

**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

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 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]; *Layton 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.