

**Austin v Podlinsek**

2010 NY Slip Op 30841(U)

February 11, 2010

Supreme Court, New York County

Docket Number: 2009-1181

Judge: Ferris D. Lebos

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At a Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse in the City of Binghamton, New York on the 16<sup>th</sup> day of December, 2009.

PRESENT: HON. FERRIS D. LEBOUS  
JUSTICE PRESIDING

STATE OF NEW YORK  
SUPREME COURT :: BROOME COUNTY

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CHERYL AUSTIN,

Plaintiff,

vs.

DECISION AND ORDER

RAYMOND E. PODLINSEK,

Index No. 2009-1181

RJI No. 2009-0931

Defendant.

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APPEARANCES:

COUNSEL FOR PLAINTIFF:

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**FERRIS D. LEBOUS, J.S.C.**

Plaintiff, Cheryl Austin, sued defendant, Raymond E. Podlinsek, to recover for personal injuries she sustained as a result of a fall down stairs located on defendant's property. By Order of this court dated August 25, 2009, a default judgment was granted to plaintiff on the issue of liability. This Decision addresses the damages inquest that was held before the court on December 16, 2009.

**BACKGROUND**

On November 22, 2007, plaintiff was a tenant of defendant at a single family residence located at 48 Lydia Street, Binghamton, New York. On that date, plaintiff fell down approximately ten stairs when an interior stairwell handrail failed.

On May 19, 2009, plaintiff commenced a negligence action against the defendant by filing a summons and complaint with the Broome County Clerk's Office. Defendant was personally served in said action on June 3, 2009. Thereafter, defendant failed to answer or appear. As noted above, a default judgment was granted to plaintiff on the issue of liability by order of this court dated August 25, 2009.

The inquest was scheduled and held on November 4, 2009 at which defendant failed to appear. The court heard plaintiff's testimony but reserved decision. However, on November 23, 2009, the court received a letter from defendant alleging that he had not received notice of the November 4, 2009 date for the inquest. In the interests of justice and because this court had

reserved decision at the conclusion of the November 4, 2009 inquest, the court decided to reconvene the inquest on December 16, 2009, on notice to both plaintiff and defendant.

On December 16, 2009, the inquest was again held, but this time with plaintiff appearing with counsel and defendant appearing *pro se*. The court once again took testimony limited solely to the issue of damages allegedly suffered by the plaintiff as a result of her fall on November 22, 2007.

### DAMAGES

Plaintiff testified that immediately following her fall she could not stand or walk and was transported to Wilson Hospital by ambulance. Plaintiff was admitted to Wilson Hospital on November 22, 2007 and discharged on November 24, 2007.

Plaintiff underwent several diagnostic tests including X-rays, CT-scan and a MRI.<sup>1</sup> Plaintiff's X-ray revealed "[c]omminuted fractures of the left C4 facet extending to the left lamina. Fractures of the C5 vertebral body and left transverse process. Possible fracture of the left C5 facet" (Plaintiff's Exhibit 4). Plaintiff's CT-scan found "[a] fracture of the C4/C5 facet joint involving the left C5 lamina, portions of the left-hand side of the 5<sup>th</sup> cervical vertebral body. Fracture of the left C5 transverse process are also seen" (Plaintiff's Exhibit 4).

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<sup>1</sup>The court received plaintiff's Exhibits 1 through 5 consisting of hospital bills, physical therapy notes and bills and records from Wilson Memorial Hospital, UHS and the Southern Tier Neurological Group.

The report of the MRI taken on December 12, 2007 indicated as follows:

1. [l]eft C4 inferior facet and C5 vertebral body superior endplate fractures with new slight C4-5 anterolistheses. Edema/hemorrhage within the left C4-5 neural foramen with presumed C5 nerve root compression. Small central C4-5 disc protrusion with slight impression on the spinal cord.
2. Mild T1 superior endplate compression fracture.

(Plaintiff's Exhibit 5).

Plaintiff testified that after she was released from the hospital she wore a neck brace for six months that she continues to wear periodically. Plaintiff also testified that she is still treating with her physician for her neck injury and will require possible surgery to repair the C4-5 injury.

Plaintiff described a daily and constant pain from her neck injury, as well as a partial limitation in range of motion with her left arm. Plaintiff indicated that she can no longer perform many of her daily tasks (or is only able to perform them with pain) as she was previously able to perform including lifting objects above her waist and attending to her personal hygiene. Plaintiff also indicated difficulty in performing household chores such as folding clothes, shopping for groceries, cleaning and vacuuming. Plaintiff also testified that many of these tasks include her function as care giver for her grandchildren. Plaintiff stated she suffers from extreme neck pain when she stands for any length of time. Additionally, plaintiff testified that her left arm is frequently sore and lame which makes it difficult to button sweaters or blouses or pull sweatshirts, sweaters or tee-shirts over her head. Overall, plaintiff described these injuries as adversely impacting her sleeping and her life in general on a daily basis.

Upon completion of plaintiff's testimony, defendant engaged in no cross-examination. The plaintiff rested.

Defendant testified on his own behalf. Defendant testified that a code enforcement officer had previously been to the property and instructed him to relocate the interior stairway handrail which he had done. Defendant testified that he did not understand how the railing could have come loose, because it was done in a secure fashion. Defendant further testified that he had no assets or insurance of any kind and was sorry for the plaintiff's injury and could appreciate the fact that she was in pain. Other than his own testimony, defendant offered no proof to offset and/or contradict plaintiff's testimony and proof as to her injuries and damages incurred.

Based upon the foregoing, the court finds that plaintiff did, in fact, suffer injury as a result of her fall on November 22, 2007. Based upon plaintiff's testimony and the medical records, the court finds that plaintiff's C4-5 fracture and associated pain and suffering attendant thereto will be permanent. At the time of the inquest, plaintiff, born in 1947, was 62 years old with a life expectancy of 22.3 years (PJI , Appendix A). In sum, the court finds that the pain suffered by plaintiff is, in fact, permanent in nature and has substantially impacted her ability to perform her daily tasks and to generally enjoy life. That having been said, while there were some references in the testimony and medical records that future surgical intervention may be necessary, plaintiff offered no proof as to the cost or anticipated benefits of the same.

**CONCLUSION**

In view of the foregoing, the court finds that plaintiff, Cheryl Austin, has established damages as follows:

1. \$6,624.40 for medical bills and expenses;
2. \$30,000 for past pain and suffering; and
3. \$65,000 for future pain and suffering for 22.3 years.

Plaintiff should have judgment against the defendant, together with the costs and disbursements of this action.

This Decision constitutes the Order of the court. Plaintiff shall submit a judgment on notice pursuant to section 202.48 of the Uniform Rules for the Trial Courts.

Dated: February 11, 2010  
Binghamton, New York

s/ Ferris D. Lebous  
HON. FERRIS D. LEOUS  
Justice, Supreme Court