Betancourt v Trump Empire State Partners
2007 NY Slip Op 31677(U)
June 1, 2007
Supreme Court, Kings County
Docket Number: 0049457/2002
Judge: Gloria Dabiri
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At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of June 2007.

PRESENT:

HON. GLORIA M. DABIRI,

Justice.

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ROBERT BETANCOURT,

Plaintiff(s),

- against -

Index No.: 49457/02

TRUMP EMPIRE STATE PARTNERS, INDIVIDUALLY and as General Partner of TRUMP EMPIRE STATE INC., HELMSLEY-SPEAR, INC., WALGREENS EASTERN CO., INC. and KAM CONSTRUCTION COMPANY,

Defendant(s).

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The following papers numbered to read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed____________	____________
Opposing Affidavits (Affirmations)____________	____________
Reply Affidavits (Affirmations)____________	____________
________Affidavit (Affirmation)____________	____________
Other Papers____________	____________

Upon the forgoing papers, defendants Trump Empire State Partners (Trump), Trump Empire State Inc. (Empire State), Helmsley-Spears, Inc. (Helmsley) and Walgreens Eastern Co. (Walgreens) seek an order, pursuant to CPLR 4404, setting aside jury verdicts as to

liability and damages.

STATEMENT OF FACTS

Robert Bentancourt commenced this action in November of 2002 to recover for personal injuries sustained on March 19, 2002, while in an exterior doorway of the Empire State Building. The building, located at 350 Fifth Avenue in New York County, was owned by defendant Trump Empire State Partners and managed by Helmsley-Spear, Inc. Plaintiff testified that he and his wife "ducked" into the entranceway to embrace for a goodbye kiss and that his arms went upward causing his right index finger to come into contact with the sharp edge of a conduit pipe. Plaintiff maintained that the building's owner, manager and a tenant, Walgreens Eastern Company, Inc. (Walgreens), were negligent in allowing a dangerous and unsafe condition to exist.

Trump, Helmsley and Walgreens moved for summary judgment dismissal of the complaint, and by order dated June 18, 2004 their motion was denied. Upon appeal the Appellate Division, Second Department, affirmed that portion of the order as denied summary judgment to Trump, Helmsley and Walgreens (27 A.D.3d 604 [2006]). Thereafter, separate trials as to liability and damages were held October 23, 2006 through October 27, 2006.

Prior to commencement of the liability trial, the defendants, by motion *in limine*, sought to preclude the plaintiff from offering evidence at trial of any repair or alteration made to the subject doorway and/or doorbell following the accident. The court granted the

motion.

THE LIABILITY TRIAL[1]

Opening Statements

In his opening remarks counsel for the plaintiff advised the jury that the plaintiff, Robert Betancourt, "*. . . felt the edge of a sharp metal pipe cut through his hand. It was covered in blood.*" The court sustained an objection and advised the jury to disregard any mention of injury or damage. Plaintiff's counsel then stated that the defendant Trump Empire State Partners agreed that the doorway condition was in fact dangerous and should not have remained there. Counsel informed the jury that the plaintiff and his wife had been high school sweethearts, had had marital difficulties, and at the time of the accident were in the process of reconciling. In closing, he stated that the accident caused the plaintiff's *whole life to change*.

In his opening remarks, defendant's counsel clarified that it was the defendants' position that the doorway was *not* in a dangerous condition, and that it was the carelessness of the plaintiff which had caused his injury. Defendants' counsel noted that the entranceway in which the plaintiff and his wife were standing was not a customer entrance, but a receiving doorway. He stated that the purposes of the pipe was to cover the doorbell wiring and that it was the defendants' "*contention that this doorway was reasonablely safe under the*

[1]In its opening instructions the court instructed the jury that it was to disregard any mention or reference to injury or damage, and that should any such evidence be permitted by the court, it could be considered only insofar as it might assist the jury with determining how the accident occurred.

circumstances." Counsel maintained that the condition was open and obvious, and that the plaintiff's action, along with that of his wife, caused the accident.

Testimony of Robert Betancourt

Plaintiff testified regarding his schooling, marital situation and employment. Mr. Bentancourt testified that on the date of the accident he was employed by Photobition, as an account executive and designed trade show displays. He indicated that he drew professionally.

On the date of the incident he met his wife, Yi-ding Betancourt, in front of the Empire State Building and they went to Burger King for lunch. He walked his wife back to the Empire State Building and they ducked into a doorway to get out of the rain. After giving his wife a hug and kiss, he raised his hands up slightly and hit his hand. Plaintiff's counsel then questioned Mr. Betancourt as follows:

"Q: *So, when you say what, your hands went up?*
A: *Right*
Q: *Or to the side? Did they go up or to the side or both?*
A: *Well, I would say more to the side. Up slightly but --*
Q: *And that's when you hit your hand you say?*
A: *Right, more specifically my knuckle.*
Q: *When you say your knuckle can you point to the knuckle that hit?*
A: *It was right here.*
Q: *Can you hold it up for the jury, please and point to the knuckle that you hit?*
A: *Right here*
Q: *So to the bottom of the index finger there?*
A: *Right*

Q: *When you say it hit what specifically did it hit and I would like to show you plaintiff's four so you can describe it, please?*
A: *It hit that pipe, rusted serrated pipe.*
Q: *Was it sharp?*
A: *It was.*
Q: *And how do you know that?*
A: *I was bleeding a lot, so. It was pretty cold and it drew my attention that's for sure.*
Q: *Now, after your – the bottom of your index finger that knuckle area hit that pipe what noise if anything did you make?*
A: *I did the (Indicating) noise, grabbed by hand. That's the noise I made.*
Q: *Did you see that blood immediately or do [sic.] it take some time to appear or how did that happen?*
A: *Pretty immediately. My wife saw my reaction, you know, to getting hit, you know. She looked for a second and then she grabbed my hand and first thing for her was to stop it from bleeding.*
Q: *Which hand was it, your right or left?*
A: *My right hand.*
Q: *Is that your dominant hand.*
A: *Yes.*
Q: *Is that the hand you would draw designs with?*
A: *Yes.*"

Questioning continued along these lines, with counsel repeatedly using the words "*blood*" or "*bleeding*." Counsel inquired, "*Was there anything on your hand afterwards besides the blood? What if anything was on there?*" Mr. Betancourt answered, "*There were little shards or scrapings of metal and some debris from the piping.*" Counsel inquired, "*Now after you made that noise and saw your hand bleeding what did you then do?*" The witness replied, "*Well, there was an Optimo, one of those cigar shops. This was a small little*

store across the street. I went to see if they had napkins or something so I could stop the bleeding." His attorney asked, "*And did they*?", to which the plaintiff replied "*No*." Mr. Betancourt stated that he did not report the incident at that time, and that "*I grabbed my hand. Accidents are accidents sometimes so it was nothing. I didn't think it was anything initially, so*." Counsel attempted to elicit testimony from the plaintiff as to the degree or nature of the injury to his hand, asking "*At some point later did you learn what had happened to your hand*?" Objections to this and similar questions were sustained.

On cross examination, Robert Betancourt testified that prior to the incident he had been standing in the doorway with his wife for approximately two minutes, when his wife, "*shrugged*" in a playful manner, and said "*I got to go*." Counsel for the defendants then read deposition testimony of the plaintiff in which he testified that his wife told him "*you're getting too mushy. Gave a little nudge and I suddenly took my arms from her*." The following deposition testimony was also read: "*Question: When you said backed off did you back off on your own or were you given a little assistance by means of a shove or a push? Answer: Maybe a shove*." Thereafter, Mr. Betancourt testified that he had moved his hands away from his wife "*quickly*."

On re-direct examination, plaintiff's counsel once again raised the matter of Mr. Betancourt's injury. Counsel asked: "*When you testified earlier, when you realized it was a much bigger issue that you thought it was what did you mean by that*?" The plaintiff testified "*Well, it became – I became immobile*."

Testimony of Yi-ding Betancourt

Yi-ding Betancourt testified that she and the plaintiff were married in February 1998, separated early in 2002 and reconciled in February of 2003. When the incident occurred she was saying good bye to her husband in the doorway. They kissed for about a minute to a minute and a half. She stated that "*I kind of nudged him because I had to go back to class and he said 'what' and he put his arms and – up and then I noticed his face tensing up and when I looked down he was holding his hand and that's when I noticed that he had a severe cut on his hand.*" Plaintiff's counsel then asked Mrs. Betancourt whether she heard *noise* coming from her husband, to which she responded "*It was a hurtful, this hurts type of noise.*" On cross examination Mrs. Betancourt testified that she gently put up her hand in front of her and shrugged her shoulders, and that the plaintiff then moved his hand and hit the pipe with such force that it cut open his finger.

Court Ruling

After dismissing the jury for the day, the court and counsel engaged in a discussion regarding the admissibility of evidence of subsequent repairs. The court once again advised the attorneys that evidence of subsequent repairs is not admissible, unless there is an issue with respect to ownership or control.

