

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Kennedy, J.P., Friedman, Gesmer, Michael, Chan, JJ.

6928

CHARLES DRUMMOND,
Plaintiff-Respondent,

Index No. 24436/18
Case No. 2025-03346

-against-

ASSOCIATED TEST & BALANCE, INC.,
Defendant-Appellant.

Mauro Lilling Naparty LLP, Woodbury (Eric Z. Leiter of counsel), for appellant.

Pollack Pollack Isaac & DeCicco LLP, New York (Brian J. Isacc of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Naita A. Semaj, J.), entered on or about May 15, 2025, which, after a jury trial, awarded a money judgment to plaintiff, affirmed, without costs.

Defendant failed to establish that the verdict was utterly irrational in light of the evidence presented during the trial (*see Killon v Parrotta*, 28 NY3d 101, 107 [2016]).

The jury could reasonably have concluded that the accident, in which plaintiff tripped and fell on a Masonite board, caused cord compression syndrome and edema (*see Feliciano v Ford Motor Credit Co.*, 28 AD3d 221, 221 [1st Dept 2006]), based on plaintiff's documentary evidence and the testimony from his expert witnesses.

Furthermore, the finding that plaintiff was not comparatively negligent was not against the weight of the evidence, as the jury could reasonably have concluded, based on the weight of the credible evidence, that plaintiff was unaware that the Masonite board was on the floor and unsecured (*see Killon*, 28 NY3d at 107). Video evidence showed that the

worker put the unsecured Masonite board down approximately 30 seconds before plaintiff tripped on it, and the jury's finding was consistent with plaintiff's testimony.

Defendant also fails to establish that any of the court's allegedly erroneous rulings caused prejudice sufficient to warrant new trial. Plaintiff's experts' use of the term "myelopathy," although originally precluded by the court, was either synonymous with, or closely related to, injuries plaintiff alleged in his bill of particulars. To the extent that the experts' use of the term may have caused prejudice, the court issued a curative instruction, and the jurors are presumed to have followed it (*see People v Baker*, 14 NY3d 266, 274 [2010]). Defendant also failed to sustain its claim that it was prejudiced by references to an injury that plaintiff withdrew — namely, that plaintiff suffered an injury to his lumbar spine. Defendant did not object at trial to several instances in which counsel referred to that injury and therefore cannot now claim that it was prejudiced by those references (*see Blake v City of New York*, 157 AD2d 482, 483 [1st Dept 1990], *lv denied* 76 NY2d 703 [1990]).

Supreme Court providently exercised its discretion in denying defendant a collateral source hearing. Defendant did not sustain its burden of showing with reasonable certainty that plaintiff's medical expenses were, or would be, replaced from a collateral source (*see Redish v Adler*, 195 AD3d 452, 453 [1st Dept 2021]).

Defendant did not establish that the jury intended to award plaintiff only \$350 in damages for past pain and suffering. The record in this case amply supports the court's conclusion that the award was, in fact, \$350,000 (*see People v Sanchez*, 201 AD3d 599, 600 [1st Dept 2022], *lv denied* 38 NY3d 1009 [2022]; *People v Ceballos*, 189 AD3d 414, 415 [1st Dept 2020], *lv denied* 37 NY3d 971 [2021]; *Scaduto v Suarez*, 150 AD2d 545, 547 [2d Dept 1989]).

Supreme Court providently exercised its discretion in granting plaintiff's motion to preclude defendant from offering evidence about plaintiff's smoking and drinking history. Defendant did not retain an expert to testify about the extent to which plaintiff's level of smoking and drinking would affect his life expectancy. In the absence of an expert, the extent of that impact based on plaintiff's age, level of consumption, and other health issues is a matter outside the ken of an average juror and may invite juror confusion or speculation. The court's decision here is consistent with the prevailing approach (*see e.g. Kirkpatrick v GEICO Cas. Co.*, 810 Fed Appx. 132, 135 [3d Cir 2020]; *Mankey v Bennett*, 38 F3d 353, 360 [7th Cir 1994]).

We have considered defendant's remaining contentions and find them unavailing.

All concur except Friedman, J. and Chan, J. who dissent in part in a memorandum by Friedman, J.

FRIEDMAN, J. (dissenting in part)

While I otherwise concur with the majority's disposition of the appeal, I dissent from the affirmance of the award of damages for future pain and suffering and future medical expenses. In my view, Supreme Court abused its discretion in granting plaintiff's motion to preclude defendant from offering evidence about his smoking and drinking history. Specifically, the court precluded testimony about the fact that plaintiff had a history of smoking and excessive drinking, precluded testimony by defendant's medical experts about the effect of these habits on his life expectancy, and even went so far as to require redaction from medical records admitted into evidence of all references to plaintiff's smoking and drinking habits. This ruling defies common sense.

Even in the absence of expert actuarial testimony, information about plaintiff's smoking and drinking habits would have been useful to the jury when it calculated future damages, as no reasonable person could honestly maintain that they did not know the deleterious effects of tobacco smoking (*see Matter of Perra*, 14 Misc 3d 438, 445-446 [Sup Ct, Oneida County 2006]; *see also Boreali v Axelrod*, 71 NY2d 1, 6-7 [1987]). Harmful side effects of alcohol are also well-known (*see People v Shepard*, 50 NY2d 640, 654 [1980, Fuchsberg, J., dissenting]). Indeed, the Pattern Jury Instructions recognize that, regardless of whether an actuarial expert has testified, a jury is entitled to consider the life expectancy figure derived from an actuarial table in light of "[the jury's] own experience and the evidence [the jury has] heard concerning the condition of . . . [the plaintiff's] *habits*, employment and activities in deciding what [the plaintiff's] present life expectancy is" (PJI 2:281 [emphasis added]; *see also id.*, Comment ["Mortality tables . . . are to be considered together with evidence of the health, constitution, *habits* and mode of living of the person whose life expectancy is in

question”] [emphasis added], citing *Rothman v St. Barnabas Hosp. for Chronic Diseases*, 20 AD2d 531 [1st Dept 1963]). Moreover, whether or not plaintiff’s smoking and drinking are related to the conditions he suffered as a result of this accident, his history of smoking and drinking would shed light on whether he suffered from other conditions, having nothing to do with this accident, that may have impacted upon his ability to enjoy life and may have affected his life expectancy (*Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 577 [1st Dept 2014, Gische, J., dissenting]).

For the foregoing reasons, I would vacate the award of damages for future pain and suffering and future medical expenses and remit the matter for a new trial on those issues. To the extent the majority does otherwise, I respectfully dissent.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: June 18, 2026

A handwritten signature in black ink, reading "Susanna Molina Rojas". The signature is fluid and cursive, with the first name "Susanna" and last name "Rojas" clearly distinguishable.

Susanna Molina Rojas
Clerk of the Court