At an IAS Term, Part 2 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 26th day of June 2008.

P R E S E N T:

HON. GLORIA DABIRI,

Justice.

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THOMAS MALONEY, JR.,

Plaintiff,

- against -

Index No. 17715/05

SILVERIO J. BASTIAO JR., et ano.,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Thomas Maloney, Jr. seeks an order, pursuant to CPLR 4404, setting aside a jury verdict on damages as contrary to the weight of the evidence, directing that judgment be entered in his favor as a matter of law on the issue of serious injury under the 90/180 category of Insurance Law § 5102, and granting him a new trial in the interest of justice on all other damage issues.

Plaintiff commenced this action against defendants to recover damages for personal injuries allegedly sustained to his neck and back during a motor vehicle accident of June 21, 2004. At the damages phase of the trial the jury unanimously found that the accident was not a proximate cause of an injury to plaintiff's neck or back.

Serious Injury Finding Under the 90/180 Category of Insurance Law § 5102

It is settled that "[t]he standard for determining whether a jury verdict is against the weight of the evidence is whether the evidence so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence (*Marino v Cunningham*, 44 AD3d 912, 912-913 [2007], citing *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]), "Where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*id.*, quoting *Tapia v Dattco, Inc.*, 32 AD3d 842, 845 [2006]).

"A motion for judgment as a matter of law pursuant to CPLR 4401 or 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party" (*Hamilton v Rouse*, 46 AD3d 514, 516 [2007], quoting *Tapia*, 32 AD3d at 844). "In considering such a motion, 'the trial court must afford the party opposing the motion every inference which may properly

be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant'" (*id.* quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Further, "[g]reat deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of the witnesses are for the fact-finders, who had the opportunity to see and hear the witnesses" (*Kinney v Taylor*, 305 AD2d 466, 467 [2003]).

Plaintiff seeks to set aside the jury's determination, that he did not sustain a medically-determined injury which prevented him from performing substantially all of his daily activities for 90 of the first 180 days immediately following the accident, as contrary to the weight of the evidence and seeks judgment as a matter of law on this claim. In support of his motion, plaintiff relies upon his trial testimony regarding his inability to maintain his daily routine and upon the testimony of his medical experts.

At trial, Dr. Joseph D'Angelo, an orthopedist, and Dr. Raymond Bartoli, a chiropractor, testified to a reasonable degree of medical and chiropractic certainty, respectively, that they examined plaintiff shortly after the accident and found significant range of motion limitations, which were numerically quantified. They found spasms and made other findings correlating with plaintiff's injuries. Plaintiff also provided evidence of cervical and lumbar disc injuries based upon MRI studies. Both doctors testified that plaintiff's injuries were causally related to the subject car accident, and that he was unable to perform substantially all of the material acts which constituted his usual and customary activities during the requisite 90-day period.

Plaintiff testified that he missed one day of work following the accident. Although plaintiff did not request light duty assignment, which would have required the approval of a police department doctor, he decided to restricted his duties as a police officer by "staying on the computer" and "looking at stats through crime reports" rather than performing anti-crime duty in the field. Plaintiff testified that he did not drive to work for "less than a month," that he had not "really gone back to work . . . [for] a long length of time" and that he could not sit for lengthy periods. Plaintiff testified that before the accident he fished, bowled and played softball and football. In addition, plaintiff testified, prior to the accident he did many things with his son who was then 6 years old. However, since the accident he could not do anything with his son who was age 9 at the time of trial. His son was "really careful around" him.

When questioned whether following the accident plaintiff was unable to perform his usual and customary activities, Dr. Bartoli replied that based upon his examination of plaintiff, his "recommendation was that [plaintiff] was unable to perform his usual and customary activities of daily living. He was verbally told many times as a matter of fact not to go to work because his condition was severe." However, Dr. Bartoli conceded that he did not know what plaintiff's customary activities were. When asked whether plaintiff was able to conduct his normal and customary activities following the accident, Dr. D'Angelo replied "[n]o, [plaintiff] was not able to conduct those duties. I kept him out of work for a period of time." Dr. D'Angelo further explained that while it was his "recommendation" to keep the plaintiff out of work, he did not "have the actual authority" to do so. Dr. D'Angelo also

indicated that he did not know what plaintiff's normal activities were at the time of the accident. Moreover, neither doctor was aware of plaintiff's other neck and back injuries (*see Silla v Mohammad*, 2008 NY Slip Op 5674, 2 [2008], citing *Moore v Sarwar*, 29 AD3d 752 [2006] [failure to acknowledge prior accident and injuries rendered speculative physician's conclusion that cervical and lumbar injuries resulted from subject accident]).

