

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Malmberg v. United States

No. 18-1446-cv (L); 18-1763-cv (XAP), United States Court of Appeals for the Second Circuit (June 24, 2019)

SUMMARY

In this FTCA medical malpractice action, the Second Circuit reversed the district court's denial of the plaintiff's motion to increase the ad damnum clause from \$6 million to \$25 million, holding that the plaintiff's significant physical deterioration (complete inability to stand or ambulate) constituted "newly discovered evidence" under 28 U.S.C. § 2675(b) because it was not reasonably foreseeable at the time of the administrative claim. The court also vacated the pain and suffering award for insufficient explanation and remanded for consideration of comparable cases under New York law, and directed the district court to offset the award by disability benefits received under 38 U.S.C. § 1151.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	John M. Walker, Jr.; José A. Cabranes; Peter W. Hall
JURISDICTION	Federal
DECIDED	June 24, 2019
DOCKET	18-1446-cv (L); 18-1763-cv (XAP)
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from a judgment of the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., Judge) after remand from prior appeal.
STANDARD OF REVIEW	clear error
PRECEDENTIAL VALUE	unpublished
PARTIES	Charles Malmberg v. United States of America

TOPICS

torts medical malpractice damages civil procedure appellate procedure standard of review
statutory interpretation

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the district court clearly erred in denying Malmberg's motion to increase the ad damnum from \$6 million to \$25 million under the FTCA's newly discovered evidence exception.
2. Whether the district court complied with the remand instructions from Malmberg I to adequately explain its award for past and future pain and suffering.
3. Whether the district court correctly offset the damages award by the amount of disability payments received under 38 U.S.C. § 1151.

HOLDINGS

1. The district court clearly erred because Malmberg's significant deterioration and present inability to stand or ambulate constitutes newly discovered evidence not reasonably discoverable at the time of the administrative claim, satisfying the first exception under 28 U.S.C. § 2675(b).
2. The district court failed to comply because its decision declining to address the award due to the ad damnum limitation did not provide the required explanation.
3. The district court failed to correctly offset; the government's position is undisputed and the award must be offset by the amount of § 1151 benefits received through the date of any amended judgment.

KEY QUOTATIONS

“Because Malmberg's significant deterioration and present inability to stand or ambulate constitutes an unforeseeable change in diagnosis, we concluded that he has satisfied the first § 2675(b) exception for newly discovered evidence.” (at 5)

“the District Court still has failed to explain adequately its initial award for past and future pain and suffering—the error we identified in Malmberg I.” (at 6)

“Malmberg 'should not be charged with knowing what the doctors could not tell him.'” (at 5)

“The fact that Malmberg knew he suffered from C7 incomplete quadriplegia that resulted in paralysis involving all extremities does not compel the conclusion that he reasonably should have known in January 2006 that, five years later, he would no longer be able to stand or ambulate.” (at 4)

FACTUAL BACKGROUND

Malmberg sustained injuries during an anterior cervical discectomy and fusion procedure at the Syracuse Veterans Administration Medical Center in November 2004. He filed an administrative claim for \$6 million in January 2006, at which time he was able to stand and ambulate with a walker. By April 2011, his condition had deteriorated significantly due to osteoporosis, rendering him unable to stand or ambulate at all and largely dependent on home health aides. The district court found the government liable and awarded damages, but the Second Circuit vacated and remanded for reconsideration of certain issues.

PROCEDURAL HISTORY

Malmberg filed FTCA action in 2006. After bench trial, district court awarded \$4,468,859.91. Both parties appealed. In *Malmberg v. United States*, 816 F.3d 185 (2d Cir. 2016) (*Malmberg I*), the Second Circuit vacated the damages award and remanded for reconsideration of ad damnum increase and explanation of pain and suffering award. On remand, the district court again denied ad damnum increase and failed to adequately explain the pain and suffering award. This appeal followed.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The District Court is to determine anew the damages owed to Malmberg, taking into account an increased ad damnum of \$25 million; to consider whether its initial pain and suffering award complies with New York law and to explain the basis, taking into account awards in comparable cases; and to offset the final award by the amount of § 1151 benefits that Malmberg receives through the date of any amended judgment. Any further appeals shall be referred to this panel.

CASES CITED

- *Malmberg v. United States*, 816 F.3d 185 (2d Cir. 2016)
- *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984)
- *Salve Regina Coll. v. Russell*, 499 U.S. 225 (1991)
- *Husovsky v. United States*, 590 F.2d 944 (D.C. Cir. 1978)
- *Michels v. United States*, 31 F.3d 686 (8th Cir. 1994)
- *Fraysier v. United States*, 766 F.2d 478 (11th Cir. 1985)
- *Malmberg v. United States*, No. 5:06-CV-1042, 2018 WL 1801958 (N.D.N.Y. Apr. 13, 2018)