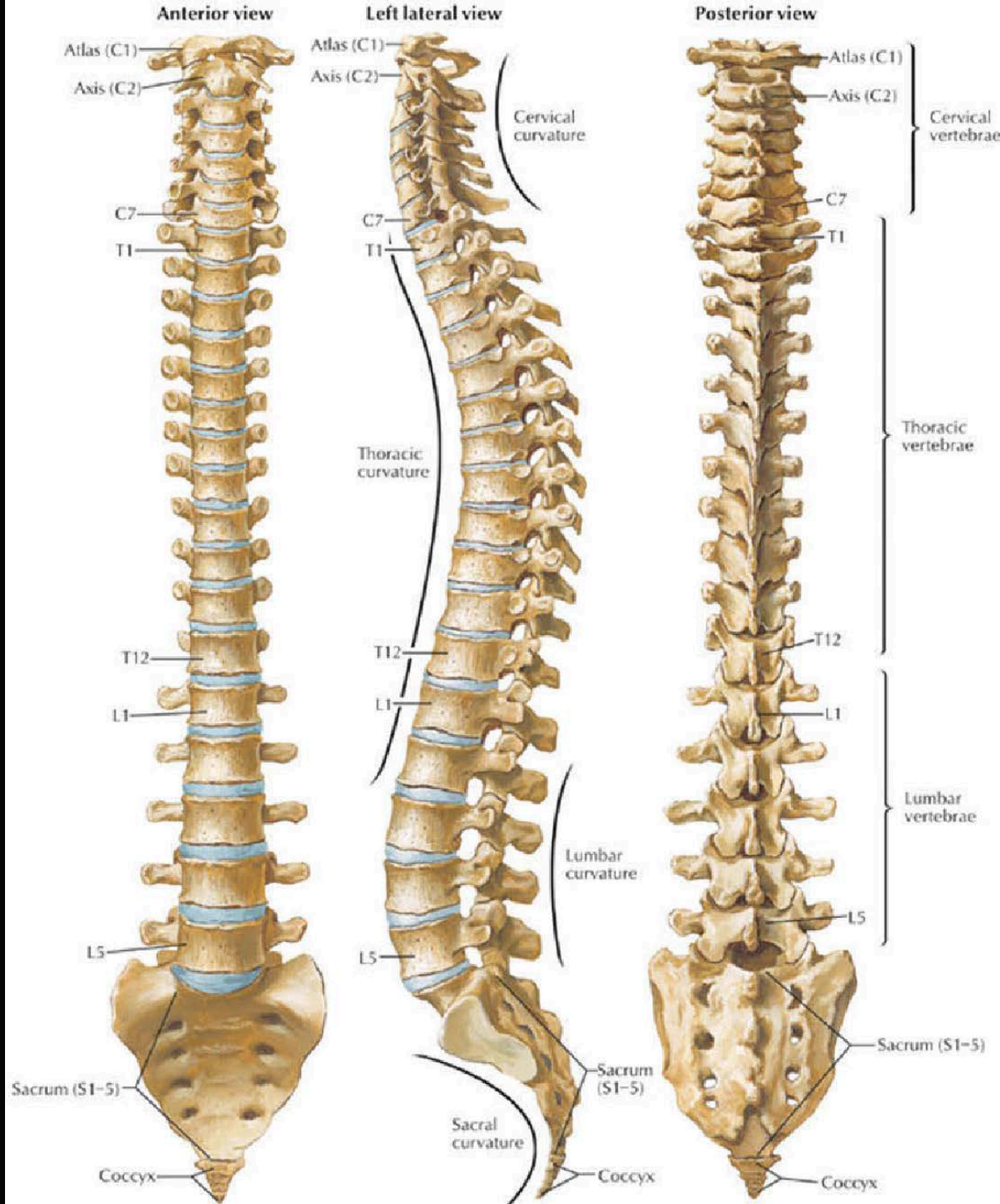
Anatomy of the Spine:

- Cervical (neck)-
  - 7 vertebrae
  - 8 roots
- Thoracic (chest)-
  - 12 vertebrae
  - Rarely injured (ribs)
- Lumbar (Low Back)-
  - 5 vertebrae
- Sacral-
  - 5 united vertebrae
  - Keystone of pelvis
  - No discs to worry about
- Coccyx-
  - 4 vertebrae
  - Vestigial (tail?)
  - Potential source of chronic injury but NEVER Surgery

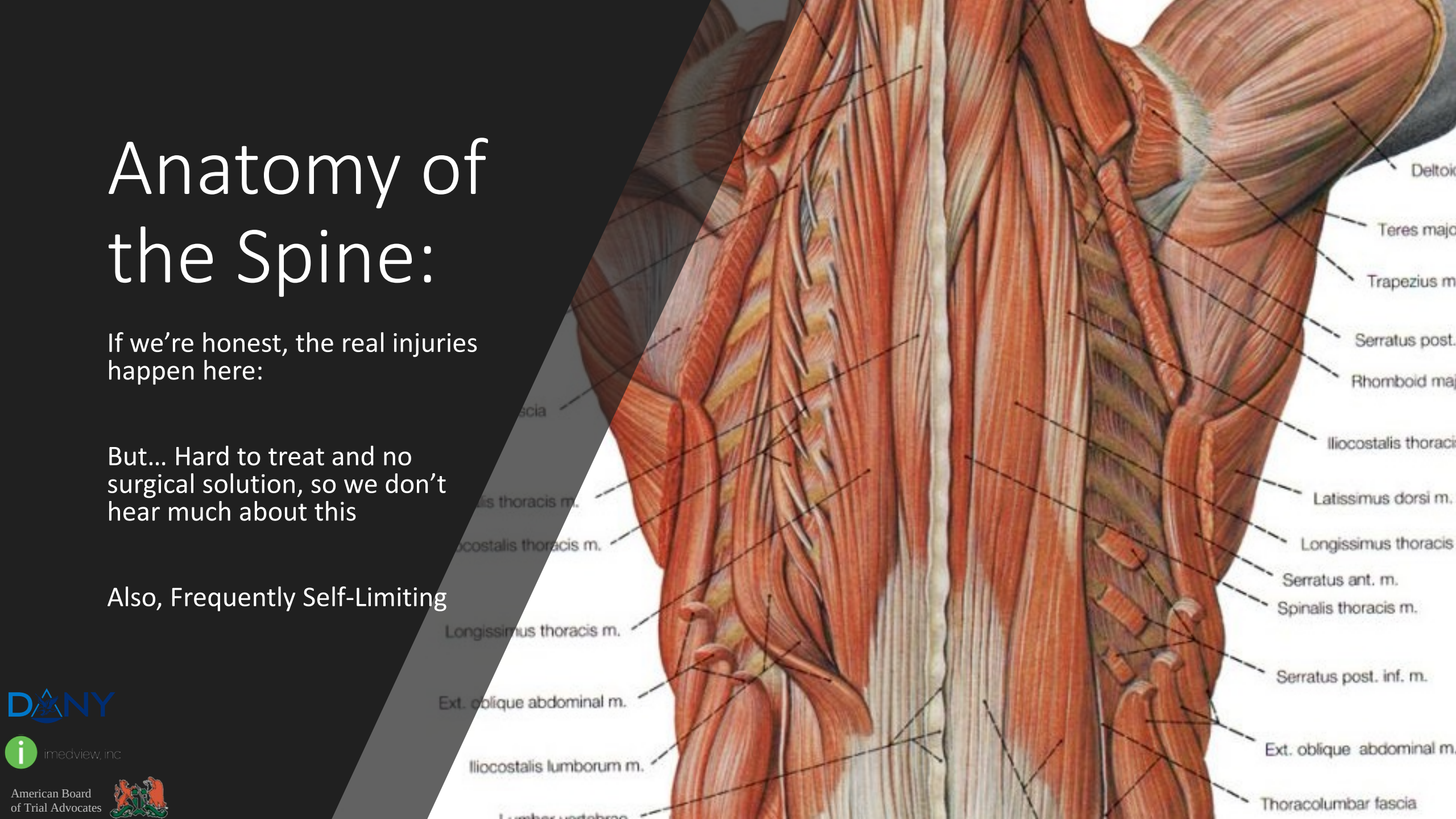


Anatomy of the Spine:

If we're honest, the real injuries happen here:

But… Hard to treat and no surgical solution, so we don't hear much about this

Also, Frequently Self-Limiting



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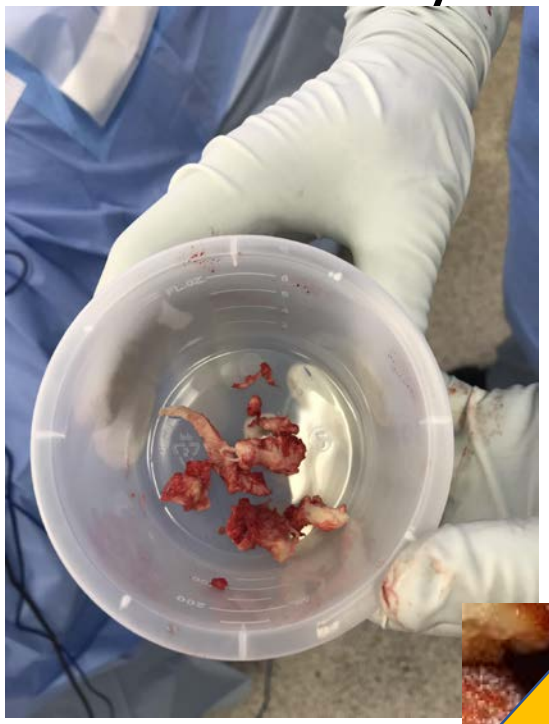
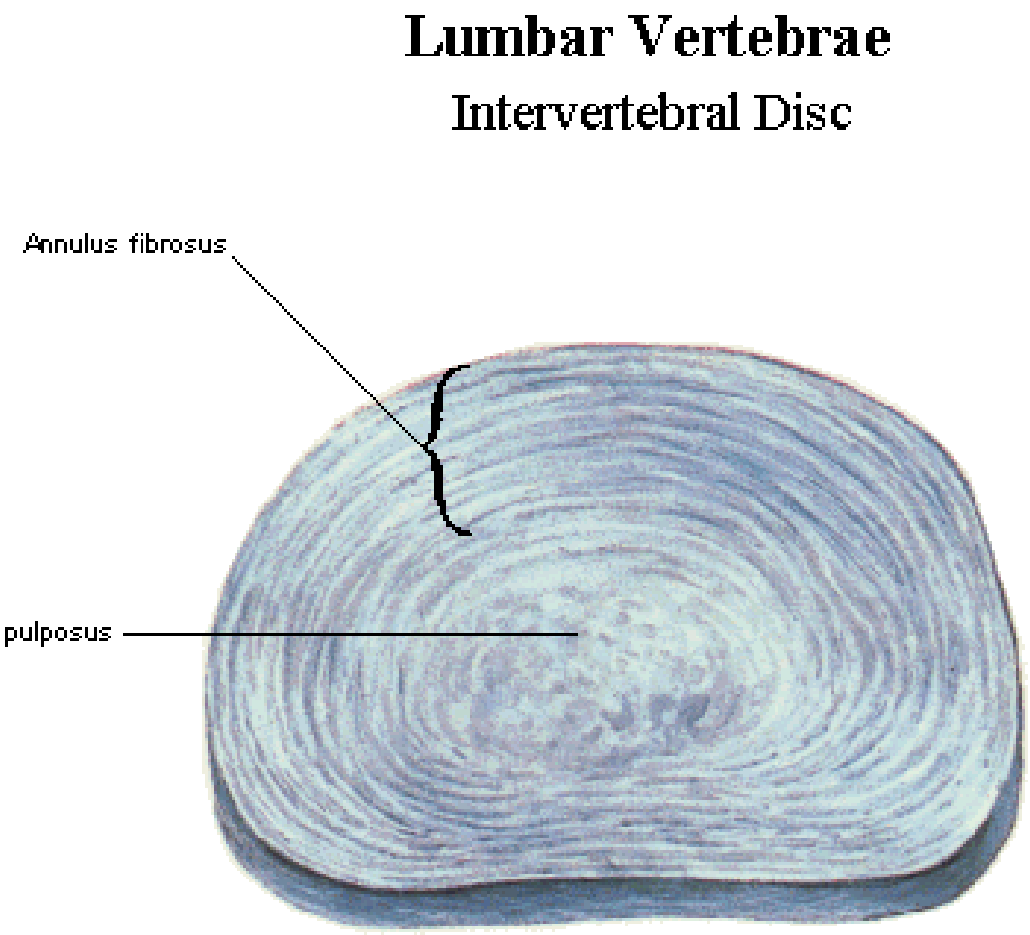
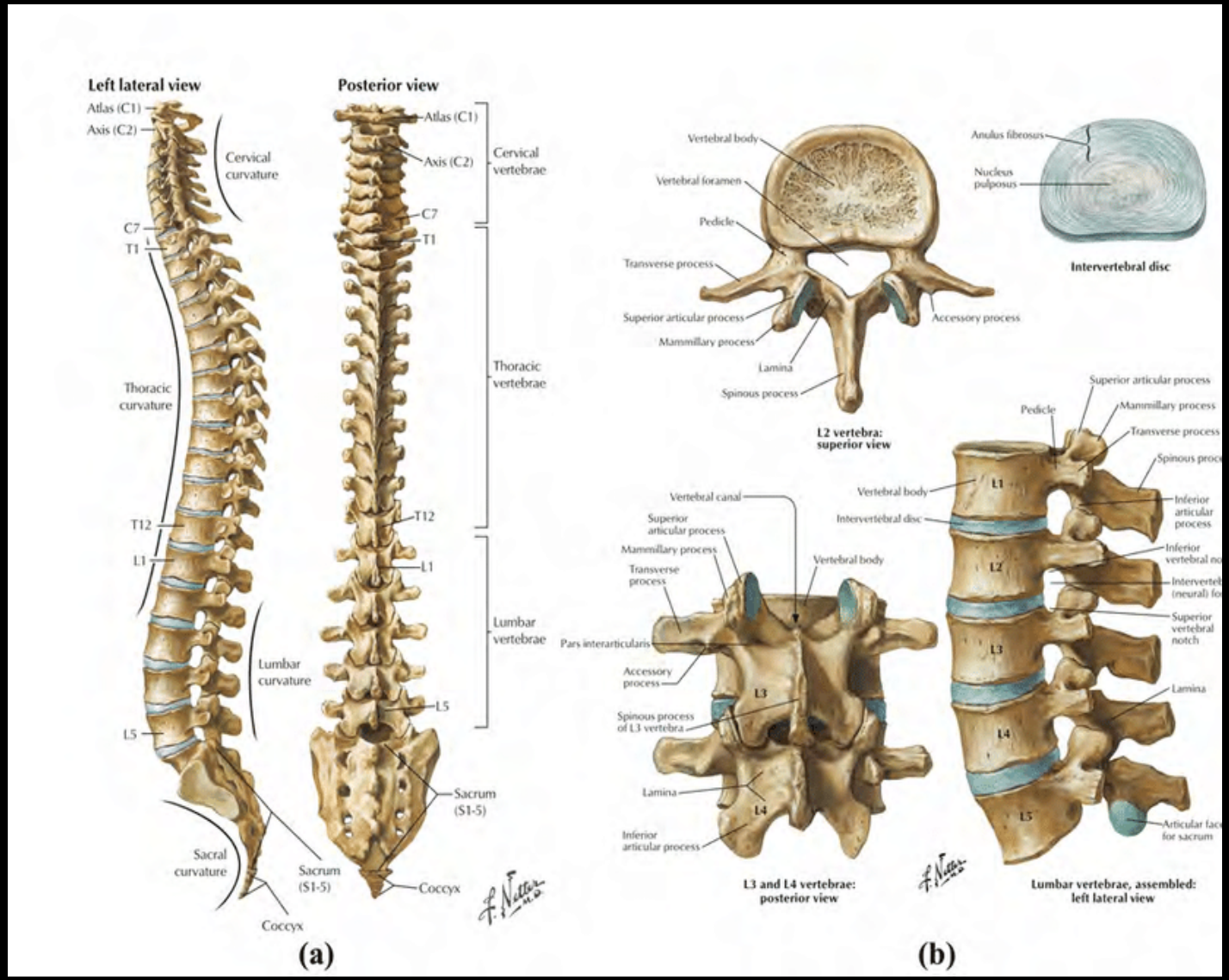
Anatomy of the Intervertebral Disc:





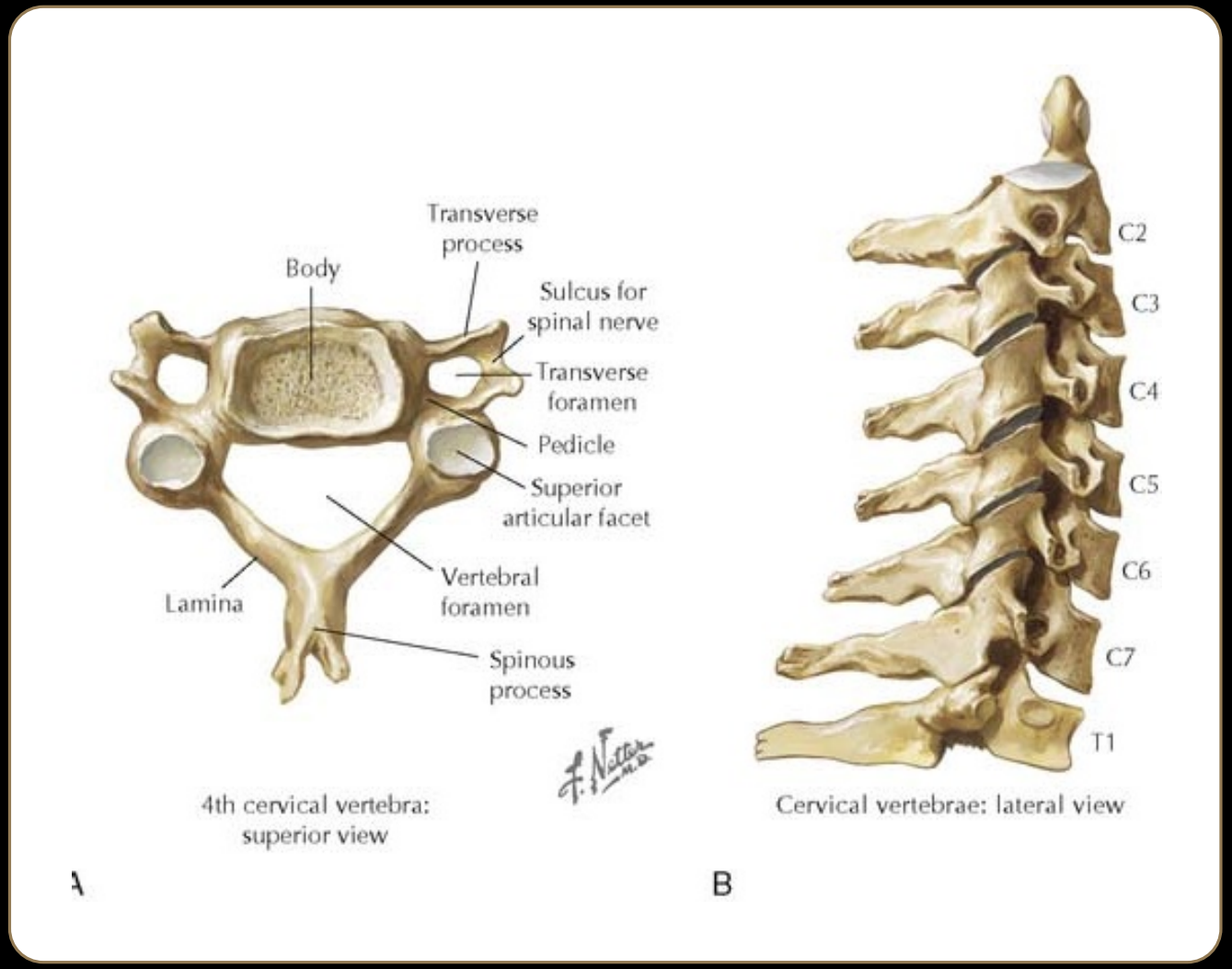
Lumbar Anatomy:

- Cauda Equina
  - No Spinal Cord
- Normal aging causes:
  - Disc desiccation
    - Loss of disc height
    - Bulging of the annulus
  - Facet hypertrophy
  - Ligament hypertrophy
  - Osteophytes
- And on occasion:
  - Spinal stenosis
  - Foraminal stenosis
  - Degenerative spondylolisthesis



Cervical Anatomy:

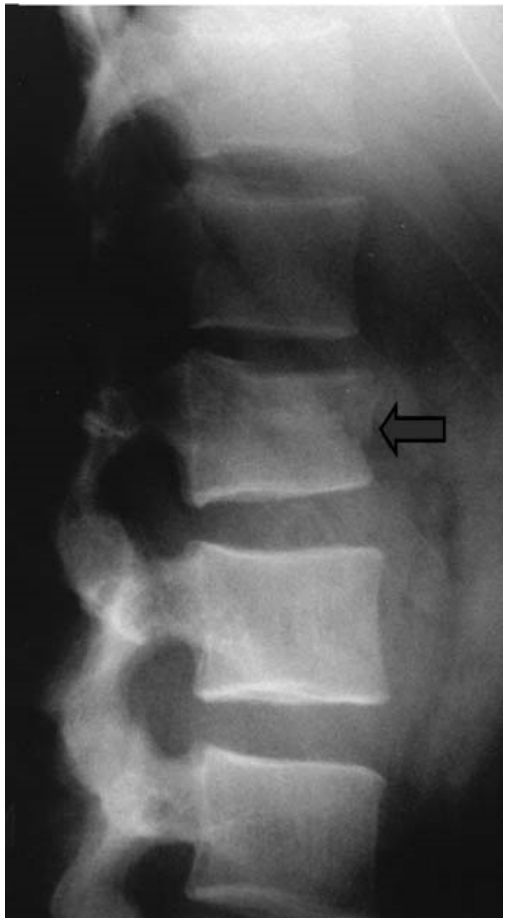
- Spinal Cord
- Normal aging causes:
  - Disc desiccation
    - Loss of disc height
    - Bulging of the annulus
  - Facet hypertrophy
  - Ligament hypertrophy
  - Osteophytes
- And on occasion:
  - Spinal stenosis
  - Foraminal stenosis
  - Degenerative spondylolisthesis

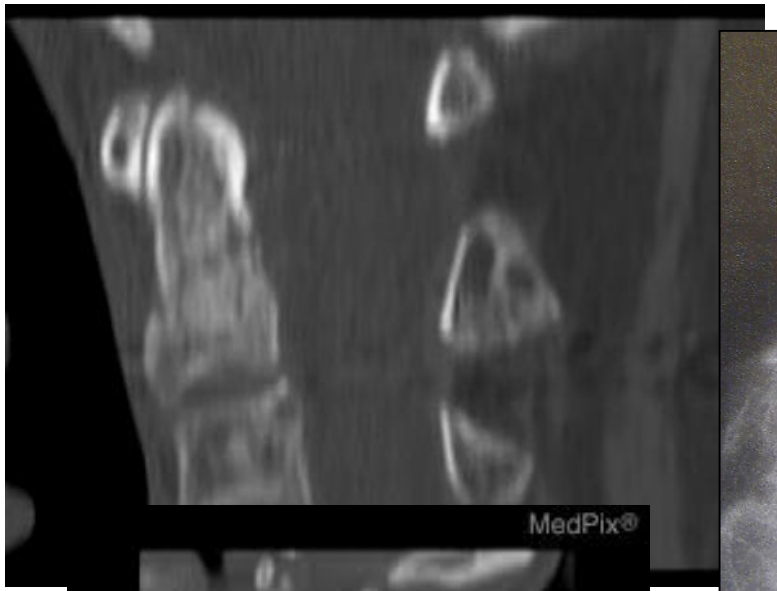


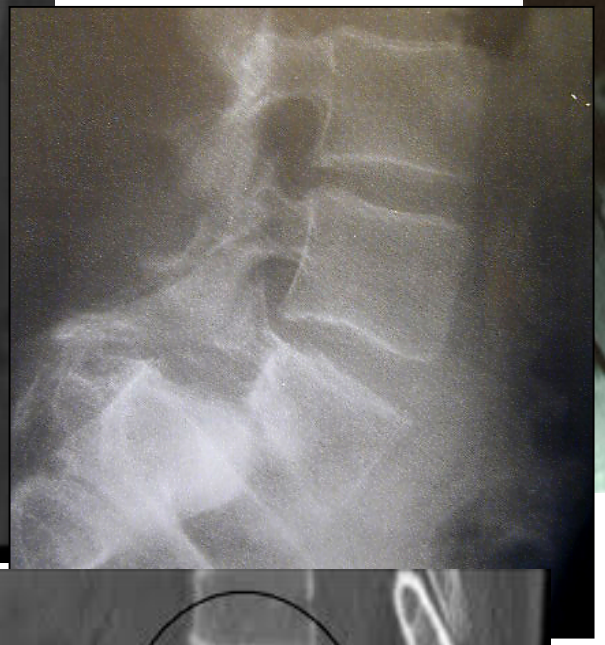
Injury To The Spine:

- True traumatic injury to the spinal column is NEVER a subtle event:
  - Fracture of the vertebral bones
  - Traumatic disc herniation
  - Traumatic ligamentous injury- Instability
- At the least, there is severe and acute pain associated with each
- Frequently, also associated with:
  - Acute focal neurological deficit
    - Weakness
    - Loss of sensation
    - Loss of motor function
  - Vascular injury

True traumatic injury to the spinal column:







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Diagnostic Modalities:

- X-rays
- CT scan
- MRI

- These are black and white in terms of diagnosis and treatment considerations
  - There may be subtle differences in techniques of treatment but the cause-effect nature of these injuries is rarely disputable
- Unfortunately- in my experience- these are the minority of cases I review

The fundamental legal paradox (as it pertains to spine anyway):

- Given that: Acute, obvious traumatic injury is rare
- Given that: Evidence of Degenerative Disease is a near universal finding on almost any imaging modality
- Given that: Many subtle traumatic findings can mimic the appearance of common degenerative changes…..
- ***Could Conundrum***:
  - Ignoring the overwhelmingly likely, in favor of believing the statistically inferior outcome, simply because it helps one's cause
  - E.g. Since we can't PROVE that the fender-bender at 4mph didn't truly cause the disc to herniate, then it becomes possible that it COULD have, even though it really didn't!!!

Natural Aging:

Cervical Spine

- **Abnormal XRAY Findings by age 65**
  - **95% Men**
  - **70% Women**

- Gore, *Spine* 1986

Asymptomatic-Abnormal MRI

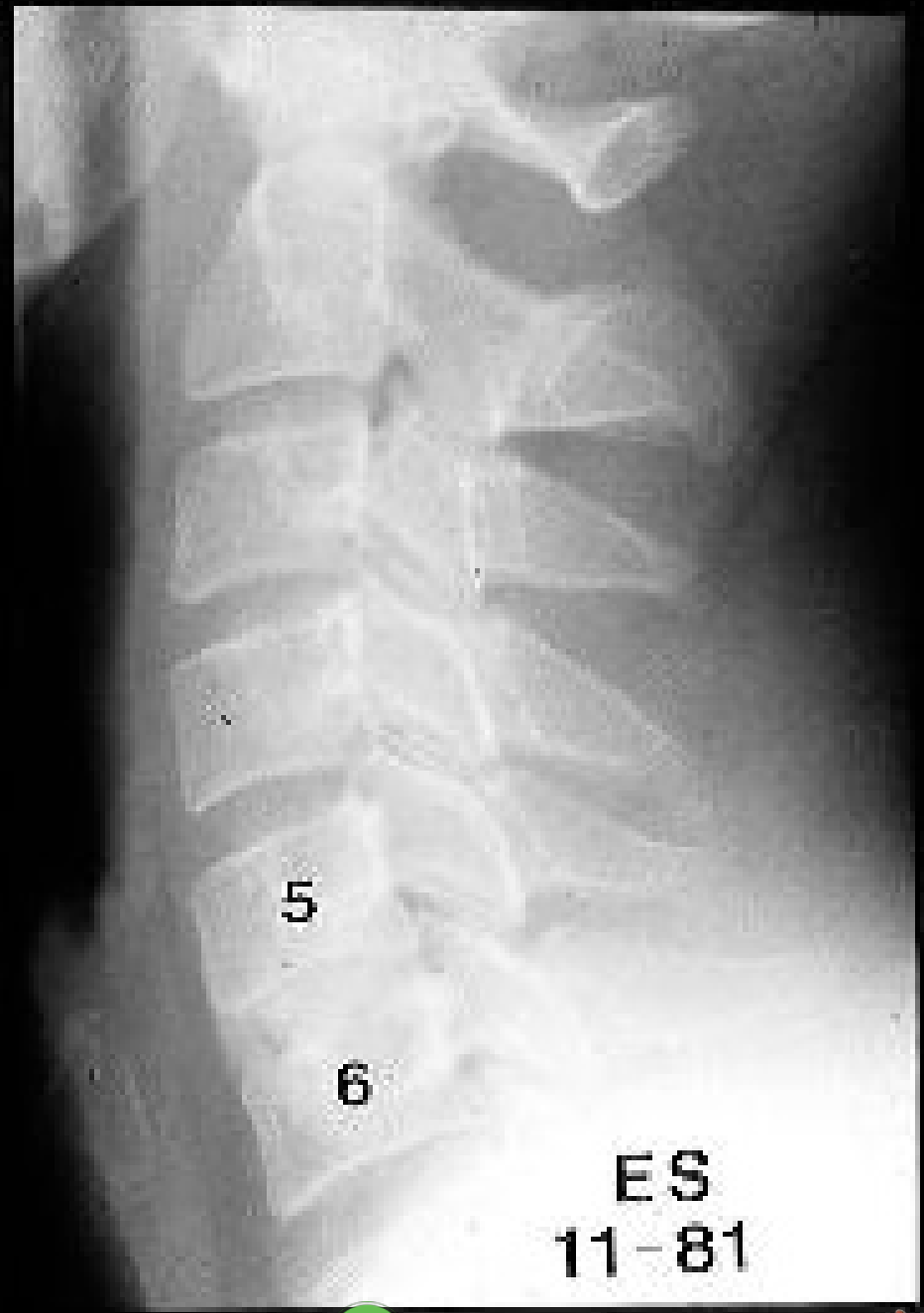
- **57% >age 64**
  - Teresi, Radiology 1987
- **60% >age 50**
  - Boden, JBJS-A 1990
- **89% M, 86% F > age 60**
  - Matsumoto, JBJS-B 1998

Causal Relationship to Spinal Injury- Team Effort

- The financial gain is GREAT, not only to the claimants, but also to the medical professionals (arguably greater) who establish the causal relationship, essentially on their say so
- The “Machines” are well oiled, organized and act in concert across the entire gamut of medical treatment, from injury to surgery
  - PT (Chiro; Acupuncture; Cupping; Massage; Etc.)
  - Physiatry (Medication; Injections)
  - Radiology (Over-reads; Ambiguous)
    - “Encroaches upon the sac”
    - “Nearly touches the nerve”
  - Surgeon
    - “Traumatic herniation was discovered”
  - etc.

Spinal Fusion Fundamentals

- What is spinal fusion?
  - Connecting two vertebrae, which ordinarily exhibit motion between them, with bridging bone
  - That's it!!!
- What ISN'T spinal fusion?
  - **Instrumentation**
  - Decompression
  - Magic

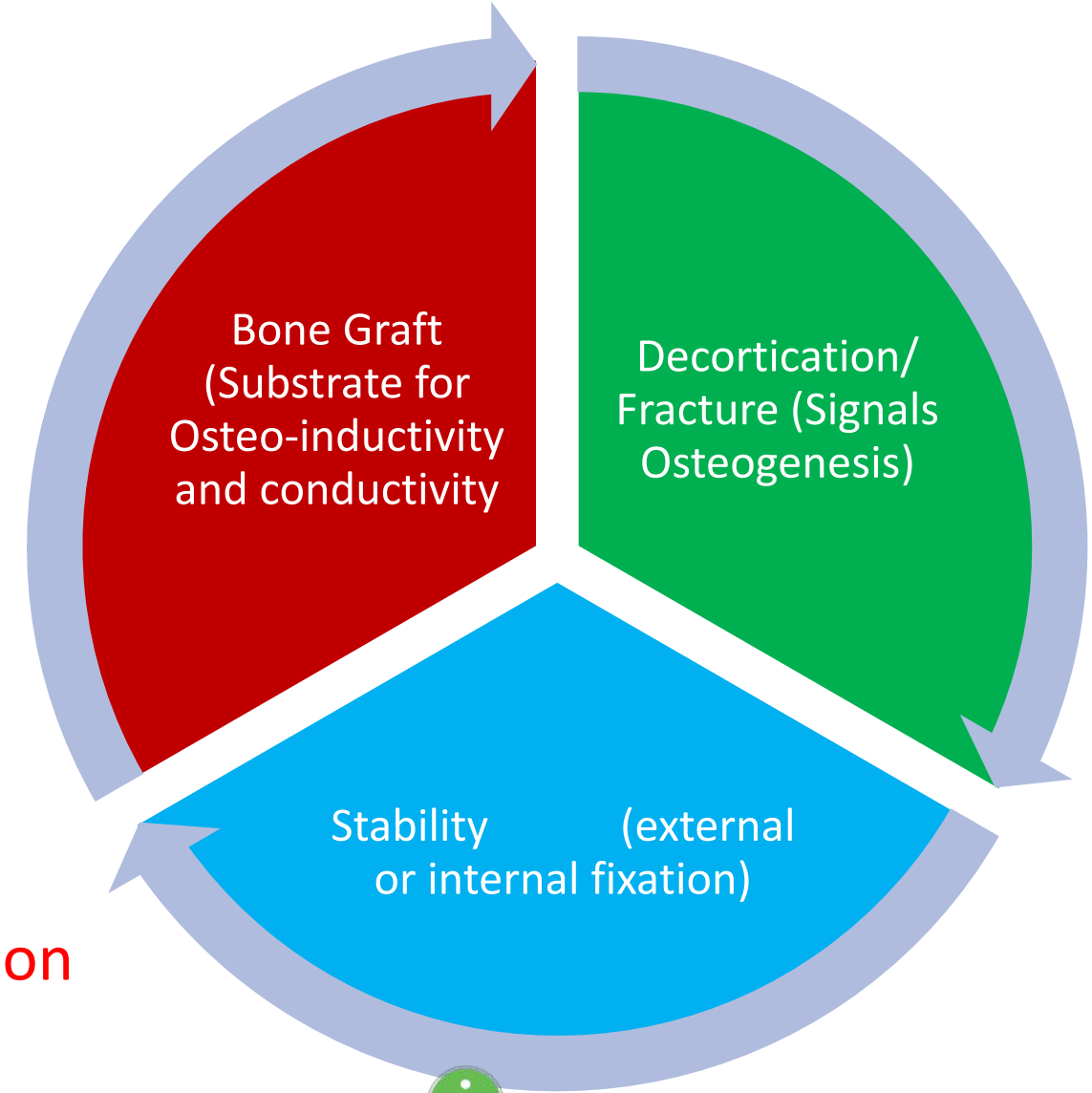


Why Do A Fusion?

- Indications to perform fusion are:
  - INSTABILITY
    - Trauma
    - Spondylolisthesis (degenerative or congenital)
    - Iatrogenic (sometimes intended [e.g. tumor] sometimes unintended)
  - Deformity
  - Restoration of anatomy?
  - (Disc/Facet Degeneration- Axial Pain) ???
    - Poor outcomes here

Ingredients of Spinal Fusion

If ANY of the 3 ingredients are missing…….
NO FUSION



How did we stabilize in the past?

When did instrumentation become the norm?

Instrumentation≠ Fusion

Techniques of Lumbar Spinal Fusion

July 29, 2020

- Anterior
  - ALIF
  - Direct Lateral
- Posterior
  - Postero-lateral (PLF)
    - Fusion between the Transverse Processes and/or Facets. NO CAGES
  - Posterior Lumbar Interbody (PLIF)
  - Trans-foraminal Lumbar Interbody (TLIF)
- Combined 360°

Not affected by surgical approach. i.e. Open vs MIS

Techniques of Cervical Spinal Fusion

July 29, 2020

- Anterior
  - ACDF
    - Anterior Cervical Discectomy with Interbody Fusion and Instrumentation
  - Corpectomy with fusion (50% or more of body)
- Posterior
  - PCLF
    - Posterior Cervical Laminectomy with Fusion and Instrumentation
- Combined 360°

Lumbar Fusion Techniques w/Cages

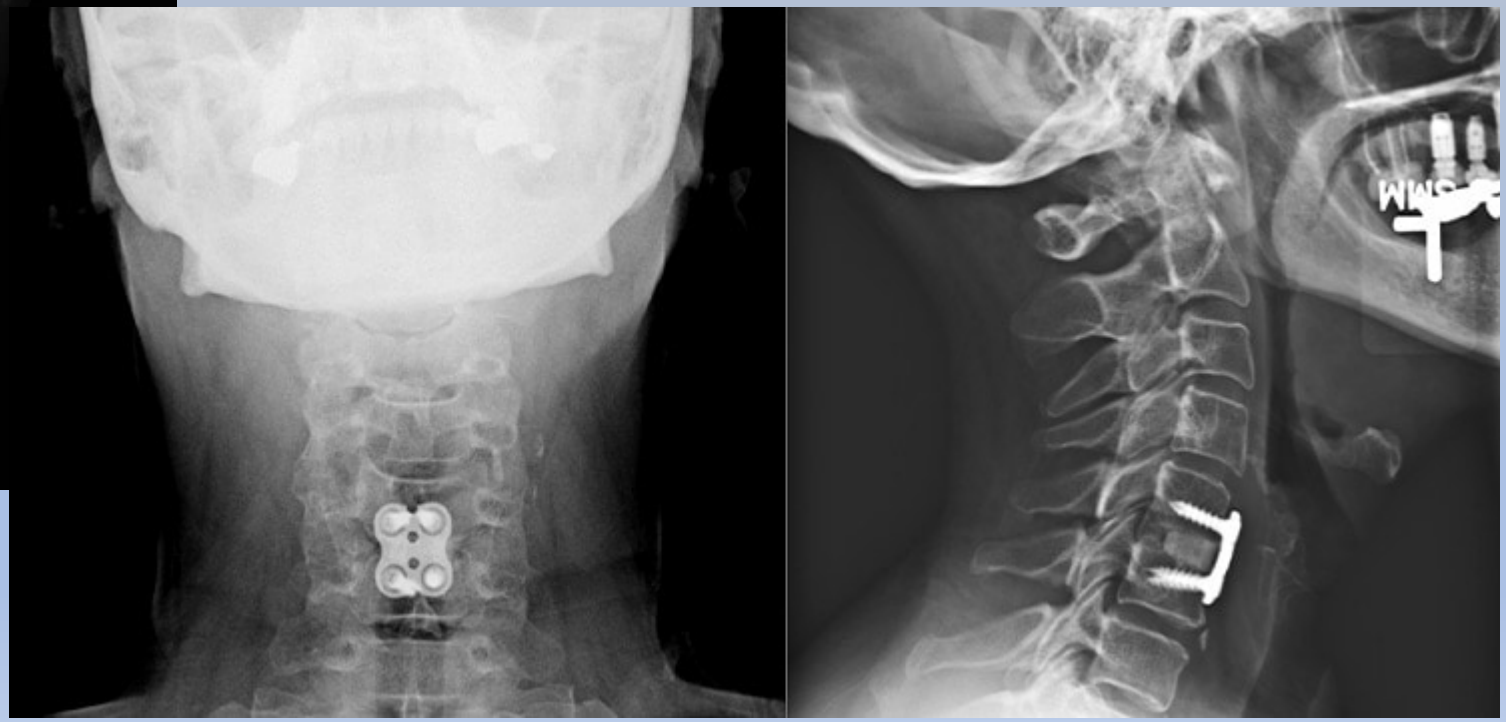
TLIF

360°

Cervical Fusion Techniques

ACDF- 2-level

ACDF- 1-level



So Are The Claimants Getting Hurt?

- Yes and No
- Some are simply counselled to appear injured for 2° gain
- Assuming that:
  - Legit traumatic event
    - Fall
    - MVA
    - Etc.
  - Correlating pain
  - Minimal to no objective evidence of severe injury on imaging or PE
  - NO 2° gain
  - SHOULD GET BETTER WITH APPROPRIATE CONSERVATIVE CARE

But What Hurts More?

- True victims are the claimants
- Not only hurt (presumably) by the injury
  - Enduring extensive treatment interventions as a result
- But also live with the consequences of having had spinal fusion
  - Painful procedure
  - Prolonged recovery
  - Restricted ROM
  - Chronic muscle spasm
  - Chronic pain
  - Potential complications of surgery
  - Adjacent segment breakdown
  - Need for subsequent surgery
- Is it worth it? Who really benefits?

The Consequences Are Real

- These consequences (and others) generate life-long effects
- Accordingly- the value of spinal fusion cases is so high!
  - Pain and suffering in the past
  - Pain and suffering in the present
  - Pain and suffering in the future
- Therefore (IMHO)- the defense of these cases lies in demonstrating that the Spinal Fusion surgery wasn't indicated or necessary to treat any causally related injury
  - Either the injury didn't occur, or
  - Surgery wasn't needed to treat it
  - Or both

The Work-up

- XRAYs (fracture; deformity; instability)
- MRI (stenosis; nerve compression; ligament damage)
- EMG/NCV
  - Differentiate true radiculopathy from peripheral neuropthy
  - Try to determine acuity and/or permanence
- Provocative testing
  - Discogram
- Failed conservative

When to do surgery

- Three pillars:
  - Have a problem that surgery can reliably fix
  - Failed all reasonable conservative treatment modalities
    - In and of itself NOT ENOUGH
  - Miserable and can not live in current condition
- Patients who fulfill these three criteria do VERY WELL from spinal surgery (assuming no complications)

Outcomes of Surgery in PI

- Typically- PI claimants fulfill less than three (and sometimes none) of the above Criteria
- Add also:
  - 2° financial gain from litigation
  - 2° gain from disability and not working

- Surgical outcomes in this population are POOR!