On the second day of proceedings plaintiff entered into evidence a copy of the lease agreement between Trump and Walgreens. The attorneys stipulated that the lease would be admitted with respect to paragraphs 3, 42A, 45E, and 46B, on the issues of possession by

Walgreens and its control of the subject entranceway.

Testimony of John Powell

The plaintiff's next witness was John Powell, Walgreens' construction superintendent, on location at the time of the incident. Mr. Powell testified that Walgreens actually took possession of the premises at the Empire State Building in or about December 2001 or January 2002, and that the door at issue was a receiving door for the store. He further testified that Walgreens, at a point after the lease was signed, contemplated converting the receiving door into a store front display with a solid glass window. Mr. Powell testified that the company ultimately decided to keep the door as a receiving door and that it was their intention to replace the door with a new, more structurally sound, door. Work at the location was completed in, or about, May 2002.

Plaintiff's attorney asked the following questions regarding alterations to the doorway and bell:

> "Q: . . . *Now, this door was replaced by Walgreens was it not?*
> A: *Yes.*
> MR. GIORDANO: Objection, Judge. We discussed this yesterday.
> THE COURT: I will allow it.
> A: *Yes.*
> THE COURT: Just one moment. Will the attorneys approach, please.
> (Discussion off the record)
> THE COURT: The incomplete question is stricken. The last portion of the question is stricken.

Q: *The plans you discussed earlier that were from 2000 or 2001 with regard to changing that doorway to a display area, right?*
A: *Okay.*
Q: *Those plans called to actually rip out the door and its frame, correct?*
A: *Correct.*

. . .

Q: *Do you know where that pipe is now, that conduit?*
MR. GIORDANO: Objection
THE COURT: Sustained."

On cross-examination Mr. Powell testified that he personally agreed with the idea of maintaining the doorway in question as a receiving door as opposed to changing it into a store front display. This was due to the convenience of not having to move products through the basement of the Empire State Building. He further testified that this door was not to be used as a public entranceway. The door eventually was replaced because the existing door was in poor condition and it was falling apart. Mr. Powell then testified that although the door was in poor shape he did not deem it a dangerous situation or a safety concern.

Testimony of Joseph Clerici

Joseph Clerici, assistant director of operations for the Empire State Building, was called by the plaintiff. Mr. Clerici testified that he was responsible for aesthetic and capital improvements to the building, serving as construction manager on contract projects and reviewing construction plans and drawings for tenant proposed changes to the building. Mr. Clerici was not the construction manager at the time plans were proposed by Walgreens, but

did testify that normally a project of this magnitude would require someone from his company to go out to the job site and perform a walk through. Mr. Clerici testified that Walgreens modified the doorway in question. He was uncertain when this modification was made.

Mr. Clerici, observed photographs of the doorway and conduit in question, and testified that he would not have allowed that particular installation due to the impact it had upon the aesthetics of the building. He testified that it did not look right. Plaintiff's counsel questioned Mr. Clerici as follows:

> "Q: *What about risks or hazards of the building? Do they look for that?*
> A: *Yeah, but I don't think it would be considered one.*
> Q: *You never actually saw it though?*
> A: *No.*
> Q: *You are judging from the photograph, is that correct?*
> A: *That's correct.*
> Q: *I am not asking for your opinion, sir?*
> A: *Okay.*
> Q: *That's what we have the jury for?*"

On cross-examination, Mr. Clerici testified that the Empire State Building is a landmark building and that Walgreens did file their plans for modifications with the Landmark Preservation for approval. The plans were subsequently approved without any safety violations. Mr. Clerici also testified that the building's accident reporting policy required that accidents be reported to security and that complainants complete an incident report. Mr. Clerici testified that no incident report was filed involving the doorway or the

pipe, prior to March 2002. The witness indicated that in March 2002 the Walgreens store was under construction and not open for business.

On re-direct examination, plaintiff's counsel requested that Mr. Clerici view plaintiff's Exhibits 2 and 3 in evidence, which were enlarged photographs of the pipe. Mr. Clerici viewed the photos and was asked "*I want you to assume on March 19 of 2002 Mr. Betancourt was in the doorway and that at the time when he moved his hand off of his wife after a hug he — his hand or the base knuckle of his hand and tendon got caught in the —.*" Defense counsel's objection was sustained and the court again rendered curative instructions to the jury to disregard any statements regarding injury. However, plaintiff's counsel proceeded to argue "*It is an assumption, Judge.*"

The Defense Case

On the defendants' case, defense counsel read to the jury the following deposition testimony of Robert Betancourt:

> "Q: *That was a store front that was on the ground level of the Empire State Building?*
> A: *Correct.*
> Q: *The store front is it the one that you referred to as the Walgreens?*
> A: *It is now Walgreens.*
> Q: *At this time was the store front opened to customers? Was it doing business?*
> A: *No.*"

Reading from page 92

> "Q: *Could you describe for me again specifically how that*

occurred?
A: *We ducked into the cubby. I gave my wife a hug. Too much in the street, you know, kinda of backed off and hit my hand.*
Q: *When you said backed off did you back off on your own or were you given a little assistance by means of a shove or a push*?
A: *Maybe a shove*."

Reading from page 96 starting with line seven.

"Q: *Describe for me in your own words how you were moving when your hand came into contact with the pipe*?
A: *Quickly*."

Summations

Mr. Giordano began his closing argument by telling the jury that the matter was before them specifically because the two sides are in dispute and that an impartial jury is needed to decide the matter because the parties are unable to do so. Counsel focused on whether the doorway condition was a dangerous condition, and whether an injury was reasonably foreseeable. Defense counsel conceded that the doorway was not a perfect doorway, but rather was a normal doorway, and that his client did state that the door was in poor shape and they intended to replace it.

Counsel reminded the jury of Mr. Betancourt's testimony that "*accidents are accidents*," and urged the jury to allow plaintiff to take responsibility for his own misfortune. Mr. Giordano argued that the plaintiff had in hindsight found the implications of the accident to be more severe and, therefore, assumed that it must have been negligence. Defense

counsel asked the jury to find that the plaintiff did not prove anything more than an accident. Counsel again stated that the defendants were not admitting in any way that the condition was dangerous, and that the two witnesses employed by them testified that they did not view the doorbell structure as a safety concern.

Defense counsel pointed out that the doorway was recessed, the store was not open for business, and the door was not intended for customers use. Counsel argued that no signs, barricades, or other warning was needed in or around this door because individuals were expected to use their own discretion. Counsel maintained that the defendants had taken reasonable steps, including routine inspections of the premises, to maintain their premises, and urged the jury to listen to the court's instruction on the law with regard to forseeability. Counsel asked the jury to find that the plaintiff and his wife carried the majority of the fault and, in the alterative, to dismiss the case outright.

In his closing statement, plaintiff's counsel told the jury that the defendants admitted during trial that the doorbell fixture was an "*improper installation*" and that it was "*not permitted.*" Mr. Harris stated that the defendants "*told you it was not permitted. Under their own rules this item, this pipe, this doorbell violates it. That equals carelessness. That equals negligence*." Plaintiff's counsel argued that the defendants' case focused on the fact that the site was a receiving door, and posed the following questions to the jury: "*We don't care about these people. Is that what they are telling you? It is not a main entrance to the store*." He then added: "*I thought everybody was the same*."

Mr. Harris told the jury: "*The other thing that is interesting, too, is we know from this morning that they replaced the door*." The court once again sustained an objection to this statement and advised the jury to disregard it. Mr. Harris then questioned why the defendants had not produced in court the items in question and displayed them to the jury. He questioned where these items were, and stated: "*Well, why not just bring it in and show it to you. They got it. Where is it? Then you could have seen for yourselves. They can't do that because then, you know, that would be the glove that fit for them*."

With respect to Mr. Betancourt's not having reported the incident, counsel argued, in essence, that it made no difference because the defendants have conceded that the accident happened at the specific location and in the specific manner in which Mr. and Mrs. Betancourt testified that it happened. Mr. Harris stated, *"[the defendants] admit that the accident happened where this happened and I mean, you know, it is hard to imagine a situation like this just out of your head. This is what happened*." Mr. Harris stated that if reporting the incident was not necessary and the defense intended to concede that the accident happened where it was, then they focused on that issue during trial for no legitimate reason, but rather to waste the time of the jury. He told the jury: ". . . *why would they have asked all those questions? Why would they have wasted your time about an issue not in this case*?"

Mr. Harris argued that the lease in evidence states that *"Walgreens is responsible to repair those doors and modify them so that they are safe*." He stated: "*When you are asked*

if the defendants were negligent, were they careless in the maintenance of the doorway tell them in your verdict to be more careful . . . Please, yes, take responsibility for your defective condition. Don't try to shift the blame to Mrs. Betancourt of all people because she said Robert, stop. That's their defense. Give me a break."