Inasmuch as plaintiff's doctors admitted that they did not know what plaintiff's normal activities were and were unaware of his other neck and back injuries, and in light of the limited evidence offered by plaintiff regarding restrictions in his normal activities during the first 90 out of 180 days following the accident, it cannot be said that the jury's finding is unsupported by a fair interpretation of the evidence or is against the weight of the evidence (*see Watt v Eastern Investigative Bureau, Inc.*, 273 AD2d 226, 228 [2000]). Moreover, by failing to move for a directed verdict during trial on the issue of serious injury, plaintiff implicitly conceded that there were issues of fact for the jury (*DeSimone v Royal GM, Inc.*, 49 AD3d 490 [2008], citing *Miller v Miller*, 68 NY2d 871 [1986]).

Motion to Set Aside Verdict in the Interest of Justice

Plaintiff argues that in the interest of justice, a new trial should be granted on all remaining damages issues due to the cumulative prejudicial effect of the court's errors in ruling on evidence, jury instructions and offers of proof, and defense counsel's inflammatory summation remarks and other misconduct. As an initial matter, since plaintiff never moved at trial for a mistrial, plaintiff has waived the right to seek relief on these grounds (*see* CPLR 4404 [a]; *Gafur v Garden Cab Corp.*, 2004 NY Slip Op 50038U, 3 [2004], citing *Bonilla v*

New York City Health and Hospital Corp., 229 AD2d 371 [1996]; *Mathews v Coca-Cola Bottling of N.Y.*, 188 AD2d 590, 591 [1992]). In any event, plaintiff's contentions lack merit.

First, plaintiff asserts that he was entitled to a missing witness charge with respect to Dr. C. M. Sharma, the defendant's neurologist. The court denied plaintiff's request as untimely in that it was made after the defendants rested. The court noted that a party seeking such a charge is required to provide the party against whom the charge is sought sufficient notice so as to allow the latter to adjust his or her strategy or provide, for example, an explanation for not calling the witness. As the plaintiff's request for the charge was "untimely made after the close of the evidence" it was properly denied (*Carrero v General Fork Lift Co., Inc.*, 36 AD3d 577, 578 [2007]; *Morgan Rosselli*, 23 AD3d 356, 357 [2005], *lv denied* 6 NY3d 705 [2006]; *Adkins v Queens Van-Plan, Inc.*, 293 AD2d 503, 504 [2002]). Moreover, plaintiff did not establish that, if called as a witness, Dr. Sharma would have provided noncumulative testimony (*see Zweben v Casa*, 17 AD3d 583, 584 [2005]).

Plaintiff further argues that defendants' experts, Drs. Pitman and Pfeffer, were improperly permitted to testify, outside the scope of their reports, about causation, his 90 out of 180 serious injury claim, and the necessity for surgery. In this regard, over objections, Dr. Pitman, an orthopedist, testified that plaintiff's complaints were the result of surgery, rather than of the subject accident. Dr. Pfeffer, defendant's radiologist, testified that plaintiff did not require surgery to his neck. Plaintiff's counsel objected on the ground that this testimony was "beyond the scope of the report and she's not a surgeon." Dr. Pittman was permitted to testify regarding the cause of plaintiff's injuries although he had not expressly stated an

opinion regarding causation in his previously exchanged report. However, the issue of causation was "implicit on the questions of damages" (*Clemons v Vanderpool*, 289 AD2d 1078 [2001]; *Fishkin v Massre*, 286 AD2d 749 [2001], *lv denied* 97 NY2d 700 [2002]; *Pola v Nycz*, 281 AD2d 839 [2001]; *Overeem v Neuhoff*, 254 AD2d 398 [1998]; *McLamb v Metropolitan Suburban Bus* Auth., 139 AD2d 572 [1998]; *see also Farrell v Gelwan*, 30 AD3d 563 [2006]). Further, Dr. Pfeffer's testimony that plaintiff did not require neck surgery "was not so inconsistent with the information and opinions contained [in the expert witness disclosure], nor [was that expert disclosure] so misleading, as to warrant preclusion of [such] testimony" (*Miller v Galler*, 45 AD3d 1325, 1326 [2007]; *Farrell*, 30 AD3d at 563 ["The expert's testimony did not transcend the scope of information set forth in the applicable expert disclosure form or the previously exchanged medical reports, received well before trial"]).