Glossary Of Medical Terms:

- Annulus Fibrosus
- Bulge
- Cauda Equina
- Claudication (neurogenic vs vascular)
- Corpectomy
- CSF (Cerebrospinal fluid)
- Discectomy
- Dura (Mater)
- EMG (NCV)
- ESI (Epidural steroid injection)
- Facet block (injection)
- HNP- herniated nucleus pulposus
- Laminectomy
- Laminotomy
- Medial Branch Block
- Myelopathy
- Nerve Root
- Nucleus pulposus
- Radiculopathy
- Spondylosis
- Spondylolysis
- Spondylolisthesis
- Stenosis (Central/ Foraminal)
- TPI- trigger point injection

Following now are PJI and cases
as to whether alleged spinal injuries
are causally related to the subject incident

N.Y. Pattern Jury Instr.--Civil 2:280

New York Pattern Jury Instructions--Civil | December 2019 Update
Committee on Pattern Jury Instructions Association of Supreme Court Justices

Division 2. Negligence Actions

J. Damages

3. Personal Injury

a. Injury and Pain and Suffering

PJI 2:280 Damages—Personal Injury—Injury and Pain and Suffering

If you decide that defendant is liable, plaintiff is entitled to recover a sum of money which will justly and fairly compensate (him, her) for any injury, disability and conscious pain and suffering to date caused by defendant. [If there is an issue relative to the level of plaintiff's awareness, the following should be charged.] Conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff (decedent).

Comment

The first sentence is based on Tate by McMahon v Colabello, 58 NY2d 84, 459 NYS2d 422, 445 NE2d 1101 (1983) (citing PJI); Kane v New York, N.H. & H.R. Co., 132 NY 160, 30 NE 256 (1892); Ransom v New York & E.R. Co., 15 NY 415 (1857); Robison v Lockridge, 230 App Div 389, 244 NYS 663 (4th Dept 1930); 7 Warren, Negligence 62, Damages, § 7.07. The second sentence is based on McDougald v Garber, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); Ramos v Shah, 293 AD2d 459, 740 NYS2d 376 (2d Dept 2002).

Where there are multiple defendants and the plaintiff fails to serve a medical report or amended bill of particulars on one defendant, it is proper to instruct the jury to bring in verdicts in different amounts against different defendants, Dawson v Nici, 22 NY2d 697, 291 NYS2d 808, 238 NE2d 917 (1968). While causal relationship must exist, it can be established without medical testimony when the results of the negligent act are within the experience and observation of a layperson, Shaw v Tague, 257 NY 193, 177 NE 417 (1931); Thompson v Carney, 52 AD2d 977, 383 NYS2d 111 (3d Dept 1976); Mitchell v Coca-Cola Bottling Co., 11 AD2d 579, 200 NYS2d 478 (3d Dept 1960); see Brown v Albany, 271 AD2d 819, 706 NYS2d 261 (3d Dept 2000) (although plaintiff was competent to testify as to past and present physical condition, alleged soft tissue damage was beyond observation of lay jury, and competent expert medical testimony was required to causally connect these injuries to accident). Moreover, the accident need not be the exclusive cause, but only a competent producing cause, Bobbe v Camato, 26 AD2d 627, 272 NYS2d 475 (2d Dept 1966). An accident which produces injury by precipitating development of a latent condition or by aggravating a pre-existing condition is a cause of that injury, Tobin v Steisel, 64 NY2d 254, 485 NYS2d 730, 475 NE2d 101 (1985); see Edmond v International Business Machines Corp., 91 NY2d 949, 671 NYS2d 437, 694 NE2d 438 (1998) (reinstating plaintiff's complaint against keyboard manufacturers whose products allegedly aggravated plaintiff's preexisting repetitive stress injury and caused new injury). Where there is any evidence of permanence or of future pain and suffering, PJI 2:281 must also be charged. Where there is evidence of emotional reaction to physical injury, PJI 2:284 must be charged. In cases involving medical, dental or podiatric malpractice, CPLR 4111(d) contains special requirements for itemizing the amount of damages attributable to pre-verdict pain and suffering, see PJI 2:151A(1) and 2:151A(2). As to the sufficiency of evidence of future pain and suffering, see Annot: 18 ALR3d 170. As to inadequacy or excessiveness of specific verdicts, see 36 NYJur2d, Damages §§ 131–153; 7 Warren, Negligence 153 ff,

Damages § 7.15; 2 Clark, New York Law of Damages 1087, §§ 621–683.

As to the validity of a verdict which awards medical expenses but not pain and suffering, see Annot: 55 ALR4th 186. No New York case has been found on the question whether shortening of life expectancy constitutes an element of damages, but see Downie v U.S. Lines Co., 359 F2d 344 (3d Cir 1966); Rhone v Fisher, 224 Md 223, 167 A2d 773 (1961); Notes: 15 Syracuse L Rev 14; 41 Temple LQ 142; Comment: 73 Dickinson L Rev 639.

The term "pain and suffering" has been utilized to encompass all items of general, non-economic damages, see CPLR 4111(d), (e), (f); McDougald v Garber, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); Lamot v Gondek, 163 AD2d 678, 558 NYS2d 284 (3d Dept 1990); Comments to PJI 2:151, 2:301; see also Bartoli v Asto Const. Corp., 22 AD3d 437, 802 NYS2d 463 (2d Dept 2005) (disfigurement is aspect of pain and suffering not separate element of damages). An award for pain and suffering should include compensation to an injured person for the physical and emotional consequences of the injury. It is improper to permit the jury to award damages for shock and fright as a category of damages separate from past pain and suffering, Eaton v Comprehensive Care America, Inc., 233 AD2d 875, 649 NYS2d 293 (4th Dept 1996). In determining the amount to be awarded plaintiff for non-economic damages, the jury may properly consider the effect of the injuries on plaintiff's capacity to lead a normal life, McDougald v Garber, supra. However, while the loss of the enjoyment of life may be considered in fixing the amount awarded plaintiff for pain and suffering, the loss of enjoyment of life does not, by itself, constitute a separate and distinct item of damages, McDougald v Garber, supra; see Kavanaugh v Nussbaum, 129 AD2d 559, 514 NYS2d 55 (2d Dept 1987), aff'd as mod on other grounds, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); Golden v Manhasset Condominium, 2 AD3d 345, 770 NYS2d 55 (1st Dept 2003); Ledogar v Giordano, 122 AD2d 834, 505 NYS2d 899 (2d Dept 1986) (both treating loss of enjoyment of life as permissible component of pain and suffering award). In Nussbaum v Gibstein, 73 NY2d 912, 539 NYS2d 289, 536 NE2d 618 (1989), decided simultaneously with McDougald v Garber, supra, the Court stated that "loss of enjoyment of life is not a separate element of damages deserving a distinct award but is, instead, only a factor to be considered by the jury in assessing damages for conscious pain and suffering." Likewise, "mental suffering" is not an item of damage distinct from "pain and suffering," Lamot v Gondek, supra.

Loss of enjoyment of life, as well as other factors in determining the amount of damages for conscious pain and suffering, may be considered only if plaintiff has "some cognitive awareness" of the loss, McDougald v Garber, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); see Ramos v Shah, 293 AD2d 459, 740 NYS2d 376 (2d Dept 2002). An award for the loss of enjoyment of life would serve no compensatory purpose where plaintiff has no awareness of the loss. The jury is not required to sort out varying degrees of cognition and to determine the level at which a particular deprivation may be fully appreciated. It is sufficient if the jury is instructed that there must be "some level of awareness" in order for plaintiff to recover, McDougald v Garber, supra; Ramos v Shah, supra.

Based upon McDougald v Garber, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989), and Nussbaum v Gibstein, 73 NY2d 912, 539 NYS2d 289, 536 NE2d 618 (1989), the following supplemental charge should be given, after the main charge, in any action where plaintiff has presented evidence on the issue of loss of enjoyment of life as an element of pain and suffering:

PJI 2:280.1 Damages—Personal Injury—Injury and Pain and Suffering [Supplemental Instruction]

In determining the amount, if any, to be awarded plaintiff for pain and suffering, you may take into consideration the effect that plaintiff's (decedent's) injuries have had on plaintiff's ability to enjoy life (have had on decedent's ability to enjoy life up to the time of death). Loss of enjoyment of life involves the loss of the ability to perform daily tasks, to participate in the activities which were a part of the person's life before the injury, and to experience the pleasures of life. However, a person suffers the loss of enjoyment of life only if the person is aware, at some level, of the loss that (he, she) has suffered.

If you find that plaintiff (decedent), as a result of (his, her) injuries, suffered some loss of the ability to enjoy life and that plaintiff (decedent) was aware, at some level, of a loss, you may take that loss into consideration in determining the amount to be awarded to plaintiff for pain and suffering.

In Broadnax v Gonzalez, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004), the Court of Appeals overruled Tebbutt v Virostek, 65 NY2d 931, 493 NYS2d 1010, 483 NE2d 1142 (1985), and other cases holding that, in the absence of independent physical injury, an expectant mother may not recover damages for emotional distress resulting from a

miscarriage or stillbirth caused by medical malpractice. The Broadnax decision recognizes that medical malpractice resulting in miscarriage or stillbirth can constitute a breach of duty to the expectant mother and that damages for emotional distress arising from such malpractice should be recoverable even where there has been no physical injury. The Broadnax holding does not address the continuing vitality of cases holding, based on Tebbutt v Virostek, supra, that damages for pain and suffering normally incidental to childbirth are not recoverable in an action for negligently caused stillbirth or miscarriage, see Wittrock v Maimonides Medical Center-Maimonides Hosp., 119 AD2d 748, 501 NYS2d 684 (2d Dept 1986); see also Fahey v Canino, 304 AD2d 1069, 758 NYS2d 708 (3d Dept 2003), rev'd, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004). The Broadnax holding is a narrow one and does not extend to situations where a fetus injured in utero was carried to term and born alive, Sheppard-Mobley ex rel. Mobley v King, 4 NY3d 627, 797 NYS2d 403, 830 NE2d 301 (2005); Ward v Safajou, 145 AD3d 836, 43 NYS3d 447 (2d Dept 2016); see Brashaw v Cohen, 154 AD3d 1327, 62 NYS3d 251 (4th Dept 2017) (same); Levin v New York City Health and Hospitals Corp., 119 AD3d 480, 990 NYS2d 490 (1st Dept 2014).

The physical and emotional injuries suffered by a pregnant woman from a miscarriage because of the defendant's negligence in failing to advise her that she still could be pregnant due to an incomplete abortion are recoverable, Ferrara v Bernstein, 81 NY2d 895, 597 NYS2d 636, 613 NE2d 542 (1993). Moreover, the damages resulting from the physical and emotional injuries suffered by a pregnant woman as the result of an abortion occasioned by a physician's negligent failure to detect the pregnancy prior to prescribing a drug potentially harmful to the fetus are recoverable, Lynch v Bay Ridge Obstetrical and Gynecological Associates, P.C., 72 NY2d 632, 536 NYS2d 11, 532 NE2d 1239 (1988), as is the emotional distress sustained by a prospective mother generally opposed to abortion who was induced to have an abortion by negligent medical advice, Martinez v Long Island Jewish Hillside Medical Center, 70 NY2d 697, 518 NYS2d 955, 512 NE2d 538 (1987). However, no damages are recoverable for negligence resulting in an incapacity to have children in the future, Devine v Brooklyn Heights R. Co., 198 NY 630, 92 NE 1083 (1910), rev'g for reasons in AD dissenting opinion, 131 App Div 142, 115 NYS 263 (2d Dept 1909).

Damages may be recoverable for emotional injuries suffered by a couple whose embryo was mistakenly placed in another woman, Perry-Rogers v Obasaju, 282 AD2d 231, 723 NYS2d 28 (1st Dept 2001). In Perry-Rogers v Obasaju, the couple suffered emotional harm caused by their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child, and by their separation from the child for more than four months after his birth, id. The couple, through medical affidavits attesting to objective manifestations of their trauma, evidenced the genuineness of their claim, and survived the defendants' motion for summary judgment dismissing the complaint, id. However, there is no recovery for psychological harm suffered by a plaintiff as a result of alleged negligence in performing a surgical procedure to enhance her husband's fertility, Cohen v Cabrini Medical Center, 94 NY2d 639, 709 NYS2d 151, 730 NE2d 949 (2000); see Landon by Landon v New York Hosp., 101 AD2d 489, 476 NYS2d 303 (1st Dept 1984), aff'd for reasons in AD opinion, 65 NY2d 639, 491 NYS2d 607, 481 NE2d 239 (1985).

It has been held that negligent delay in delivery which causes the mother emotional distress related to a previous physical condition may be compensable, Prado v Catholic Medical Center of Brooklyn and Queens, Inc., 145 AD2d 614, 536 NYS2d 474 (2d Dept 1988) (mother feared real possibility of rupture of prior rectocystocele repair). But Prado has been limited to its "exceptional" factual circumstances, Guialdo v Allen, 171 AD2d 535, 567 NYS2d 255 (1st Dept 1991).

There is no cause of action for "wrongful life" where a child claims that the doctor's negligence consisted of failing to advise the child's mother that the fetus was impaired which prevented the mother from electing to have an abortion, Becker v Schwartz, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978); Howard v Lecher, 42 NY2d 109, 397 NYS2d 363, 366 NE2d 64 (1977); Stewart v Long Island College Hospital, 35 AD2d 531, 313 NYS2d 502 (2d Dept 1970), aff'd, 30 NY2d 695, 332 NYS2d 640, 283 NE2d 616 (1972); see PJI 2:150, 2:284, 2:318. However, in an action sometimes referred to as "wrongful birth," the parents may recover the cost of care and treatment of a disabled child born because of a negligent failure to test for or advise the parents of the potential for the birth of such a child, Becker v Schwartz, supra; see B.F. v Reproductive Medicine Associates of New York, LLP, 30 NY3d 608, 69 NYS3d 543, 92 NE3d 766 (2017); Foote v Albany Medical Center Hosp., 16 NY3d 211, 919 NYS2d 472, 944 NE2d 1111 (2011); Mayzel v Moretti, 105 AD3d 816, 962 NYS2d 656 (2d Dept 2013). This recovery is limited to the extraordinary expenses incurred or to be incurred prior to the child's 21st birthday, Bani-Esraili v Lerman, 69 NY2d 807, 513 NYS2d 382, 505 NE2d 947 (1987). The existence of government programs that provide resources to a disabled child will not, as a matter of law, eliminate the parents' financial obligation for their child's extraordinary medical and educational expenses during the child's minority, Foote v Albany Medical Center Hosp., supra. Therefore, the existence of such programs is not necessarily fatal to the parents' claim, id. The

parents, however, must demonstrate that they have incurred or will incur some extraordinary expenses in caring for the child; conclusory or speculative assertions that such expenses have been or will be incurred are insufficient, see Mayzel v Moretti, supra (parents failed to raise triable issue of fact regarding whether they sustained damages as a result of child's "wrongful birth"; child's care was provided by a residential care facility and paid for by Medicaid, and parents offered no evidence that resources provided by government were insufficient or that they actually intended to care for child in future).

Recovery for pain and suffering of an inmate of a mental institution is allowed, notwithstanding the inability of the injured party to describe the pain and suffering experienced, Scolavino v State, 187 Misc 253, 62 NYS2d 17 (Ct Cl 1946), mod on other grounds, 271 App Div 618, 67 NYS2d 202 (3d Dept 1946), aff'd, 297 NY 460, 74 NE2d 174 (1947); Siegel v New York, 43 AD2d 271, 351 NYS2d 394 (1st Dept 1974); Schreck v State, 35 Misc2d 929, 231 NYS2d 563 (Ct Cl 1962); Dowly v State, 190 Misc 16, 68 NYS2d 573 (Ct Cl 1947), unless there is evidence that the injured party was incapable of experiencing pain and suffering at all, see Ledogar v Giordano, 122 AD2d 834, 505 NYS2d 899 (2d Dept 1986) (autistic child); Tinnerholm v Parke, Davis & Co., 411 F2d 48 (2d Cir 1969) (sustaining an award for past and future pain and suffering of three-month-old); see also Capelouto v Kaiser Foundation Hospitals, 7 Cal 3d 889, 103 Cal Rptr 856, 500 P2d 880 (1972) (infant under one year old).

Where the interval between injury and death is relatively brief, the amount, if any, awarded for the decedent's conscious pain and suffering depends upon such factors as degree of consciousness, severity of pain, apprehension of impending death, and duration of suffering, Jones v Simeone, 112 AD2d 772, 492 NYS2d 270 (4th Dept 1985); see also Cassar v Central Hudson Gas & Elec. Corp., 134 AD2d 672, 521 NYS2d 337 (3d Dept 1987). Plaintiff has the threshold burden of proving consciousness for at least some period of time following an accident to justify an award of damages for pain and suffering, Cummins v Onondaga, 84 NY2d 322, 618 NYS2d 615, 642 NE2d 1071 (1994); Cleary v LJR Associates, 198 AD2d 394, 604 NYS2d 140 (2d Dept 1993). The burden can be satisfied by direct or circumstantial evidence, id; see Cushing v Seemann, 247 AD2d 891, 668 NYS2d 791 (4th Dept 1998) (affirmation of pathologist who performed autopsy was sufficient to establish triable issue of fact with respect to whether decedent had conscious pain and suffering after his vehicle was struck by truck). Testimony by the deceased infant's parents that, in the moments before he died, the baby was "changing colors," "trying to breathe," "his forehead was becoming swollen," "his eyes were different" and "he was full of blood" was legally sufficient to create a question for the jury, Lopez v Gomez, 305 AD2d 292, 761 NYS2d 601 (1st Dept 2003). In those circumstances, the requirement that there must have been some level of cognitive awareness did not preclude recovery for the pain and suffering experienced by the 15-day-old decedent, id.

No precise rule can be formulated to measure pain or to compensate for it in money damages, Robison v Lockridge, 230 App Div 389, 244 NYS 663 (4th Dept 1930); see McDougald v Garber, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989). Where a plaintiff requires further surgery, the jury should be instructed to consider the pain and suffering entailed in the surgery, Caro v Skyline Terrace Coop., Inc., 132 AD2d 512, 517 NYS2d 531 (2d Dept 1987). It is peculiarly fitting therefore that the amount of such damages should be determined by the jury, Frey v Gerhard Lang Brewery, 256 App Div 1054, 10 NYS2d 874 (4th Dept 1939); Wolfe v General Mills, Inc., 35 Misc2d 996, 231 NYS2d 918 (Sup 1962); and it is improper for the trial judge to give the jury the court's evaluation of the maximum sum recoverable, Lieberman v Washington Square Hotel Corp., 40 AD2d 647, 336 NYS2d 518 (1st Dept 1972); or to state to the jury that a given sum would not be too much or too little, Wersebe v Broadway & S.A.R. Co., 1 Misc 472, 21 NYS 637 (Super Ct 1893).

CPLR 4016(b), which was enacted in 2003, L 2003, ch 694, effective November 27, 2003 and amended in 2004, L 2004, ch 372, expressly permits counsel for both plaintiff and defendant to make reference in their closing statements to "a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action." The statute further provides that if an attorney exercises the right to refer to a specific dollar amount of damages, the court must, upon request of any party, include in its closing charge instructions that the attorney's remarks are permitted as argument, that the attorney's references to specific dollar amounts are not evidence and should not be considered as evidence and, finally, that the determination of damages is solely for the jury, id; see PJI 2:277A.

It is improper to suggest to the jury that they may follow a particular mathematical guide or unit-of-time basis in fixing damages for pain and suffering, Halftown v Triple D Leasing Corp., 89 AD2d 794, 453 NYS2d 514 (4th Dept 1982); De Cicco v Methodist Hospital of Brooklyn, 74 AD2d 593, 424 NYS2d 524 (2d Dept 1980); Paley v Brust, 21 AD2d 758, 250 NYS2d 356 (1st Dept 1964); Jacobs v Peress, 24 AD2d 746, 263 NYS2d 675 (1st Dept 1965); see Laughing v Utica Steam Engine and Boiler Works, 16 AD2d 294, 228 NYS2d 44 (4th Dept 1962); A "unit of time" argument, while improper, is not

grounds for setting aside the verdict where it is plain that the jury disregarded the argument, Lee v Bank of New York, 144 AD2d 543, 534 NYS2d 409 (2d Dept 1988). It has been held that it is not improper to make a "unit of time" argument if no specific monetary value for each unit is suggested, Feldman v Bethel, 106 AD2d 695, 484 NYS2d 147 (3d Dept 1984). Whether the Court of Appeals will adopt this rule is unclear, see Tate by McMahon v Colabello, 58 NY2d 84, 459 NYS2d 422, 445 NE2d 1101 (1983); see also Annot: 3 ALR4th 940.

