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New York Jury Verdict Review & Analysis

GARRAHAN vs. ANNEX ANTIQUE FAIR & FLEA MARKET, ET AL.

Index No. 10841/02

Verdict Date: October 27, 2004;

Publication Date: March, 2005

Topic: HEEL OF PLAINTIFF'S SHOE BECAME STUCK IN HOLE IN DEFENDANT'S PARKING LOT - PLAINTIFF FELL AND SUSTAINED BIMALLEOLAR FRACTURE OF HER ANKLE REQUIRING OPEN REDUCTION AND INTERNAL FIXATION - THE COMPANY LEASING THE PARKING LOT AND COMPANY SUBLEASING THE PARKING LOT EACH FOUND LIABLE

Result: $ 500,000 Verdict Reduced by Plaintiff's 5% Comparative Negligence

Title: Premises Liability; Hazardous Premises

State: New York

County: New York

Judge: Donna M. Mills

Plaintiff Attorney: Stavros E. Sitinas of Wingate Russotti & Shapiro, L.L.P. in Manhattan

Defendant Attorney: Annex Antique: Nichole Brown of Wade Clark Mulcahy in Manhattan; Irwin Parking Corp.: Daniel Herreta of Zwacki Everett Gray & McLaughlin of Manhattan

Facts: On December 1, 2001, the plaintiff, a 64-year-old female, was walking in the parking lot of the Annex Antique Fair and Flea Market on Six Avenue between West 25th Street and West 26th Street. The plaintiff claimed that her foot slipped into a depression and her heel became stuck in a hole. She contended that she then fell and fractured her ankle. The plaintiff sued the owner of the lot, the company that leased the property, the company that subleased the property and a property owner that had been mistakenly named. That party was stipulated out during discovery and the owner of the property was granted summary judgment as an out-of-possession landlord. The plaintiff claimed that the pothole was a dangerous condition and that the defendants had prior notice.

The defendants argued that the pothole was an open and obvious condition and that the plaintiff had been negligent for not watching where she was walking. The lessor of the property argued that it did not have notice of the parking lot's condition and that there had been no reported accidents prior to the plaintiff's fall. The sublessor argued that the lessor was responsible for the maintenance of the property.

The plaintiff testified that the pothole had existed for several years. Her expert engineer testified that the pothole existed and that it was a dangerous condition. He opined that the area had been improperly maintained and repaired on several

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occasions and this led to further deterioration of the pavement.
The plaintiff sustained a bimalleolar fracture of her left ankle requiring open reduction and internal fixation. The surgery required the insertion of a metal plate, a screw over the distal fibula, and two screws traversing the medial malleoulus. The plaintiff underwent physical therapy and reports continuing pain, swelling and range-of-motion limitations. The plaintiff, a retired guidance counselor, contended that the injury prevents her from lifting heavy objects and impedes her playing with her grandson. In addition, the plaintiff has developed plantar fascitis.
The plaintiff's expert orthopedist opined that the plaintiff suffered a permanent disability causally related to her fall. He testified that the X-rays taken shortly before trial showed that her condition had worsened and that she would have to undergo further surgery. The defendants' expert orthopedist opined that the plaintiff had made a good recovery. He testified that the plaintiff has no limitations or disabilities and is not a candidate for further surgery. He did concede that the plaintiff had developed plantar fascitis that he argued had resolved.
The plaintiff's husband withdrew his loss-of-consortium claim when the couple divorced after the accident. They have since remarried.
The plaintiff had demanded $ 650,000. The defendants had offered $ 200,000. The trial lasted four days. After deliberating for five hours, the jury of five males and one female returned a plaintiff's verdict but found the plaintiff 5% comparatively negligent. The jury found the lessor of the property 60% liable and the sublessor 35% liable. The jury awarded the plaintiff $ 500,000 which was reduced to $ 475,000 as a result of the plaintiff's negligence.

Plaintiff Experts: Engineer: Nicholas Bellini of N.J.
Treating Orthopedist: **Andrew Merola,** M.D. of Astoria

Defendant Experts: Orthopedic Surgeon: Edward S. Crane, M.D. of Manhattan

Issue: Published in Volume 22, Issue 3

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PHILLIP vs. FLYNN-HILL ELEVATOR CO., INC.

