

Janda v Michael Rienzi Trust

2009 NY Slip Op 31371(U)

June 25, 2009

Supreme Court, Queens County

Docket Number: 0012146/2006

Judge: Bernice Daun Siegal

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 5

ALEKSANDER JANDA	x	INDEX NO. 12146/06
-against-		MOTION SEQ. NO. 3
MICHAEL RIENZI TRUST, et al.		BY: SIEGAL, J.
		DATED: June 25, 2009

x

In this action to recover damages for personal injuries arising out of a violation of Labor Law § 240(1), defendants seek an order, pursuant to CPLR 4401, 4404(a), and 5501(c): (1) setting aside the verdict and granting a new trial on the grounds that the damage award materially deviates from reasonable compensation for plaintiff's injury, and that plaintiff's counsel made improper comments to the jury during the opening, trial, and summation that precipitated the excessive award; (2) setting aside the verdict and dismissing the award for lost earnings on the basis of federal preemption, or ordering a new trial on the grounds that the jury's verdict on this issue is irrational and/or against the weight of the evidence, and on the basis that plaintiff's counsel made improper comments to the jury; (3) setting aside the verdict and dismissing the award for future medical expenses on the grounds that plaintiff's expert's testimony regarding future surgeries and medical expenses was inadequately disclosed, and that the plaintiff failed to prove the necessity of future surgeries with the

requisite reasonable certainty; (4) setting aside the jury verdict and ordering a new trial on damages as the verdict was against the weight of credible evidence; and(5) granting a stay of entry of judgment and any hearing related to collateral sources pursuant to CPLR 4545(c) and the structuring of the judgment pursuant to CPLR 50-B, pending the hearing and determination of this motion. Plaintiff cross-moves in opposition and seeks an order conforming the pleadings to the proof, pursuant to CPLR 3025(b), and setting a date for a CPLR 50-B and collateral source hearing.

Plaintiff Aleksander Janda, a laborer employed by the ABC Construction Corporation, sustained personal injuries during the course of his employment on October 6, 2005, when he fell through the roof of the building to the floor 12 feet below. The subject premises are owned by defendant Michael Rienzi Trust. The Hon. Janice A. Taylor, in an order dated May 28, 2008, granted plaintiff's motion for partial summary judgment against defendant Michael Rienzi Trust on the issue of liability based upon a violation of Labor Law § 240(1).

A jury trial as to damages was held on February 5, 6, 9, 10, 11, 13, and 17, 2009. On February 17, 2009, the jury rendered a verdict in favor of plaintiff as follows: \$100,000.00 for past pain and suffering; future pain and suffering \$200,000.00 over 25 years; \$24,662.00 for past medical expenses; \$330,000.00 for future medical expenses over 25 years; \$163,870.00 for past loss of

earnings and \$1,892,300.00 for future loss of earnings. At the time of the accident, Mr. Janda, an undocumented worker from Poland, was 37 years old.

Defendant's requests to set aside the jury verdict on the ground that plaintiff's counsel made improper comments to the jury during the opening, trial, and summation are denied. It is well settled that when the "misconduct of counsel in interrogation or summation so violates the rights of the other party to the litigation that extraneous matters beyond the proper scope of the trial may have substantially influenced or been determinative of the outcome, such breaches . . . will not be condoned" (*Kohlmann v City of New York*, 8 AD2d 598, 598 [1959]). Plaintiff's counsel's opening statement and remarks objected to during trial did not constitute a continual and deliberate effort to divert the jurors' attention from the issues to be determined (*cf. Reynolds v Burghezi*, 227 AD2d 941, 942 [4th Dept. 1996]) and did not operate cumulatively to taint the verdict by preventing a fair consideration of the evidence. The single remark objected to here, regarding plaintiff's counsel's statement about an MRI film, which the court previously ruled was a fair comment on the evidence, and the single comment objected to regarding defendant's expert, Dr. Coyne, are within the bounds of permitted commentary on the evidence. Furthermore, the remarks objected to pertaining to Mr. Janda's immigration status, the work he performed prior to his

injury at various work sites including those with close proximity to the site of the former World Trade Center, ABC Construction's employment of workers who speak languages other than English, and the extent of ABC's knowledge of Mr. Janda's status, does not constitute a cumulative attack on the entire construction industry and its hiring practices. These statements cannot be said to have constituted a prejudicial appeal to the jury's sympathies. Plaintiff's counsel did not seek to exploit any bias that the jury might have, nor were his references to Mr. Janda's immigration status, ABC Construction's actions, and the medical evidence irrelevant. In the course of the trial, plaintiff's counsel elicited testimony and produced evidence that provided support for his case.