Any allusion by plaintiff's attorney to the defendant's ability to pay damages is improper, Adams v Acker, 57 AD2d 741, 394 NYS2d 8 (1st Dept 1977); Nicholas v Island Industrial Park of Patchogue, Inc., 46 AD2d 804, 361 NYS2d 39 (2d Dept 1974); Laughing v Utica Steam Engine and Boiler Works, 16 AD2d 294, 228 NYS2d 44 (4th Dept 1962), and if made is grounds for mistrial, Annot: 32 ALR2d 9. Likewise, defense counsel may not suggest that defendant lacks the funds to respond to a large judgment and may not make allusions to plaintiff's financial status, Vassura v Taylor, 117 AD2d 798, 499 NYS2d 120 (2d Dept 1986). Moreover, it is improper for counsel in summation or the court in its charge to relate the amount to be fixed to what the jurors would like to receive as compensation if they were in plaintiff's place, Liosi v Vaccaro, 35 AD2d 790, 315 NYS2d 225 (1st Dept 1970); Weintraub v Zabotinsky, 19 AD2d 906, 244 NYS2d 905 (2d Dept 1963); see Annot: 96 ALR2d 760. It is likewise error for counsel repeatedly to refer to the jury as the "conscience of the community," Halftown v Triple D Leasing Corp., 89 AD2d 794, 453 NYS2d 514 (4th Dept 1982).

Damages for personal injury and loss of earnings resulting therefrom are not taxable, 26 USC § 104(a)(2); see Lanzano v New York, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988); see also C.I.R. v Schleier, 515 US 323, 115 SCt 2159 (1995); but see BNSF Railway Company v Loos, 139 SCt 893 (2019) (recovery pursuant to the Federal Employers' Liability Act for lost wages due to an on-the-job injury is taxable income). The courts have recognized the possibility that a tax-conscious jury may, in "ignorance of relevant rules in this highly specialized field," proceed on "erroneous speculations and assumptions," to render an unfair and inaccurate verdict, Lanzano v New York, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988); Johnson v Manhattan & Bronx Surface Transit Operating Authority, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988); Coleman v New York City Transit Authority, 37 NY2d 137, 371 NYS2d 663, 332 NE2d 850 (1975); see Norfolk & W. Ry. Co. v Liepelt, 444 US 490, 100 SCt 755 (1980). To counter this possibility, the Court of Appeals has declared that "it is better practice in all cases where jury awards are excluded from taxation under 26 USC § 104(a)(2) for the jury to be instructed in substance that such awards, if any, are not subject to income taxes, and that it should not add or subtract from the award on account of income taxes but should follow the ordinary, specific instructions for measuring damages which the courts usually give," Lanzano v New York, supra; Cramer v Kuhns, 213 AD2d 131, 630 NYS2d 128 (3d Dept 1995).

Based upon Lanzano v New York, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988) the court should instruct the jury:

PJI 2:280.2 Damages—Personal Injury—Injury and Pain and Suffering [Supplemental Instruction]

If your verdict is in favor of plaintiff, plaintiff will not be required to pay income taxes on the award and you must not add to or subtract from the award any amount on account of income taxes.

The above charge should not be used as to causes of action subject to the provisions of EPTL 5-4.3; see PJI 2:151C. It should also not be used as to a cause of action pursuant to the Federal Employer's Liability Act for lost wages, BNSF Railway Company v Loos, 139 SCt 893 (2019).

CPLR 4546, applicable to medical, dental, and podiatric malpractice actions, requires the court to reduce any award for lost earnings or impairment of earning ability to account for the federal, state and local income taxes that the court finds with reasonable certainty "the plaintiff would have been obligated by law to pay." EPTL 5-4.3, applicable to wrongful death actions grounded in medical or dental malpractice, requires the jury to "consider," in connection with the assessment of the amount that would have been available for support of the distributees had the decedent lived, the income taxes that decedent would have been obligated by law to pay. The CPLR and EPTL provisions contain express directions as to what the jury must be instructed with respect to income tax considerations. Pattern charges for use in actions subject to CPLR 4546 and/or EPTL 5-4.3 appear in PJI 2:151C.

As to lawyers' fees it is error to instruct the jury that lawyers' fees are customarily paid from jury verdicts, Brod v Central School Dist. No. 1 of Towns of Sand Lake and Poestenkill, Rensselaer County, 53 AD2d 1002, 386 NYS2d 125 (3d Dept

1976). Attorneys' fees are merely incidents of litigation, Klein v Sharp, 41 AD2d 926, 343 NYS2d 1014 (1st Dept 1973), and absent a contractual obligation or specific statutory authority, such fees do not constitute an element of damage and are not recoverable, Buffalo v J. W. Clement Co., 28 NY2d 241, 321 NYS2d 345, 269 NE2d 895 (1971); Piaget Watch Corp. v Audemars Piguet & Co., 35 AD2d 920, 316 NYS2d 104 (1st Dept 1970).

Pre-verdict interest is not recoverable in a personal injury case even though the action is for breach of warranty of fitness for use, Gillespie v Great Atlantic & Pacific Tea Co., 26 AD2d 953, 276 NYS2d 372 (2d Dept 1966), mod, 21 NY2d 823, 288 NYS2d 907, 235 NE2d 911 (1968); Hyatt v Pepsi-Cola Albany Bottling Co., 32 AD2d 574, 298 NYS2d 1005 (3d Dept 1969); Raman v Carborundum Co., 31 AD2d 552, 295 NYS2d 534 (2d Dept 1968). However, where the trial is bifurcated, interest on the recovery is computed from the date that liability was determined, rather than from the date of the final judgment, Love v State, 78 NY2d 540, 577 NYS2d 359, 583 NE2d 1296 (1991); Gunnarson v State, 70 NY2d 923, 524 NYS2d 396, 519 NE2d 307 (1987); Trimboli v Scarpaci Funeral Home, Inc., 37 AD2d 386, 326 NYS2d 227 (2d Dept 1971), aff'd, 30 NY2d 687, 332 NYS2d 637, 283 NE2d 614 (1972). Interest is measured from the date that liability was fixed regardless of which party is responsible for any delay in the assessment of plaintiff's damages, Love v State, supra. Where the trial is bifurcated and the trial court structures the award pursuant to Articles 50-A and 50-B of the CPLR, interest is properly computed on the present value of future damages from the date of the liability verdict under CPLR 50-A and 50-B, Rohring v Niagara Falls, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994); Karagiannis v New York State Thruway Authority, 209 AD2d 993, 619 NYS2d 906 (4th Dept 1994). Likewise, under CPLR 5003 post-judgment interest accrues on awards for future damages when such awards are paid in a structured judgment pursuant to CPLR Article 50-A, Silvestri v Smallberg, 88 NY2d 1004, 648 NYS2d 870, 671 NE2d 1267 (1996).

An injured plaintiff's inability to perform household services is a quantitative economic loss separate and apart from pain and suffering, Cramer v Kuhns, 213 AD2d 131, 630 NYS2d 128 (3d Dept 1995); see Compani v State, 183 AD2d 966, 583 NYS2d 582 (3d Dept 1992). Damages for loss of household services should be awarded only for those services which are reasonably certain to be incurred and necessitated by plaintiff's injuries, Schultz v Harrison Radiator Div. General Motors Corp., 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997). In Schultz, the court held that since plaintiff did not incur any actual expenditures for household services between the accident and the date of verdict, having relied on the gratuitous assistance of relatives and friends, the jury improperly awarded plaintiff an award for household services for that period.

Annot: 14 ALR3d 541.

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166 A.D.3d 1278
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of the Claim of Gregory MOLETTE, Appellant,
v.
NEW YORK CITY TRANSIT AUTHORITY, Respondent.
Workers' Compensation Board, Respondent.

526569
|
Calendar Date: October 19, 2018
|
Decided and Entered: November 15, 2018

Synopsis

Background: Claimant, a city transit authority employee, filed claim with Workers' Compensation Board after he was injured after he tripped in pothole, fell, and sustained injury to left shoulder. Claim was amended to include consequential right shoulder injury. Board affirmed Workers' Compensation Law Judge's denial of claimant's application to amend claim to include consequential injury to neck. Claimant appealed.

[Holding:] The Supreme Court, Appellate Division, Rumsey, J., held that claimant did not suffer consequential injury to neck.

Affirmed.

West Headnotes (2)

[1] **Workers' Compensation**
Credibility and conflict with other evidence

Workers' Compensation Board has the exclusive province to resolve conflicting medical opinions.

2 Cases that cite this headnote

[2] **Workers' Compensation**
Head, neck, and shoulder injuries

Claimant, a city transit authority employee, did not suffer consequential injury to neck after he was injured when he tripped in pothole, fell, and sustained injury to left shoulder; claimant's treating chiropractor opined that neck injury was consequentially related to shoulder injury, medical doctor who conducted an independent medical examination of claimant opined that there was no evidence of pathology of neck injury, and Workers' Compensation Board was entitled proper deference to its resolution of conflicting medical evidence and credibility determinations.

4 Cases that cite this headnote

Attorneys and Law Firms

****799** Geoffrey Schotter, New York City, for appellant.

Foley, Smit, O'Boyle & Weisman, Hauppauge (Theresa E. Wolinski of counsel), for New York City Transit Authority, respondent.

Before: Lynch, J.P., Clark, Mulvey, Rumsey and Pritzker, JJ.

MEMORANDUM AND ORDER

Rumsey, J.

***1278** Appeal from a decision of the Workers' Compensation Board, filed June 15, 2017, which ruled that claimant did not suffer a consequential injury to his

neck.
In 2011, while working for the New York City Transit Authority, claimant tripped in a pothole and fell, thereby sustaining an injury to his left shoulder. The Transit Authority did not dispute the left shoulder claim and paid claimant his full wages during his disability. The claim was later amended to include claimant's consequential right shoulder injury.

In 2016, claimant sought to amend the claim to include a consequential neck injury. Following an examination by an independent medical examiner and a hearing, the Workers' Compensation Law Judge denied claimant's application to amend, finding that there was no causal relationship for a consequential neck injury. Upon review, the Workers' Compensation Board affirmed, and claimant appeals.

[1]We affirm. Whether claimant's neck injury consequentially arose from the left shoulder injury that he sustained in the 2011 work-related accident was a factual issue for the Board to resolve, and its determination will not be disturbed so long as it is supported by substantial evidence (*see Matter of Schmerler v. Longwood Sch. Dist.*, 163 A.D.3d 1373, 1374, 81 N.Y.S.3d 669 [2018]). Moreover, the Board has the exclusive province to resolve conflicting medical opinions (*see id.*).

[2]Claimant's treating chiropractor, Xerxes Oshidar, opined that claimant's neck injury is consequentially related to the left shoulder injury. Oshidar explained ****800** that, due to claimant's weakened shoulder muscles, the muscles that connect the neck and the shoulder have been "overutilized," thereby altering the "biomechanics of [his] neck" and causing pain. In contrast, Julio Westerband, a medical doctor who conducted an independent medical examination of claimant, opined that there was no evidence of the pathology of his neck injury. Westerband noted that there was an "[o]bvious attempt to mislead the exam" and that the statements contained in Oshidar's report are "pure pseudoscience speculation." According proper deference to the Board's resolution of conflicting medical evidence and credibility determinations, we find the Board's determination to be supported by substantial evidence (*see* ***1279** *Matter of Johnson v. Adams & Assoc.*, 140 A.D.3d 1552, 1553, 34 N.Y.S.3d 709 [2016]; *Matter of Pearson v. Bestcare*, 48 A.D.3d 862, 851 N.Y.S.2d 288 [2008], *lv denied* 10 N.Y.3d 715, 862 N.Y.S.2d 336, 892 N.E.2d 402 [2008], *cert denied* 557 U.S. 907, 129 S.Ct. 2796, 174 L.Ed.2d 297 [2009]; *Matter of Jones v. New York State Dept. of Correction*, 35 A.D.3d 1025, 1026, 825 N.Y.S.2d 316 [2006]).

Lynch, J.P., Clark, Mulvey and Pritzker, JJ., concur.

ORDERED that the decision is affirmed, without costs.

All Citations

166 A.D.3d 1278, 86 N.Y.S.3d 798, 2018 N.Y. Slip Op. 07820

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150 A.D.3d 1129
Supreme Court, Appellate Division, Second Department, New York.

Joseph PASQUARETTO, respondent,
v.
LONG ISLAND UNIVERSITY, et al., defendants,
Raj Persaud, et al., appellants.

May 24, 2017.

Attorneys and Law Firms

Phelan, Phelan & Danek, LLP, Albany, NY (Timothy S. Brennan of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York, NY (Brian J. Shoot and Gabriel A. Arce–Yee of counsel), for respondent.

Opinion

***1130** Appeal from an order of the Supreme Court, Nassau County (Angela G. Iannacci, J.), dated March 26, 2015. The order denied the motion of the defendants Raj Persaud, Raj Persaud, President Kappa Sigma Fraternity Omicron–Beta Chapter, Kappa Sigma Fraternity Omicron–Beta Chapter, Eric Vingo, and Daniel Lacy for summary judgment dismissing the amended ****647** complaint insofar as asserted against them.

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendants Raj Persaud, Raj Persaud, President Kappa Sigma Fraternity Omicron–Beta Chapter, Kappa Sigma Fraternity Omicron–Beta Chapter, Eric Vingo, and Daniel Lacy for summary judgment dismissing the amended complaint insofar as asserted against them is granted.

In 2009, the plaintiff, who at the time was a student at the C.W. Post Campus of Long Island University, was "pledging" for membership in the Kappa Sigma Fraternity through its Omicron–Beta Chapter (hereinafter the Local Chapter). According to the plaintiff, he participated in a pledge activity that caused him to sustain personal injuries by exacerbating his preexisting asthma condition. The plaintiff further alleged, inter alia, that his personal injuries resulted from the negligence of the Local Chapter and members of the Local Chapter, the defendants Raj Persaud, Raj Persaud in his capacity as President of the Local Chapter, Eric Vingo, and Daniel Lacy (hereinafter collectively the Local Fraternity Defendants). The Local Fraternity Defendants moved for summary judgment dismissing the amended complaint insofar as asserted against them, and the Supreme Court denied the motion. The Local Fraternity Defendants appeal.

"The elements of a cause of action alleging common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach of that duty constituted a proximate cause of the injury" (*Roberson v. Wyckoff Hgts. Med. Ctr.*, 123 A.D.3d 791, 792, 999 N.Y.S.2d 428; *see Turcotte v. Fell*, 68 N.Y.2d 432, 437, 510 N.Y.S.2d 49, 502 N.E.2d 964). "Even when negligence and injury are both properly found, the negligent party may be held liable only where the alleged negligence is found to be a proximate cause of the injury" (*Canonico v. Beechmont Bus Serv., Inc.*, 15 A.D.3d 327, 328, 790 N.Y.S.2d 36). Moreover, "although 'the determination of the issue of causation is generally for the trier of fact, upon a motion for summary judgment the court must determine if a prima facie case of negligence is established in the first instance' " (*Khan v. Bangla Motor & Body Shop, Inc.*, 27 A.D.3d 526, 528, 813 N.Y.S.2d 126, quoting *Fowler v. Sammut*, 259 A.D.2d 516, 517, 686 N.Y.S.2d 109).

***1131** Here, the Local Fraternity Defendants established their prima facie entitlement to judgment as a matter of law based upon their submission of the affirmed medical report of their examining physician, which demonstrated that their alleged negligence was not a proximate cause of the plaintiff's alleged injuries (*see Roberson v. Wyckoff Hgts. Med. Ctr.*, 123 A.D.3d at 792, 999 N.Y.S.2d 428). In opposition, the plaintiff failed to raise a triable issue of fact as to causation (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). The report of his treating physician, which was neither sworn to nor affirmed to be true under the penalties of perjury, did not constitute competent evidence (*see* CPLR 2106; *Bourgeois v. North Shore University Hosp. at Forest Hills*, 290 A.D.2d 525, 526, 737 N.Y.S.2d 101; *Parisi v. Levine*, 246 A.D.2d 583, 583, 667 N.Y.S.2d 283). Moreover, the remaining evidence submitted by the plaintiff in opposition to the motion was insufficient to raise a triable issue of fact.

The plaintiff's remaining contention is unpreserved for appellate review.

Accordingly, the Supreme Court should have granted the Local Fraternity Defendants' motion for summary judgment dismissing the amended complaint insofar as asserted against them.

All Citations

150 A.D.3d 1129, 52 N.Y.S.3d 646 (Mem), 2017 N.Y. Slip Op. 04128

****648** DILLON, J.P., LEVENTHAL, MILLER and BRATHWAITE NELSON, JJ., concur.

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147 A.D.3d 1165
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of the Claim of Maurice OPARAJI, Appellant,
v.
BOOKS & RATTLES, et al., Respondents.
Workers' Compensation Board, Respondent.

Feb. 9, 2017.

Synopsis
Background: Claimant appealed decision of Workers' Compensation Board that he did not sustain causally-related injury to his lumbar spine and denied authorization for surgery to his right shoulder.

Holdings: The Supreme Court, Appellate Division, Aarons, J., held that:

[1] substantial evidence supported Board determination that claimant's back injury was not causally-related to physical altercation, and

[2] substantial evidence supported Board decision not to authorize claimant's right shoulder surgery for lack of causal relationship.

Affirmed.

West Headnotes (4)

[1] **Workers' Compensation**
Accident or injury and consequences thereof in general

The Workers' Compensation Board is empowered to determine the factual issue of whether a causal relationship exists between an injury and a workplace accident based upon the record, and its determination will not be disturbed when supported by substantial evidence.

5 Cases that cite this headnote

[2] **Workers' Compensation**
Back injuries

Substantial evidence supported determination by Workers' Compensation Board that claimant's back injury to his lumbar spine was not causally-related to physical altercation he was involved in with parent of one of his students, including that physician who saw claimant after altercation diagnosed him with displaced intervertebral cervical disc, not low back syndrome, that his initial claim form listed constant pain in his chest and shortness of breath, but did not mention any back pain, and that physician who examined claimant shortly after altercation reported that claimant did not mention any back injury.

1 Cases that cite this headnote

[3] **Workers' Compensation**
Extent of Right

Under workers' compensation law, employers are required to pay for medical treatment, procedures, devices, tests, and services for employees who sustain causally related injuries from a workplace accident for such period as the nature of the injury or the process of recovery may require.

[4] **Workers' Compensation**
Compensability of injury

Substantial evidence supported decision by Workers' Compensation Board not to authorize claimant's right shoulder surgery for lack of causal relationship between injury and physical altercation claimant was involved in with parent

of one of his students, since nothing in medical records indicated that claimant was diagnosed with shoulder injury, or complained of shoulder pain, contemporaneous with altercation, and physician who examined claimant on behalf of workers' compensation carrier opined that condition of claimant's right shoulder was result of degenerative changes.

1 Cases that cite this headnote

Attorneys and Law Firms

****150** Maurice Oparaji, Rosedale, appellant pro se.

William O'Brien, State Insurance Fund, New York City (David J. Schatten of counsel), for Books & Rattles and another, respondents.

****151** Before: PETERS, P.J., EGAN JR., ROSE, DEVINE and AARONS, JJ.

Opinion

AARONS, J.

***1165** Appeal from a decision of the Workers' Compensation Board, filed December 29, 2014, which ruled that claimant did not sustain a causally-related injury to his back and denied authorization for surgery to his right shoulder.

In 2008, claimant, a preschool teacher, was injured when he was involved in a physical altercation with the parent of a student. His claim for workers' compensation benefits was established for injuries to his neck and chest. In 2010, the claim was amended to include injuries to both his arms. At that time, claimant also sought to establish a causally-related injury to his back and requested that surgery to his right shoulder be authorized. A Workers' Compensation Law Judge thereafter amended the claim to include a back injury and authorized surgery for claimant's right shoulder. Upon review, a majority decision of the Workers' Compensation Board affirmed, with one Board panel member dissenting. The employer's workers' compensation carrier requested full Board review of the Board panel's decision. Following such review, the full Board reversed the decision of the Board panel and found that claimant did not sustain a causally-related injury to his back and denied authorization for right shoulder surgery. Claimant now appeals.

[1] [2] We affirm. "The Board is empowered to determine the factual issue of whether a causal relationship exists based upon the record, and its determination will not be disturbed when supported by substantial evidence" (*Matter of Virtuoso v. Glen Campbell Chevrolet, Inc.*, 66 A.D.3d 1141, 1142, 887 N.Y.S.2d 330 [2009] [citations omitted]; *see Matter of Mallette v. Flattery's*, 111 A.D.3d 989, 990, 975 N.Y.S.2d 210 [2013]). In support of a finding of a causally-related back injury, claimant presented the reports and testimony of his treating physician, surgeon Emmanuel Lambrakis. Lambrakis testified that he began treating claimant in 2010, and he diagnosed claimant as suffering from, among other things, a causally-related injury to his lumbar spine. Lambrakis also testified that he concluded that the back injury was a result of the 2008 altercation, based upon the diagnosis of the physician who treated claimant right after the altercation, who Lambrakis believed diagnosed claimant with low back syndrome. The record ***1166** reflects, however, that claimant's previous physician limited his diagnosis to a displaced intervertebral cervical disc. Moreover, claimant's 2008 C–3 employee claim form lists constant pain in the chest and shortness of breath, with no mention of back pain. Further, a physician who examined claimant in May 2009 reported that claimant complained of pain in his chest, neck and shoulder as a result of the altercation, with no mention of a back injury. Based upon our review of the record, the Board's decision that claimant failed to establish a causally-related back injury is supported by substantial evidence (*see Matter of Guz v. Jewelers Machinist, Inc.*, 71 A.D.3d 1272, 1273, 896 N.Y.S.2d 267 [2010]; *Matter of Hernandez v. Vogel's Collision Serv.*, 48 A.D.3d 861, 861–862, 851 N.Y.S.2d 287 [2008]).

