

Westlaw.

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Karwacki v. Astoria Medical Anesthesia Associates, P.C.
N.Y.A.D. 2 Dept., 2005.

Supreme Court, Appellate Division, Second Department, New York.

Eugeniusz **KARWACKI**, et al., respondents,
v.

ASTORIA MEDICAL ANESTHESIA ASSOCIATES, P.C., a/k/a Astoria Anesthesia Associates, P.C., defendant,
Carlo Cinganelli, appellant.
Nov. 14, 2005.

Background: Accident victim, who was injured in fall from ladder, brought action to recover damages for personal injuries. The Supreme Court, Kings County, Kramer, J., entered judgment on jury verdict awarding victim damages of \$200,000 for past pain and suffering, \$38,000 for past medical expenses, \$132,000 for past lost earnings, \$400,000 for future pain and suffering, \$150,000 for future lost earnings, and \$133,000 for future medical expenses. One defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) jury award for past and future pain and suffering was not excessive, and
- (2) evidence of past medical services provided by doctor could not be submitted.

Affirmed as modified.
West Headnotes

[1] Appeal and Error 30 ↪74

30 Appeal and Error
30III Decisions Reviewable

30III(D) Finality of Determination

30k67 Interlocutory and Intermediate Decisions

30k74 k. Effect of Right to Review on Appeal from Final Judgment. Most Cited Cases
Right of direct appeal from intermediate order of trial court terminated with the entry of judgment in personal injury action, necessitating dismissal of appeal from order.

[2] Damages 115 ↪127.21

115 Damages

115VII Amount Awarded

115VII(B) Injuries to the Person

115k127.18 Arm, Hand, Wrist, and Shoulder Injuries

115k127.21 k. Fractures, Sprains, and Connective Tissue Injuries. Most Cited Cases

Damages 115 ↪127.38

115 Damages

115VII Amount Awarded

115VII(B) Injuries to the Person

115k127.36 Injuries to the Nervous System and Paralysis

115k127.38 k. Arms and the Upper Body. Most Cited Cases

Jury verdict awarding accident victim who was injured in fall from ladder \$200,000 for past pain and suffering and \$400,000 for future pain and suffering was not excessive where victim sustained comminuted intra-articular distal radius fracture of his dominant right wrist, underwent two operations, sustained permanent damage to his median nerve, developed traumatic arthritis, and continued to experience pain, weakness, and limited range of motion in his right hand approximately six years after accident, and also suffered from weakened grip strength and numbness in some of his right fingers.

[3] Damages 115 ↪186

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115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k186 k. Loss of Earnings, Services, or Consortium. Most Cited Cases

Damages 115 ↪187

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k187 k. Impairment of Earning Capacity. Most Cited Cases
Personal injury plaintiffs bore burden of establishing damages for past and future lost earnings with reasonable certainty, such as by submitting tax returns or other relevant documentation.

[4] Pretrial Procedure 307A ↪434

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)6 Failure to Comply; Sanctions
307Ak434 k. In General. Most Cited Cases
Accident victim's failure to provide authorization for his medical records from doctor's office and to provide, prior to trial on his personal injury claims, any medical records relating to doctor's services precluded trial court's submission of evidence of past medical services provided by doctor.

****124** Caulfield Law Office (Carol R. Finocchio of counsel), for appellant.
Samuel J. Lurie, New York, N.Y. (Jay L.T. Breakstone of counsel), for respondents.

SONDRA MILLER, J.P., GABRIEL M. KRAUSMAN, GLORIA GOLDSTEIN, and JOSEPH COVELLO, JJ.

