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17 NY. J.V.R.A. 4:C8

1999 WL 33489513 (Unknown State Ct.), 17 NY. J.V.R.A. 4:C8

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Unknown State Ct.
PROSZEK vs. CMT, INC.
5753/97

DATE OF VERDICT/SETTLEMENT: November, 1999

TOPIC: TRACTOR-TRAILER DRIVER PULLS FROM LOADING DOCK PREMATURELY - PLAINTIFF'S FORKLIFT, WHICH WAS PARTIALLY ON TRAILER, FALLS OFF LOADING DOCK - COMPRESSION FRACTURE - MYOFASCIAL PAIN SYNDROME.

SUMMARY:

Result: \$788,267 Gross Verdict

EXPERT WITNESSES:

Plaintiff's: Donald Asa from Phoenix, Az.: Plaintiff's trucking expert.

and from Amherst. Plaintiff's chiropractor.

Scott Syracuse from Clarence.: Plaintiff's chiropractor.

ATTORNEY:

Plaintiff's: **Craig Z. Small** and Linda J. Marsh of Ziller Marsh & Lang in Buffalo for plaintiff.

Defendant's: Jeffrey C. Sendziak of Gibson McAskill & Crosby in Buffalo for defendant.

JUDGE: Frank A. Sedita

RANGE AMOUNT: \$500,000-999,999

STATE: New York

COUNTY: Erie

INJURIES:

TRACTOR-TRAILER DRIVER PULLS FROM LOADING DOCK PREMATURELY - PLAINTIFF'S FORKLIFT, WHICH WAS PARTIALLY ON TRAILER, FALLS OFF LOADING DOCK - COMPRESSION FRACTURE - MYOFASCIAL PAIN SYNDROME.

FACTS:

In this action, the male plaintiff fork-lift operator in his early 50's contended that the defendant operator of an 18 wheel tractor-trailer negligently pulled from the dock as the plaintiff's fork-lift was still partially on the dock plate bridging from the dock to the back of the tractor-trailer. The plaintiff maintained that as a result, the fork-lift tumbled some five feet off the dock. The

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plaintiff contended that he suffered a compression lumbar fracture and myofascial pain syndrome which will cause severe permanent pain and restriction in the lower back permanently relegate him to sedentary, light duty type work.

The plaintiff related that as he was completing his work, and while his rear wheels were on the loading dock and the front on tractor-trailer, the defendant began moving forward and the fork-lift fell off the dock with the plaintiff still seated inside of it. The plaintiff's trucking expert contended that Federal regulations and good safety practice mandate that the trucker check that the load is fully secure before moving. The expert contended that if the defendant had done so, the accident would not have occurred. The defendant contended that the shipping clerk had received the bill of lading from the plaintiff and advised him he could leave. The defendant named the employer as a third-party defendant. The Court, based upon relatively recent changes in the law relating to Workers' Compensation, held that in the absence of sufficiently grave injuries, the third-party action against the employer could not be maintained and the Court dismissed this aspect.

The defendant further maintained that the plaintiff was overwhelmingly comparatively negligent in giving the bill of lading to the clerk before the work was completed. The plaintiff contended that before he began to load the truck, the clerk entered, gave him instructions to load older product before newer product and then took the bill of lading from him. The clerk testified that the plaintiff had given her the bill of lading shortly before the accident occurred and denied that she had taken it before he began loading the truck a significant time earlier. The plaintiff contended that even if received, the bill of lading is not a substitute for making observations. The plaintiff further pointed to the absence of defense expert testimony on liability.

The defendant additionally contended that cushioning surrounded the rear of the truck obstructed his view of the loading dock and that he was not permitted onto the loading dock itself. The plaintiff countered that the defendant should have looked upwards from under his trailer and that he would have been able to ascertain that the dock plate remained extended from the loading dock and that it was not, therefore, safe to proceed. The plaintiff also asserted that the defendant could have gone onto the dock briefly to make observations before leaving.

The plaintiff's neurologist contended that the plaintiff suffered a lumbar compression fracture which was treated conservatively. The physician related that although the fracture healed, the plaintiff continue to suffer severe and unrelenting lower back pain. The plaintiff contended that he attempted to return to work on a number of occasions. The plaintiff maintained that the vibrations entailed in operating the fork-lift significantly heightened the pain and that he was unable to continue. The plaintiff maintained that he will be permanently relegated to much more sedentary work and the plaintiff, who was previously earning \$28,000-\$30,000, related that he now works two days a week on a hot dog stand which he owns earning \$25-50 per week.

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The defendant's orthopedist contended that the compression fracture resolved and denied that there were any objective signs of other continuing injury. The plaintiff countered that he had worked for the company for many years, had worked himself up to a fork-lift operator from an entry level position and had an excellent work history with the company. The plaintiff maintained that in view of this factor, his testimony should be given greater weight.