Index No. 28525/97

Verdict Date: September 15, 2003;

Publication Date: January, 2004

Topic: DISMISSAL OF COMPLAINT AFTER CONCLUSION OF PLAINTIFF'S CASE - JUDGE DISMISSED CASE FOR PLAINTIFF'S FAILURE TO MAKE OUT A PRIMA FACIE SHOWING OF NEGLIGENCE AGAINST DEFENDANT ELEVATOR MAINTENANCE COMPANY - ALLEGED TRIP BY PLAINTIFF AS A RESULT OF ELEVATOR MISLEVELING - ALLEGED HERNIATED DISC REQUIRING LAMINECTOMY AND SPINAL FUSION

Title: Elevator Maintenance Negligence

State: New York

County: Kings

Judge: Ira Harkavy

Plaintiff Attorney: Vincent Gonalez of Brecher Fishman Pasternack Popish Heller Rubin & Reiff, P.C. in Manhattan

Defendant Attorney: Frederick N. Gaffney of Costello Shea & Gaffney in Manhattan

Facts: On January 2, 1997, the plaintiff, a 55-year-old nursing attendant at Brookdale Hospital, alleged that she tripped as a result of elevator misleveling. The plaintiff was bringing medical supplies from the basement of the hospital to the first floor. The doors of the elevator opened and the plaintiff claimed that she tripped because the elevator stopped below the first floor level. She maintained that she stumbled, but was able to catch herself from falling by placing her hands out against the wall facing the elevator.

The defendant produced service records which indicated that the defendant had repaired leveling problems on the subject elevator in August and November of 1996 and that the problems had been corrected by December of 1996. In addition, two employees of the defendant company testified that they had performed three routine and preventative maintenance calls in December of 1996 and did not detect a leveling problem. The service records reflected no further leveling problems before the plaintiff's incident. The plaintiff testified that she had used the elevator frequently and had never before encountered leveling problems.

The plaintiff alleged that as a result of the incident, she sustained a large lateral disc herniation to the left side at L4-L5 and a small lateral disc herniation to the right side at L4-L5. In November of 2001, the plaintiff underwent a laminectomy with spinal fusion. The plaintiff's treating orthopedist and orthopedic surgeon both testified and described her injuries and treatment.

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The defendant's medical proofs included the fact that the plaintiff's medical records demonstrated that she suffered from degenerative disc disease which predated the elevator incident and had required surgery which she underwent in November of 2001. On cross-examination, the plaintiff's treating orthopedist conceded that the plaintiff had suffered from long-term degenerative disc disease.

The plaintiff testified that she was unable to work after July of 2001 as a result of the injuries to her back. However, when she stopped working in July of 2001, she conceded on cross-examination that she had noted on her application for social security disability benefits both back and heart conditions which rendered her unable to work.

At the close of the plaintiff's case, the defense made a motion to dismiss the plaintiff's complaint for her failure to make out a prima facie showing of negligence against the defendant. The cross-examination of the plaintiff in which she did not give a clear rendition of the elevator incident and the conflict between her deposition and trial testimony regarding her application for social security disability benefits contributed to the judge's decision to dismiss the complaint.

Plaintiff Experts: Treating Orthopedist: Joel Teicher of Brooklyn
Orthopedic Surgeon: **Andrew Merola** of Brooklyn

Issue: Published in Volume 21, Issue 1

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THEOLOGIST vs. HOME DEPOT, U.S.A., INC.

Civil Action No. CV4430/00

Verdict Date: August 28, 2003;

Publication Date: September, 2003

Topic: HOME IMPROVEMENT STORE EMPLOYEE IMPROPERLY STACKS PLYWOOD BOARDS AGAINST OUTER WALL OF STORE DURING HIGH WIND CONDITIONS - BOARD PROPELLED APPROXIMATELY 20 FEET, STRIKING PLAINTIFF - THREE CERVICAL HERNIATIONS NECESSITATING FUSION - SHOULDER SEPARATION - CONCUSSION AND POST-CONCUSSION SYNDROME - PSYCHIATRIC REACTION OF DEPRESSION, PANIC ATTACKS AND AGORAPHOBIA

Result: $ 1,057,785 Verdict

State: New York

Court: U.S. District Court, Eastern District of New York

Judge: Mag. Judge Cheryl L. Pollak

Plaintiff Attorney: Ira H. Goldfarb and Jeffrey I. Weiner of Friedman Levy & Goldfarb in Manhattan

Facts: This was an action involving a 51-year-old patron of the defendant home improvement store in which the plaintiff contended that the defendant's employee, who was unloading sheets of 4'x 8' x 1/2" plywood boards during very windy conditions, negligently leaned the boards against the outer wall of the store without securing them. The plaintiff maintained that as a result, one of the boards was blown from the stack and flew approximately 20 feet into the air, striking him in the neck and shoulder. The plaintiff contended that he sustained a concussion, post-concussion syndrome herniations at C4-C5, C5-C6 and C6-C7 which ultimately necessitated a laminectomy and a three-level fusion, an aggravation of previously asymptomatic degenerative disc disease at C6-C7 and a psychiatric reaction of depression and agoraphobia.