In concluding, Mr. Harris called jurors' attention to the damages portion of the trial and to Mr. Betancourt's injuries, stating:

> "*I am going to stop now and save more time for when I address you again on the issue of damages . . . I think that there was some impressions without going into it that were misleading during this trial on that subject and I look forward to explaining all of that to you tomorrow and I am going to remind all of you of your promise during jury selection where I asked each and every one of you even on late hour to take you time with the deliberations and consider the impact this has on Mr. Betancourt's life when rendering this verdict.*"

The Liability Verdict

The jury rendered a unanimous verdict, finding the defendants Trump Empire State, Inc., Helmsley-Spear, Inc. and/or Walgreens Eastern Co., Inc. to be one hundred percent at fault. The jury found that neither the plaintiff, Robert Betancourt, nor the non-party, Yi-Ding Betancourt, was at fault in the happening of the accident.

THE DAMAGES TRIAL

Opening Statements

Mr. Harris stated that, unfortunately for his client, the very sharp piece of metal

severed the tendon in his hand, which had to be surgically repaired, and that during surgery a greenish piece of rust or metal was removed from the wound. The plaintiff underwent a three-day course of intravenous antibiotics at St. Vincent's Catholic Medical Center. Following his discharge from St. Vincent's plaintiff was seen by Dr. Hendel. Counsel commented that he believed that Dr. Hendel, presently, was *out of the country*. The jury was advised not to consider counsel's beliefs. Counsel indicated that the evidence would show that plaintiff received physical therapy for three months, two to three times a week, aimed at improving range of motion in his finger. Counsel stated that the plaintiff was unable to fully make a fist and that this was "*terribly significant for somebody that was a graphic designer, somebody that had tremendous talent and tremendous promise to actually earn a living doing it. A lot of us are good doodlers in high school or things of that nature. He actually made a living at it.*" Mr. Harris stated: "*So, he earns a living and the amount of money that he earns may be similar to what he earned before. That's not the point . . . The point is we should all be able to pursue our passions in life . . . and I will let him tell you about the other difficulties that he has in his life as a result of this handicap . . .*"

In his opening statement Mr. Giordano emphasized that the plaintiff did not seek medical treatment for six days and that this delay is what necessitated intravenous antibiotic treatment. Counsel stated that the plaintiff suffered a partially lacerated tendon, that plaintiff had surgery six days later, and that the insertion of sutures made the tendon whole again. Defense counsel questioned whether the plaintiff actually received physical therapy, and

asked the jury to contemplate whether a reasonable person would forego physical therapy if his livelihood was at stake. Counsel indicated that, in fact, there would be evidence presented that the plaintiff had not received treatment since 2002 and that the only doctor seen by the plaintiff in the past two years was an expert hired by his attorney. Defense counsel proposed to the jury that although the plaintiff worked with a company which designed trade show displays, the plaintiff was a normal guy working in sales.

Testimony of Robert Betancourt

Robert Betancourt testified that he has been an "*artist*" for as long as he could remember. He stated that upon graduation from high school he received an internship to Family Circle magazine, which was "*pretty much unheard of*," and that he was presented with a Saint Gordon's metal for excellence in draftsmanship. The plaintiff testified that in March of 2002 he was employed at Photobition, designing and proposing designs for trade show displays, and that he would render on-site illustrations of design ideas for prospective customers using his right hand. Plaintiff indicated that he also assisted with assembling and demonstrating design products. Mr. Betancourt testified that prior to Photobition he was employed by Harlem Music Cut where he designed CD covers.

Plaintiff indicated that while the favorite part of his work was drawing, since March 19, 2002 he had not done artwork professionally. Plaintiff indicated that he tries to sketch, but becomes frustrated and throws the work away. Mr. Betancourt stated that he moved to Florida to make a life for himself and his family, and that he is currently a construction

manager. However, he is unable to do any construction work which requires that pressure be applied, such as when holding a drill or similar equipment.

With respect to his injury, the plaintiff indicated that after his finger came in contact with the pipe he saw a lot of blood and clenched his hand. He testified that he "left a drip trail going across the street " to the Optimo store where he went for napkins, and the drug store where he obtained bandages and Betadine solution. He then told his employer he had to go, "[i]t was pretty obvious why." The plaintiff did not see a doctor that day because ". . . I got cut. I mean everyone gets cut, you know. Just waited for it to heal." During the next six days he bandaged the injury, applied a cleaning agent, and changed the bandages daily. On the sixth day he became worried because he was not able to move his hand, and went to St. Vincent's Medical Center emergency room where they "pumped antibiotics into" him. His hand was throbbing, and the pain remained the same throughout the six days. He equated the pain to an earthquake having an epicenter and then rippling to a little bit above his wrist. He could not recall whether the hospital administered any pain medications to him.

He underwent surgery, which was performed under some sort of anesthesia. After the anesthesia wore off his hand was aching and it was placed in a cast extending to below his elbow. He wore the cast for two weeks. Plaintiff testified that he received physical therapy for approximately two to three months. Each session was approximately one hour and he attended three times a week. According to the plaintiff, his treatment included resistance training, acupuncture, heat therapy, use of a stress ball and electrotherapy. Plaintiff testified

that he exercises with putty and a stress ball, daily.

Mr. Betancourt did not visit another doctor for his hand until after he met with his attorney. On cross examination it was clarified that the plaintiff initially met with his attorney in 2002, but he did not see Dr. David Neuman until March 2004. The plaintiff testified that he saw Dr. Neuman, upon recommendation by his attorney, for a "second opinion," because he was experiencing limited mobility in his finger. Although Dr. Neuman recommended additional surgery, plaintiff declined because "It wasn't guaranteed. I could still do some things . . . It could make the situation worse than what it was." Plaintiff did not seek treatment following his visit with Dr. Neuman.

Mr. Harris requested that the plaintiff exhibit his hand and finger to the jury and make a fist with his right hand. Based upon the attorney's representations, "the fifth, fourth, and third digits [were] closed, the index, second digit and thumb. The tips [were] touching but not closed." The plaintiff testified that as a result of the injury to his hand, he is no longer able to do precision illustrations, play handball or open jars, and that he has difficulty turning doorknobs. Mr. Betancourt testified that the injury has effected his self esteem and confidence.

Upon cross examination, Mr. Betancourt indicated that he had been employed by Photobition from age 20 through 27, and that Photobition retained artists whose responsibility it was to create 3D design renderings. Following his surgery he returned to work full-time in sales, but in late August 2002 was fired by Photobition. According to the

plaintiff, his boss Steven Saltzman was upset because he could not write sales reports. According to the plaintiff, he was granted permission to provide verbal reports to his boss.

When Mr. Betancourt visited Dr. Neuman in 2004 he was working in sales, full-time, at Graphic Systems, a print production company. About two years after the incident he and his wife had their third child. The plaintiff stated that he still did not intend to have the surgery suggested by Dr. Neuman. According to the plaintiff, since receiving medication, prescribed by Dr. Phillip Hendel, he had not been prescribed pain medication. The plaintiff testified that when he saw Dr. Neuman his hand was getting better and that the pain came and went. He testified that he has pain mostly when it is cold.

Testimony of Dr. David Neuman

Dr. Neuman, an orthopedic surgeon, was called by the plaintiff. He first saw the plaintiff on March 25 of 2004. He reviewed the St. Vincent's Catholic Medical Center medical records which reflect that plaintiff sustained a tendon laceration of the right second digit over the knuckle and underwent surgery. Based upon the record of a blood count test, he concluded that there was no indication of an infection. Dr. Neuman's testified that "there is an examination of the finger stating that the patient was lacking a little bit of full flexion, meaning it got somewhere less than completely straight. But this was a painless maneuver . . . he denied pain twice, both on asking him and then performing this activity. So, the incidents of infection even goes further down because there is not even much pain. It just essentially says he has pain tolerance from the laceration." A post-operative note indicates

that the plaintiff had "stable vital signs meaning his heart rate and blood pressure were within normal limits. He was afebrile which means he didn't have any sort of fever and patient had little complaints after the surgery . . ." An entry by Dr. Hendel indicated that it was found that the wound was contaminated. Dr. Neuman interpreted this as meaning that there was some foreign material in the wound which required that the plaintiff remain in the hospital on IV antibiotics. He opined that it is "standard practice that when something is contaminated then IV antibiotics are administered for seventy-two hours or three days to help prevent the onset of a potential infection of which none was present and none did arise."

Dr. Neuman testified that the surgical notes did not clearly indicate how much of the tendon was cut, but did state that the endings were identified. He opined that the tendon must have been cut almost completely, if not completely, to be able to see both ends. He indicated that "greenish material was present at tendon ends," and hypothesized that if someone was cut by a piece of rusty metal, metal could be left behind and the metal sitting in a wet fluid can cause the metal to become green, yellow or "whatever color is perceived." On re-direct the doctor indicated that in his opinion, the medical records did not indicate the presence of gangrene, that the ends of the tendon were cut off, cleaned and stitched back together, and that the arm was placed in a cast to relax the tendon and prevent the wrist from bending.