[3] [4] Turning to the authorization of right shoulder surgery, "employers are required to pay for medical treatment, procedures, devices, tests and services ... for employees who sustain *causally related* injuries for such period as the nature of the injury or the process of recovery may require" (*Matter of Pinkhasov v. Auto One Ins.*, 140 A.D.3d 1487, 1488, 34 N.Y.S.3d 265 [2016] [internal quotation marks and ****152** citations omitted]). Lambrakis diagnosed claimant as suffering from a derangement of the right shoulder and a partial tear of the rotator cuff, as evidenced by a 2010 MRI of the shoulder, and that the conditions were causally related to the 2008 altercation. Lambrakis, however, incorrectly concluded that claimant was diagnosed with a right shoulder injury by the initial treating physician, insofar as there is nothing

in the medical records indicating either a diagnosis of a shoulder injury or complaints of shoulder pain by claimant contemporaneous with the altercation. Additionally, orthopedic surgeon John Xethalis, who examined claimant in 2010 and 2011, concluded that claimant's right shoulder condition was causally related to the altercation. Xethalis testified, however, that claimant informed him that he was experiencing pain in the right shoulder immediately after the altercation, a contention that is not supported by claimant's medical records. In contrast, orthopedic surgeon Jonathan Glassman, who examined claimant on behalf of the carrier in July 2010 and February 2011 and reviewed his medical records, opined that the condition of claimant's right shoulder, including the rotator cuff tear, was the result of degenerative changes and not causally related to the 2008 altercation. Glassman noted the lack of any contemporaneous complaints of right shoulder pain by claimant following the altercation. According proper deference to the Board's resolution of conflicting medical evidence and evaluation of witness credibility (*see Matter of Johnson v. Adams & Assoc.*, 140 A.D.3d 1552, 1553, 34 N.Y.S.3d 709 [2016]; *Matter* ***1167** *of Wilson v. Yonkers Raceway/Empire City*, 126 A.D.3d 1260, 1261, 6 N.Y.S.3d 694 [2015]), we conclude that the Board's decision not to authorize causally-related right shoulder surgery is supported by substantial evidence and it will not be disturbed. Claimant's remaining claims have been considered and found to be without merit.

ORDERED that the decision is affirmed, without costs.

PETERS, P.J., EGAN JR., ROSE and DEVINE, JJ., concur.

All Citations

147 A.D.3d 1165, 47 N.Y.S.3d 150, 2017 N.Y. Slip Op. 01036

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103 A.D.3d 828
Supreme Court, Appellate Division, Second Department, New York.

Neville CROOKS, respondent,
v.
E. PETERS, LLC, appellant, et al., defendants.

Feb. 27, 2013.

Synopsis

Background: Worker, an electrician's helper, sued **premises** owner for personal injuries sustained in fall from ladder. After jury found that accident was **substantial** factor in causing worker's right ankle/foot **injury**, but was not **substantial** factor in causing **injury** to his lower back, right elbow, or left knee, and jury had failed to award future damages, the Supreme Court, Kings County, Baily–Schiffman, J., granted worker new trial on issues of causation and damages. Owner appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] jury's determination on causation was not contrary to weight of evidence, but

[2] jury verdict on issue of future damages was result of juror confusion and/or impermissible compromise.

Affirmed as modified.

West Headnotes (4)

[1] **New Trial**
Weight of Evidence

Jury verdict should not be set aside as contrary to weight of evidence unless jury could not have reached verdict by any fair interpretation of evidence.

9 Cases that cite this headnote

[2] **Appeal and Error**
Jury as factfinder below

It is for jury to make determinations as to credibility of witnesses, and great deference in this regard is accorded to jury, which had opportunity to see and hear witnesses.

5 Cases that cite this headnote

[3] **New Trial**
Negligence and torts in general

Jury's determination that worker's fall from ladder was **substantial** factor in causing his right ankle/foot **injury**, but was not **substantial** factor in causing **injuries** to his lower back, right elbow, or left knee, was supported by fair interpretation of evidence and, thus, was not contrary to weight of evidence, as required for grant of new trial; furthermore, record did not reflect any confusion on jury's part. McKinney's CPLR 4404.

4 Cases that cite this headnote

[4] **New Trial**
New trial as to part of issues

Trial court properly granted new trial on issue of future damages on ground that jury verdict awarding $0 for future pain and suffering, and $0 for future lost earnings and benefits, despite awards of $2 million for past pain and suffering, $2 million for past lost earnings and benefits, and $1 million for past medical expenses, was result of juror confusion and/or impermissible compromise.

Attorneys and Law Firms

****166** Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains, N.Y. (Nancy Quinn Koba of counsel), for appellant.

Block, O'Toole & Murphy, LLP (Mischel & Horn, New York, N.Y. [Scott T. Horn and Naomi M. Taub], of counsel), for respondent.

REINALDO E. RIVERA, J.P., L. PRISCILLA HALL, SHERI S. ROMAN, and ROBERT J. MILLER, JJ.

Opinion

***828** In an action to recover damages for personal injuries, the defendant E. Peters, LLC, appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Baily–Schiffman, J.), dated January 18, 2012, as, upon a jury verdict finding that the negligence of the defendant E. Peters, LLC, was a **substantial** factor in causing **injury** to the plaintiff's right ankle/foot, that the negligence of the defendant E. Peters, LLC, was not a **substantial** factor in causing **injury** to the plaintiff's lower back, right elbow, or left knee, and awarding the plaintiff the sums of $2 million for past pain and suffering, $2 million for past lost earnings and benefits, $1 million for past medical expenses, $0 for future pain and suffering, and $0 for future lost earnings and benefits, granted those branches of the plaintiff's motion which were pursuant to CPLR 4404 to set aside the jury verdict on the issues of causation and future damages and for a new trial on those issues.

***829** ORDERED that the order is modified, on the facts, by deleting the provision thereof granting that branch of the plaintiff's motion which was pursuant to CPLR 4404 to set aside the jury verdict on the issue of causation and for a new trial on that issue, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the issue of past and future damages sustained by reason of the injury to the plaintiff's right ankle/foot.

The plaintiff fell 12 feet from a ladder while working as an electrician's helper on **premises** owned by the defendant E. Peters, LLC (hereinafter Peters). On a prior appeal, this Court affirmed the Supreme Court's award of summary judgment on the issue of liability to the plaintiff on the cause of action alleging a violation of Labor Law § 240(1) (*see Crooks v. E. Peters, LLC*, 60 A.D.3d 717, 875 N.Y.S.2d 521). Thereafter, a jury trial on the issues of causation and damages was held. The jury found that the accident was a substantial factor in causing the plaintiff's right ankle/foot **injury**, but was not a **substantial** factor in causing **injury** to his lower back, right elbow, or left knee. The jury awarded the sums of $2 million for past pain and suffering, $2 million for past lost earnings and benefits, and $1 million for past medical expenses, but made no award for future damages.

The plaintiff moved pursuant to CPLR 4404 to set aside the verdict on the ground that it was the result of juror confusion and impermissible compromise and contrary to the weight of the evidence. The plaintiff sought, inter alia, a new trial on the issues of causation and damages. The Supreme Court granted those branches of the plaintiff's motion and directed a new trial on the issues of causation and damages. On appeal, Peters contends that the Supreme Court erred in granting those branches of the plaintiff's motion which were to set aside the jury verdict on the ****167** issues of causation and future damages and for a new trial on those issues.

[1] [2] A jury verdict should not be set aside as contrary to the weight of the evidence unless 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, 746, 631 N.Y.S.2d 122, 655 N.E.2d 163; *Verizon N.Y., Inc. v. Orange & Rockland Utils., Inc.*, 100 A.D.3d 983, 954 N.Y.S.2d 641; *Nicastro v. Park*, 113 A.D.2d 129, 134, 495 N.Y.S.2d 184). "It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses" (*Exarhouleas v. Green 317 Madison, LLC*, 46 A.D.3d 854, 855, 847 N.Y.S.2d 866; *see Lopreiato v. Scotti*, 101 A.D.3d 829, 954 N.Y.S.2d 895).

[3] ***830** Here, the jury's determination on the issue of causation—that the accident was a substantial factor in causing the plaintiff's right ankle/ foot **injury**, but was not a **substantial** factor in causing **injuries** to his lower back, right elbow, or left knee—was supported by a fair interpretation of the evidence and, thus, was not contrary to the weight of the evidence. Furthermore, the record does not reflect any confusion on the jury's part with respect to that issue (*see Martinez v. Te*, 75 A.D.3d 1, 6–7, 901 N.Y.S.2d 161). Accordingly, the Supreme Court erred in granting that branch of the plaintiff's motion which was pursuant to CPLR 4404 to set aside the jury verdict on the issue of causation and for a new trial on that issue.

[4] However, contrary to Peters's contention, the Supreme Court properly determined that the jury verdict on the issue of future damages was the result of juror confusion and/or impermissible compromise (*see Zimnoch v. Bridge View Palace, LLC,* 69 A.D.3d 928, 930, 893 N.Y.S.2d 253). Accordingly, the court properly granted a new trial with respect to that issue. In light of the foregoing and since the propriety of the Supreme Court's setting aside of the jury verdict on the issue of past damages is not at issue on this appeal, the matter must be remitted to the Supreme Court, Kings County, for a new trial on the issue of past and future damages sustained by reason of the injury to the plaintiff's right ankle/foot.

In light of our determination, we need not reach the parties' remaining contentions.

All Citations

103 A.D.3d 828, 960 N.Y.S.2d 165, 2013 N.Y. Slip Op. 01226

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50 A.D.3d 1266
Supreme Court, Appellate Division, Third Department, New York.

Karl KING, Appellant–Respondent,
v.
Leander PERROTTE, Respondent–Appellant.

April 11, 2008.

Synopsis
Background: Roofer, who was injured while removing and replacing roof on house owned by building contractor, brought action against contractor, alleging violation of scaffold law and common-law negligence. The Supreme Court, Clinton County, Dawson, J., entered judgment upon jury verdict rendered in favor of contractor. Parties cross-appealed.

Holdings: The Supreme Court, Appellate Division, Kavanagh, J., held that:

[1] malfunctioning of forklift constituted scaffold law violation;

[2] jury verdict finding that scaffold law violation was not **substantial** cause of roofer's **injuries** was based upon fair interpretation of the record;

[3] trial court's error in precluding contractor from making any argument to jury that roofer's negligence was proximate cause of his injuries was harmless;

[4] contractor had absolute right to make argument to jury that roofer's negligence was proximate cause of his injuries; and

[5] jury's verdict that contractor was not negligent was supported by weight of credible evidence.

Affirmed.

West Headnotes (7)

[1] **Negligence**
Scaffolding laws

Malfunctioning of bucket loader forklift while roofer was unloading shingles from forklift onto roof constituted scaffold law violation. McKinney's Labor Law § 240(1).

[2] **Negligence**
Particular cases

Jury verdict finding that scaffold law violation, which occurred when bucket ladder forklift malfunctioned while roofer was unloading shingles from forklift onto roof, was not **substantial** cause of roofer's toe **injuries** was based upon fair interpretation of the evidence; jury could have reasonably concluded that failure of forklift did not cause any shingles to fall on roofer's toe, and instead could have found that roofer was injured simply because he dropped bale of shingles that he was holding, and that act was not in any way related to malfunctioning of forklift. McKinney's Labor Law § 240(1).

[3] **Negligence**
Liabilities relating to construction, demolition and repair

Simply because a scaffold law violation has in fact occurred does not necessarily mean that malfunction in question caused the plaintiff's injuries. McKinney's Labor Law § 240(1).

[4] **Negligence**
Particular cases

Only if questions of liability and damages are so interwoven that it would be illogical to conclude

that a scaffold law violation existed but did not cause resulting injury would a trial court be justified in directing a verdict on issue of causation. McKinney's Labor Law § 240(1).

[5] **Appeal and Error**
Refusal of court to permit argument or conduct

Trial court's error in precluding building contractor from making any argument to jury that it was roofer's negligence, and not malfunction of forklift, that was proximate cause of roofer's injuries, in light of court's entry of directed verdict in roofer's favor as to existence of scaffold law violation, was harmless; ruling was obviously adverse to contractor's interest and did not in any way prejudice roofer. McKinney's Labor Law § 240(1).

[6] **Trial**
Statements as to Facts, Comments, and Arguments
Trial
Hearing and determination

Building contractor had absolute right, based on competent evidence introduced at trial, to argue to jury that roofer's negligence, and not malfunction of forklift, was sole proximate cause for any injuries that roofer sustained as result of incident, even though trial court entered directed verdict in roofer's favor as to existence of scaffold law violation. McKinney's Labor Law § 240(1).

[7] **Negligence**
Liabilities relating to construction, demolition and repair

Jury's finding that building contractor was not negligent was supported by weight of credible evidence, in roofer's action against contractor, seeking to recover damages for injuries he allegedly sustained as result of malfunctioning forklift; contractor's testimony regarding circumstances leading up to accident was corroborated in large measure by that of another eyewitness, and there was no evidence establishing that contractor had either actual or constructive notice of existence of any defect that would have caused forklift to malfunction. McKinney's Labor Law § 240(1).

Attorneys and Law Firms

****707** Conway & Kirby, L.L.P., Niskayuna (Andrew W. Kirby of counsel), for appellant-respondent.

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., Albany (Jessica A. Desany of counsel), for respondent-appellant.

Before: CARDONA, P.J., SPAIN, CARPINELLO, KAVANAGH and STEIN, JJ.

Opinion

KAVANAGH, J.

***1266** Cross appeals from a judgment of the Supreme Court (Dawson, J.), entered January ****708** 11, 2007 in Clinton County, upon a verdict rendered in favor of defendant.

Plaintiff was hired by defendant, a building contractor, to remove and replace the roof on a house which defendant had used as a rental property and was in the process of selling to his granddaughter. Defendant provided the shingles to be used in this project as well as a bucket loader forklift with an attachment (hereinafter the forklift) to transport the shingles to the job site. After defendant drove the forklift containing a palette of shingles to the work area, he raised the forklift's bucket by hydraulic lift to roof level and plaintiff and a coworker began removing shingles from the forklift onto the roof. In an apparent attempt to expedite this process, plaintiff stepped from the roof onto the forks of the lift and began handing bales of

shingles to his coworker, who in turn carried them onto the roof. From this point forward, the parties relate very different versions as to what then transpired in the moments leading up to the actual accident.

Plaintiff testified that defendant was still operating the forklift as he was standing on the bucket of the forklift some three feet above the level of the roof. According to plaintiff, suddenly, and without any warning, the lift began to move backward and, after it had moved three to five feet, the bucket tipped downward dumping plaintiff and its contents some 15 feet to the ground below.

Defendant's version is dramatically different. He testified that after he raised the bucket lift to an area just below the level of the roof, he exited the vehicle and watched as plaintiff and his coworker unloaded the shingles onto the roof. Suddenly, according to defendant, and in part corroborated by plaintiff's ***1267** coworker, the hydraulic lift began to move slowly downward and the bucket-carrying plaintiff and the palette of shingles-began to slowly descend to the ground below. As it descended, plaintiff remained standing in the bucket and continued to move shingles onto the roof. When it reached the ground, the bucket tilted downward and two to three bales of shingles slid off, rolled towards the garage and dented the garage door. Defendant, whose view of what transpired was partially obstructed by the forklift, walked around the apparatus and saw plaintiff standing next to the bucket holding a bale of shingles in one hand. According to defendant, plaintiff was laughing and, at that time, stated something to the effect that he had dropped a bale of shingles that he had been holding on his foot and that he was injured.

Later that day, plaintiff sought medical care and was subsequently diagnosed with a nondisplaced transverse fracture of his left toe. He later complained of pain in his back and knee, which he attributed to the injuries he had sustained in the accident. Plaintiff commenced this action against defendant based upon, among other things, violations of Labor Law § 200 and 240(1) and common-law negligence.

At the close of proof at trial, each party moved for a directed verdict. Supreme Court granted plaintiff's motion finding that the lift was a hoist that had malfunctioned during a construction related activity and that defendant had violated Labor Law § 240(1). The court submitted to the jury the question as to whether plaintiff's injuries were caused by this violation as well as whether defendant was negligent.[1] The jury returned a verdict in defendant's ****709** favor, finding that the Labor Law § 240(1) violation was not a **substantial** factor in causing plaintiff's **injuries** and that defendant was not negligent. Plaintiff moved to set the verdict aside as against the weight of the evidence and on the ground that, as rendered, it was inconsistent with the court's finding that the failure of the forklift constituted a Labor Law § 240(1) violation. Supreme Court denied the motion, plaintiff appeals and defendant cross appeals.[2]

In arguing that the jury's verdict was against the weight of the evidence, plaintiff claims that there is no real dispute that he fractured his toe as a result of this accident and that, based on the evidence submitted, the jury could not have reasonably ***1268** concluded that this injury was caused by anything other than a malfunction of the forklift. As such, plaintiff argues that this verdict should be set aside because the evidence " 'so preponderate [d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence' " (*Lolik v. Big V Supermarkets*, 86 N.Y.2d 744, 746, 631 N.Y.S.2d 122, 655 N.E.2d 163 [1995], quoting *Moffatt v. Moffatt*, 86 A.D.2d 864, 447 N.Y.S.2d 313 [1982], *affd.* 62 N.Y.2d 875, 478 N.Y.S.2d 864, 467 N.E.2d 528 [1984]; *see Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145 [1978]; *Black v. City of Schenectady*, 21 A.D.3d 661, 662, 800 N.Y.S.2d 240 [2005]). We disagree and, for reasons that follow, we affirm the judgment.

[1] Labor Law § 240(1) requires property owners "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure [to] furnish or erect, or cause to be furnished or erected for the performance of such labor, ... hoists ... and other devices which shall be so ... placed and operated as to give proper protection to a person so employed." While much is at issue in terms of the circumstances surrounding this accident, it is not in dispute that the forklift was being used to raise a palette of shingles to a height so that the shingles could be unloaded onto a roof. While the shingles were being unloaded onto the roof, the parties agree that the lift malfunctioned (although they dramatically differ as to the description of that malfunction) and plaintiff was subsequently injured (*see Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 577 N.Y.S.2d 219, 583 N.E.2d 932 [1991]; *Gonzalez v. Glenwood Mason Supply Co., Inc.*, 41 A.D.3d 338, 339, 839 N.Y.S.2d 74 [2007]). For that reason, we agree with Supreme Court's decision directing a verdict in plaintiff's favor as to the existence of a Labor Law § 240(1) violation (*see Fitzsimmons v. City of New York*, 37 A.D.3d 655, 657, 831 N.Y.S.2d 441 [2007]; *Gabriel v. Boldt Group, Inc.*, 8 A.D.3d 1058, 1059, 778 N.Y.S.2d 829 [2004]).

[2] [3] [4] However, simply because a Labor Law § 240(1)

violation had in fact occurred does not necessarily mean that the malfunction in question caused plaintiff's injuries (*see Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003]). Only if the questions of liability and damages are so interwoven that it would be illogical to conclude that a Labor Law § 240(1) violation existed but did not cause resulting injury would a trial court be justified in directing a verdict on the issue of causation (*see* ****710** *Futo v. Brescia Bldg. Co.*, 302 A.D.2d 813, 815, 755 N.Y.S.2d 125 [2003]; *Calderon v. Irani*, 296 A.D.2d 778, 778, 745 N.Y.S.2d 610 [2002]; *Darrow v. Lavancha*, 169 A.D.2d 965, 966, 564 N.Y.S.2d 861 [1991]). Here, there was dramatically different depictions presented by the parties as to what precisely occurred as a result of the forklift's malfunction, and the jury had to make a final determination as to which account was credible. The jury obviously adopted defendant's version of the events leading up to ***1269** plaintiff being injured, and this decision, as reflected by the verdict, enjoys ample support in the record (*see Starr v. Cambridge Green Homeowners Assn.*, 300 A.D.2d 779, 780–781, 751 N.Y.S.2d 640 [2002]; *Murphy v. Finer Home Alterations*, 300 A.D.2d 782, 782, 752 N.Y.S.2d 119 [2002]).

Specifically, the jury could have reasonably concluded that the failure of the forklift did not cause any of the shingles to fall on plaintiff's toe. Instead, it could have found that plaintiff was injured simply because he dropped the bale of shingles that he was holding and this act was not in any way related to the malfunction of the forklift. As such, it could have reasonably concluded that plaintiff's actions, and not the Labor Law § 240(1) violation, were the sole proximate cause of the accident (*see Danton v. Van Valkenburg*, 13 A.D.3d 931, 932, 787 N.Y.S.2d 431 [2004]). Because the jury's verdict was based upon a fair interpretation of the evidence, Supreme Court properly denied plaintiff's motion to set it aside (*see Cross v. Finch Pruyn & Co.*, 281 A.D.2d 836, 838, 722 N.Y.S.2d 312 [2001]).