The evidence disclosed that the plaintiff's wife had died of a heart attack a few years prior to the accident. The plaintiff contended that he has difficulties with everyday work around the house. The plaintiff has one adult son and one adult daughter. The daughter moved out of the house before the accident and the son moved out after the incident occurred.

The jury found the defendant 57.5% negligent, the plaintiff 42.5% comparatively negligent and rendered a gross awarded of \$788,267, including \$72,000 for past pain and suffering, \$18,467 for past medical expenses, \$131,000 for past lost earnings, \$208,000 for future pain and suffering, \$83,000 for future medical expenses and \$275,800 for future lost earnings.

COMMENTARY:

The defendant trucker stressed that the shipping clerk had told him he could leave, maintaining that he had been given the bill of lading by the clerk and that he would not be given this document until the plaintiff completed loading the truck. The defendant argued, therefrom, that it was clear that he had acted reasonably. The plaintiff, who nonetheless prevailed, emphasized that regulations require that a trucker ascertain that the load is secure before proceeding and argued that the defendant could not rely on the clerk rather than making his own observations. In this regard, although the trucker contended that his view was obstructed by a loading dock curtain surrounding the rear of the truck, the plaintiff argued that the experienced trucker should have simply looked up from under the trailer and that had he done so, he would have seen that the metal docking plate was still extended reflecting that the plaintiff had not completed his work. Moreover, it is felt that the finding of 42.5% comparative negligence was significant and that this finding could have reflected an acceptance of the defendant's contentions, supported by the shipping clerk's testimony, that the plaintiff had given the clerk the bill of lading a short time earlier despite the fact that he had not completed his work, leading the defendant to mistakenly believe that the plaintiff had, in fact, completed loading the trailer.

It should be noted that the Court dismissed the third-party action brought against the employer based on changes in the Workers' Compensation law enacted in 1996 which prohibits such a third-party action in the absence of a 'grave' injury held not to be present in this case. It is felt that the jury, which could not assess any liability against the employer, may have felt that irrespective of the accuracy of the plaintiff's and clerk's versions, the plaintiff nonetheless bore significant responsibility for the miscommunication.

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Regarding damages, the compression lumbar fracture essentially resolved and the plaintiff's continuing complaints revolved around the claimed myofascial pain syndrome, the diagnosis of which was largely based on continuing subjective complaints. The jury apparently accepted the plaintiff's claims and it is thought that the evidence that the plaintiff had been an excellent long-term employee with a very favorable work history rendered his claims that he would have continued working if he had been able to do so much more believable.

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For docket see 0069079/2004

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Supreme Court, Eighth Judicial District, Cattaraugus County, New York
Matthew D. Ellis and Zan P. Ellis v. **Craig** Alan Emerson and Postlewait Logging
Company

No. 69079/04

DATE OF VERDICT/SETTLEMENT: February 07, 2007

TOPIC: MOTOR VEHICLE - REAR-ENDER - MOTOR VEHICLE - TRAFFIC OFFENSES - MOTOR
VEHICLE - TRACTOR-TRAILER - MOTOR VEHICLE - MULTIPLE VEHICLE
Truck Crash Caused Disabling Back Injury, Plaintiff Alleged

SUMMARY:

RESULT: Verdict-Plaintiff

The jury found that the defendants were liable for the crash. It determined that the plaintiffs' damages totaled \$925,000.

EXPERT WITNESSES:

Plaintiff: Dr. Jeffrey Angelli; Chiropractic; Arcade, NY Donald Comstock, M.D.;
Primary Care Physician; Arcade, NY Gregory Bennett, M.D.; Neurosurgery; Buffalo,
NY Ronald Hojnacki; Physical Therapy; Springville, NY

Defendant: Robert M. Lifeso, M.D.; Orthopedic Surgery; Buffalo, NY

ATTORNEYS:

Plaintiff: **Craig Z. Small**; Small Law Firm; Buffalo, NY (Matthew P. Ellis, Zan P. Ellis)

Defendant: Shawn P. Martin; Hurwitz & Fine, P.C.; Buffalo, NY (**Craig** Emerson, Postlewait Logging Co.)

JUDGE: Larry M. Himelein

RANGE AMOUNT: \$500,000-999,999

STATE: New York

COUNTY: Cattaraugus

INJURIES: Immediately following the accident, Ellis sought treatment from his family physician and a chiropractor. Ellis was referred to a specialist, who determined that Ellis was suffering a disc herniation at C4-5. He underwent about eight months of physical therapy.

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Facts:

On Jan. 23, 2004, plaintiff Matthew Ellis, 42, a truck driver, was driving a box truck on a slippery portion of Route 400, in Aurora. His truck's rear end was struck by a semi-trailer that was transporting about 84,000 pounds of wood chips. Ellis claimed that he sustained a back injury.

Ellis sued the semi trailer's driver, **Craig** Emerson, and the owner of Emerson's vehicle, Postlewait Logging Co. Ellis alleged that Emerson was negligent in the operation of his vehicle and that Postlewait Logging was vicariously liable for Emerson's actions.

