Bermingham v Peter, Sr. & Mary L. Liberatore Family L.P.
2010 NY Slip Op 34029(U)
November 16, 2010
Supreme Court, Erie County
Docket Number: I2008-13687
Judge: Timothy J. Drury

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

HEATHER L. BERMINGHAM

Plaintiff

-vs-

Index #I2008-13687

THE PETER, SR. & MARY L. LIBERATORE FAMILY LIMITED PARTNERSHIP d/b/a LINCOLN SQUARE APARTMENTS

Defendants

THE PETER, SR. & MARY L. LIBERATORE FAMILY LIMITED PARTNERSHIP d/b/a LINCOLN SQUARE APARTMENTS

Third-Party Plaintiffs

-vs-

GEARY S. KOPP d/b/a S&K LANDSCAPING

Third Party Defendant

CHIACCHIA & FLEMING, LLP
Attorneys for Plaintiff
BY: DANIEL J. CHIACCHIA, ESQ.
and TIFFANY M. KOPACZ, ESQ.

COHEN & LOMBARDO, P.C.
Attorneys for Defendants and Third-Party Plaintiffs
BY: JAMES J. NASH, ESQ.

KENNEY, SHELTON, LIPTAK & NOWAK, P.C.
Attorneys for Third-Party Defendant
BY: AMANDA L. MACHACEK, ESQ.

DECISION

DRURY, TIMOTHY J., J.S.C.

The plaintiff has moved to set aside the damages portion of the jury verdict in the instant case on the ground that it was inadequate and deviated materially from what would be reasonable compensation, pursuant to CPLR Section 4404(a). The defendants have opposed this motion and in turn cross-moved to set aside the verdict. Their cross-motion is based on the jury's verdict finding that the plaintiff was negligent but that her negligence was not a proximate cause of the accident. The defendants have claimed that the jury's determination was inconsistent and against the weight of the evidence.

The plaintiff testified as follows: that after her fall, she was in instant pain; her whole body was hurting; everything felt like it was kind of on fire. As she moved into the ambulance, she experienced jolts of pain. She was sedated in the hospital and she was extremely uncomfortable as she waited twelve hours for surgery. After the surgery, she was taken to a rehab room and was instructed on how to use crutches and how to use a portable toilet. She cried through the whole thing and threw up. Her husband drove her home. She was exhausted. During the first few weeks, she did not sleep at all.

Every time she moved, she was in a lot of pain. She was always tired and weak. She was depressed since she knew she would be out of work for quite a while and was home alone for most of the day when her husband was at work. This was a long lonely period for her.

She next saw the surgeon, Dr. Mark Andres, two weeks after the operation. Her ankle hurt a good bit at this time; any jostling caused a lot of pain. She was prescribed pain medication when she left the hospital, but it made her nauseous. She did not take it after the first month.

She was non-weight-bearing for the first couple of months. It was pretty much impossible for her to do anything for this period of time. She could not fix herself a meal. It was hard for her to bathe or wash her hair or anything like that. Her husband helped lower her onto the edge of the tub to bathe. For the first three months, she felt disgusting no mater how much she tried to clean herself. It was hard for her to get dressed. Her husband ended up taking over doing the laundry, grocery shopping and cooking.

She returned to work after four months. She had only been full weight-bearing for maybe a month. When she returned to work, she still experienced a lot of pain at the beginning of the day. Her ankle

would start off with a dull throbbing and the pain got sharper as the day went on. She had a slight limp at the beginning of the day and a pronounced limp at the end of the day. She was exhausted by the time she arrived home. At the time, she was working as a classroom aide at Baker Victory Services Day Treatment Program for emotionally and behavior-challenged children. It was difficult to perform the job because it required a lot of physical interaction with young people who were sometimes emotional and acting out in a very aggressive manner. Since the accident, she has not been able to do anything that involved any kind of running because it becomes painful very quickly. She worked in her job from when she returned to work four months after the accident [December 20, 2007] until this August, when she left it to return to school to become a teacher.

Before the accident, the plaintiff was an active person biking and using the treadmill three or four times a week. Now, she can only perform these activities a lot less frequently because it becomes painful very quickly. She doesn't walk with her husband often anymore. She doesn't participate in games with the family at picnics as she did before the accident. She realizes that her limitations will effect her ability to play with her children when she has them. She and her husband have purchased a house since the accident and it is

awkward for her to use the staircase. She must walk a distance at the Erie Community College campuses where she is in school and feels it at the end of the day.

Dr. Mark Andres testified that the plaintiff's tibia and fibia were broken in her ankle. He stated that on the date of her accident he repaired the broken bones and the related ligaments by inserting a metal plate and seven screws to act as an internal cast until the ankle healed. The operation was performed under general anesthesia. He stated that the fracture was fairly severe. He said that the plaintiff was given pain medication when she was released to return home after the operation. He stated he saw the plaintiff at various times thereafter at office visits. She had a routine recovery. She was non-weight-bearing for a month-and-a-half and was not allowed to be full weight-bearing until after her visit of April 11, 2008. She had a slow recovery. She was released to work after the April 11 appointment, but was restricted from doing heavy work and prohibited from activities like running. He explained that the office notes indicating that the plaintiff was experiencing zero pain means that she was not complaining of experiencing pain. He stated that he expected that she was experiencing pain, but that the pain medication was controlling her pain.