***438** In an action to recover damages for personal injuries, etc., the defendant Carlo Cinganelli appeals, as limited by his brief, from (1) stated portions of an order of the Supreme Court, Kings

County (Kramer, J.), dated March 31, 2004, and (2) a judgment of the same court entered July 1, 2004, as, upon a jury verdict on the issue of damages finding that the plaintiff Eugeniusz Karwacki sustained damages of \$200,000 for past pain and suffering, \$38,000 for past medical expenses, \$132,000 for past lost earnings, \$400,000 for future pain and suffering, \$150,000 for future lost earnings, and \$133,000 for future medical expenses, is in favor of the plaintiff Eugeniusz Karwacki and against him in the principal sum of \$1,053,000.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is modified, on the law, the facts, and as an exercise of discretion, by (1) deleting the provision thereof awarding the injured plaintiff damages for past and future lost earnings in the principal sum of \$282,000 and substituting therefor a provision dismissing those claims, and (2) deleting the provision thereof awarding the injured plaintiff damages for past medical expenses and substituting therefor a provision severing the cause of action as to damages for past medical expenses and granting a new trial as to that cause of action only; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, and the order is modified accordingly, unless within 30 days after service upon ***439** the injured plaintiff of a copy of this decision and order, the injured plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Kings County, a written stipulation consenting to reduce the verdict as to past medical expenses from the sum of \$38,000 to the sum of \$32,000, and to the entry of an amended judgment accordingly; in the event that the injured plaintiff so stipulates, then the judgment, as so modified, reduced, and amended, is affirmed insofar as appealed from, without costs or disbursements.

[1] The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on appeal from the order are brought up for

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review and have been considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

[2] The injured plaintiff fell off a ladder, sustaining a comminuted intra-articular distal radius fracture of his dominant right wrist. He underwent two operations, sustained permanent damages to his median nerve, and developed traumatic arthritis. Approximately six years following the accident, he continued to experience pain, weakness, and limited range of motion in his right hand. He also suffered from weakened grip strength and numbness in some of his right fingers. Under the circumstances, contrary to the contention of the defendant Carlo Cinganelli (hereinafter the appellant), the jury award for past and future pain and suffering was not excessive (*see Marrone v. Orson Holding Corp.*, 15 A.D.3d 631, 789 N.Y.S.2d 901; *Harris v. City of New York*, 2 A.D.3d 782, 770 N.Y.S.2d 380; **125 *Cabezas v. City of New York*, 303 A.D.2d 307, 756 N.Y.S.2d 566; *Julien v. Physician's Hosp.*, 231 A.D.2d 678, 647 N.Y.S.2d 831).

[3] The plaintiffs had the burden of establishing damages for past and future lost earnings with reasonable certainty, such as by submitting tax returns or other relevant documentation (*see St. Hilaire v. White*, 305 A.D.2d 209, 759 N.Y.S.2d 74; *Schiller v. New York City Tr. Auth.*, 300 A.D.2d 296, 750 N.Y.S.2d 774; *Bailey v. Jamaica Buses Co.*, 210 A.D.2d 192, 620 N.Y.S.2d 257; *O'Connor v. Rosenblatt*, 276 A.D.2d 610, 714 N.Y.S.2d 327). Even assuming that the plaintiffs' tax returns were properly submitted in evidence, they failed to establish with reasonable certainty the injured plaintiff's damages for past and future lost earnings (*see Papa v. City of New York*, 194 A.D.2d 527, 598 N.Y.S.2d 558).

[4] The Supreme Court should not have submitted evidence of past medical services provided by Dr. Areta Podhorodecki since the plaintiffs had failed to provide an authorization for the injured plaintiff's medical records from Dr. Podhorodecki's office and the plaintiffs had failed to provide any medical records *440 relating to Dr. Podhorodecki's services prior to the trial (*see generally Raymond v. Rutherford*, 12 A.D.3d 355, 783 N.Y.S.2d 313; *Alto v. Gilman Mgt. Corp.*, 7 A.D.3d 650, 776

N.Y.S.2d 823). Additionally, the award for past medical expenses was unsupported by competent evidence to the extent that it exceeded \$32,000 (*see O'Connor v. Rosenblatt, supra*).

The appellant's remaining contention is without merit.

N.Y.A.D. 2 Dept., 2005.

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