With respect to his examination of March 25, 2004, Dr. Neuman indicated that the plaintiff was unable to make a full fist, in that the second finger did not fully bend. The

plaintiff had altered sensation in the right digit compared to the left, however, blood flow was about equal. The right finger lacked 15 degrees of motion at the end joint, 20 degrees at the middle joint, and about 30 degrees at the knuckle. He observed that the bones were functioning fine, the wound had healed well, and there was no evidence of infection, redness or hardness to the area. An X-ray revealed that the bones were within normal limits. Based upon plaintiff's complaint of stiffness and loss of motion, Dr. Neuman recommended surgery to remove a built up scar tissue over the knuckle which, he opined, prevented plaintiff from bending his finger fully and making a fist. The doctor testified that plaintiff would have to wear a splint for a few days after the surgery. According to the doctor, certain people have a very vigorous reaction to cuts, creating extra scar tissue or keloids which can cause stiffness or worse following surgery. The doctor testified that within a reasonable degree of medical certainty Mr. Betancourt's injury was causally related to the accident, and that his condition was permanent in view of the fact that plaintiff had underwent the common post-operative regimen and after two years had no improvement in range of motion.

However, when cross-examined, Dr. Neuman agreed that he had not reviewed any physical therapy records and that his assessment of the plaintiff was based upon his examination and the verbal history provided by the plaintiff. The doctor indicated that he had assumed that plaintiff underwent extensive physical therapy for several months in 2002, and testified that this was the basis for his conclusion that "conservative measures" had failed and that additional surgery was required.

With respect to the initial surgery, Dr. Neuman offered that even if the plaintiff had obtained medical treatment on the day he was injured, tendon repair surgery would have been necessary and, thus, the six-day delay made no difference. The doctor testified that had the contaminant been removed from the site on the day of the accident, plaintiff still would have required IV antibiotics for three days, since whenever a foreign containment is found the patient is always administered a 72-hour course of antibiotics. Dr. Neuman admitted that he did not know for sure what the green material was in the plaintiff's wound.

The doctor acknowledged that when he noted limitations in flexion, this was based upon subjective testing, and that plaintiff had completed a medical questionnaire in which plaintiff indicated that the pain "comes and goes." According to Dr. Neuman, plaintiff also indicated that the finger was getting better and that he was on regular work status. The doctor explained that the surgery, which was recommended to the plaintiff, was roughly an hour in duration and could be done under local anesthesia.

Testimony of Dr. Martin Posner

Dr. Posner, the director of the hand surgery fellowship program at New York University Hospital for Joint Diseases, testified on behalf of the defendants. Dr. Posner testified that he was also the consulting hand surgeon for the New York Rangers hockey team and for other professional athletes.

Dr. Posner reviewed medical records from St. Vincent's Catholic Medical Center, and concluded that Mr. Betancourt was administered a course of IV antibiotics because he had

an open wound, which was potentially infected. In Dr. Posners opinion, it would not be standard operating procedure to administer a 72-hour course of antibiotics to every emergency room patient with a laceration. Dr. Posner testified, within a reasonable degree of medical certainty, that the greenish material observed at the tendon ends was local necrosis, caused by local infection. In his opinion, had Mr. Betancourt sought medical attention on the date of the incident, and the tissue had not had an opportunity to become necrotic, then the medical procedure would have been approximately twenty to thirty minutes in duration and plaintiff would have gone home that same day.

Dr. Posner conducted a physical examination of the plaintiff on January 20, 2004, at which time Mr. Betancourt's chief complaints were limited mobility of his right index finger and pain in cold weather. The doctor observed that the right index finger had "*an exceedingly faint sort of wavy scar*" over the knuckle, extending 3.5 centimeters over the proximal segment of the finger. The scar was well healed, not tender and was freely movable. The plaintiff had full extension of the finger. The doctor observed, that with some encouragement, Mr. Betancourt was able to make a full fist by himself. He concluded that plaintiff had no sensory deficits or muscle atrophy of the right arm. Disagreeing with Dr. Neuman, Dr. Posner opined that Mr. Betancourt had no deficits or decrease in flexion of any of the finger joints, and no scarring within his finger, as evidenced by his full, active flexion and normal motion.

Dr. Posner testified that Mr. Betancourt suffered no lack of strength and, therefore,

should be able to turn doorknobs and open jars without difficulty, to play handball and to play with his children. Dr. Posner opined that the plaintiff should have no difficulty drawing with precision, pointing out that when one holds a pen or paint brush the joints only flex slightly, rather than fully. Dr. Posner indicated that should a piece of tendon be cut away during surgical repair, the repaired tendon would have enough elasticity so as to not adversely effect extension or flexion of the finger.

According to Dr. Posner, the tendon repair surgery was successful and plaintiff reached full recovery. Mr. Betancourt required no further treatment, currently or in the future. However, Dr. Posner opined, even if extensor tendon surgery were necessary, it could be performed on an outpatient basis, under local anesthesia, and completed within no more than 30 minutes, with a very low risk of complications. Following this surgery the patient would immediately begin active range of motion exercises to avoid re-scaring. According to Dr. Posner, the use of a splint, as recommended by Dr. Neuman, is contraindicated.

Cross examination of Dr. Posner began with a list of questions regarding how often the doctor provided expert testimony, on whose behalf such testimony was given, and other cases in which the doctor had testified. Plaintiff's counsel questioned the doctor about his fees and income for independent medical examinations, eliciting testimony that Dr. Posner received $875 for his examination of the plaintiff. Thereafter, counsel asked Dr. Posner: "*Can you tell us what at all is independent about this process when you call it an independent medical exam when you are given $875 to do this examination on behalf of the*

defendants?" Dr. Posner was asked whether he knew "*. . . that if [his] opinion didn't support the defendant's position [he] wouldn't be sitting here today, isn't that correct*?" The Doctor then was asked whether his practice was on Park Avenue and whether he lived in Mamaroneck.

Cross examination of Dr. Posner then turned to plaintiff's injury. When the doctor indicated that he could not be absolutely sure that plaintiff's injury was a laceration caused by a pipe, because he was not present when the injury occurred, counsel responded "I understand you weren't there. Just like you weren't in the operating room back in March of 2002." The comment was stricken. Thereafter, Dr. Posner and plaintiff's counsel engaged in an exchange which produced no substantive testimony. The doctor asked counsel not to manipulate what he said, and that he was trying to answer counsel's specific question. Counsel responded, "the jury will be the judge of that, doctor." This comment also was ordered stricken. When the doctor commented that one of counsel's questions was silly, the following occurred:

> "Q: *Doctor, let me ask you this if we are talking about silly questions, all right. Assuming that Robert Betancourt came in here and showed this jury that he can't make a fist wouldn't it be silly for you to come and say that he could*?
> A: *Absolutely not.*
> Q: *Not for eighty-five hundred dollars right, Doctor*?"

When plaintiff's attorney questioned Dr. Posner about the report he prepared after examining the plaintiff on January 20, 2004, the doctor admitted that he did not mention the

infection in his two-page report. Counsel then asked Dr. Posner whether he knew that was a theory in the defendants' case at the time he wrote the report. An objection to the question was sustained. Mr. Harris then repeatedly asked Dr. Posner whether he was aware of the defendants' legal theory of the case and, if so, was he aware at the time he examined the plaintiff. When the doctor testified that he did not treat the plaintiff when he saw him in January 2004, but rather examined him at the request of the defendants, Mr. Harris commented, "*And you were paid handsomely for that, isn't that true*?" Dr. Posner was asked whether he knew what a "*malingerer*" was, and then whether he agreed that somebody with a cast on after surgery, who goes back to work a week later, was not somebody that was trying to build up their case. The jury was advised to disregard the latter question.

Testimony of William Soto

The plaintiff's case continued with the testimony of William Soto, a licensed process server retained to serve a subpoena upon Dr. Phillip Hendel. Mr. Soto testified that he attempted to serve the doctor at St. Vincent's Medical Center and at his office. At both locations he was unable to effectuate service. He did not attempt to serve Dr. Hendel at his private residence.

Testimony of Yi-Ding Betancourt

Mrs. Betancourt offered testimony that during the six days following her husband's accident, he complained to her that his hand throbbed all the way up his forearm and that he

had trouble sleeping. After the surgery, Mr. Betancourt had difficulty getting dressed and bathing due to the cast. He did not sleep much because he could not put his hand down because it would hurt. She testified that after the cast was removed his finger "*was pretty much always stiff.*"

Mrs. Betancourt stated that since the accident she has not seen her husband make a fist with his right hand, because "*It hurts him a lot, a lot.*" She was then asked by Mr. Harris: "*What expression do you see in his face when you try to do that,*" she responded that she saw pain and the expression of what pain would look like on somebody. The witness indicated that her husband is not as outgoing as he used to be, and that it is almost like "*a little piece of him was taken.*"

Testimony of Steven Saltzman

Mr. Steven Saltzman, a manager at Photobition, was called by the defendants. In 2002 Mr. Bentancourt was a salesperson under Mr. Saltzman's direction. Mr. Saltzman testified that the plaintiff was not hired based on his artistic or creative abilities but as a salesperson. He stated that the company hired full-time sketch artists and that artistic ability was not a criteria for hiring salespersons in his company. According to Mr. Saltzman, Mr. Betancourt was terminated due to his lack of sales, complaints from production managers that he was argumentative, not being reachable when he was in the field, and a generally poor attitude. After plaintiff's cast was removed the plaintiff never complained about not being able to use his hand. Upon cross examination, Mr. Saltzman testified that Mr. Betancourt

did not turn in written sales reports and that he asked the plaintiff to type them with his left hand if possible. However, Mr. Saltzman added, even prior to the accident Mr. Betancourt never properly handed in sales reports.