As regards the summation, it is well settled that "[a] wide latitude is allowed to counsel in his summation and we have no desire to curb a vigorous, robust summation. A witness may be characterized as untruthful, as a falsifier, as a liar, and even as a perjurer. That is a matter of propriety, of good taste and of judgment, with which a court will not interfere" (*Cohen v Covelli*, 276 App Div 375, 376 [1st Dept. 1950]). When considered within the context of the summation, the plaintiff's comments objected to here "were within the bounds of the wide latitude allowed to counsel in summation" (*Schneer v Bellantoni*, 250 AD2d 666, 667 [2nd Dept. 1998]; see *Meyers v Levine*, 273 AD2d 449 [2nd Dept. 2000]; *Heberer*

v Nassau Hosp., 119 AD2d 729 [2nd Dept. 1986]; *Caraballo v City of New York*, 86 AD2d 580 [1st Dept. 1982]). Although the summation was undoubtedly zealous and argumentative, it is not per se grounds for a new trial.

The amount of damages to be awarded for personal injuries is primarily a question of fact for the jury (see *Taylor v Martorella*, 35 AD3d 722, 724 [2nd Dept. 2006]; *Kravits v City of New York*, 300 AD2d 362, 363 [2nd Dept. 2002]; *Mogil v Gorgone*, 225 AD2d 674, 675 [2nd Dept. 1996]). Only when an award "deviates materially from what would be reasonable compensation" is a new trial on damages granted (CPLR 5501[c]; see *Kihl v Pfeffer*, 47 AD3d 154 [2nd Dept. 2007]; *Paruolo v Yormak*, 37 AD3d 794, 795 [2nd Dept. 2007]; 2nd Dept. 2006]; *Miller v Weisel*, 15 AD3d 458, 459 [2nd Dept. 2005]). Here, although defendant asserts that the jury's award materially deviates from reasonable compensation for plaintiff's injury, defendant offers no evidence of what it believes the amount of reasonable compensation should be. The court finds that the award of \$100,000.00 for past pain and suffering and \$200,000.00 over 25 years for future pain and suffering does not deviate from reasonable compensation for the type of injury sustained here.

The jury award for past medical expenses in the sum of \$24,662.00 is not supported by the evidence. The only testimony as to past medical expenses was provided by Dr. Negendra, who

testified that plaintiff's past expenses were \$16,000.00. Therefore, the award of past medical expenses is reduced to \$16,000.00.

The remainder of the damages award is supported by the evidence presented at trial, except for the amount of past and future wages as noted below.

Defendant's request to set aside the verdict and dismiss the award for lost earnings on the basis of federal preemption is denied. The Immigration Reform and Control Act of 1986 (8 USC § 1324a; hereinafter the IRCA) makes it unlawful to employ aliens who are not authorized to work in the United States (see 8 USC § 1324a[a][1]). The statute requires that every employer, before hiring any person, verify that the person is not an unauthorized alien by examining specified documents that establish the person's identity and eligibility for employment in the United States and by completing Form I-9, which evidences that examination (see 8 USC § 1324a[b]). An employer that fails to verify an employee's eligibility is subject to civil and criminal penalties (see 8 USC § 1324a[a][1][B][I]; § 1324a[e], [f]). Furthermore, an employee who submits false or fraudulent documents in order to satisfy the verification requirements is subject to criminal prosecution (see 8 USC § 1324c[a]; 18 USC § 1546[b]).

In *Balbuena v IDR Realty LLC* (6 NY3d 338 [2006]), the Court of Appeals held that an award of damages for lost wages to an

undocumented alien who is injured on the job is not preempted by federal immigration policy. The court in *Balbuena* noted that there was no evidence that the plaintiffs therein violated IRCA by submitting fraudulent documents to their employers at the time they were hired, and that although it was not lawful for said plaintiffs to be employed in this country, the type of work performed was lawful and as no statute makes it a crime to be employed without proper documentation, and thus the plaintiffs were not precluded from recovering damages for lost wages. In addition, the Court observed that the plaintiffs' inability to mitigate damages did not preclude recovery as they both had allegedly sustained injuries that would preclude them from being employed at any time in the future, and that the jury could take into account the plaintiffs' immigration status.