It was undisputed that very windy conditions, with regular winds between 20 and 30 mph and with higher gusts, were occurring on the day of the events in question. The plaintiff established that the defendant's employee, who was unloading a truck, leaned the boards in a stack against the outer wall of the building without securing them or placing them in a special lumber cart, or carrying the boards directly into the store. The plaintiff, who is a contractor, related that as he was walking with several friends towards the contractor's entrance to purchase cabinets he planned on installing in one of the friend's apartment, one of the boards was propelled by the wind and traveled some 20 feet before striking him. The plaintiff maintained that in view of the very high winds, such a procedure was very dangerous and that the defendant should have either brought the boards directly into the store or used the lumber cart.

The defendant contended that such an incident involving boards of such a size was unforeseeable. The defendant further

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argued that the plaintiff was not sufficiently alert and could otherwise have avoided the board.
The plaintiff countered these postures by maintaining that in the first instance, in view of the presence of such high winds, such an incident was indeed foreseeable, further arguing that the large size and surface area of the boards permitted the winds to propel the boards with greater ease. The plaintiff presented several current and former employees who testified that the employee's handling of the merchandise was improper. The plaintiff also maintained that the defense position that the plaintiff could have been more alert and avoided the airborne board should clearly be rejected.
The plaintiff contended that after conservative treatment, including physical therapy, medication and epidural injections for the herniations was inadequate, he underwent a laminectomy and a three-level fusion. The evidence reflected that the plaintiff's current orthopedist has recommended further surgery to stabilize a pseudoarthrosis. The plaintiff, who is a self-employed contractor, maintained that he will be permanently unable to engage in physical work.
The plaintiff's psychiatrist related that the traumatic nature of the incident contributed to a psychiatric disorder involving depression, panic attacks, agoraphobia and insomnia. The psychiatrist offered a guarded prognosis.
The defendant maintained that the cervical difficulties were degenerative in nature and predated the accident. The plaintiff countered that he was previously asymptomatic. The defendant also contended that cervical injuries sustained in a subsequent automobile accident were accounting for much of any complaints the plaintiff is currently suffering. The plaintiff's orthopedist, who provided treatment both before and after this subsequent accident, contended that the plaintiff suffered the approximate same level of pain and restriction after the automobile accident as he had shortly before the collision. The plaintiff's orthopedist also contended that the diagnostic imaging studies showed no difference after the automobile accident.
The defendant further contended that the plaintiff's claims that he could not work as a self-employed contractor should be rejected and presented a woman for whom the plaintiff had done work after the incident with the boards. The plaintiff, who was renovating the witness's bathroom, maintained that he utilized two workers to do the physical aspects of the job and was primarily supervising only. The witness countered that the plaintiff had only brought one other worker and that she had observed plaintiff engaging in physical work. The plaintiff further argued that there was a dispute between the plaintiff and the homeowner regarding payment for the work, and that the defense witness's testimony should be rejected.
The jury found the defendant 100% negligent and awarded $ 1,057,785, including $ 104,459 for past medical costs, $ 350,254 for future medical costs, $ 82,000 for past lost earnings, $ 21,072 for future lost earnings, $ 200,000 for past pain and suffering and $ 300,000 for future pain and suffering.

Plaintiff Experts: Orthopedic Surgeon: **Andrew Merola** from New York City
Orthopedic Surgeon: Christian I. Fras from New York City
Radiologist: Thomas H. Kolb from New York City
Psychiatrist: Stephen T. Moran
Vocational: Edmond A. Provder from Hackensack, N.J.
Economist: Alan Leiken from East Setauket, N.Y.

Commentary: It is felt that the unusual and traumatic nature of the incident in which the plaintiff was struck by a plywood board that was propelled some 20 feet by the wind, had a significant impact on both the liability and damages aspects of this case. The defendant denied that such an incident was foreseeable. The plaintiff effectively countered this position by presenting the weather records, showing consistent 20 to 30 mph winds with higher gusts; by stressing that eyewitness testimony reflected unusually strong winds which rendered it difficult to walk; and by arguing that the large size and surface of the board rendered it much more prone to be propelled by the wind. Additionally, the plaintiff argued that the defense position that the plaintiff was comparatively negligent in failing to avoid this board as it flew towards him should be strongly rejected. Finally, it should be noted that the plaintiff, who did not present a liability expert, produced both current and former defense employees who concurred that the worker's actions, in leaning the boards against the outer wall of the store as he unloaded the truck, were improper.

Issue: Published in Volume 20, Issue 9