Evidence as to Physical Therapy

Prior to summations the Court advised the jury to disregard any testimony regarding physical therapy which the plaintiff claims to have received at a facility on George Street in Staten Island. This was due, *inter alia*, to plaintiff's failure to provide authorizations for records maintained by a physical therapy facility located on George Street.

Summations

In his closing statement the defendants' counsel urged the jury not to accept the plaintiff's contentions that this accident was life altering. He argued that the plaintiff's behavior was not that of an ordinary reasonable person, in that he waited six days until his finger was pre-gangrenous before going to the doctor. Counsel argued that the plaintiff's prolonged hospital stay was due, in large part, to the plaintiff's delay in seeking treatment. Mr. Giordano reminded the jury of Dr. Posner's testimony that had surgery been performed on the same day, it would have been a twenty minute procedure and the plaintiff would have been sent home that same day. Defense counsel commented that Dr. Neuman's testimony that administering IV antibiotics is standard procedure for minor cuts with debris, was absurd. He questioned Dr. Neuman's veracity in not admitting that the plaintiff was referred

to him by the plaintiff's attorney.

Defendants' counsel reminded the jury that there was no real evidence offered that Mr. Betancourt was a "brilliant artist." No examples of his sketches or renderings were offered into evidence. Counsel highlighted that although testimony was given by both Mr. and Mrs. Betancourt that it was the plaintiff's dream to be an artist, there was no evidence provided that Mr. Betancourt had engaged in physical therapy or a course of treatment for his finger, and there was a two-year delay in seeing Dr. Neuman after receiving a referral from plaintiff's attorney. Counsel noted that, in fact, evidence was offered that plaintiff's jobs did not require drawing.

With respect to mitigation, defense counsel told the jury that the plaintiff should not be compensated for costs which could have been avoided, such as his three-day hospital stay. He asserted that the plaintiff did not suffer any permanent injury and that the jury should compensate the plaintiff, if at all, for the "*little faint scar*" on his finger. Counsel reminded the jury that, according to the testimony, plaintiff's claimed restriction could be cured with a twenty minute procedure under local anesthesia and with a low risk of complications.

Plaintiff's counsel began his closing argument by telling the jury: "*It's been a long day, I know. Very different to sit in that chair and listen for 35 minutes [to] your client being called a liar, misleading you the jury, pumping up a case and belittling most importantly a very dramatic change in his life*." Mr. Harris referred to the defense summation as "*almost insulting*." He then turned to his cross examination of Dr. Posner, wherein he asked the

doctor to show the court, jury and himself how it was that he convinced the plaintiff to bend his hand into a fist. An objection by defense counsel lead to this exchange:

MR. HARRIS:	And that's exactly it, counsel objected. He was afraid of what we would all see.
MR. GIORDANO:	I demand a curative instruction.
THE COURT:	Oh, yes. That's inappropriate. The jury is to disregard it. What counsel - - would counsel approach, please.
(Discussion off the record)	
THE COURT:	Members of the jury, counsel's comment is totally inappropriate. Please disregard it. Mr. Harris you can continue.
MR. HARRIS:	Your Honor, I respectfully disagree with you.
THE COURT:	Your object is noted. Let's continue."

Mr. Harris argued to the jury that his client "*did everything that he could up until this accident to make himself into his God given gift of being able to draw and design. A gift that was just so easily swatted away with words a few moments ago, a gift that a former employer who never actually worked with him, never saw his work just came in and swatted it away because Robert stood up to him and made a complaint*." Counsel pointed out Mr. Betancourt's testimony that his employer loved when he filled in for the sketch person and "*made those sales*." He told the jury "*we*" know it was Mr. Betancourt's dream to rise well above that and do pure illustration, pure design; it was in his client's blood and still is in his blood, and "*his hand just wouldn't do what his brain is telling him to do. More importantly what his heart wants him to do*." Counsel argued that his client had an "*inability to use his hand in any way, shape or form like it was before . . . March 19 of 2002*," which was four

and one half years. Counsel argued that if the jury were to come back with a decision that plaintiff's post pain and suffering was five to seven thousand, that it would be "*just darn right insulting*."

Counsel stated that the defendants "*paid a man $8,500 to come in here and try to sell you an infection . . . Oh, that's clearly [an infection] with that green material that would have been [from] metal but for $8,500 that wasn't from metal that was clearly an infection. . . .*"[2] Counsel told the jury that the plaintiff "*didn't want a lawsuit*," otherwise the plaintiff "*Would have said yes, I was preparing to be an artist and [now] I can't work for the rest of my life. Well, that opposite is here. And now they want you to punish him for it . . . I would like you to reward him for it. Reward him for his heroic measures of going back to work and doing everything [he] possible could in furtherance of what he believed and what he hoped his abilities would be able to continue*."

Turning to future pain and suffering and loss of enjoyment, plaintiff's attorney advised the jury that they should take into consideration that his client will have to spend the next forty-four and a half years "*with a finger that won't bend*." He stated "*. . . I mean think, Dr. Posner just in this little side gig is making thirty, forty, thousand dollars a year doing a few hours work. Isn't Mr. Betancourt's hand worth at least that, the side gig of Dr. Posner. Or is he so big and he so little. Is that what . . . they are trying to say*?" Counsel urged the jury to decide the case in a way so that when they reflect upon their decision they are able to say

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[2]Throughout his summation, plaintiff's counsel mentioned Dr. Posner's expert witness fee(s), and stated $8,500 on at least five occasions.

"*. . . we took care of Robert Betancourt.*"

The Verdict

The jury awarded to the plaintiff $125,000.00 in past pain and suffering, $175,000.00 in future pain and suffering, and $8,600.00 in past medical expenses. There was no claim made by plaintiff for future loss of earnings or for future medical expenses.

THE MOTION

The Defendants' Contentions

Defendants argue that during the course of both the liability and damages trials jurors were subjected to inappropriate, unfair and inflammatory conduct by plaintiff's trial counsel which mislead the jury into rendering verdicts which are against the weight of the evidence. Defendants also maintained that the cumulative effect of counsel's inflammatory conduct deprived them of a fair trial. Defendants point out as one example, that despite the court's order precluding evidence of subsequent alterations and repairs, plaintiff's attorney continuously sought to place before the jury testimony regarding the post-accident replacement of the door and wiring. Defendants maintain that as a result of this misconduct they were required to question the witnesses regarding same, in an attempt to rehabilitate their case, and that in so doing they elicited additional prejudicial testimony that the door was replaced due to certain inadequacies. Defendants argue that this conduct by plaintiff's counsel, alone, requires vacatur of the verdicts and a new trial.

Defendants argue that plaintiff's attorney made vituperative remarks solely for the purpose of inducing the jury to decide the case based upon sympathy and upon passion, rather than upon the evidence. They point out, as yet another example, that during the liability trial plaintiff's counsel deliberately elicited testimony, and made statements to the jury regarding, plaintiff's injury and its claimed severity.

Defendants further argue that the jury's liability verdict, which found them to be totally at fault, is contrary to the weight of the evidence, as the testimony revealed that plaintiff was "shoved" by his wife. Defendants argue that while Mrs. Betancourt committed a discernable overt intentional act which was a substantial contributing factor in causing the accident, the jury failed to apportion fault against her. In this regard, the defendants maintain that the evidence established that the plaintiff struck his hand on the edge of the metal pipe when he was either "shoved" away by his angry or embarrassed wife, or moved his hand away "quickly," banging his knuckle. Defendant's argue that the pipe was, at the most, a passive background which presented no danger and was made potentially dangerous by the actions of the plaintiff and his wife.

Finally, the defendants contend that the jury's awards for pain and suffering are excessive, when compared with awards in similar cases, and unsupported by the evidence. In this regard, defendants rely, *inter alia*, upon evidence that: plaintiff missed no more than two weeks from work; had a good recovery from surgery; suffered no restriction or limitation in his work; and, in fact, obtained another job in the same field; did not seek treatment during

the four years following the accident; does not require pain medication; and suffers, as his only permanent injury, a faint scar on his finger. The defendants argue that the jury's award clearly demonstrates that jurors failed to consider plaintiff's failure to mitigate damages.

The Plaintiff's Contentions

Plaintiff argues that the defendants' contention that the doorbell and conduit did not create a dangerous condition was rejected by the court upon their pre-trial motion for summary judgment (Barasch, J), by the Appellate Division which affirmed the order denying summary judgment [27 A.D.3d 604], and finally by the trial jury. Plaintiff maintains that each defendant had a duty to correct the sharp edge of piping adjacent to the doorbell and failed to do so. Plaintiff argues that the law does not require that the defendants have notice of the particular manner in which the accident would occur, or the precise injury which would result in order for an accident to be deemed foreseeable (*Cleveland v. New Jersey Steamboat Co*., 125 N.Y. 299).