Subsequently, the Appellate Division, Second Department determined that where the undocumented alien submits a fraudulent document upon being hired, a plaintiff will be denied lost wages only in "situations in which an innocent employer is duped by fraudulent documentation into believing that the employee is a United States citizen or otherwise eligible for employment..." (*Coque v Wildflower Estates Developers, Inc.*, 58 AD3d 44, 52 [2nd Dept. 2008]). In *Coque*, the court held that "if the employer hires the employee with knowledge of the employee's undocumented status, or without verifying the employee's eligibility for the employee's

undocumented status, or without verifying the employee's eligibility for employment, the employer has not been induced by the false document to hire the employee and, thus, has not 'obtained employment by' submitting false documentation" (*Id.* at 53). The court further stated that "where an employer violates the IRCA in hiring an employee, such as failing to properly verify the employer's eligibility for work, the employee is not precluded from recovering damages for lost wages as a result of a workplace accident" (*Id.* at 54; *cf. Matter of Amoah v Mallah Mgt., LLC*, 57 AD3d 29 [1st Dept. 2008]).

At trial, Mr. Janda testified through an interpreter that he is an undocumented worker from Poland, and that he came to New York on a tourist visa which has expired. He stated that he first started working for ABC Construction Company sometime between 1999 and 2000, performing asbestos removal work, at which time he presented his licenses for asbestos removal work and copy of a Social Security card to ABC Construction. Mr. Janda testified that he took courses, and received a diploma and course completion certificate for asbestos removal. He stated that his licenses included his photograph and a Social Security number which he obtained from friends.

ABC Construction's president, Stanko Koronovac, testified that he would have only accepted the actual Social Security card and would not have accepted a copy. Testimony

was presented by Mr. Janda, Mr. Koronovac, and ABC Construction's vice-president, Alex Gregoriou, regarding Mr. Janda's I-9 form. This form listed a February 22, 2001 date of hire. Mr. Janda stated that he filled out portions of the form with help from his friends and that he did not complete the portion of the I-9 form which required him to verify his status as a citizen or non-citizen permitted to work lawfully in this country. Mr. Janda stated that he never made any representations to any employer as to his immigration status and stated that he did not have a work visa. ABC Construction's officers testified that they retained the I-9 form which was not verified by the employee, and no other I-9 form was completed by Mr. Janda. Evidence was presented that Mr. Janda was employed by ABC between 1999 and 2005, although W-2 forms could not be located for all of these years.

The evidence presented at trial regarding Mr. Janda's use of a false Social Security number, as well as the asbestos removal licenses bearing the false Social Security number, and evidence of his union membership, all of which were presented at the time of hiring is insufficient, as a matter of law, to establish that ABC Construction was induced into believing that Mr. Janda was a United States citizen or otherwise entitled to work in this country. Although ABC Construction claims to have verified his status, there is no evidence that it ever requested that Mr. Janda complete the I-9 form, or provide any evidence as to his

citizenship or legal right to work in this country. The jury, based upon the evidence presented was thus not precluded from awarding lost earnings.

That branch of defendant's motion which seeks to set aside the judgment notwithstanding the verdict as to lost earnings is denied. The power of the court to set aside a jury's verdict and to order a new trial is discretionary. The Court of Appeals in *Cohen v Hallmark Cards, Inc.* (45 NY2d 493, 499 [1978]), held that, "the question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors (see *Mann v Hunt*, 283 App Div 140)." In applying the *Cohen* discretionary balancing test, the Court in *Nicastro v Park* (113 AD2d 129, 133-134 [2nd Dept. 1985]) instructed: "The fact that determination of a motion to set aside a verdict involves judicial discretion does not imply, however, that the trial court can freely interfere with any verdict that is unsatisfactory or with which it disagrees. A preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict."