Dr. Andres testified that he saw the plaintiff again on May 8, 2009 and took out a screw that was working loose. The doctor saw the plaintiff once more on September 14, 2010 in preparation for his testimony at trial. He viewed a scan of the plaintiff's ankle and observed that mild arthritis had developed in her ankle, which is not normal for a person of her age. The arthritis would have been caused by the injury and could eventually lead to increased pain and loss of range of motion in the ankle. However, the doctor stated that it was impossible to predict the course of the plaintiff's injury, other than to say that it was permanent.

During Dr. Andres' last visit with the plaintiff, the issue of difficulty with stairs came up. The doctor believed it was because he asked her if she was in pain. He stated that it was normal for a person with her injury to have pain during prolonged walking and exercising. He stated that he did not expect her to have normal ankle function; her ankle would never be normal. At one point during cross-examination, the doctor described the plaintiff as being stoic.

The plaintiff's husband, Mark Bermingham, also testified. He testified about the difficulties the plaintiff faced in rehabilitating at home. He discussed her use of a portable toilet and how she had difficulty bathing and how she cried in pain at times. He stated that,

for a time, if she made a sandwich, it was a good day. He stated that when she returned to work she was wiped out after a day's work. He stated that she could not keep up on walks they took and that they had to return home from a Toronto vacation a day early because of her fatigue.

The above testimony was essentially unrebutted. Dr. Andres was cross-examined with his office notes, but he explained that the fact that the plaintiff did not complain of pain did not mean that she was not experiencing pain. His testimony remained unshaken on cross-examination [*see Baker, et al. v Shepard, et al.*, 276 AD2d 873, 875-876], although defense counsel stressed the issue of the notes in his summation.

The case was defended mainly on the issue of whether the weather was such as to create dangerous icy conditions and whether the plowing company employed by the defendants acted reasonably in plowing and icing in light of the weather conditions.

The testimony detailed above amply depicts the pain, humiliation and dislocation to the plaintiff's life and the limitations that have occurred to her life as a result of the injuries she has sustained due to the defendants' negligence.

Given this testimony, the Court determines that the jury's

award of $10,000 for pain and suffering and loss of enjoyment of life from the date of the accident to the date of the verdict deviated materially from what would be reasonable compensation. Reasonable compensation would, in this Court's opinion, be at a minimum $100,000.

The Court also determines that the jury's award of $15,000 for pain and suffering and loss of enjoyment of life from the verdict for the future for a term of 48 years also deviated materially from what would be reasonable compensation. Reasonable compensation would, in this Court's opinion, be at a minimum $200,000.

The authority for the additur above is *Delany v State* [256 AD2d 1135], *Ruiz v New York City Transit Authority, et al.* [44 AD3rd 331], *Fishbane v Chelsea Hall, LLC* [65 AD3rd 1079], and *Covington v New York City Transit Authority* [66 AD3rd 948].

Unless the defense stipulation to pay damages in these amounts, this Court orders a new trial on the issues of past and future damages for pain and suffering and loss of enjoyment of life.

As to the defense motion to set aside the verdict, it is well to look at what the jury was presented with at trial. On cross-examination of the plaintiff, defense counsel developed that she had lived in the same apartment for four years, that she had encountered

black ice before and had slipped on ice in the parking lot before. The plaintiff testified that, although she was a native of Alabama, she knew that she had to be more careful in Buffalo in the wintertime. She testified that she did not see ice on the day of the accident until she slipped on it. She also testified that she was wearing sneakers at the time and that they were worn.

Defense counsel did not discuss the issue of plaintiff's negligence in his summation. He did, however, admit that sometimes you cannot see black ice until you are right on it.

Plaintiff's counsel did discuss his client's possible negligence. He said she assumed that, since the stairs were and free from ice, the lot was too. He stated that the defense position was that the plaintiff should have seen the ice; but, in rebuttal, he said that she had no assigned parking space and, when she parked her car the prior night, she had no reason to walk behind it and check for ice. He stated that she would have needed cleats or double-bladed ice skates that day and implied that she would have fallen whatever her footwear was. He stated that she was wearing sneakers like all of us do in the winter. He asked the jury to find that she was not negligent and, if she was, that her negligence was not a substantial factor in her fall.

"A jury finding that a party was negligent but that such negligence was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause . . . Moreover, when . . . an apparently inconsistent or illogical 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. . . . Here, the jury's findings are supported by a reasonable view of the evidence and are not inconsistent as a matter of law" [*Potter v Potter, et al.*, 71 AD3rd 1565, 1567 (internal quotation marks and citations omitted)].

In the instant case, if the jury found that the plaintiff was negligent for failing to use caution walking on ice, it could have determined that her negligence played no part in her fall since she could not have seen the black ice. If the jury found that she was negligent in wearing worn sneakers in the winter, it could reasonably have found that the area she fell on was so icy that she would have fallen with better footwear. Plaintiff's counsel argued in regard to the instant motion that the testimony was that the ambulance attendants had problems with the ice. If carrying a bag was an issue, the jury

still could have found that she could not have seen the black ice and would have fallen anyway.

Therefore, the defendants' motion to set aside the jury's verdict finding that the plaintiff's negligence did not contribute to causing the accident is denied.

Submit order.

DATED: Buffalo, New York
November 16, 2010

GRANTED

NOV 16 2010

BY Carol M. Williams
CAROL M. WILLIAMS
COURT CLERK

HON. TIMOTHY J. DRURY
Justice of the Supreme Court