Plaintiff also argues that Dr. Pfeffer should not have been permitted to testify since the defendants failed to timely exchange the doctor's medical report. In addition, plaintiff asserts that once it was exchanged, the report was incomplete. These claims, similarly, are without merit. In particular, Dr. Pfeffer explains in a letter dated July 20, 2007, that in September 2006 she received and reviewed MRI films which she thought were for Mr. Maloney, Sr. (as opposed to plaintiff, Mr. Maloney, Jr.), since the film envelope stated that the films had been performed on "Mr. Maloney Sr." However, after receiving the films for plaintiff in 2007, Dr. Pfeffer compared the two sets of films (for years 2006 and 2007) and realized that the films she received in September 2006 were in fact for plaintiff, and not for

plaintiff's father. Dr. Pfeffer's report was not exchanged until July 30, 2007, when jury selection began. Opening statements were made on August 8, 2007. Prior to commencement of the trial, this issue was raised by plaintiff's counsel. Defense counsel explained the above-noted circumstances to the court. Plaintiff's counsel argued that he was prejudiced by the late exchange because it prevented him from preparing plaintiff's case, and suggested that there was no basis for the mix-up inasmuch as the 2006 films stated "Thomas Maloney, 36 year old male." The court disagreed and concluded that there was no basis for concluding that there was bad faith by the defendants in view of the "mix up in the names" and that there was "good cause for the delay."

"CPLR 3101(d)(1)(I) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (*Cutsogeorge v Hertz Corp.*, 264 AD2d 752, 753-754 [1999] [internal quotations omitted]). Here, the record does not support a conclusion that defendants' delay in serving their expert information was intentional or willful. Rather, the record reveals that the late exchange was the result of a mix-up in the names of plaintiff and his father on the envelope containing plaintiff's MRI films. Furthermore, plaintiff had at least a week within which to review the material prior to commencement of trial (*Rowan v Cross County Ski & Skate, Inc.*, 42 AD3d 563, 564 [2007]). Moreover, the court gave plaintiff's counsel the opportunity to apply for an adjournment, and thus any "potential prejudice to the plaintiffs

could have been eliminated" (*id.*). With respect to the missing pages of the report, defendants assert that only one page was missing and that it was provided the next day. Plaintiff does not dispute this representation in his reply.

Plaintiff next argues that the court erred in permitting defense counsel to use New York Police Department Line of Duty (LOD) reports to refresh plaintiff's recollection during cross-examination. Plaintiff complains that defense counsel had him refer to and read directly from these reports although they were not in evidence. Plaintiff further asserts that he never indicated that he needed his recollection refreshed and that, therefore, defense counsel should not have been permitted to use the LOD reports for this purpose. This claim is rejected. In the example cited by plaintiff, defense counsel questioned whether plaintiff hurt his back and neck in *July 2006*. Plaintiff replied that he believed he injured the left side of his back. When asked if he had injured his neck, plaintiff said he did not remember. Immediately thereafter, defense counsel marked a LOD report for identification and asked plaintiff if the report refreshed his recollection. Plaintiff's counsel objected, stating that plaintiff had not said that "his memory faulted." The court overruled the objections. When defense counsel then asked plaintiff if the report refreshed his recollection as to whether he had claimed an injury to his neck and back, plaintiff informed defense counsel that counsel had mistaken the date, since the report was from July 1996, not July 2006. Contrary to plaintiff's current claim, it was an error in the date of the injury that caused plaintiff to indicate that he did not remember if he had injured his neck which caused defense counsel to use the LOD report to refresh plaintiff's recollection. Further, plaintiff neither read directly nor extensively from

the report.

Plaintiff also argues that defense counsel made the jury aware of the identity of the documents by questioning him about the LOD reports and then having those documents marked for identification and shown to him, which was improper. Plaintiff asserts that defense counsel should have disclosed the reports to him in such a manner that the jury was not made aware of their contents. In this regard, defense counsel asked plaintiff whether the report was a "line of duty injury report that you have to prepare or that you did have prepared for this particular accident" which occurred on July 13, 1996. The court overruled plaintiff's counsel's objection. Defense counsel then asked plaintiff whether it was a report required by the police department, and plaintiff answered "yes, sir." Plaintiff's counsel objected again and the objection was overruled. Defense counsel asked if the report was prepared around the time of the accident, and over objection, plaintiff answered that he did not know when he signed it. Defense counsel stated that he was moving the report into evidence, and plaintiff's counsel objected on the grounds that there was no foundation. Finally, after the court sustained plaintiff's counsel's objection, defense counsel asked whether, without referring to the report, he signed a statement indicating that he had pushed opened a door, slipped on a wet floor and fell into a wooden bench injuring his back and neck, to which plaintiff answered "yes." Contrary to plaintiff's claim, defense counsel did not read extensively from the LOD report. In any event, the report was admitted into evidence later in the trial and, thus, any error in referring to the report was harmless.