Fact-finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of

its duty to oversee the proper administration of justice leads it to overstep its bounds and “unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury’s duty” (*Ellis v Hoelzel*, 57 AD2d 968, 969 [3rd Dept. 1977]; accord *Zolli v Dubois*, 88 AD2d 951 [2nd Dept. 1982]; *Durante v Frishling*, 81 AD2d 631 [2nd Dept.1981]). This is especially true if a verdict is contested solely on weight of the evidence grounds and interest of justice factors have not intervened to flavor the judicial response to the motion. Absent such complications, the challenge is directed squarely at the accuracy of the jury’s fact-finding and must be viewed in that light” (see *Ahr v Karolewski*, 48 AD3d 719 [2nd Dept. 2008]; *Kaplan v Miranda*, 37 AD3d 762 [2nd Dept. 2007]; *Romero v Metropolitan Suburban Bus Authority*, 25 AD3d 683 [2nd Dept. 2006]; *Yau v New York City Tr. Auth.*, 10 AD3d 654, 655 [2nd Dept. 2004]).

In *Hernandez v Carter and Parr Mobile, Inc.* (224 AD2d 586 [2nd Dept. 1996]), the court instructed that “it is beyond cavil that the determination of the jury which observed the witnesses and the evidence is entitled to great deference.” Further, “[g]reat deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the jury, which had the opportunity to see and hear the witnesses” (*Cicillini v City of New York*, 15 AD3d 522 [2nd Dept. 2005]; see *Clarke v Limone*, 40 AD3d 571 [2nd Dept. 2007];

Speciale v Achari, 29 AD3d 674 [2nd Dept. 2006])). “A jury verdict should not be set aside as against the weight of the evidence if supported by any fair interpretation of the evidence” (*Rivera v MTA Long Is. Bus*, 45 AD3d 557, 558 [2007] citing *Yau v New York City Tr. Auth.*, 10 AD3d 654, 655 [2004]; *Nicastro v Park*, 113 AD2d 129, 134 [1985])).

With respect to the issue of whether plaintiff is totally disabled and unable to work, there was extensive conflicting medical expert testimony at trial. The jury’s finding of total disability was based upon the testimony presented by his treating physician, Dr. Negendra, as well as that of Dr. Merola, a surgeon. Defendant’s assertion that the jury’s verdict on all components of damages was tainted by the testimony of Dr. Merola, who testified as to the need for future surgeries, is rejected. The court finds that the testimony of plaintiff’s treating physician, Dr. Negendra, was in itself sufficient for the jury to determine the extent of plaintiff’s injuries. Notably, Dr. Negendra testified that he has examined the plaintiff on a monthly basis from November 16, 2005 through January 2009, and opined with a reasonable degree of medical certainty that plaintiff’s injuries to his thoracic spine, specifically the fracture of the spine at T-12, the injuries to the lumbar spine, thoracic body spine, the pain experienced in the mid-back thoracic region, pain in the lower back, leg pain, knee pain, and pain radiating down his right leg, were all causally

related to the accident of October 6, 2005. Dr. Negendra stated that he prescribed certain prescription pain relievers and muscle relaxers, administered trigger point cortisone injections for muscle spasms on several occasions, epidural injections, and prescribed medicated patches and lotions as well as physical therapy. He stated that Mr. Janda has used a thoracic and lumbar back brace. He stated that when he examined Mr. Janda on October 22, 2008, an MRI of the thoracic spine revealed T-12 vertebral body fracture and lumbar disk herniation at L-5/S-1. He stated that Mr. Janda cannot sit, stand, or walk for an extended period of time without experiencing muscle spasms and pain, that his gait is antalgic, meaning that he walks favoring the right side, and opined that Mr. Janda is totally disabled and unable to do physical work. He opined with a reasonable degree of medical certainty that Mr. Janda will need future pain management consisting of trigger point injections for the muscle spasms when they get severe during inclement weather and a series of three epidural injections about once a year, and that he would need future follow-up visits once every month or two for pain medication and treatment due to his permanent chronic pain condition, and would need future physical therapy to treat severe muscle pain.