Plaintiff contends that the testimony of the superintendent of Walgreens and the construction manager for the Empire State Building, indicate that the condition existed for the entire duration of Walgreens' construction project, that both Walgreens and the Empire State Building were in a position to observe and discover the dangerous condition, and that they failed to take remedial action notwithstanding ample opportunity to do so. Plaintiff argues that portions of the lease agreement were placed in evidence to establish that even if the prior tenant Duane Reade had installed the conduit and doorbell, the new tenant

Walgreens had a contractual duty, pursuant to the lease, to maintain the entranceway, including the doorbell and conduit.

Moreover, plaintiff argues that no evidence of subsequent remedial measures was introduced at the liability trial. In this regard, plaintiff distinguishes between the doorbell conduit upon which plaintiff was injured, and the receiving door, which was not dangerous. Plaintiff contends that his trial counsel focused on the attention paid by Walgreens to the door in order to "establish notice" and to prove Walgreens' "control" over the doorway. Plaintiff contends that he demonstrated that in planning to modify the doorway and in changing the door, Walgreens had actual notice of the condition of the conduit, but chose to replace the door and not the conduit.[3] Plaintiff argues that such evidence also established control as "by repeatedly referring to third parties" the defendants put Walgreens' control of the premises in issue.

Plaintiff maintains that any reference to injury or damages during the liability trial was "very limited" and, in any event, subject to sufficient curative instructions. With respect to such references made during opening and closing statements, plaintiff contends that the defendants failed to preserve their objections by requesting a mistrial (*Lind v. New York City Transit Authority*, 270 A.D.2d 315 [2000]). Plaintiff contends that the failure to object to the sufficiency of the court's curative instructions, precludes the instant challenge (*Dennis v. Capital District Transportaion Authority et al*, 274 A.D.2d 901 [2000]).

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[3]There was no evidence before the jury that prior to the accident Walgreens replaced the door and not the conduit.

With reference to the issue of apportionment at the liability trial plaintiff argues that the jury was free to credit Mrs. Betancourt's testimony that she did not shove plaintiff and to consider her petite physical stature.

As to damages, plaintiff argues that the jury was free to disregard the testimony of Dr. Posner, to credit plaintiff's testimony that he was unable to make a fist, and to consider Dr. Posner as biased in favor of the defense. Plaintiff points out that he suffered a tendon laceration and surgery to his right, dominant hand.

Finally, with respect to the award for past medical expenses, plaintiff argues that it has not been established, that the plaintiff's medical insurance carrier paid the bills that were admitted into evidence.

DISCUSSION

When the misconduct of counsel has so permeated the trial so as to create a climate which effectively destroys an opposing party's ability to obtain a fair trial, vacating the jury's verdict is an appropriate remedy (*Berkowitz v. Marriott Corp.*, 163 A.D.2d 52 [1990]; *Dwyer v. Nicholson*, 193 A.D.2d 70, 77 [1983]; *Rich v. City of New York*, 84 A.D.2d 578 [1981]). CPLR 4404[a] provides that, upon motion or upon its own initiative, a trial court "may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial . . . where the verdict is contrary to the weight of the evidence, [or do so] in the interest of justice . . ." In determining whether to grant a motion to set aside the verdict, the court must consider the

cumulative effect of the counsel's conduct in influencing the jury verdict in [that party's] favor. In this case, where neither apportionment of liability nor damages was necessarily proven to an extreme on either side, it cannot be said the conduct of his trial counsel did not to a great degree influence the jury's verdict in the plaintiff's favor (*Pagano v. Murray*, 309 A.D.2d 910, 911 [2003]; *see also, Cherry Creek National Bank v. Fidelity & Casualty Company of New York*, 207 A.D.2d 789, 790 [1924]).

Particularly when the evidence does not overwhelmingly favor any one party, it is essential that the issues be determined by an impartial jury upon legal evidence uninfluenced by extraneous and prejudicial circumstances (*Cherry Creek*, 207 A.D. 787, 789). Thus, in *Steidel v. County of Nassau*, counsel's suggestions that the opposing party's expert was "shading the truth" and accusation that the expert was a "hired gun," were deemed factors necessitating a new trial (*Steidel*, 182 A.D.2d 809, 814 [1992]). There, the court concluded that "had [liability] been shown with any degree of clarity, these improper remarks probably would have been attributed to excessive zeal and forgiven as harmless" (*Steidel*, 182 A.D.2d 809, 814; *see also, Johnson v. Lazarowitz*, 4 A.D.3d 334, 335 [2004]). In *Cherry Creek (id.)* the court noted that the "law is so intent that misleading prejudicial matter shall not be allowed to enter jurors' minds that under certain circumstances the asking of an incompetent question for an ulterior purpose, even though the question be not answered, will justify the setting aside of a verdict. . . . It is time that the bar should realize that when counsel in a close case resorts to such practices to win a verdict, they imperil the very verdict which they

thus seek" (*Cherry Creek*, 207 A.D. 787, 790-791, [trial counsel, among other things, told the jury in closing: "I hope and believe that this jury is going to place the stamp of its condemnation on the kind of practices which have obtained in this case . . . Have we got to fight the bank accounts of all these mighty corporations?"]). In *Dwyer v. Nicholson* (193 A.D.2d 70, 77 [1993]), it was determined that the defendants were deprived of their right to a fundamentally fair hearing where counsel for plaintiff referred to defendants and their attorneys in derogatory terms and repeatedly accused them of perjury and theft (193 A.D.2d at 77). The court commented that such inappropriate behavior "destroys confidence in the fairness of judicial rulings and judgments and perverts the trial procedures as a serious search for the truth" (193 A.D.2d at 77, *quoting Matter of Castellano*, 46 A.D.2d 792 [1974]).

Although attorneys, during summation, are permitted the widest latitude in discussing the evidence and presenting their theories of the case to the jury, this latitude does not authorize an attorney to demand a verdict for purposes "other than the just settlement of the matters at issue between the litigants or [permit] appealing to prejudice or passion" (*Cherry Creek*, 207 A.D. 787, 790). Appellate courts also have reminded trial attorneys that an address to the jury may not lead the jury astray by raising misleading and prejudicial matters (*id.* at 791). Thus, when an attorney makes incorrect suggestions on the evidence presented and improperly interjects his own beliefs into his summation, this is sufficiently prejudicial to warrant a new determination on a narrowed issue (*McAlister v. Schwartz*, 105 A.D.2d 731, 733 [1984]). Improper attempts by an attorney to deflect the jurors' attention away from "the

issues in the case," by referring to the opposing side's expert as "'a biased prejudiced paid off witness' who 'lied,' and whose testimony was 'worthless' and 'valueless,'" has been deemed, cumulatively, sufficient grounds for granting a new trial (*Pagano v. Murray*, 309 A.D.2d 910, 911 [2003]). It also is not acceptable for trial counsel to attempt to induce the jury to decide the case based upon sympathy or passion, rather than upon the basis of the evidence (*Johnson v. Lazarowitz*, 4 A.D.3d 334, 335 [2004]).

In this case, plaintiff's trial counsel, *inter alia*, improperly injected plaintiff's injury into the liability trial; prejudiced the jury with questions as to post-accident alterations, in disregard of the court's ruling; denigrated the defendants' expert witness; mislead the jury as to the evidence; diverted jurors' attention from the issues in the case; and sought to have the case decided on sympathy and passion.

EVIDENCE OF INJURY DURING LIABILITY TRIAL

Plaintiff's attorney began his opening statement during the liability trial with a graphic description of plaintiff's injury, stating, "[he] felt the edge of a sharp metal pipe cut through his hand. It was covered in blood." Counsel concluded by indicating that the cut *through* the plaintiff's hand, *changed* his client's *whole life*.

During his direct examination of the plaintiff, counsel called attention to plaintiff's injury in ways that went far beyond what was relevant to establish liability. He asked the plaintiff to ". . . hold [his hand] up for the jury, please and point to the knuckle that you hit." Plaintiff demonstrated to the jury that the injury was to the knuckle of his right index finger.

Mr. Harris then asked:

> "Q: *Was it sharp?*
> A: *It was.*
> Q: *And how do you know that?*
> A: *I was bleeding a lot, so. It was pretty cold and it drew my attention that's for sure.*
> Q: *Now, after your – the bottom of your index finger that knuckle area hit that pipe what noise if anything did you make?*
> A: *I did the (Indicating) noise, grabbed by hand. That's the noise I made.*
> Q: *Did you see that blood immediately or do [sic.] it take some time to appear or how did that happen?*
> A: *Pretty immediately. My wife saw my reaction, you know, to getting hit, you know. She looked for a second and then she grabbed my hand and first thing for her was to stop it from bleeding.*"

Counsel also, repeatedly made reference to "*blood*" or "*bleeding*" in his questions to plaintiff and suggested to the jury that the injury was more serious than a simple cut, when he asked: "*At some point later did you learn what had happened to your hand?*" The court did not allow this question to be answered.