The defense admitted that the trailer's load did not have a proper permit and that it was about 4,000 pounds overweight at the time of the accident.

Ellis claimed that he suffers a permanent residual disability that permanently prevents his resumption of his truck-driving duties. He was also a former professional drummer in rock bands, but he claimed that his disability also prevents him from drumming. He contended that he continues to suffer pain and that he will likely remain on pain medication for the rest of his life.

Ellis sought recovery of his past and future lost earnings, his past and future medical expenses, and damages for his past and future pain and suffering. His wife sought recovery of damages for her loss of consortium.

Defense counsel contended that Ellis did not sustain a serious injury, as defined by the no-fault law, Insurance Law § 5102(d).

The defense's expert orthopedic surgeon opined that Ellis' injuries were the result of a long-standing preexisting condition. He acknowledged that Ellis was injured in the accident, but he contended that it was a temporary injury that has healed. He claimed that any further injuries were due to the preexisting condition and Ellis' age.

Defense counsel also contended that Ellis had sought chiropractic treatment during the 10 years that preceded the accident. In response, Ellis' treating chiropractor testified that he saw Ellis about twice a year for muscle-related issues, not disc problems. He also testified that he refused to treat Ellis after the accident when he realized that he had sustained a herniation.

Defense counsel also hired an individual who conducted videotaped surveillance of Ellis. The defense claimed that the two-hour-long videotape, which was the only product of about 32 hours of surveillance, showed Ellis performing all of the same activities that he did prior to the accident.

Plaintiffs' counsel opined that the surveillance videotape backfired because it merely showed Ellis driving, standing and talking with friends. He contended that the videotape also showed that Ellis physically struggled to stand up and move around.

Insurer:

Progressive Casualty Insurance Co. for both defendants

ALM Properties, Inc.

Cattaraugus Supreme

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Unknown State Ct.
SLAWATYCKI vs. NABI
1998/1282

DATE OF VERDICT/SETTLEMENT: October, 2001

TOPIC: MEDICAL MALPRACTICE - NEGLIGENT DISCHARGE OF PATIENT SUFFERING PROFUSE BLEEDING PROMPTING CESSATION OF SINUS SURGERY - CRANIOTOMY - DEFENSE VERDICTS ON CLAIM OF NEGLIGENT SURGICAL TECHNIQUE CAUSING PERFORATION OF CRIBRIFORM PLATE AND ON INFORMED CONSENT CLAIM.

SUMMARY:

Result: \$204,000 Verdict

EXPERT WITNESSES:

Plaintiff's: Robert Jablonski from Pearl River.: Plaintiff's expert ENT specialist.

Defendant's: Arden Kane from N.C.: Defendant's expert ENT specialist.

ATTORNEY:

Plaintiff's: **Craig Z. Small** of Ziller Marsh Lang **Small & Zweig** in Buffalo for plaintiff.

Defendant's: J. Mark Gruber of Roach Brown McCarthy & Gruber in Buffalo for defendant.

JUDGE: John A. Michalek

RANGE AMOUNT: \$200,000-499,999

STATE: New York

COUNTY: Erie

INJURIES:

MEDICAL MALPRACTICE - NEGLIGENT DISCHARGE OF PATIENT SUFFERING PROFUSE BLEEDING PROMPTING CESSATION OF SINUS SURGERY - CRANIOTOMY - DEFENSE VERDICTS ON CLAIM OF NEGLIGENT SURGICAL TECHNIQUE CAUSING PERFORATION OF CRIBRIFORM PLATE AND ON INFORMED CONSENT CLAIM.

FACTS:

The female plaintiff in her 20s, who was undergoing functional endoscopic sinus surgery, contended that the defendant ENT specialist perforated the cribriform plate during the surgery, maintaining that such an incident would not occur in the absence of negligence. The plaintiff further maintained that she was not properly

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informed of such a risk.

The defendant contended that such a perforation is a recognized risk of the surgery and that the plaintiff was so advised. The generalized consent form did not mention this specific issue. The plaintiff additionally contended that after the surgery was stopped and the area packed, she was discharged prematurely before sufficient diagnostic tests were performed. The plaintiff maintained that over the course of the next several days, she developed severe headaches, returned to the defendant's office and was ultimately admitted to the hospital. The plaintiff contended that had the perforation been diagnosed promptly, she probably could have avoided the need for a craniotomy with bed rest and that the discharge dictated the need for the surgery.

The plaintiff maintained that the surgery has left her with scarring which is under the hairline. The plaintiff related that the underlying sinus condition is no better and no worse than before the surgery.

The jury found for the defendant on the issues of negligent surgical technique and informed consent. They then found for the plaintiff on the issue of premature discharge and awarded \$160,000 for past pain and suffering, \$20,000 for future pain and suffering, \$20,000 for hospital bills and \$3500 for past lost wages. The case subsequently settled for \$185,000.

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