Defendant's medical experts testified that plaintiff did not suffer from a disk herniation at the L-5/S-1 level immediately following the accident, that the fracture to the T-12 thoracic

vertebrae has healed, and that he is not disabled. The weight to be afforded conflicting testimony of experts is a matter peculiarly within the province of the jury (*Chodos v Flanzer*, 109 AD2d 771 [2nd Dept. 1985]). The jury, in the instant case, observed the witnesses, measured their credibility, and weighed the evidence.

With respect to the jury's award of future lost wages, plaintiff's medical witnesses testified that plaintiff was permanently and totally disabled from construction work and was totally disabled in general. Dr. Leiken testified as to Mr. Janda's maximum earnings in the year he was injured and presented a basis for his analysis of past and future lost wages. While defendant's medical witnesses disagreed as to the extent of his disability, defendant failed to present competing expert testimony as to whether plaintiff would ever be able to perform physical labor consistent with his work experience or various types of sedentary work (*cf. Rodriguez v City of New York*, 10 AD3d 551, 552 [1st Dept. 2004]). The jury, therefore, was entitled to evaluate the testimony of Dr. Leiken and disregard the defendant's unsupported claims. The court finds that the evidence presented by plaintiff "allow[ed] the loss of earnings to be ascertained with reasonable certainty" (*Burdick v Bratt*, 203 AD2d 950, 951 [1994], *lv denied* 84 NY2d 801 [4th Dept. 1994]). It simply cannot be said that the evidence so preponderated in favor of the defendant on the issue of lost wages that the jury

could not have reached its verdict in favor of the plaintiff on any fair interpretation of the trial evidence.

However, to the extent that Dr. Leiken testified that Mr. Janda's past loss of wages was \$158,107.00, and future losses to the date of retirement was \$1,848,063.00, the jury's award of past lost wages in the sum of \$163,870.00, and future lost wages of \$1,892,300.00, must be reduced accordingly.

That branch of defendant's motion which seeks to set aside the verdict and dismiss the award for future medical expenses on the grounds that plaintiff's expert's testimony regarding future surgeries and medical expenses was inadequately disclosed is denied. Plaintiff served a bill of particulars dated March 13, 2007 which states, in pertinent part, that "[a]s a result of plaintiff's injuries plaintiff may be required to undergo future thoracic spinal surgery." On October 17, 2008, plaintiff served an amended bill of particulars, as of right pursuant to CPLR 3043(b) which stated in pertinent part that "[a]s a result of plaintiff's injuries plaintiff will be required to undergo future thoracic and lumbar spinal surgeries." The parties then stipulated to adjourn the trial and give defense counsel further authorizations, further IME's, and a further deposition of the plaintiff with respect to future surgeries. Plaintiff's counsel served defendant's counsel on September 24, 2008 and December 30, 2008 with identical further HIPPA authorizations for Dr. Merola and Alpha 3tmi where the

September 19, 2008 MRI was taken; a further pharmacy authorization served on October 29, 2008, a further medical records authorization served on April 22, 2008, further discovery responses and additional authorizations served on January 15, 2009. Additional authorizations relating to his workers' compensation records were served on February 1, 2009. Plaintiff's counsel also provided defendant's counsel with Dr. Merola's medical reports of September 15, 2008 which was served in a Notice of Medical Exchange dated October 14, 2008; Dr. Merola's medical report of October 13, 2008 was served in a Notice of Medical Exchange dated October 16, 2008. Dr. Merola's medical report of October 13, 2008 sought medical authorizations from Workers' Compensation for a "decompressive lumbar laminectomy and possible partial discectomy at the L5-S1 segment," and also stated that Mr. Janda "continues to remain totally disabled at this juncture."

Plaintiff's additional deposition was held on December 12, 2008 by defendant's counsel at which time he testified about his visits to Dr. Merola beginning in September 2008, his most recent MRI and Dr. Merola's recommendation regarding disk surgery. Following plaintiff's deposition, Dr. Merola's medical report dated January 5, 2009 was served in a Notice of Medical Exchange dated January 15, 2009. The January 5, 2009 report stated that plaintiff will "require corrective surgery up to and including anterior posterior reconstruction particularly as he ages. Within

a reasonable degree of medical surgery, this may happen in 15 years or so." The plaintiff's counsel also served the defendant with a CPLR 3101(d) notice dated January 5, 2009, stating that plaintiff would call Dr. Merola as a witness and that in addition to the treatment delineated in the exchanged medical reports previously served, Dr. Merola "will testify and opine that the plaintiff's lumbar herniation has resulted over time from the instability and lack of normal curvature created by the thoracic compression fracture. The doctor will further opine that as a result of the plaintiff's accident the plaintiff will require a lumbar fusion in the next approximate 15 years due to the compression fracture which will result in future degeneration and instability in the plaintiff's lower spine. The doctor will opine that the potential benefits of performing surgery for the thoracic compression fracture at this time are outweighed by the risks of surgery. The doctor will opine that surgery for the thoracic spine at this time is not recommended...."