[5] [6] At the charge conference held prior to submitting this matter to the jury, Supreme Court directed defendant not to argue to the jury that it was plaintiff's negligence and not the malfunction of the forklift that was the proximate cause of plaintiff's injuries. Specifically, the court indicated that its decision to direct the verdict on the Labor Law § 240(1) violation precluded defendant from making any such argument on the ground that comparative negligence is not a valid issue to be raised in response to such a violation. We find that this was error. Defendant had the absolute right, based on competent evidence introduced at trial, to argue that plaintiff's negligence, and not the malfunction of the hoist, was the sole proximate cause for any injuries that plaintiff sustained as a result of this incident (*see Ball v. Cascade Tissue Group–N.Y., Inc.*, 36 A.D.3d 1187, 1189, 828 N.Y.S.2d 686 [2007]; *Danton v. Van Valkenburg*, 13 A.D.3d at 932, 787 N.Y.S.2d 431; *Cross v. Finch Pruyn & Co.*, 281 A.D.2d at 837, 722 N.Y.S.2d 312). Given that this ruling was obviously adverse to defendant's interest and did not in any way prejudice plaintiff, it was harmless error (*compare Carlo v. Lynn Ladder & Scaffolding Co.*, 309 A.D.2d 999, 1000, 765 N.Y.S.2d 692 [2003]).

While Supreme Court incorrectly ruled at the charge conference that the Labor Law § 240(1) violation necessarily included a finding that the accident was proximately caused by such violation, the jury was not given such a specific instruction. The verdict questionnaire[3] specifically asked the jury to decide whether the failure of the forklift was a **substantial** factor in ***1270** causing any of the **injuries** that plaintiff claims to have incurred as a result of this incident. In that regard, we note that the court, without objection, instructed the jury that, to find for plaintiff, "you also have to find that the violation of the statute was a **substantial** factor in causing the **injuries**. In that regard, if you find that the failure of the hoist, that is the bucket loader to ****711** protect the plaintiff[,] was a **substantial** factor in causing plaintiff's **injuries**, you will find for the plaintiff. If you find that the failure of the hoist to protect the plaintiff was not a **substantial** factor in causing plaintiff's **injuries**, you will find for the defendant."

[7] We also agree that the jury's finding that defendant was not negligent was supported by the weight of the credible evidence. Not only was defendant's testimony regarding the circumstances leading up to the accident corroborated in large measure by that of another eyewitness, but there was no evidence introduced establishing that defendant had either actual or constructive notice of the existence of any defect that would have caused the forklift to malfunction while being used on this project (*see Gadani v. Dormitory Auth. of State of N.Y.*, 43 A.D.3d 1218, 1220, 841 N.Y.S.2d 709 [2007]; *Desharnais v. Jefferson Concrete Co., Inc.*, 35 A.D.3d 1059, 1061, 827 N.Y.S.2d 312 [2006]).

Because we find that Supreme Court properly denied plaintiff's motion to set aside the verdict, we need not reach the remainder of the issues presented in defendant's cross appeal. Plaintiff's remaining arguments have been reviewed and found to be without merit.

ORDERED that the judgment is affirmed, with costs to defendant.

CARDONA, P.J., SPAIN, CARPINELLO and STEIN, JJ., concur.

50 A.D.3d 1266, 855 N.Y.S.2d 706, 2008 N.Y. Slip Op. 03265

All Citations

Footnotes

1 At the close of trial, plaintiff chose not to have the Labor Law § 200 claim go to the jury.

2 Defendant cross-appeals from Supreme Court's decisions denying his motion for a directed verdict dismissing the Labor Law § 240(1) claims and granting plaintiff's motion for a directed verdict.

3 Plaintiff did not have any objections to the jury instructions or the verdict sheet.

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15 A.D.3d 327
Supreme Court, Appellate Division, Second Department, New York.

Gregory R. CANONICO, respondent,
v.
BEECHMONT BUS SERVICE, INC., et al., appellants.

Feb. 7, 2005.

Synopsis
Background: Motorist brought negligence action against owner and operator of school bus to recover damages for personal injuries he allegedly sustained when vehicle he was driving was hit from behind by bus. The Supreme Court, Westchester County, Jamieson, J., upon a jury verdict on issue of damages, awarded plaintiff the sums of $100,000 for past pain and suffering, $400,000 for future pain and suffering, and $60,000 for future medical expenses. Defendants appealed.

[Holding:] The Supreme Court, Appellate Division, held that issue of whether accident proximately caused all of plaintiff's injuries was for jury.

Reversed, and matter remitted.

West Headnotes (3)

[1] **Damages**
Natural and Probable Consequences of Torts
Damages
Personal Injuries and Physical Suffering

Plaintiff in negligence case bore the burden of proving, by a preponderance of the evidence, that the defendants' negligence was a proximate cause of his injuries.

2 Cases that cite this headnote

[2] **Damages**
Natural and Probable Consequences of Torts

Even when negligence and injury are both properly found, the negligent party may be held liable only where the alleged negligence is found to be a proximate cause of the injury.

2 Cases that cite this headnote

[3] **Damages**
Questions for Jury

Issue of whether accident, in which vehicle was hit from behind by school bus, proximately caused all of the injuries for which motorist sought to recover damages was for jury in motorist's negligence action against owner and operator of school bus.

1 Cases that cite this headnote

Attorneys and Law Firms

****37** Kevin J. Barry, White Plains, N.Y., for appellants.

Cascione, Purcigliotti & Galluzzi, P.C. (Mischel, Neuman & Horn, P.C., New York, N.Y. [Scott T. Horn] of counsel), for respondent.

DAVID S. RITTER, J.P., GLORIA GOLDSTEIN, NANCY E. SMITH, and STEVEN W. FISHER, JJ.

Opinion

***327** In an action to recover damages for personal injuries, the defendants appeal from a judgment of the Supreme Court, Westchester County (Jamieson, J.), dated July 30, 2003, which, upon a jury verdict on the issue of damages, awarded the plaintiff the sums of $100,000 for past pain and suffering, $400,000 for future pain and suffering, and $60,000 for future medical expenses.

ORDERED that the judgment is reversed, on the law, and

the matter is remitted to the Supreme Court, Westchester County for a new trial on the issue of damages in accordance herewith, with costs to abide the event.

On July 9, 1999, the plaintiff allegedly sustained injuries to his neck, back, and right knee when the vehicle he was driving was hit from behind by a school bus owned by the defendant Beechmont Bus Service, Inc., and operated by the defendant William Gomez. The plaintiff commenced this action and successfully moved for partial summary judgment on the issue of liability. A jury trial on the issue of damages ensued.

At the trial, the plaintiff testified that he drove himself to the hospital after the accident. While he complained of pain to his neck, lumbosacral spine area, and left hand, he presented no outwardly visible signs of injury. Approximately six weeks after the accident, the plaintiff first complained to a physician about pain in his right knee, and a subsequent MRI revealed the presence of water on the knee, a bruised kneecap, and a tear in the patella tendon. His testimony as to whether his right knee had come into contact with the dashboard during the accident was ***328** equivocal. Also, the plaintiff testified that he was involved in a second accident in May 2002, which resulted both in new injuries to his thoracic spine area and aggravation of his pre-existing neck and lumbosacral back injuries.

[1] [2] In this negligence case, it is axiomatic that the plaintiff bore the burden of proving, by a preponderance of the evidence, that the defendants' negligence was a proximate cause of his injuries (*see e.g. Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 550, 684 N.Y.S.2d 139, 706 N.E.2d 1163). Even when negligence and injury are both properly found, the negligent party may be held liable only where the alleged negligence is found to be a proximate cause of the injury (*see Farinaro v. State of New York*, 132 A.D.2d 642, 643, 518 N.Y.S.2d 16; *see also* ****38** *McDonald v. We're Assoc. Co.*, 290 A.D.2d 422, 736 N.Y.S.2d 82; *Senno v. Picture Cars E.*, 275 A.D.2d 315, 712 N.Y.S.2d 52).

[3] Contrary to the plaintiff's contention, the relevant facts pertaining to causation were not entirely undisputed, and more than one possible inference could have been drawn from the evidence presented. Under the circumstances, it was for the jury, as the trier of fact, to decide whether the 1999 accident proximately caused all of the injuries for which the plaintiff sought to recover damages (*see Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 312, 434 N.Y.S.2d 166, 414 N.E.2d 666). By denying the defendants' application to include an interrogatory on causation on the verdict sheet and refusing to charge the jury on proximate cause, the Supreme Court removed causation from the jury's consideration and decided the issue as a matter of law despite the existence of triable issues of fact. This was error (*cf. Christopher v. St. Vincent's Hosp. & Med. Ctr.*, 121 A.D.2d 303, 307, 504 N.Y.S.2d 102; *compare with Siagha v. Salant–Jerome, Inc.*, 271 A.D.2d 274, 706 N.Y.S.2d 634). Accordingly, we remit the matter to the Supreme Court, Westchester County, for a new trial on the issue of damages to include the issue of causation.

Moreover, the Supreme Court improvidently exercised its discretion in precluding the defendants from cross-examining one of the plaintiff's treating physicians in connection with the May 2002 accident, despite evidence that the physician treated the plaintiff following that accident (*see Selly v. Port of N.Y. Auth.*, 36 A.D.2d 861, 321 N.Y.S.2d 683; *Chopak v. Walker*, 275 App.Div. 669, 86 N.Y.S.2d 202).

In light of our determination to grant a new trial, the defendants' contention that the Supreme Court erred in limiting the scope of their expert's testimony has been rendered academic inasmuch as the defendants will have an opportunity to supplement their expert disclosure notice (*see Hunter v. Tryzbinski*, 278 A.D.2d 844, 845, 719 N.Y.S.2d 422; *cf. People v. Evans*, 94 N.Y.2d 499, 706 N.Y.S.2d 678, 727 N.E.2d 1232; ***329** *Hothan v. Metropolitan Suburban Bus*, N.Y.L.J., Nov. 21, 2002, at 24, col. 3 [Sup. Ct., Nassau County, Winslow, J.]) and we do not reach the defendants' remaining contention regarding the award of damages.

All Citations

15 A.D.3d 327, 790 N.Y.S.2d 36, 2005 N.Y. Slip Op. 00965

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Following now are cases

which may be background

concerning the value of a matter

177 A.D.3d 929
Supreme Court, Appellate Division, Second Department, New York.

Calvin L. TARPLEY, et al., Respondents,
v.
NEW YORK CITY TRANSIT AUTHORITY, et al., Appellants.

2017–10506
|
Index No. 31972/10
|
Argued -October 11, 2019
|
November 20, 2019

Synopsis
Background: Motorist and his wife brought action against bus driver and city transit authority to recover damages for injuries they sustained when a city bus struck their stationary vehicle, which had been pulled over by a traffic ticketing agent. Following a jury verdict in favor of motorist and his wife, the Supreme Court, Queens County, Cheree A. Buggs, J., awarded them $13,920,850.74 in damages. Bus driver and transit authority appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] damages award for pain and suffering deviated materially from what would be reasonable compensation;

[2] damages award for future pain and suffering deviated materially from what would be reasonable compensation;

[3] damages award for past loss of services deviated materially from what would be reasonable compensation;

[4] damages award for future loss of services deviated materially from what would be reasonable compensation;

[5] evidence did not support damages award of $92,950 for past lost earnings and $301,600 for future lost earnings; and

[6] evidence supported damages award of $100,000 for future medical expenses.

Affirmed as modified and remitted.

West Headnotes (12)

[1] **Appeal and Error** Tort cases and personal injuries in general
Damages Questions for Jury

The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation. N.Y. CPLR § 5501(c).

1 Cases that cite this headnote

[2] **Damages** Injuries to the Person

The reasonableness of compensation to a plaintiff for personal injuries must be measured against relevant precedent of comparable cases. N.Y. CPLR § 5501(c).

[3] **Appeal and Error** Consideration of other cases and matters therein

Although prior damage awards in cases involving similar injuries are not binding upon the courts when calculating a damage award to a plaintiff for personal injuries, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation. N.Y. CPLR § 5501(c).

1 Cases that cite this headnote

[4] **Damages** Disc injuries

Jury's damages award in amount of $3 million for past pain and suffering to motorist whose stationary vehicle was struck by a city bus, causing injuries to motorist's neck and lower back, deviated materially from what would be reasonable compensation in motorist's personal injury action against bus driver and city transit authority. N.Y. CPLR § 5501(c).

[5] **Damages** Disc injuries

Jury's damages award in amount of $7 million for future pain and suffering to motorist whose stationary vehicle was struck by a city bus, causing injuries to motorist's neck and lower back, deviated materially from what would be reasonable compensation in motorist's personal injury action against bus driver and city transit authority. N.Y. CPLR § 5501(c).

[6] **Damages** Husband and wife

Jury's damages award in amount of $325,000 for past loss of services to wife of motorist whose stationary vehicle was struck by a city bus, causing injuries to motorist's neck and lower back, deviated materially from what would be reasonable compensation in motorist's personal injury action against bus driver and city transit authority. N.Y. CPLR § 5501(c).

[7] **Damages** Husband and wife

Jury's damages award in amount of $1,414,999.90 for future loss of services to wife of motorist whose stationary vehicle was struck by a city bus, causing injuries to motorist's neck and lower back, deviated materially from what would be reasonable compensation in motorist's personal injury action against bus driver and city transit authority. N.Y. CPLR § 5501(c).

[8] **Damages** Back and spinal injuries in general

Evidence did not support jury's damages award of $92,950 for past lost earnings and $301,600 for future lost earnings to motorist whose stationary vehicle was struck by a city bus, causing injuries to motorist's neck and lower back; award was speculative to extent that it exceeded income motorist could have expected to earn based on his W2 forms for previous two years, since no documentation or expert testimony was presented to establish that motorist's income was likely to increase in future years, and parties had stipulated to motorist's receipt of collateral source benefits from no-fault insurance and social security disability in amounts of $73,642 for past lost earnings $178,955 for future lost earnings, which exceeded recommended reasonable compensation.

[9] **Damages** Loss of earnings, services, or consortium

A party claiming lost earnings has the burden of proving the amount of actual past earnings with reasonable certainty, by means of tax returns or other documentation.

[10] **Damages** Loss of earnings, services, or consortium

Unsubstantiated testimony, without documentation, is insufficient to establish lost

earnings.

[11] **Damages** Future expenses

Evidence supported jury's damages award for future medical expenses in amount of $100,000 to motorist whose stationary vehicle was struck by a city bus, where motorist's treating physician provided an uncontroverted opinion that motorist would require a future lumbar fusion surgery, with an estimated cost of $100,000, due to his ongoing symptoms following a prior laminectomy, but evidence of future medical expenses in excess of that amount was speculative.

[12] **Damages** Expenses

Awards of damages for past and future medical expenses must be supported by competent evidence which establishes the need for, and the cost of, medical care.

Attorneys and Law Firms

****150** Lawrence Heisler, Brooklyn, N.Y. (Timothy J. O'Shaughnessy of counsel), for appellants.

Kelner and Kelner, New York, N.Y. (Joshua D. Kelner and Emil L. Samuels of counsel), for respondents.

WILLIAM F. MASTRO, J.P., COLLEEN D. DUFFY, BETSY BARROS, VALERIE BRATHWAITE NELSON, JJ.

DECISION & ORDER

***929** In an action to recover damages for personal injuries, etc., ***930** the defendants appeal from a judgment of the Supreme Court, Queens County (Chereé A. Buggs, J.), entered June 21, 2017. The judgment, insofar as appealed from, upon a jury verdict on the issue of liability in favor of the plaintiffs, upon a jury verdict on the issue of damages, inter alia, awarding the plaintiff Calvin L. Tarpley the principal sums of $3,000,000 for past pain and suffering, $92,950 for past lost earnings, $7,000,000 for future pain and suffering, $301,600 for future lost earnings, and $250,000 for future medical expenses, and awarding the plaintiff Cynthia Tarpley the principal sums of $325,000 for past loss of services and $1,414,999.90 for future loss of services, and upon the denial of the defendants' motion pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages as contrary to the weight of the evidence and as excessive, is in favor of the plaintiffs and against them in the total sum of $13,920,850.74.

ORDERED that the judgment is modified, on the facts and in the exercise of discretion, by deleting the provisions thereof awarding damages to the plaintiff Calvin L. Tarpley for past pain and suffering, past lost earnings, future pain and suffering, future lost earnings, and future medical expenses, and awarding damages to the plaintiff Cynthia Tarpley for past loss of services and future loss of services, and the matter is remitted to the Supreme Court, Queens County, for a new trial on the issue of damages for past and future pain and suffering, past and future loss of services, and future medical expenses only, ****151** and for the entry of an appropriate amended judgment thereafter, unless within 30 days after service upon the plaintiffs of a copy of this decision and order, the plaintiff Calvin L. Tarpley serves and files in the office of the Clerk of the Supreme Court, Queens County, a written stipulation consenting to reduce the verdict as to damages for past pain and suffering from the principal sum of $3,000,000 to the principal sum of $1,000,000, for future pain and suffering from the principal sum of $7,000,000 to the principal sum of $2,000,000, and for future medical expenses from the principal sum of $250,000 to the principal sum of $100,000, and to the entry of an appropriate amended judgment, and the plaintiff Cynthia Tarpley serves and files in the office of the Clerk of the Supreme Court, Queens County, a written stipulation consenting to reduce the amount of damages for past loss of services from the principal sum of $325,000 to the principal sum of $50,000, and for future loss of services from the principal sum of $1,414,999.90 to the principal sum of $100,000, and to the entry of an appropriate amended judgment accordingly; in the event that the plaintiffs so stipulate,

then the judgment, as so ***931** reduced and amended, is affirmed insofar as appealed from, without costs or disbursements.

On November 19, 2009, Calvin L. Tarpley (hereinafter Tarpley) was pulled over in his vehicle by a traffic ticketing agent at an intersection in Queens. After a ticket was issued to Tarpley, his stationary vehicle was struck at the front driver's side by a bus operated by Dhanpaul Singh and owned by the New York City Transit Authority (hereinafter together the defendants). Tarpley, and his wife Cynthia Tarpley (hereinafter together the plaintiffs) suing derivatively, commenced this action to recover damages.

The jury found the defendants to be 100% at fault in the happening of the accident. At trial on the issue of damages, the plaintiffs adduced testimony that Tarpley suffered injuries to his neck and lower back as a result of the collision, and was diagnosed with cervical and lumbar herniated discs with radiculopathy and myelopathy. In July 2010, Tarpley underwent an anterior cervical discectomy and fusion surgery. The surgery resulted in Tarpley developing a large, bulbous, keloid scar across the front of his neck. In April 2012, Tarpley underwent a laminectomy for the placement of a spinal cord stimulator to relieve his ongoing lower back pain. Despite undergoing these surgical procedures, Tarpley continued to experience chronic pain. He was treated with oral pain medications and injections which made him feel drowsy and lethargic. Following the collision, Tarpley was unable to drive long distances, participate in recreational sports, or play with his grandchildren, as he had before the accident. Tarpley's spinal surgeon testified that his injuries were permanent and that Tarpley would most likely need a subsequent surgical procedure involving the insertion of a plate and screws in Tarpley's lumbar spine.

The jury awarded Tarpley damages, inter alia, in the principal sums of $3,000,000 for past pain and suffering, $92,950 for past lost earnings, $7,000,000 for future pain and suffering, $301,600 for future lost earnings, and $250,000 for future medical expenses, and awarded Cynthia Tarpley damages in the principal sums of $325,000 for past loss of services and $1,414,999.90 for future loss of services. The defendants moved pursuant to CPLR 4404(a) to set aside the verdict as contrary to the weight of the evidence and as excessive, and the Supreme Court denied the motion. The parties subsequently stipulated to reduce the awards by the sum of $283,597 to ****152** account for Tarpley's collateral source benefits from no-fault insurance and social security disability. The parties agreed, ***932** inter alia, that these benefits would reduce Tarpley's awards for past lost earnings from $92,950 to $19,308, and for future lost earnings from $301,600 to $122,645. A judgment was subsequently entered in favor of the plaintiffs and against the defendants in the total sum of $13,920,850.74. The defendants appeal.

[1] [2] [3]" 'The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation' " (*Nayberg v. Nassau County*, 149 A.D.3d 761, 762, 51 N.Y.S.3d 160, quoting *Graves v. New York City Tr. Auth.*, 81 A.D.3d 589, 589, 916 N.Y.S.2d 793; *see* CPLR 5501[c]). " 'The reasonableness of compensation must be measured against relevant precedent of comparable cases' " (*Peterson v. MTA*, 155 A.D.3d 795, 798, 64 N.Y.S.3d 266, quoting *Halsey v. New York City Tr. Auth.*, 114 A.D.3d 726, 727, 980 N.Y.S.2d 487). " 'Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation' " (*Peterson v. MTA*, 155 A.D.3d at 798, 64 N.Y.S.3d 266, quoting *Vainer v. DiSalvo*, 107 A.D.3d 697, 698–699, 967 N.Y.S.2d 107).

