

Mottola v Lodes

2016 NY Slip Op 32166(U)

October 4, 2016

Supreme Court, Westchester County

Docket Number: 64293/13

Judge: Terry J. Ruderman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THEODORE MOTTOLA and BIANCA MOTTOLA,
Plaintiffs,

-against-

INDEX NUMBER 64293/13
DECISION

PATTI LODES,
Defendant.

-----X
RUDERMAN, J.

In this jury trial, the Court made two rulings based on oral motions after the jury had reported its verdict in open court, and had been discharged. The following decision is intended to clarify the Court's reasoning underlying these trial rulings.

Plaintiff Theodore Mottola sought damages for alleged personal injuries sustained in a rear-end automobile accident. His wife, plaintiff Bianca Mottola, sought damages for loss of services. Defendant conceded liability, and the case was tried only as to the issues of "serious injury" under Insurance Law 5102(d), and damages. The court's charge to the jury included the language of PJI 2:281 ("Damages - Personal Injury - Permanence - Life Expectancy Tables"), and the jury was advised that plaintiff Theodore Mottola's life expectancy was 22.5 years, according to the standard mortality tables.

The Court presented the jury with a verdict sheet, agreed upon by counsel, which asked the jury to determine whether plaintiff Theodore Mottola sustained a serious injury under the significant limitation (Question 1), permanent consequential limitation (Question 2), and/or the 90/180-days (Question 3) categories of Insurance Law 5102(d). The jury answered "No" to the first two questions, and "Yes" to the third question. The jury then awarded \$100,000 for past pain and suffering, \$400,000 for future pain and suffering over the course of 20 years, and no damages for past or future loss of services.

After the verdict was announced in open court, the court inquired whether the attorneys desired to poll the jury. Neither side made such a request. The Court thereupon discharged the jury. The

plaintiffs' attorney then moved to set aside the verdict as to loss of services as contrary to the weight of the evidence, which the court denied. The defendant's attorney then moved to set aside the verdict as inconsistent. No part of the motion addressed the weight of the evidence. The court denied the motion on the ground that the motion was untimely, having been made after the jury was discharged.

Analysis

Plaintiffs' Motion on Weight of the Evidence

A jury verdict in favor of a defendant should not be set aside as contrary to the weight of the evidence unless the evidence preponderates so heavily in the plaintiff's favor that the verdict could not have been reached on any fair interpretation of the evidence. (*Russo v. Mignola*, 2016 N.Y. App. Div. LEXIS 5964 [2d Dept. 2016].) The plaintiffs sought to establish at trial that the injured plaintiff sustained an exacerbation of existing, but latent, back and shoulder conditions. While the jury found that the plaintiff sustained a "serious injury," it cannot be said that the failure to award damages for loss of services could not have been reached on any fair interpretation of the evidence. The jury may have found, consistent with the evidence, that while the plaintiff sustained injuries, he was prevented from providing services and society to his wife for only a relatively brief period. The jury may have been persuaded that as the plaintiff was able to return to work and resume many of his normal activities, he was able to provide for his wife's needs despite her testimony to the contrary.

Defendant's Motion As to Inconsistent Verdict

Objections to a verdict on the ground of inconsistency must be raised before the jury is discharged, at which time corrective action may be taken by resubmitting the matter to the jury. (*Ahmed v. Port Auth. of N.Y. & N.J.*, 131 A.D.3d 493 [2d Dept. 2015].) The Court never prohibited or prevented the defendant from making the motion, and would have excluded the jury while the motion was made if

defense counsel had indicated that he desired to make a motion outside of the presence of the jury before the jury was disbanded. The Court therefore denied the motion as untimely.

In any event, a jury may award future damages even if a plaintiff does not sustain a permanent injury. (*Gallagher v. Samples*, 6 A.D.3d 659, 660 [2d Dept. 2004] [Supreme Court erroneously charged the jury that it could only award future damages upon a finding that she sustained a permanent injury].) In *Obdulio v. Fabian* (33 A.D.3d 418 [1st Dept. 2006]), the jury, as in the present trial, rejected serious injury under the permanent consequential and significant limitation categories of Insurance Law 5102(d), and found that a serious injury existed only under the 90/180-days category. The Court rejected the concept that future damages were barred, holding:

“[O]nce a prima facie case of serious injury has been established and the trier of fact determines that a serious injury has been sustained, plaintiff is entitled to recover for all injuries incurred as a result of the accident” (*Rizzo v DeSimone*, 6 AD3d 600, 601, 775 NYS2d 531 [2004] [internal quotation marks omitted]; see *Gallagher v Samples*, 6 AD3d 659, 776 NYS2d 585 [2004]; *Deyo v Laidlaw Tr.*, 285 AD2d 853, 727 NYS2d 797 [2001]; *Bebry v Farkas-Galindez*, 276 AD2d 656, 714 NYS2d 734 [2000]). Accordingly, plaintiff was not foreclosed from recovering damages for future pain and suffering on the ground that he did not sustain a serious injury under the significant limitation or permanent consequential injury categories.”

Future damages may clearly be awarded where the jury finds that a serious injury exists under the 90/180-days category. This Court has located only one case which has held that where the jury’s verdict is predicated on a violation of the 90/180-days category alone, the jury is “precluded from awarding plaintiff damages for permanent injuries.” (*Wymer v. National Fuel Gas Distrib. Corp.*, 217 A.D.2d 920, 921 [4th Dept. 1995]). The *Wymer* court reasoned that since the jury found that the injured plaintiff has suffered only a “medically determined injury or impairment of a non-permanent nature,” permanent damages could not be awarded.

Assuming that *Wymer* applies here, in the present case the jury awarded future damages for a 20-year period. Any claim of inconsistency under the circumstances presented would require the Court to

find that an award of future damages for a 20-year period was an award of *permanent* damages.

Permanent damages must logically mean an award of future damages for the plaintiff's life span. The agreed-upon verdict sheet did not require that the jury report the plaintiff's life expectancy. The future damages in the present case, awarded for a 20-year period, cover a time period which is mathematically close to the 22.5-year life expectancy for the plaintiff as listed in the statistical tables. While it is tempting to assume that the jury awarded lifetime damages (on the assumption that the jury found that plaintiff would live for an additional 20 years), the jury was charged in accordance with the standard PJI instructions that it could find that the plaintiff's life expectancy was more than 22.5 years. The jury may have found that the plaintiff's life expectancy was 20 years, but they may equally have found that the plaintiff would have lived for another 27 years. In other words, it is impossible to determine if the jury awarded damages for the period of time which they found that the plaintiff would live, and thus awarded permanent damages.

Because the jury's thinking may have been clarified by a timely objection, it was all the more important for the defendant to raise an objection before the jury was disbanded. Had a timely objection been raised, the Court could have sought clarification as to whether damages were awarded for a period which the jury believed constituted the plaintiff's life expectancy, and if so, re-charged the jury.

For these reasons, the Court denied the motion based on inconsistency. Further, it is noted that no motion was made by defendant on the ground that the award of future damages was against the weight of the evidence.

This foregoing clarifies the Court's ruling as set forth on the record.

Dated: White Plains, New York
October 4, 2016


HON. TERRY JANE RUDERMAN, J.S.C.