Defendant scheduled and held two further independent physical examinations of the plaintiff on January 6, 2009 and January 8, 2009, solely as they related to the future surgeries. Defendant's counsel, in a notice dated January 13, 2009, rejected plaintiff's expert disclosure notice pertaining to Dr. Merola on the grounds that it was untimely and not in conformity with CPLR 3101(d), and asserted that plaintiff would have to make a

motion to compel acceptance of said notice. Defendant's counsel thereafter served its CPLR 3101(d) notice with regard to its expert, Dr. Scott Coyne, on plaintiff's counsel on January 23, 2009.

It is well settled that "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" (*Aversa v Taubes*, 194 AD2d 580, 582 [2nd Dept. 1993], quoting *Lillis v D'Souza*, 174 AD2d 976 [4th Dept. 1991]; *Cutsogeorge v Hertz Corp.*, 264 AD2d 752, 754 [2nd Dept. 1999]). Here, there was no intentional or willful failure to disclose on the part of the plaintiff, and it is clear that the defendant was not prejudiced because it had received the medical reports of the proffered expert prior to trial, as well as the amended bill of particulars months prior to trial, and thus had notice of the basis and content of Dr. Merola's anticipated testimony regarding the two future surgeries (see generally *Taylor v Daniels*, 244 AD2d 176 [1st Dept. 1997]; *Han Soo Lee v Riverhead Bay Motors*, 57 AD3d 283 [1st Dept. 2008]; *Holshek v Stokes*, 122 AD2d 777 [2nd Dept. 1986]; see also *Butler v Grimes*, 40 AD3d 569 [2nd Dept. 2007]; *Burton v New York City Housing*

Authority, 191 AD2d 669 [2nd Dept. 1993]). Defendant's purported repudiation of plaintiff's CPLR 3101(d) notice was unauthorized and a nullity. Furthermore, as defendant's counsel engaged in even later service of its CPLR 3101(d) notice, it can hardly be heard to complain about late service on the part of plaintiff. Finally, as defendant's own expert report from Dr. Kerness, served in late January 2009, stated that he would testify that plaintiff did not need any future surgeries or injections, defendant cannot claim surprise or prejudice, as he was aware that future surgery was going to be an issue at trial.

Defendant's assertion that the plaintiff failed to prove the necessity of future surgeries with the requisite reasonable certainty is denied. It is well settled that an award for future medical expenses may not be based upon mere speculation (see *Cramer v Kuhns*, 213 AD2d 131, 139 [3rd Dept. 1995], *lv dismissed* 87 NY2d 860 [1995]). Here, plaintiff's medical expert, Dr. Merola, a spinal surgeon, testified, inter alia, that the plaintiff had two separate problems: that due to the fracture of the thoracic spine at T-12, the structure of the spinal column was angulated (not straight), which is a central or mechanical axial issue, and that he has a sciatic issue with the his leg because of the disk herniation of the lumbar spine at L-5/S-1.

Dr. Merola offered a definite opinion with regard to the need for two separate surgeries. He stated that the fracture at

T-12 would require reconstruction of the area using multiple rods and screws placed behind the spine in order to bring the area as close as possible to zero degrees and to support the spine with a process called fusion. Dr. Merola testified about the short-term and long-term potential risks of surgery, and stated that as Mr. Janda is 40 years old and the T-12 fracture was currently stable, he was not recommending surgery at this time, as the risk of surgery outweighs the potential benefits of surgery at this time. Dr. Merola opined with a reasonable degree of medical certainty that in the future, Mr. Janda will need reconstructive surgery of the thoracic spine. He stated that within the next 10 to 15 years, there will be stress at the junction of the thoracic and lumbar spine and a reasonable likelihood that the area will go off neutral alignment, become progressively more bent, and thus more painful. He stated that such pressure on the spine is caused by being up and walking around, and that as time goes on, the force and wear and tear will lead to progressive degenerative changes and collapse at the T-12 area (Transcript at 338). He opined with a reasonable degree of medical certainty that due to said stress, Mr. Janda will require, in the future, reconstructive surgery. He further opined, with a reasonable degree of medical certainty, that assuming that Mr. Janda was not gainfully employed over the next 10 to 15 years, his opinion as to the need for future surgery would be the same. He stated that the cost of the reconstructive surgery,