[4] [5] [6] [7]Considering the nature and extent of the injuries sustained by Tarpley, the awards for past and future pain and suffering and past and future loss of services deviate materially from what would be reasonable compensation to the extent indicated herein (*see* CPLR 5501[c]; *see generally Peterson v. MTA*, 155 A.D.3d at 798–799, 64 N.Y.S.3d 266; *Starkman v. City of Long Beach*, 148 A.D.3d 1070, 50 N.Y.S.3d 148; *Stanisich v. New York City Tr. Auth.*, 73 A.D.3d 737, 900 N.Y.S.2d 422; *cf. Loja v. Lavelle*, 132 A.D.3d 637, 17 N.Y.S.3d 483; *Lopez v. New York City Dept. of Envtl. Protection*, 123 A.D.3d 982, 999 N.Y.S.2d 848; *Halsey v. New York City Tr. Auth.*, 114 A.D.3d at 727, 980 N.Y.S.2d 487).

[8] [9] [10]"A party claiming lost earnings has the burden of proving the amount of actual past earnings with reasonable certainty, by means of tax returns or other documentation" (*Deans v. Jamaica Hosp. Med. Ctr.*, 64 A.D.3d 742, 744, 883 N.Y.S.2d 580; *see Gore v. Cardany*, 167 A.D.3d 851, 852, 90 N.Y.S.3d 144; *Nayberg v. Nassau County*, 149 A.D.3d at 762, 51 N.Y.S.3d 160). "Unsubstantiated testimony, without documentation, is insufficient to establish lost earnings" (*Lodato v. Greyhawk N. Am., LLC*, 39 A.D.3d 494, 496, 834 N.Y.S.2d 239). Here, the award for lost earnings was speculative to the extent that it exceeded the income Tarpley could have expected to earn based on his 2008 and 2009 W2 forms submitted into evidence, since no

documentation or expert testimony was presented to establish that Tarpley's income was likely to increase in future ***933** years (*see Janda v. Michael Rienzi Trust*, 78 A.D.3d 899, 901, 912 N.Y.S.2d 237). In any event, because the parties stipulated to Tarpley's receipt of collateral benefits in the amounts of $73,642 for past lost earnings and $178,955 for future lost earnings, which amounts exceed the recommended reasonable compensation for Tarpley's lost earnings, additional damages need not be awarded for the same (*see Andino v. Mills*, 135 A.D.3d 407, 409, 23 N.Y.S.3d 63, *affd as modified* 31 N.Y.3d 553, 81 N.Y.S.3d 331, 106 N.E.3d 714).

[11] [12]" 'Awards of damages for past and future medical expenses must be supported by competent evidence which establishes ****153** the need for, and the cost of, medical care' " (*Quijano v. American Tr. Ins. Co.*, 155 A.D.3d 981, 983, 65 N.Y.S.3d 221, quoting *Starkman v. City of Long Beach*, 148 A.D.3d at 1072, 50 N.Y.S.3d 148). Here, an award of damages for future medical expenses was supported by the evidence (*see Nayberg v. Nassau County*, 149 A.D.3d at 762, 51 N.Y.S.3d 160). Tarpley's treating physician provided an uncontroverted opinion that Tarpley would require a future lumbar fusion surgery, with an estimated cost of $100,000, due to his ongoing symptoms following the prior laminectomy. However, the verdict awarding damages for future medical expenses in excess of $100,000 was speculative, and we reduce it accordingly (*see Mohamed v. New York City Tr. Auth.*, 80 A.D.3d 677, 679, 915 N.Y.S.2d 599; *O'Donnell v. Blanaru*, 33 A.D.3d 776, 776–777, 822 N.Y.S.2d 316; *Jansen v. Raimondo & Son Constr. Corp.*, 293 A.D.2d 574, 575, 741 N.Y.S.2d 71; *Sanvenero v. Cleary*, 225 A.D.2d 755, 756, 640 N.Y.S.2d 174).

MASTRO, J.P., DUFFY, BARROS and BRATHWAITE NELSON, JJ., concur.

All Citations

177 A.D.3d 929, 113 N.Y.S.3d 148, 2019 N.Y. Slip Op. 08440

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175 A.D.3d 1237
Supreme Court, Appellate Division, Second Department, New York.

Alfred CHUNG, Appellant,
v.
Rachelle SHAW, Respondent.

2017–03076
|
(Index No. 8375/13)
|
Argued - April 12, 2019
|
September 11, 2019

Synopsis
Background: Motorist brought action to recover damages for personal injuries he allegedly sustained in an automobile accident. Following a trial, the jury awarded motorist $25,000 for past pain and suffering, $25,000 for past medical expenses, and no damages for future pain and suffering or future medical expenses. Motorist moved to set aside the damages award as inadequate and for a new trial on the issue of damages. The Supreme Court, Kings County, Larry D. Martin, J., denied the motion. Motorist appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] jury's damages award for past pain and suffering was inadequate;

[2] jury's failure to award any damages for future pain and suffering was unreasonable;

[3] jury's damages award for past medical expenses was reasonable; and

[4] jury's failure to award any damages for future medical expenses was reasonable.

Affirmed as modified.

[1] New Trial Preponderance of evidence

A jury verdict on the issue of damages may be set aside as against the weight of the evidence only if the evidence on that issue so preponderated in favor of the plaintiff that the jury could not have reached its determination on any fair interpretation of the evidence.

1 Cases that cite this headnote

[2] Damages Questions for Jury

The amount of damages to be awarded for personal injuries is a question for the jury.

1 Cases that cite this headnote

[3] New Trial Amount of recovery in general

The jury's determination as to damages is entitled to great deference, but may be set aside if the award deviates materially from what would be reasonable compensation. N.Y. CPLR § 5501(c).

1 Cases that cite this headnote

[4] Appeal and Error Consideration of other cases and matters therein

Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation.

West Headnotes (10)

[5] **Damages**Disc injuries

Jury's damages award of $25,000 for past pain and suffering was inadequate in motorist's personal injury action, where motorist was required to undergo an anterior cervical discectomy and fusion surgery as a result of automobile accident.

[6] **Damages**Disc injuries

Jury's failure to award any damages for future pain and suffering was unreasonable in motorist's personal injury action, where it was undisputed that cervical fusion surgery motorist underwent as a result of automobile accident permanently reduced motorist's cervical range of motion.

[7] **Damages**Medical Treatment and Custodial Care

Jury's award of $25,000 in damages for past medical expenses was reasonable in motorist's personal injury action, although amount was lower than requested, where motorist's witnesses presented inconclusive testimony about cost of medical care motorist received for injuries he sustained in an automobile accident.

[8] **Damages**Future expenses

Jury's failure to award any damages for future medical expenses was reasonable in motorist's personal injury action to recover damages for injuries he sustained in an automobile accident.

[9] **Damages**Expenses

Awards of damages for past and future medical expenses must be supported by competent evidence which establishes the need for, and the cost of, medical care.

[10] **Appeal and Error**In general; general verdict

Motorist failed to preserve for appellate review his contention that jury verdict in his personal injury action to recover damages for injuries he sustained in an automobile accident was inconsistent.

Attorneys and Law Firms

****48** Subin Associates, LLP (Pollack, Pollack, Isaac & DeCicco, LLP, New York, N.Y. [Brian J. Isaac, Michael H. Zhu, and Christopher Soverow], of counsel), for appellant.

Pillinger Miller Tarallo, LLP, Elmsford, N.Y. (Shawn M. Weakland of counsel), for respondent.

WILLIAM F. MASTRO, J.P., RUTH C. BALKIN, COLLEEN D. DUFFY, FRANCESCA E. CONNOLLY, JJ.

DECISION & ORDER

***1238** In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated January 30, 2017. The order denied the plaintiff's motion pursuant to CPLR 4404(a) to set aside, as inadequate, a

jury verdict awarding the plaintiff damages in the principal ****49** sum of only $25,000 for past pain and suffering, $0 for future pain and suffering, $25,000 for past medical expenses, and $0 for future medical expenses, and for a new trial on the issue of damages.

ORDERED that the order is modified, on the facts, by deleting the provision thereof denying those branches of the plaintiff's motion pursuant to CPLR 4404(a) which were to set aside, as inadequate, the jury 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, and substituting therefor a provision granting those branches of the motion to the extent of setting aside, as inadequate, the jury verdict on those damages and directing a new trial on the issue of those damages unless the defendant shall serve and file in the Office of the Clerk of the Supreme Court, Kings County, a written stipulation consenting to increase the award of damages for past pain and suffering from the principal sum of $25,000 to the principal sum of $150,000 and for future pain and suffering from $0 to the principal sum of $100,000; as so modified, the order is affirmed, with costs payable to the plaintiff; and it is further,

ORDERED that the time for the defendant to serve and file the written stipulation consenting to increase the award of damages, if she be so advised, shall be 30 days after service upon her of a copy of this decision and order.

The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on March 16, 2013, when his vehicle was struck in the rear by a vehicle operated by the defendant. The plaintiff was awarded summary judgment on the issue of liability, and the action proceeded to a trial on the issue of damages. The evidence at trial established that, following the accident, the plaintiff experienced pain and tingling in his extremities. The plaintiff underwent a conservative course of treatment consisting of physical therapy, acupuncture, and chiropractic care, which failed to resolve his symptoms. On December 2, 2013, the plaintiff underwent an anterior cervical discectomy and fusion surgery at the C5–C6 level. The plaintiff testified that after the surgery, he continued to experience intermittent pain and burning sensations, and he described the loss of range of motion in his neck.

***1239** The jury returned a verdict awarding the plaintiff $25,000 for past pain and suffering, $0 for future pain and suffering, $25,000 for past medical expenses, and $0 for future medical expenses. The plaintiff moved pursuant to CPLR 4404(a) to set aside the damages award as inadequate and for a new trial on the issue of damages. The Supreme Court denied the motion, and the plaintiff appeals.

[1] [2] [3] [4]A jury verdict on the issue of damages may be set aside "as against the weight of the evidence only if the evidence on that issue so preponderated in favor of the plaintiff that the jury could not have reached its determination on any fair interpretation of the evidence" (*Carter v. New York City Health & Hosps. Corp.*, 47 A.D.3d 661, 663, 851 N.Y.S.2d 588; *see Williams v. City of New York*, 71 A.D.3d 1135, 1137, 898 N.Y.S.2d 208). "While the amount of damages to be awarded for personal injuries is a question for the jury, and 'the jury's determination is entitled to great deference' " (*Vainer v. DiSalvo*, 107 A.D.3d 697, 698, 967 N.Y.S.2d 107, quoting *Coker v. Bakkal Foods, Inc.*, 52 A.D.3d 765, 766, 861 N.Y.S.2d 384; *see Schray v. Amerada Hess Corp.*, 297 A.D.2d 339, 746 N.Y.S.2d 405), it may be set aside if the award deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]; ****50** *Harvey v. Mazal Am. Partners*, 79 N.Y.2d 218, 225, 581 N.Y.S.2d 639, 590 N.E.2d 224; *Vainer v. DiSalvo*, 107 A.D.3d at 698–699, 967 N.Y.S.2d 107). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Miller v. Weisel*, 15 A.D.3d 458, 459, 790 N.Y.S.2d 189; *see Nutley v. New York City Tr. Auth.*, 79 A.D.3d 711, 913 N.Y.S.2d 694).

[5]Under the circumstances of this case, where the plaintiff was required to undergo an anterior cervical discectomy and fusion surgery as a result of the accident, the jury's award for past pain and suffering was inadequate to the extent indicated (*see Cicola v. County of Suffolk*, 120 A.D.3d 1379, 1379, 993 N.Y.S.2d 131; *Sanz v. MTA–Long Is. Bus*, 46 A.D.3d 867, 868, 849 N.Y.S.2d 88).

[6]Further, since it was undisputed that the cervical fusion, inter alia, permanently reduced the plaintiff's cervical range of motion, the jury's failure to award any damages for future pain and suffering was not based upon a fair interpretation of the evidence (*see Conlon v. Foley*, 73 A.D.3d 836, 837, 900 N.Y.S.2d 458; *see also Conley v. City of New York*, 40 A.D.3d 1024, 1026, 837 N.Y.S.2d 702), and was inadequate to the extent indicated (*see Cicola v. County of Suffolk*, 120 A.D.3d at 1379, 993 N.Y.S.2d 131; *Sanz v. MTA–Long Is. Bus*, 46 A.D.3d at 868, 849 N.Y.S.2d 88).

[7] [8] [9]"Awards of damages for past and future medical expenses must be supported by competent evidence which

establishes ***1240** the need for, and the cost of, medical care" (*Pilgrim v. Wilson Flat, Inc.*, 110 A.D.3d 973, 974, 973 N.Y.S.2d 738; *see Lane v. Smith*, 84 A.D.3d 746, 749, 922 N.Y.S.2d 214). Here, the jury's award for past medical expenses, in an amount lower than requested, was reasonable in light of inconclusive testimony from the plaintiff's witnesses as to the cost of his medical care (*see Starkman v. City of Long Beach*, 148 A.D.3d 1070, 1072). Further, we decline to disturb the jury's award of $0 damages for future medical expenses (*see Nicastro v. Park*, 113 A.D.2d 129, 495 N.Y.S.2d 184).

[10]The plaintiff's contention that the verdict was inconsistent is unpreserved for appellate review (*see Barry v. Manglass*, 55 N.Y.2d 803, 806, 447 N.Y.S.2d 423, 432 N.E.2d 125; *Iovino v. Kaplan*, 145 A.D.3d 974, 978, 44 N.Y.S.3d 498).

MASTRO, J.P., BALKIN, DUFFY and CONNOLLY, JJ., concur.

All Citations

175 A.D.3d 1237, 108 N.Y.S.3d 47, 2019 N.Y. Slip Op. 06468

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170 A.D.3d 561
Supreme Court, Appellate Division, First Department, New York.

Lush DACAJ, Plaintiff–Respondent,
v.
NEW YORK CITY TRANSIT AUTHORITY, et al., Defendants–Appellants.

8769
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Index 151523/12
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ENTERED: MARCH 21, 2019

Synopsis
Background: Injured pedestrian who allegedly slipped and fell on stairway at subway station brought action against city transit authority to recover for his injuries. The Supreme Court, Bronx County, Manuel J. Mendez, J., entered judgment upon jury verdict awarding pedestrian damages for past and future pain and suffering, future medical expenses, and future loss of earnings, and denied transit authority's motion to set aside verdict. Transit authority appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] missing witness charges were properly given as to expert orthopedist and radiologist who failed to testify at trial;

[2] jury's award of $255,582 for future medical expenses was not contrary to weight of evidence; and

[3] award of $1.2 million for past pain and suffering and $1 million for future pain and suffering deviated materially from what would be reasonable compensation.

Affirmed as modified.

West Headnotes (4)

[1] **Trial**Failure of party to testify or to call witness or produce evidence

Missing witness charge was properly given with regard to city transit authority's expert, an orthopedist, who failed to testify at trial, in injured pedestrian's action against transit authority to recover for injuries sustained in slip-and-fall accident at subway station, where transit authority's neurologist admitted during cross-examination that he was not an orthopedist, pedestrian's claimed injuries were orthopedic in nature, and he could not offer any orthopedic opinions, and thus testimony of the expert orthopedist would not have been cumulative of neurologist's testimony, since she would have been in a position to offer such opinions.

[2] **Trial**Failure of party to testify or to call witness or produce evidence

Missing witness charge was properly given with regard to city transit authority's expert, a radiologist, who failed to testify at trial, in injured pedestrian's action against transit authority to recover for injuries sustained in slip-and-fall accident at subway station, where radiologist's testimony would have borne on a material issue in the case, namely, the presence of degenerative disc disease in the affected areas of pedestrian's cervical spine.

[3] **Damages**Future expenses

Jury's award of $255,582 for future medical expenses was not contrary to weight of evidence, in injured pedestrian's action against city transit authority to recover for injuries sustained in slip-and-fall accident on stairway at subway station, where it was based upon a fair interpretation of the evidence.

[1] **Trial**Failure of party to testify or to call

[4] **Damages**Excessive damages in general

Jury's award of $1.2 million for past pain and suffering and $1 million for future pain and suffering for 69-year-old injured pedestrian deviated materially from what would be reasonable compensation, in pedestrian's action against city transit authority to recover for injuries sustained in slip-and-fall accident on stairway at subway station. N.Y. CPLR § 5501(c).

Attorneys and Law Firms

****20** Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

Morgan Levine Dolan, P.C., New York (Glenn P. Dolan of counsel), for respondent.

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

Opinion

***561** Judgment, Supreme Court, Bronx County (Manuel J. Mendez, J.), entered March 30, 2018, upon a jury verdict, which, to the extent appealed from as limited by the briefs, awarded plaintiff $ 1.2 million for past pain and suffering, $ 1 million for future pain and suffering over 10 years, $ 255,582 for future medical expenses, and $ 250,000 for future loss of earnings, and bringing up for review an order, same court and Justice, entered on or about April 6, 2017, which denied defendant's motion to set aside the verdict, unanimously modified, on the law, the facts and in the exercise of discretion, to vacate the awards for past pain and suffering and future pain and suffering, and to remand the matter for a new trial on damages for past pain and suffering and future pain and suffering, unless plaintiff stipulates, within 30 days after entry of this order, to reduce the awards for past pain and suffering to ***562** $ 1,000,000 and for future pain and suffering to $ 675,000, and to the entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

[1] [2]Missing witness charges were properly given with regard to defendant's expert orthopedist and radiologist, who failed to testify at trial (*see Devito v. Feliciano*, 22 N.Y.3d 159, 165–166, 978 N.Y.S.2d 717, 1 N.E.3d 791 [2013]; *People v. Gonzalez*, 68 N.Y.2d 424, 427, 509 N.Y.S.2d 796, 502 N.E.2d 583 [1986]). Defendant's neurologist admitted during cross-examination that he was not an orthopedist, plaintiff's claimed injuries were ****21** orthopedic in nature, and he could not offer any orthopedic opinions. Accordingly, the testimony of defendant's expert orthopedist would not have been cumulative of defendant's neurologist's testimony, since she would have been in a position to offer such opinions. Regarding defendant's expert radiologist, his testimony would have borne on a material issue in the case, namely, the presence of degenerative disc disease in the affected areas of plaintiff's cervical spine, and so the missing witness charge was properly given as to him as well.

[3]Contrary to defendant's argument, "there is a rational view of the evidence that supports the jury's award for future medical expenses. Moreover, the jury's award for future medical expenses was based upon a fair interpretation of the evidence, and thus, was not contrary to the weight of the evidence" (*Roman v. Brooklyn Navy Yard Dev. Corp.*, 63 A.D.3d 1136, 1137, 882 N.Y.S.2d 270 [2d Dept. 2009][internal citations omitted]).

Similarly, the jury's award for future loss of earnings was not so "utterly irrational" as to be against the weight of the evidence (*Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145 [1978]; *see Tassone v. Mid–Valley Oil Co.*, 5 A.D.3d 931, 932, 773 N.Y.S.2d 744 [3d Dept. 2004], *lv denied* 3 N.Y.3d 608, 785 N.Y.S.2d 26, 818 N.E.2d 668 [2004]; *Calo v. Perez*, 211 A.D.2d 607, 608, 621 N.Y.S.2d 370 [2d Dept. 1995]).

[4]To the extent indicated, we find that the jury's awards for past pain and suffering and future pain and suffering for the 69–year–old plaintiff deviated materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Donlon v. City of New York*, 284 A.D.2d 13, 18, 727 N.Y.S.2d 94 [1st Dept. 2001]; *compare Diaz v. West 197th St. Realty Corp.*, 290 A.D.2d 310, 736 N.Y.S.2d 361 [1st Dept. 2002], *lv denied* 98 N.Y.2d 603, 745 N.Y.S.2d 502, 772 N.E.2d 605 [2002] [$ 900,000 for past pain and suffering for herniated disc requiring spinal fusion surgery] *with Miranda v. New Dimension Realty Co.*, 278 A.D.2d 137, 718 N.Y.S.2d 54 [1st Dept. 2000] [$ 400,000 for past pain and suffering for multilevel spinal fusion surgery]; *compare also Mata v. City of New York*, 124 A.D.3d 466, 1 N.Y.S.3d 83 [1st Dept. 2015] [$ 2 million over 50 years (amounting to $ 40,000 per year)

for plaintiff who underwent spinal fusion surgery] *with* ***563** *Gonzalez v. Rosenberg*, 247 A.D.2d 337, 669 N.Y.S.2d 216 [1st Dept. 1998] [$ 750,000 for future pain and suffering where plaintiff sustained a herniated disc that was the subject of two operations]).

We have considered the parties' remaining contentions and find them unavailing.

All Citations

170 A.D.3d 561, 97 N.Y.S.3d 19, 2019 N.Y. Slip Op. 02171

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134 A.D.3d 772
Supreme Court, Appellate Division, Second Department, New York.

Suzanne KUSULAS, respondent,
v.
Diane SACO, appellant.

Dec. 9, 2015.

Synopsis
Background: Passenger brought personal injury action against driver of vehicle that collided with vehicle in which passenger was riding in, and which resulted in herniated discs requiring spinal fusion surgery, and future surgery and medical treatment. Passenger moved for summary judgment on the issue of liability. The Supreme Court, Kings County, Partnow, J., granted motion. Following a jury trial, passenger was awarded $1,000,000 for past pain and suffering and $1,000,000 for future pain and suffering. Driver appealed.

[Holding:] The Supreme Court, Appellate Division, held that jury award did not deviate materially from what would be reasonable compensation.

Appeal dismissed.

