

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

Melnick v. Chase

148 A.D.3d 1589 (N.Y. App. Div. 4th Dep't 2017) · Decided March 24, 2017

SUMMARY

The New York Appellate Division, Fourth Department, held that the jury's award of no damages for past pain and suffering was against the weight of the evidence and ordered a new trial limited to that element of damages. The court declined to disturb the \$20,000 award for future pain and suffering and found the plaintiff's challenge to the verdict as inconsistent unpreserved.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Fourth Department
WRITING FOR THE COURT	Whalen, P.J.; Centra, J.; DeJoseph, J.; NeMoyer, J.; Troutman, J.
JURISDICTION	New York
DECIDED	March 24, 2017
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiff appealed from an order denying his motion to set aside the jury verdict and for a new trial on damages.
STANDARD OF REVIEW	Whether the verdict was against the weight of the evidence and whether plaintiff preserved his challenge to the verdict's alleged inconsistency.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	Melnick v. Chase

TOPICS

damages personal injury preservation of error motion for new trial appellate procedure

PRACTICE AREAS

personal injury damages appellate procedure civil procedure

QUESTIONS PRESENTED

1. Whether plaintiff preserved his contention that the jury verdict was inconsistent by raising it before the jury was discharged.
2. Whether the jury's failure to award damages for past pain and suffering was against the weight of the evidence.
3. Whether the jury's award of \$20,000 for future pain and suffering was against the weight of the evidence.

HOLDINGS

1. Plaintiff failed to preserve for appellate review his contention that the verdict was inconsistent because he did not raise the contention before the jury was discharged.
2. The jury's failure to award any damages for past pain and suffering was against the weight of the evidence, requiring a new trial limited to that element of damages.
3. The \$20,000 award for future pain and suffering was not against the weight of the evidence and should not be disturbed.

KEY QUOTATIONS

"We further conclude that the jury's failure to award plaintiff any damages for past pain and suffering is against the weight of the evidence" (1590)

"We reject plaintiff's contention, however, that the award of future damages is against the weight of the evidence." (1590)

FACTUAL BACKGROUND

Plaintiff was injured in a motorcycle accident and claimed past and future pain and suffering. The jury awarded no damages for past pain and suffering but awarded \$20,000 for future pain and suffering. Defense medical testimony acknowledged that plaintiff sustained a lumbosacral strain or sprain aggravating a degenerative spinal condition, while plaintiff's treating orthopedic surgeon testified that plaintiff sustained a painful and debilitating L-3 endplate fracture causing a herniated disc.

PROCEDURAL HISTORY

After a jury awarded plaintiff no damages for past pain and suffering and \$20,000 for future pain and suffering, plaintiff moved to set aside the verdict as inconsistent and against the weight of the evidence and sought a new trial on both elements of damages. Supreme Court, Chautauqua County, denied the motion. The Appellate Division held that the inconsistency argument was unpreserved, but granted a new trial on past pain and suffering while affirming the future-damages award.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Set aside the verdict with respect to damages for past pain and suffering and conduct a new trial on that element of damages only; the order is affirmed as modified.

CASES CITED

- Barry v Manglass, 55 NY2d 803, 806 [1981]
- Berner v Little, 137 AD3d 1675, 1676 [2016]
- Simmons v Dendis Constr., 270 AD2d 919, 920 [2000]
- Laylon v Shaver, 187 AD2d 983, 984 [1992]
- Zimnoch v Bridge View Palace, LLC, 69 AD3d 928, 929-930 [2010]
- Lai Nguyen v Kiraly [appeal No. 2], 82 AD3d 1579, 1580 [2011]
- Sanfilippo v City of New York, 272 AD2d 201, 202 [2000]
- Leonard v Irwin, 280 AD2d 935, 936 [2001]

OPINION

PER CURIAM.

Appeal from an order of the Supreme Court, Chautauqua County (Paul B. Wojtaszek, J.), entered January 22, 2016. The order denied plaintiff's motion to set aside the jury verdict and for a new trial on the issue of damages. It is hereby ordered that the order so appealed from is unanimously modified on the law by granting the motion in part and setting aside the verdict with respect to damages for past pain and suffering, and a new trial is granted on that element of damages only, and as modified the order is the affirmed without costs.

Memorandum: In this action to recover damages for injuries sustained by plaintiff in a motorcycle accident, the jury returned a verdict that, inter alia, awarded plaintiff no damages for past pain and suffering and \$20,000 for future pain and suffering. Plaintiff appeals from an order that denied his *1590motion to set aside the jury verdict with respect to damages as inconsistent and against the weight of the evidence, and for a new trial on both elements of damages.

We conclude that plaintiff has failed to preserve for our review his contention that the verdict is inconsistent inasmuch as he failed to raise that contention before the discharge of the jury (see Barry v Manglass, 55 NY2d 803, 806 [1981], rearg denied 55 NY2d 1039 [1982]; Berner v Little, 137 AD3d 1675, 1676 [2016]).

We further conclude that the jury's failure to award plaintiff any damages for past pain and suffering is against the weight of the evidence (see Simmons v Dendis Constr., 270 AD2d 919, 920 [2000]; Laylon v Shaver, 187 AD2d 983, 984 [1992]).

In reaching that conclusion, we note that defendants' own expert testified that, as a result of the motorcycle accident, plaintiff sustained a lumbosacral strain or sprain that aggravated his degenerative spinal condition and would have lasted for three to six months before healing.

In light of that testimony, and the testimony of plaintiff's treating orthopedic surgeon that plaintiff sustained a painful and debilitating L-3 endplate fracture that caused a herniated disc, we conclude that the verdict awarding plaintiff no damages for past pain and suffering is contrary to the weight of the evidence and that there should be a new trial on that element of damages (see generally *Zimnoch v Bridge View Palace, LLC*, 69 AD3d 928, 929-930 [2010]).

We modify the order accordingly. We reject plaintiff's contention, however, that the award of future damages is against the weight of the evidence. There was conflicting expert testimony concerning the likelihood, severity, and causation of plaintiff's alleged future pain and suffering, and we thus conclude that the verdict in that respect should not be disturbed (see *Lai Nguyen v Kiraly* [appeal No. 2], 82 AD3d 1579, 1580 [2011]; *Sanfilippo v City of New York*, 272 AD2d 201, 202 [2000], lv dismissed 95 NY2d 887 [2000]; see generally *Leonard v Irwin*, 280 AD2d 935, 936 [2001]).

Present — Whalen, P.J., Centra, DeJoseph, NeMoyer and Troutman, JJ.