Counsel elicited similar testimony from Mrs. Betancourt when he asked what she observed after her husband hit his hand. She responded: "*I noticed his face tensing up and when I looked down he was holding his hand and that's when I noticed that he had a severe cut on his hand.*" Counsel then questioned Mrs. Betancourt regarding whether she observed any noise coming from her husband and she testified "*It was a hurtful, this hurts type of noise.*" Such questions and testimony did not serve, merely, to amply for the jurors how the

accident occurred.

In questioning Mr. Clerici, counsel stated: "*I want you to assume on March 19 of 2002 Mr. Betancourt was in the doorway and that at the time when he moved his hand off of his wife after a hug he - - his hand or the base knuckle of his hand and tendon got caught in the - -.* " After the court sustained an objection to the question, counsel argued with the court in the presence of the jury that he was posing a hypothetical question.

Again, during closing argument, counsel called the jury's attention to plaintiff's injury, stating: "*I am going to stop now and save more time for when I address you again on the issue of damages . . . I think that there was some impressions without going into it that were misleading during this trial on that subject and I look forward to explaining all of that to you tomorrow and I am going to remind all of you of your promise during jury selection where I asked each and every one of you even on late hour to take you time with the deliberations and consider the impact this has on Mr. Betancourt's life when rendering this verdict.*"

EVIDENCE OF POST-ACCIDENT REPAIR/ALTERATION

Plaintiff sought to admit evidence as to Walgreens' plans, prior to the accident, for alteration of the doorway and doorbell upon the theory that this established notice by Walgreens of the claimed dangerous condition (*see i.e. Mansfield v. City of New York*, 119 A.D. 199 [1907], [evidence that awning had been inspected several years prior to accident

and found to be unsafe admissible to show notice and that the unsafe condition had continued, there being no evidence to the contrary]; *Shvets v. Landau*, 121 Misc.2d 34 [1983], [discovery of requests for repair made prior to accident]). To the extent that the defendants argued that Walgreens had no notice of the claimed defect to the bell conduit which was installed by Duane Reade, plaintiff sought to elicit evidence regarding Walgreens' plans for alteration of the doorway area. This evidence was relevant on the issue of notice (*see Shvets v. Landau*, 121 Misc.2d at 36). However, questioning by plaintiff's counsel, once again, went beyond the bounds of what was appropriate.

Evidence of subsequent alterations or remedial measures is not admissible in a negligence action unless there is an issue of maintenance or control (*Niemann v. Lucca*, 214 A.D.2d 658 [1995]; *see also, DeRoche v. Methodist Hospital*, 249 A.D.2d 438 [1998]; *Klatz v. Armor Elevator Co., Inc.*, 93 A.D.2d 633 [1983]). Evidence of post-accident repairs and alterations with respect to the structure or instrumentality claimed to have caused the injury, has been deemed admissible, in limited circumstances, to demonstrate the condition at the time of the accident, to identify the cause of the injury, for rebuttal or impeachment, or to show the feasibility of precautionary measures (*Caprara v. Chrysler Corp.,* 52 N.Y.2d 114, 122-123 [1981]; *DePasquale v. Morbark Industries, Inc.*, 221 A.D.2d 409, 410 [1995]; *see also, Yates v. City of New York*, A.D.3d 458 [2007]).

Here, the parties stipulated to the admissibility of the lease agreement which established Walgreens' control and responsibility to maintain the doorway including the

doorbell and conduit. Under the circumstances, herein, evidence as to post-accident replacement of the door and suggestions of post-accident repair/replacement of the conduit piping "[have] no tendency . . . to show that the *[door or bell conduit] was not previously in a reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect, safe and secure*" (*Corcoran v. Village of Peekskill*, 108 N.Y. 151, 155 [1888]). Rather than have some legitimate bearing upon the defendants' negligence or knowledge, "*its natural tendency is undoubtably too prejudice and influence the minds of the jury*" (*id.*). Thus, such evidence was excluded at trial.

Moreover, plaintiff's contention that his counsel's questioning of witnesses was limited to eliciting evidence concerning the actual door, and not the conduit, is inaccurate. Plaintiff's attorney questioned Mr. Powell, Walgreens' construction superintendent, as follows: ". . . *Now, this door was replaced by Walgreens was it not*?" Following an objection and bench conference resulting in this question being stricken, Mr. Harris continued by asking: "*Those plans called to actually rip out the door and its frame, correct*?"; ". . . *did Walgreens decide, if you know, to leave that doorbell in place*?"; "*Do you know where that pipe is now, that conduit*?"

Mr. Harris mislead the jury on this issue in his summation by telling jurors that, during the trial, the defendants admitted that the doorbell fixture was an "*improper installation*" and was "*not permitted.*" The actual testimony by Mr. Clerici, director of operations for the

Empire State Building, was that he would not have allowed the installation due to the aesthetic impact on the building.[4] However, Mr. Harris stated that the defendants "*told you it was not permitted. Under their own rules this item, this pipe, this doorbell violates it. That equals carelessness. That equals negligence*." Mr. Harris, told the jury: "*The other thing that is interesting, too, is we know from this morning that they replaced the door*." He continued: "*Well, why not just bring it in and show it to you. They got it. Where is it? Then you could have seen for yourselves. They can't do that because then, you know, that would be the glove that fit for them*."[5]

EVOKING SYMPATHY AND PASSION

During the liability trial plaintiff's attorney, rather than focus the jury on issue of liability, sought to sway the jury with sympathy and passion. For example, in his opening statement at the liability trial Mr. Harris told the jury that this incident caused the plaintiff's whole life to change and, thereafter, elicited testimony that Mr. Betancourt drew professionally and had injured his dominant hand, specifically the hand he used for drawing. In closing argument Mr. Harris appealed to class deferences. In responding to defendants' argument that the incident allegedly occurred in a receiving doorway and not a main entranceway, Mr. Harris asked the jury whether by this the defendants were saying: "*We*

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[4]Clerici was unsure when the door was changed. Powell testified that renovation work began in or about December 2001 or January 2002 and was completed in May 2002.

[5]This comment also sought to shift the burden of proof to the defendants.

don't care about these people? Is that what they are telling you? It is not a main entrance to the store . . . I thought everybody was the same." Finally, Mr. Harris stated to the jury "*When you [the jury] are asked if the defendants were negligent, were they careless in the maintenance of the doorway tell them in your verdict to be more careful . . . Please, yes, take responsibility for you defective condition. Don't try to shift the blame to Mrs. Betancourt of all people because she said Robert, stop. That's their defense. Give me a break.*" In the liability trial, Mr. Harris told the jury to "*take [its] time with its deliberations and [to] consider the impact this has on Mr. Betancourt's life when rendering this verdict.*"

Again, during the damages trial counsel sought sympathy for his client, telling the jury that Mr. Betancourt "*had tremendous talent and tremendous promise to actually earn a living*" as a graphic designer.[6] During cross examination of Dr. Posner, counsel suggested that his client was not a "*malingerer*" and did not act like someone who was trying to build up his case. Mr. Harris, asked the doctor, ". . . *Doctor, somebody, can we agree, with a cast on after surgery like this that goes back to work a week later . . . is not somebody that is trying to build up their case, do you agree with that?*" And, during summation he told the jury: "*It's been a long day, I know. Very difficult to sit in that chair and listen for 35 minutes your client being called a liar, misleading you the jury, pumping up a case and belittling most importantly a very dramatic change in his life.*" *He referred to the defense counsel's summation as "almost insulting.*" He told the jury that the defendants "*want you [the jury]*

[6]Mr. Betancourt did not seek damages for loss of past or future earnings.

to punish" the plaintiff for going back to work soon after the incident. Counsel stated "*I would like you [the jury] to reward him for it. Reward him for his heroic measures of going back to work and doing everything that he possibly could in furtherance of what he believed and what he hoped his abilities would be able to continue.*" Counsel also sought sympathy from the jury for Dr. Neuman, his expert witness by stating: "*I mean do you realize that was less money than he [defendants' counsel] paid his doctor for a couple hours this morning. It is insulting. It was insulting to Dr. Neuman. I mean the poor young man is a young guy. Has been out of school couple of years. He failed his boards or part of his boards. He is still an orthopedic surgeon. . . . He wasn't coming in here for $8,500.*"

DENIGRATION OF DEFENSE EXPERT

During the damages trial counsel repeatedly called the jury's attention to the fact that Dr. Posner received $875 for his examination of the plaintiff. He asked Dr. Posner "*Can you tell us what at all is independent about this process when you call it an independent medical exam when you are given $875 to do this examination on behalf of the defendants*?" He insinuated that the doctor had tailored his opinion to fit the defendant's "*theory*" of the case. He questioned whether Dr. Posner was advised, in advance of his examination and/or testimony, of the defendant's legal theory of the case. He went so far as to seek to elicit evidence that the doctor had offices on Park Avenue and lived in Mamaroneck, a not so subtle reference to the wealth of the defendants and their expert.