West Headnotes (3)

[1] **Damages**Head and Neck Injuries in General; Mental Impairment
DamagesDisc injuries

Jury's $1,000,000 award for past pain and suffering and $1,000,000 award for future pain and suffering did not deviate materially from what would be reasonable compensation in passenger's personal injury action against driver of vehicle that collided with vehicle passenger was riding in, where passenger suffered herniated discs requiring spinal fusion surgery, future surgery and medical treatment, including physical therapy and pain management, for rest of her life, she suffered from chronic and severe neck pain, despite physical therapy, epidural injections, and pain medications, and she was unable to engage in many athletic activities that she had previously enjoyed. McKinney's CPLR 5501(c).

4 Cases that cite this headnote

[2] **New Trial**Amount of recovery in general

While the amount of damages to be awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference, it may be set aside if the award deviates materially from what would be reasonable compensation. McKinney's CPLR 5501(c).

8 Cases that cite this headnote

[3] **Appeal and Error**Consideration of other cases and matters therein

Prior damages awards in cases involving similar injuries are not binding upon the courts but serve to guide and enlighten them in determining whether a verdict constitutes reasonable compensation. McKinney's CPLR 5501(c).

9 Cases that cite this headnote

Attorneys and Law Firms

****326** Morris Duffy Alonso & Faley (Rivkin Radler LLP, Uniondale, N.Y. [Evan H. Krinick, Cheryl F. Korman, and Merril S. Biscone], of counsel), for appellant.

Block, O'Toole & Murphy, LLP (Pollack, Pollack, Isaac & De Cicco, LLP, New York, N.Y. [Brian J. Isaac and Michael H. Zhu], of counsel), for respondent.

WILLIAM F. MASTRO, J.P., JOHN M. LEVENTHAL, SHERI S. ROMAN, and BETSY BARROS, JJ.

Opinion

***773** In an action to recover damages for personal injuries, the defendant appeals, as limited by her brief, from (1) so much of an order of the Supreme Court, Kings County (Partnow, J.), dated June 12, 2012, as, upon a jury verdict on the issue of damages awarding the plaintiff the principal sums of $1,000,000 for past pain and suffering and $1,000,000 for future pain and suffering, denied that branch of her motion which was to set aside the verdict on the issue of damages for past and future pain and suffering as excessive, and (2) so much of a judgment of the same court dated August 12, 2014, as, upon the jury verdict and upon the order, is in favor of the plaintiff and against her in the principal sums of $1,000,000 for past pain and suffering and $1,000,000 for future pain and suffering.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondent.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho,* 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

The plaintiff was injured when the defendant's vehicle collided with a vehicle in which she was a passenger. The plaintiff commenced this action against the defendant and was subsequently awarded summary judgment on the issue of liability.

At the damages trial, evidence was adduced demonstrating that, as a result of the accident, the plaintiff sustained herniated discs at C4–5 and C5–6, requiring spinal fusion surgery. The plaintiff underwent a second surgery after the bone graft between C5–6 failed to properly fuse, causing the adjacent disc at C6–7 to herniate. The plaintiff testified that she suffers from chronic and severe neck pain, despite physical therapy, epidural injections, and pain medications, and that she is unable to engage in many athletic activities that she previously enjoyed. According to the plaintiff's treating physician and expert, the plaintiff will require future surgery and medical treatment, including physical therapy and pain management, for the rest of her life.

The jury awarded the plaintiff damages in the principal sums of $1,000,000 for past pain and suffering and $1,000,000 for ***774** future pain and suffering. Upon an order dated June 12, 2012, which denied the branch of the defendant's motion which was to set aside the verdict on the issue of damages, judgment was entered in accordance with the jury verdict.

[1] [2] [3] "While the amount of damages to be awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference, it may be set aside if the award deviates materially from what would be reasonable compensation" ****327** (*Vainer v. DiSalvo,* 107 A.D.3d 697, 698, 967 N.Y.S.2d 107 [internal quotation marks and citations omitted]; *see* CPLR 5501[c]; *Coker v. Bakkal Foods, Inc.,* 52 A.D.3d 765, 861 N.Y.S.2d 384). Prior damages awards in cases involving similar injuries are not binding upon the courts but serve to "guide and enlighten" them in determining whether a verdict constitutes reasonable compensation (*Taveras v. Vega,* 119 A.D.3d 853, 854, 989 N.Y.S.2d 362). Here, contrary to the defendant's contention, the jury's award for past pain and suffering and future pain and suffering did not deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]).

All Citations

134 A.D.3d 772, 21 N.Y.S.3d 325, 2015 N.Y. Slip Op. 09073

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120 A.D.3d 1379
Supreme Court, Appellate Division, Second Department, New York.

Christopher CICOLA, respondent,
v.
COUNTY OF SUFFOLK, et al., appellants.

Sept. 24, 2014.

Synopsis
Background: Motorist whose vehicle was rear-ended by county sheriff's deputy's vehicle brought personal injury action against county. The Supreme Court, Suffolk County, Garguilo, J., denied county's motion for judgment as a matter of law, denied county's motion to set aside jury verdict in favor of motorist, and awarded motorist damages for past pain and suffering in the amount of $325,000, and future pain and suffering in the amount of $250,000. County appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] evidence was sufficient to prove that motorist sustained serious injury, within meaning of no-fault law, and

[2] damages award was excessive.

Affirmed in part, and reversed in part.

West Headnotes (7)

[1] **Trial**🔑Insufficiency to support other verdict; conclusive evidence

To be entitled to judgment as a matter of law, a defendant has the burden of showing that there is no rational process by which the jury could find in favor of the plaintiff and against the moving defendant. McKinney's CPLR 4401.

3 Cases that cite this headnote

[2] **Trial**🔑Inferences from evidence

In considering a motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant. McKinney's CPLR 4401.

4 Cases that cite this headnote

[3] **Automobiles**🔑Evidence and fact questions; instructions

Evidence was sufficient to prove that motorist sustained serious injury, within meaning of no-fault law, in collision with county deputy's vehicle, as required for motorist to maintain personal injury action against county; the medical evidence showed that motorist sustained injuries to the cervical region of his spine, which required two spinal fusion surgeries and a period of physical therapy and other related medical treatment, and motorist's treating physicians testified that any preexisting condition was minimal and insignificant, and that, in their opinions, the accident caused the herniation of the subject disks in the motorist's spine. McKinney's Insurance Law § 5102(d).

[4] **Trial**🔑Insufficiency to support other verdict; conclusive evidence

A jury verdict is contrary to the weight of the evidence when the evidence so preponderates in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence. McKinney's CPLR 4404(a).

9 Cases that cite this headnote

[5] **Evidence** Conflict with other evidence

Where conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert.

7 Cases that cite this headnote

[6] **New Trial** Determination in general
Trial Credibility of Witnesses

Issues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence; its resolution on matters of credibility is entitled to deference on a motion to set aside the jury verdict. McKinney's CPLR 4404(a).

9 Cases that cite this headnote

[7] **Damages** Disc injuries

Award of damages for past pain and suffering in the amount of $325,000, and for future pain and suffering in the amount of $250,000 to motorist who sustained cervical spine injuries in rear end collision was excessive; although motorist's injuries included disk herniation and required two spinal fusion surgeries, the award deviated materially from what would be reasonable compensation for such injuries. McKinney's CPLR 5501(c).

5 Cases that cite this headnote

Attorneys and Law Firms

****133** Dennis M. Brown, County Attorney, Hauppauge, N.Y. (Christopher A. Jeffreys of counsel), for appellants.

Rubin & Licatesi, P.C., Garden City, N.Y. (Anthony J. Licatesi and Jennifer M. Ahlfeld of counsel), and Zlotolow & Associates, P.C., Sayville, N.Y., for respondent (one brief filed).

WILLIAM F. MASTRO, J.P., LEONARD B. AUSTIN, SANDRA L. SGROI, and ROBERT J. MILLER, JJ.

Opinion

***1379** In an action to recover damages for personal injuries, the defendants appeal, as limited by their brief, (1) from so much of an order of the Supreme Court, Suffolk County (Garguilo, J.), entered July 27, 2012, as, upon, in effect, reargument, adhered to its prior determinations (a) denying their motion pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint, and (b) denying those branches of their motion pursuant to CPLR 4404(a) which were to set aside a jury verdict in favor of the plaintiff and against them on the issue of damages finding that the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) under the significant limitation of use and permanent consequential limitation of use categories as a result of the subject accident and awarding the plaintiff damages for past pain and suffering in the principal sum of $325,000, and future pain and suffering in the principal sum of $250,000, and for judgment as a matter of law or, alternatively, to set aside the jury verdict as contrary to the weight of the evidence and excessive and for a new trial on the issues of causation and damages for past and future pain and suffering, and (2) from so much of a judgment of the same court dated August 3, 2012, as, upon an order of the same court (Baisley, Jr., J.), dated September 17, 2007, granting the plaintiff's motion for summary judgment on the issue of liability, upon the jury verdict, and upon the order entered July 27, 2012, is in favor of the plaintiff and against them in the principal sums of $325,000 for past pain and suffering and $250,000 for future pain and suffering.

ORDERED that the appeal from the order entered July 27, 2012, is dismissed; and it is further,

ORDERED that the judgment is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, ***1380** that branch of the defendants' motion pursuant to CPLR 4404(a) which was to set aside, as excessive, the jury verdict on the issue of damages for past and future pain and suffering is granted, the order entered July 27, 2012, is modified accordingly, and the matter is remitted to the Supreme Court, Suffolk

County, for a new trial on the issue of damages for past and future pain and suffering, unless, within 30 days after service upon the plaintiff of a copy of this decision and order, the plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Suffolk County, a written stipulation consenting to reduce the verdict as to damages for past pain and suffering from the principal sum of $325,000 to the principal sum of $150,000, and to reduce the verdict as to damages for future pain and suffering from the principal sum of $250,000 to the principal sum of $100,000, and to the entry of an appropriate amended judgment accordingly; in the event that the plaintiff so stipulates, then the judgment, as so reduced and amended, is affirmed insofar as appealed from, without costs or disbursements.

The appeal from the intermediate order entered July 27, 2012, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see* ****134** *Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

On January 11, 2007, a vehicle owned by the defendant County of Suffolk and operated by the defendant Deputy Sheriff Glenn S. Muller, struck the plaintiff's vehicle in the rear.

The plaintiff commenced this action against the defendants claiming that he sustained a serious injury within the meaning of Insurance Law § 5102(d) under the significant limitation of use and permanent consequential limitation of use categories as a result of the subject accident. The plaintiff alleged that, as a result of the accident, he sustained injuries to the cervical region of his spine, which required two spinal fusion surgeries and a period of physical therapy and other related medical treatment. The plaintiff's bill of particulars did not allege that the plaintiff's injuries were related to a preexisting condition that was exacerbated by the subject accident. The plaintiff was awarded summary judgment on the issue of liability, and a jury trial on the issue of damages followed.

At the damages trial, the plaintiff's treating physicians testified that any preexisting degenerative disk condition represented simple normal wear and tear for someone the plaintiff's ***1381** age, and was so minimal that it played no role in the plaintiff's injuries caused by the accident. The defendants maintained that the plaintiff's injuries were the result of aggravation of a preexisting degenerative condition. The orthopedic surgeon who examined the plaintiff on the defendants' behalf opined that while he found significant limitations in the range of motion in the cervical region of the plaintiff's spine, they were attributable to the preexisting degenerative disk disease that was present prior to the accident.

The jury found that the plaintiff's injuries were caused by the subject accident and awarded him damages for, inter alia, past and future pain and suffering. Following an order entered July 27, 2012, which, upon reargument, adhered to the prior denial of the defendants' CPLR 4401 and 4404 motions, judgment was entered in favor of the plaintiff and against the defendants, among other things, in the principal sums of $325,000 for past pain and suffering and $250,000 for future pain and suffering.

[1] [2] [3] " 'To be entitled to judgment as a matter of law pursuant to CPLR 4401, a defendant has the burden of showing that there is no rational process by which the jury could find in favor of the plaintiff and against the moving defendant' " (*Delaney v. Delaney*, 83 A.D.3d 647, 648, 919 N.Y.S.2d 912, quoting *Velez v. Goldenberg*, 29 A.D.3d 780, 781, 815 N.Y.S.2d 205). In considering the motion for judgment as a matter of law, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556, 664 N.Y.S.2d 252, 686 N.E.2d 1346; *see Delaney v. Delaney*, 83 A.D.3d at 648, 919 N.Y.S.2d 912). Contrary to the defendants' contention, viewing the facts in the light most favorable to the plaintiff at the end of the plaintiff's case, there was a rational process by which the jury could find that the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) which was proximately caused by the subject accident. The plaintiff's treating physicians testified that any preexisting degenerative condition was minimal and insignificant and would have no bearing in this case, ****135** and that, in their opinions, the accident caused the herniation of the subject disks in the plaintiff's cervical spine. They noted that the minimal degenerative process seen on the plaintiff's initial X rays was asymptomatic and played no role in his injury or in their treatment. They also testified that all of the other disks depicted in the X ray showed good "heights," and that to become clinically significant, one would expect to see worn out disks and thickened "N plates," none of which was present.

***1382** The defendants' challenge to the Supreme Court's denial of that branch of their motion pursuant to CPLR 4404(a), which was to set aside the jury verdict and for judgment as a matter of law, is also without merit, as there was a valid line of reasoning and permissible

inferences which could lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial (*see Cohen v. Hallmark Cards,* 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145).

[4] [5] [6] A jury verdict is contrary to the weight of the evidence when the evidence so preponderates in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence (*see Nolan v. Union Coll. Trust of Schenectady, N.Y.,* 51 A.D.3d 1253, 1255, 858 N.Y.S.2d 427; *Biello v. Albany Mem. Hosp.,* 49 A.D.3d 1036, 1037, 853 N.Y.S.2d 697). Where, as here, conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert (*see Liounis v. New York City Tr. Auth.,* 92 A.D.3d 643, 644, 938 N.Y.S.2d 176; *Ross v. Mandeville,* 45 A.D.3d 755, 757, 846 N.Y.S.2d 276). "Issues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence. Its resolution is entitled to deference" (*Lalla v. Connolly,* 17 A.D.3d 322, 323, 791 N.Y.S.2d 845; *see Robinson v. City of New York,* 300 A.D.2d 384, 385, 751 N.Y.S.2d 533). "[A] successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence" (*see Lalla v. Connolly,* 17 A.D.3d at 323, 791 N.Y.S.2d 845). Here, the only testimony presented at trial that a preexisting degenerative disk disease may have caused the disk herniation or played any role in the plaintiff's claimed injuries was elicited from the defendants' examining orthopedic surgeon. The jury was entitled to reject that testimony, given that the expert failed to account for the plaintiff being asymptomatic pre-accident and disregarded his own range of motion testing, which revealed significant limitations in the movement of the plaintiff's neck. Thus, a fair interpretation of the evidence supports the jury's conclusion that, based on the evidence before it, the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident.

[7] Nonetheless, under the circumstances of this case, the award of damages deviated materially from what would be reasonable compensation to the extent indicated herein (*see* CPLR 5501[c]; *see also Sanz v. MTA–Long Is. Bus,* 46 A.D.3d 867, 869, 849 N.Y.S.2d 88).

The defendants' remaining contentions are without merit.

All Citations

120 A.D.3d 1379, 993 N.Y.S.2d 131, 2014 N.Y. Slip Op. 06293

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46 A.D.3d 867, 849 N.Y.S.2d 88, 2007 N.Y. Slip Op. 10523
(Cite as: 46 A.D.3d 867, 849 N.Y.S.2d 88)

H

Supreme Court, Appellate Division, Second Department, New York.
Tracey SANZ, respondent,
v.
MTA–LONG ISLAND BUS, appellant.

Dec. 26, 2007.

Background: Bus passenger involved in a traffic accident sued the bus owner to recover damages for personal injuries. The Supreme Court, Nassau County, Feinman, J., entered judgment on a jury verdict awarding damages in the sums of $350,000 for past pain and suffering and $400,000 for future pain and suffering, and the owner appealed.

Holdings: The Supreme Court, Appellate Division, held that:
(1) there was sufficient evidence that the passenger's injuries were sustained in the accident at issue, but
(2) damage awards were excessive to the extent they exceeded $200,000.

Ordered accordingly.

West Headnotes

[1] Damages 115 185(1)

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k185 Personal Injuries and Physical Suffering
115k185(1) k. In General. Most Cited Cases

Evidence 157 571(9)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(9) k. Cause and Effect. Most Cited Cases

There was sufficient evidence that bus passenger's injuries were sustained in the motor vehicle accident at issue to support recovery of damages against bus owner, despite claim that the passenger's medical experts failed to indicate an awareness of a prior accident alleged to have been the cause of the injuries; an internist had conducted a routine annual physical exactly one week prior to the subject accident and found full cervical range of motion and no spinal tenderness at that time, and the passenger's treating physician stated that he would not change his opinion that the injuries were caused by the subject accident as a result of learning of the prior accident.

[2] Damages 115 127.35

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.32 Back and Spinal Injuries in General
115k127.35 k. Disc Injuries. Most Cited Cases

Damages award to bus passenger injured in an accident, in the amount of $350,000 for past pain and suffering, was excessive to the extent it exceeded $200,000; the passenger allegedly sustained herniated discs in her cervical spine and numbness and tingling in both hands.

[3] Damages 115 127.35

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.32 Back and Spinal Injuries in General
115k127.35 k. Disc Injuries. Most Cited Cases

Damages award to bus passenger injured in an accident in the amount of $400,000 for future pain and suffering was excessive to the extent it exceeded

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$200,000; the passenger allegedly sustained herniated discs in her cervical spine and numbness and tingling in both hands.

****88** Sciretta & Venterina LLP, Staten Island, N.Y. (Marilyn Venterina of counsel), for appellant.

Sackstein Sackstein & Lee, LLP, Garden City, N.Y. (Leonard B. Chipkin of counsel), for respondent.

FRED T. SANTUCCI, J.P., GABRIEL M. KRAUSMAN, ANITA R. FLORIO, and ROBERT A. LIFSON, JJ.

***867** In an action to recover damages for personal injuries, the defendant appeals, as limited by its brief, from so much of a judgment of the Supreme Court, Nassau County (Feinman, J.), dated May 16, 2006, as, upon a jury verdict finding that the plaintiff ***868** sustained a serious injury and awarding the plaintiff damages in the sums of $350,000 for past pain and suffering and $400,000 for future pain and suffering, and upon the denial of its motion pursuant to CPLR 4404, inter alia, to set aside the jury verdict and for judgment as a matter of law, is in favor of the plaintiff and against it in the principal sum of $750,000.

****89** ORDERED that the judgment is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, and the matter is remitted to the Supreme Court, Nassau County, for a new trial on the issue of damages, unless within 30 days after service upon the plaintiff of a copy of this decision and order, the plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Nassau County, a written stipulation consenting to reduce the verdict as to damages for past pain and suffering from the principal sum of $350,000 to the principal sum of $200,000 and to reduce the verdict as to damages for future pain and suffering from the principal sum of $400,000 to the principal sum of $200,000, and to the entry of an appropriate amended judgment accordingly; in the event that the plaintiff so stipulates, then the judgment, as so reduced and amended, is affirmed insofar as appealed from, without costs or disbursements.

This action arises from a motor vehicle accident on August 12, 2002, when a bus owned by the defendant and in which the plaintiff was riding as a passenger, was struck by another bus. The plaintiff claimed that, as a result of the accident, she sustained herniated discs in her cervical spine and numbness and tingling in both hands. Approximately one month after the accident, the plaintiff underwent an anterior cervical discectomy, with an allograft and plate fusion.

At trial, the defendant failed to call as witnesses any of the doctors whom it had retained to examine the plaintiff. Instead, the defendant's strategy was to show that the plaintiff's various injuries were the result of an earlier accident, which occurred in January 1994.

[1] On appeal, the defendant contends, inter alia, that the plaintiff failed to establish a prima facie case that her injuries were sustained in the subject motor vehicle accident, as her medical experts failed to indicate an awareness of the prior accident. We disagree. Notably, the plaintiff presented testimony from her internist, who had conducted a routine annual physical exactly one week prior to the subject accident, and found full cervical range of motion and no spinal tenderness at that time. In addition, the plaintiff's treating physician, Dr. Stephen Burstein, stated that he would not change his opinion that the ***869** plaintiff's injuries were caused by the subject accident as a result of learning of the prior accident in 1994, for which she underwent physical therapy for a number of years. He explained that the large extruded disc fragment which was found in the plaintiff's cervical spine was the result of an acute episode of the kind which generally follows a whiplash type of injury. Moreover, the evidence presented by the plaintiff's medical experts, including the surgeon who performed the discectomy, established a prima facie case of serious injury, by virtue of her having sustained a " significant limitation of use of a body function or system" and a "medically determined injury or impairment of a non-permanent nature which [prevented the plaintiff] from performing substantially all of the material acts which [constituted her] usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (Insurance Law § 5102[d]).

[2][3] However, the jury's damages awards deviated materially from what would be reasonable compensation to the extent indicated (*see* CPLR 5501 [c]

).

The defendant's remaining contentions are either unpreserved for appellate review, waived, or without merit.

N.Y.A.D. 2 Dept.,2007.
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