with anesthesia, implants, monitoring and in-hospital stay is \$125,000.00.

Dr. Merola stated that as regards the lower back, sciatic pain or radiculopathy because of herniation, a laminectomy or decompression is required at this time. He described the potential risks of the surgery, and the potential benefits as decreasing the sciatic pain and preventing further deterioration in the nerve itself from persistent pressure. He opined with a reasonable degree of medical certainty that surgery will decrease the leg pain but would not eliminate it altogether, due to the fact that Mr. Janda has experienced long-term pain since the time of the accident. He opined that the disk herniation in the lower back was causing the pain in the lower back region. He further opined with a reasonable degree of medical certainty that the lumbar disk herniation that Mr. Janda sustained as shown in the MRI of 2008 was causally related to the subject accident. He stated that the cost of the lumbar surgery, including anesthesia, monitoring and in-hospital stay is \$15,000.00.

Dr. Negendra, plaintiff's treating physician, testified that plaintiff's medical expenses for future treatment for pain management, which include trigger point injections, epidurals and office visits, will be \$6,000.00 to \$7,000.00 a year for the rest of his life.

The jury awarded plaintiff future medical expenses of \$300,000.00, which was less than the total future medical expenses testified to by Dr. Merola and Dr. Negendra. The court finds that the jury's award for future medical expenses is supported by the evidence presented at trial, and was not based upon "uninformed speculation" (see *Sanvenero v Cleary*, 225 AD2d 755, 756 [2nd Dept. 1996]; *Strangio v New York Power Auth.*, 275 AD2d 945, 946-947 [4th Dept. 2000]; *Cramer v Kuhns*, *supra* at 139; see also *Brownell v Thomas*, 201 AD2d 872 [4th Dept. 1994]; *Liebman v Otis El. Co.*, 145 AD2d 546, 547 [2nd Dept. 1998]; *Buggs v Veterans Butter & Egg Co.*, 120 AD2d 361 [1st Dept. 1986]).

To the extent that defendant asserts that plaintiff failed to plead as special damages future medical expenses, this claim is rejected. Plaintiff's original bill of particulars clearly states that he may be required to undergo future thoracic spine surgery, and the supplemental bill of particulars states that plaintiff will be required to undergo future thoracic and lumbar spinal surgeries. Plaintiff admittedly failed to set forth any monetary amount for said future surgeries in the bills of particular. However, defendant was on notice of the claim for future surgeries, defendant's medical experts opined that plaintiff's thoracic fracture healed and that there was no injury to the lumbar spine, and as defendant consistently maintained that there was no need for future surgery, defendant claims unfair

surprise or prejudice as regards future medical expenses is unfounded. Therefore, that branch of the defendant's cross motion which seeks to set aside the award of damages for future medical expenses is denied, and that branch of plaintiff's cross motion pursuant to CPLR 3025(c) to conform his pleadings to the proof adduced at trial is granted (see *Reed v City of New York*, 304 AD2d 1, 8-9 [1st Dept. 2003], *lv denied* 100 NY2d 503 [2003]; see also *O'Brien v Barretta*, 1 AD3d 330 [2nd Dept. 2003]).

In view of the foregoing, defendant's motion is granted to the extent that plaintiff's past medical expenses are reduced to \$16,000.00, plaintiff's past lost wages are reduced to \$158,107.00, and future lost wages are reduced to \$1,848,300.00. The remainder of defendant's motion is denied. Plaintiff's cross motion to conform the pleadings to the proof is granted, and the parties are directed to contact chambers to schedule a CPLR 50-B and collateral source hearing.

Settle order.

Bernice D. Siegal J.S.C.