Plaintiff next argues that on two occasions the court denied plaintiff's counsel the opportunity to make offers of proof. Plaintiff cites two incidents in the record without articulating precisely why he believes the court was in error. In any event, in the first instance, the court denied the application of plaintiff's counsel to display, with a projector, a medical report written by plaintiff's treating physician. The court properly stated that the doctor could look at the report to refresh his recollection but that displaying it by projection would constitute improper bolstering (*cf. Cohn v Haddad,* 244 AD2d 519, 520 [1997] [to permit one physician to testify as to the contents of the operative reports he received from three physicians – who had also testified at trial and had related the procedures they had performed on plaintiff and the operative reports, would result in bolstering their testimony]; *Kupfer v Dalton*, 169 AD2d 819, 820-821 [1991] [evidence that the plaintiffs sought to present could have been presented during their direct case and would have merely served to bolster the testimony of the plaintiffs' expert]). In the second instance, defense counsel indicated an intention to call the police officer who filled out an accident report at the scene and plaintiff's counsel asked for an offer of proof, outside the presence of the jury, as to what the police officer was going to testify to. The court noted that defense counsel had made an offer of proof earlier even though the court had not requested one. Plaintiff's counsel responded that the court did not have the police officer present and that he was unable to conduct a *voir dire*, which he was now requesting. The court denied the application as unnecessary. Moreover, inasmuch as the record reveals that there was an offer of proof made by defense counsel prior to plaintiff's counsel's request – namely that the officer had filled

out a form at the scene of the accident which contained information as to what was said to him by plaintiff regarding plaintiff's injuries – the court properly denied the application of plaintiff's counsel to conduct a *voir dire* of the witness.

Plaintiff next argues that during summation, defense counsel made numerous inflammatory remarks which were unwarranted, unsupported by proof and not fairly inferrable from it, and calculated to inflame the jury. Plaintiff does not address each comment specifically, and thus fails to articulate the basis for his objections. "In any event, the summation was well within the bounds of proper rhetorical comment" and not prejudicial (*Anest v Scheinberg*, 233 AD2d 256, 257 [1996], *appeal dismiss in part, appeal denied in part* 89 NY2d 1064 [1997]).

Lastly, plaintiff argues that the court erred in permitting the police officer to testify that, at the accident scene, plaintiff offered no complaint of injury. Plaintiff argues that this was error because the officer was not a witness to the accident and had no personal recollection of the accident. Plaintiff also states he was only given a few hours notice that this witness would be called to testify.

As an initial matter, plaintiff's counsel did not object to the testimony of the police officer on this ground. Rather, plaintiff's counsel objected on the grounds that there was "no CPLR 3101(d) exchange" and that the officer would not be able to "offer any evidence with respect to anything germaine [sic] to the damages portion of the trial." In any event, the officer's testimony was admissible under the past recollection recorded exception to the hearsay rule (*People v Taylor*, 80 NY2d 1, 8 [1992]; *see also Calandra v Norwood*, 81 AD2d

650 [1981]; *Jones v Gelineau*, 154 Misc 2d 930 [1992]; *Wright v Nat'l Amusements,* 2003 NY Slip Op 51390U, 8-9 [NY Sup Ct Oct. 21, 2003]). The officer stated that he had no specific recollection of the incident and could only recite from his report. There was sufficient indicia that the report correctly represented the officer's knowledge and recollection when made since the officer testified that the report was prepared in the normal course of his duties, that he was required to fill out the form at the scene of the accident, that it was part of his job and his procedure to ascertain if anyone at the scene required medical attention, that he would have interviewed plaintiff at the scene to ascertain whether plaintiff had injuries, that he would have documented any injuries on the report if plaintiff had indicated that he had been injured, that if plaintiff had had any significant pain, and was uncertain whether he wanted medical attention, he would have mentioned that in the report, and that if plaintiff had sustained an injury but refused medical attention, that would also have been recorded. Plaintiff's remaining contentions are without merit. Accordingly, it is

ORDERED, that the motion of plaintiff is denied.

E N T E R,

J. S. C.

HON. GLORIA DABIRI