Counsel sarcastically argued with Dr. Posner, inquiring: "*Assuming that Robert Betancourt came in here and showed this jury that he can't make a fist wouldn't it be silly for you to come and say that he could*?" The doctor answered, "*Absolutely not*" and Mr. Harris added, "*Not for eighty-five hundred dollars right, Doctor*?" Mr. Harris asked Dr. Posner, "*Isn't it true, Doctor, that during that exam you forced his hand closed with your own hand, isn't that true*?" The doctor replied "*That's absolutely a lie, Mr. Harris, and you know that*." Mr. Harris responded "*So then he is lying then right, Doctor*?"[7]

Counsel accused the defendants' of paying Dr. Posner to testify in a specific manner stating: ". . . *they want to say well, on such and such a day, we are going to give you Dr. Posner $875 for a report and if this case comes to trial we are going to want you to testify where you will get to make a boat load of money. We need that finger to bend. That's what we need. And [the defendants] went out and bought the best doctor they could find, didn't they*." Mr. Harris went on to say that defendants paid Dr. Posner to "*come in here and try and sell you an infection . . ." and "Oh, . . . but for $8,500 that wasn't from metal that was clearly an infection*."

<u>Unsworn Witness</u>

"It is well settled that trial counsel improperly acts as an unsworn witness, [in violation of Code of Professional Responsibility DR 7-106], when he injects 'unsworn

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[7] Plaintiff never testified that Dr. Posner had "forced" him to make a fist.

statements of personal knowledge of the facts of the case'" (*Clarke v. New York City Transit Authority*, 174 A.D.2d 268, 276 [1992]). Counsel also violates DR 7-106 when counsel asserts a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused (DR 7-106[3]). It is also improper for trial counsel to bolster his case by repeated accusations that a witness for the other side is a liar (*Clarke v. New York City Transit Authority*, 174 A.D.2d at 277).

During his summation in the damages trial, plaintiff's counsel called the jury's attention to that point in the trial when he asked Dr. Posner to demonstrate how it was that he convinced the plaintiff to bend his hand into a fist. This comment resulted in an objection and then an inappropriate outburst by Mr. Harris, in the jury's presence, that the defendants' attorney was "*afraid of what we would all see*."

Regarding the plaintiff's expert witness, Dr. Neuman, Mr. Harris stated "*the poor young man is a young guy. Has been out of school couple of years. He failed his boards or part of his boards . . . He wasn't coming in here for $8,500 . . . I think it was clear that Dr. Hendel is not around and yes I said to Mr. Betancourt hey, go see Dr. Neuman, he is a good guy. Go see him. He will take care of you. See what he says. See what you need.*"

Counsel again imparted personal knowledge to the jury when he said: "*And we know it was [the plaintiff's] dream to even rise well above that and do pure illustration, pure design. That's what was in his blood. It is still in his blood. His hand just wouldn't do what*

his brain is telling him to do. More importantly what his heart wants him to do." Counsel also told the jury that his client "*didn't want a lawsuit.*"

Finally, plaintiff's counsel sought to distracted the jury from deciding issues of fact presented to them by stating the following: "*If you analyze what I have asked you[,] for I mean think. Dr. Posner just in this little side gig is making thirty, forty thousand dollars a year doing a few hours work. Isn't Mr. Betancourt's hand worth at least that, the side gig of Dr. Posner. Or is he so big and he so little. Is that what you they [sic.] are trying to say?*" Counsel told the jury "*when you [the jury] go to bed and you close your eyes and you think about what you just did today and just make sure that when you are in that position that you are able to say we took care of Robert Betancourt. We did the right thing. We did out job for the past, more importantly for his future.*"

The cumulative effect of the aforementioned improper and inflammatory conduct deprived the parties of a fair trial (*see Brooks v. Judlau Contracting, Inc.*, ___ A.D.3d ___, 2007 WL 1018429 [N.Y.A.D. 2nd Dept.]; *Clark v. New York City Transit Authority*, 174 A.D. at 276-278; *Berkowitz v. Marriott*, 163 A.D.2d 52 [1990]; *McAlister v. Schwartz*, 105 A.D.2d 731 [1984]). The court's ruling on objections and curative instructions could not ameliorate the effect of such prejudice (*Weinberger v. The City of New York*, A.D.2d 819 [1983]).

DAMAGES

Moreover, while the amount of damages to be awarded for personal injuries is primarily a question of fact for the jury (*Senko v. Fonda*, 53 A.D.2d 638, 639 [1976]), "where

the verdict of a jury is contrary to the weight of the evidence, or where it is excessive or inadequate, the trial court is vested with the power, and has the duty, to set it aside and to order a new trial" (53 A.D.2d at 639, citing *Kligman v. City of New York*, 281 A.D. 93, 94 [1952]). "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 [2005]).

Here, the jury's assessment of the severity and extent of pain and suffering appears to have been motivated by sympathy, and was against the weight of the evidence. The award of $125,000 for past pain and suffering and $175,000 for future pain and suffering, also, "*materially deviates*" from what constitutes reasonable compensation (CPLR 5501[c]; compare *Grazier v. Snap-on Corp.*, 279 A.D.2d 448 [2nd Dept., 2001], [$66,000 for past and $150,000 for future pain and suffering for complete laceration of tendon in dominant middle finger, with surgical repair, diminished hand strength and need for future surgery]; *Neils v. Putnam Hospital*, 276 A.D.2d 607 [2nd Dept., 2000], [reduced to $200,000 for future pain and suffering for medical malpractice where injury to non-dominant hand, intermittent pain, slight loss of sensation, and some diminished range of motion]; *Bradshaw v. 845 U.N. Ltd. Partnership*, 2 A.D.3d 191 [1st Dept., 2003], [worker entitled to $35,000 for future pain and suffering where distal portion of worker's right ring finger was amputated and he had hypersensitivity in remaining portion]; *Mane v. Brusco*, 280 A.D.2d 436 [1st Dept., 2001]

[$50,000 for past and $100,000 for future pain and suffering for 14-year old who severed ulna nerve, artery and two tendons in non-dominant hand resulting in permanent nerve damage and scarring]; *Faulkner v. Darien Lake Theme Park and Camping Resort, Inc.*, 6 A.D.3d 1097 [3rd Dept., 2004], [$35,000 for past and $150,000 for future for injury to infant's hand caught on spinning portion of ride]; *Pendoza v. City of New York*, 289 A.D.3d 315 [2nd Dept. 2001], [$50,000 for past and $110,000 for future pain and suffering where 12-year old severed nerve and muscle of index finger of dominant hand, requiring microsurgical repair, and still had pain and inability to bend]; *Zakarya v. 125 Broad Street Co.* ([12 JRD 153] [Sup. Ct. N.Y. Co. 2003], [$150,000 for past and $0 for future where worker lacerated two tendons in dominant hand, with 10 percent restriction in index finger which did not inhibit function but was cosmetically relevant]; *Mirando v. Colonial Centre Co.* [12 JRD 103] [Sup. Ct. Suffolk Co., 2002], [$200,000 for past and $10,000 for future pain and suffering for laceration of median nerve of right dominant hand, with surgery to remove ceramic fragments, carpal tunnel release, exploration of median nerve and repair of digital branches of thumb and index finger of median nerve; weakness, restricted motion and decreased sensation]).

Here plaintiff suffered a lacerated tendon of his dominant right hand which was surgically repaired. The operation was successful and without complications. Evidence was presented that plaintiff's six-day delay in receiving medical attention may have resulted in an infection which necessitated a three-day hospital stay. Moreover, there was no evidence

properly before the jury that plaintiff had complied with the prescribed physical therapy regiment.

It was also undisputed that the plaintiff did not seek medical treatment between 2002 and 2004, and that his visit to Dr. Neuman in 2004 was the result of a referral by his attorney. No explanation was offered for the two-year delay between the referral and his visit to Dr. Neuman. Nor is there evidence that plaintiff was treated elsewhere. While Dr. Neuman recommended corrective surgery to address the restriction he found, plaintiff testified that he would not undergo the surgery. Moreover, Dr. Neuman's recommendation was based upon the assumption that plaintiff had already under gone the recommended post-operative regiment of physical therapy and that this had failed. As noted, there was no such evidence before the jury.

While plaintiff claimed diminished strength in his right hand, neither the plaintiff's or the defendants' medical expert found any lack of strength.

Finally, plaintiff returned to work shortly after the accident performing the same work and, thereafter, obtained another position in the same field. At the time of trial plaintiff was employed as a construction manager in Florida. There was no claimed loss of earnings, nor a claim for future medical treatment before the jury.

Moreover, the jury's award for past medical expenses is not supported by the evidence. The court need not address the parties' remaining contentions. Accordingly, it is

ORDERED, that the jury's verdicts as to both liability and damages are vacated; and

it is further

ORDERED, that counsel for all parties appear in Part 39, Civil Term of this court on July 20, 2007 at 9:30 a.m.