

Westlaw.

2009 WL 260481

--- N.Y.S.2d ----, 2009 WL 260481 (N.Y.A.D. 1 Dept.), 2009 N.Y. Slip Op. 00626

(Cite as: 2009 WL 260481 (N.Y.A.D. 1 Dept.))

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

Lori KEATING, et al., Plaintiffs-Respondents,

v.

SS & R MANAGEMENT CO., et al., Defendants,

Robert Borgella, Defendant-Respondent,

High Thor Taxi Corp., Defendant-Appellant.

Feb. 3, 2009.

1-1 mm

X

TIB/FB  
6 surgeries etc.  
45 y old pscr.

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P	5mm	scrk	scrk
F	7mm	600k	600k
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**Background:** In action for personal injuries sustained when pedestrian was hit by a taxi registered and leased by defendant company, the Supreme Court, New York County, Lottie E. Wilkins, J., denied defendant company's motion to dismiss, and granted in part company's motion for a new trial on the issue of damages. Company appealed.

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

- (1) company was vicariously liable for taxi driver's negligence;
  - (2) award of \$500,000 for past pain and suffering, and \$600,000 for future pain and suffering did not deviate materially from what would be reasonable compensation; and
  - (3) award of \$150,000, rather than \$800,000, was appropriate for future medical expenses.
- Affirmed as modified.

West Headnotes

[1] Automobiles ↪ 197(1)

48Ak197(1) Most Cited Cases

Company that registered and leased taxi was vicariously liable for taxi driver's negligence in hitting pedestrian, where the company was in the business of registering the vehicles and then leasing them to taxi drivers as the taxi owner's agent.

[2] Damages ↪ 127.28

115k127.28 Most Cited Cases

[2] Damages ↪ 127.43

115k127.43 Most Cited Cases

Award of \$500,000 to personal injury plaintiff hit by a taxi for past pain and suffering, and \$600,000 for her future pain and suffering did not deviate materially from what would be reasonable compensation, where plaintiff, 45 year years old at the time of the accident, suffered an open fracture of the tibia and a fracture of the fibula requiring six surgical procedures performed over the course of almost three years, including external fixation and internal fixation, as well as skin, muscle, and nerve grafts, the fracture had not yet achieved union, would likely require additional surgery, and had continued to cause plaintiff significant pain, and plaintiff had had severe scarring, had undergone extensive physical therapy, and had not yet gained full mobility of her

right ankle.

**[3] Damages** ↪ 127.71(2)

115k127.71(2) Most Cited Cases

**[3] Evidence** ↪ 571(10)

157k571(10) Most Cited Cases

Award of \$150,000, rather than \$800,000, to personal injury plaintiff hit by a taxi for future medical expenses was appropriate, where the only evidence of such costs was the testimony of plaintiff's treating orthopedic surgeon that plaintiff would likely require future surgery at a cost of \$40,000 to \$50,000, exclusive of hospital costs, and future physical therapy at a cost of "tens of thousands of dollars."

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for appellant.

Arnold E. DiJoseph, III, New York, for Lori and Kevin Keating, respondents.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Robert Borgella, respondent.

MAZZARELLI, J.P., MOSKOWITZ, RENWICK, FREEDMAN, JJ.

\*1 Order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered April 10, 2007, which, in an action for personal injuries sustained when plaintiff pedestrian was hit by a taxi registered and leased by defendant-appellant High Thor Taxi Corp., insofar as appealed from as limited by High Thor's brief, denied High Thor's posttrial motion insofar as it sought judgment dismissing the complaint as a matter of law, and granted the motion insofar as it sought a new trial to the extent of directing a new trial on the issues of past and future pain and suffering only, unless plaintiffs stipulated to reduce the jury's award for past pain and suffering from \$5 million to \$500,000 and the award for future pain and suffering from \$7 million (over 31 years) to \$600,000, unanimously modified, on the facts, to direct that the new trial also include the issue of future medical expenses unless, within 30 days after service of a copy of this order, plaintiffs also stipulate to reduce the award for future medical expenses from \$800,000 (over 10 years) to \$150,000, and otherwise affirmed, without costs.

[1] The parties stipulated that defendant SS & R Management Co. is the "titled owner" and that defendant-appellant High Thor is the "registered owner" of the taxi involved in the accident, and that the individual defendant had permission to operate the taxi. There also appears to be no dispute that, as the trial court found, High Thor was in the business of registering vehicles owned by SS & R Management and then leasing them to taxi drivers as SS & R's agent. Such an arrangement makes High Thor vicariously liable for the taxi driver's negligence (*see Taughrin v. Rodriguez*, 254 A.D.2d 735, 677 N.Y.S.2d 861 [1998]) in an action commenced prior to the effective date of the Graves Amendment (49 USC § 30106), barring vicarious liability against professional lessors and renters of vehicles (*cf. Graham v. Dunkley*, 50 A.D.3d 55, 852 N.Y.S.2d 169 [2008], *appeal dismissed* 10 N.Y.3d 835, 859 N.Y.S.2d 607, 889 N.E.2d 484 [2008]).

[2][3] The awards for past and future pain and suffering do not deviate materially from what would be reasonable compensation, where plaintiff, 45 years old at the time of the July 2003 accident, suffered an open fracture of the tibia and a fracture of the fibula requiring six surgical procedures performed over the course of almost three years, including external fixation and internal fixation, as well as skin, muscle and nerve grafts; the fracture has not achieved union, will likely require additional surgery, and continues to cause plaintiff significant pain; and plaintiff has severe scarring, has undergone extensive

physical therapy, and does not have full mobility of her right ankle (*cf. Bello v. New York City Tr. Auth.*, 50 A.D.3d 511, 856 N.Y.S.2d 577 [2008]; *Brown v. Elliston*, 42 A.D.3d 417, 840 N.Y.S.2d 96 [2007]; *Orellano v. 29 E. 37th St. Realty Corp.*, 4 A.D.3d 247-248, 772 N.Y.S.2d 659 [2004], *lv. denied* 4 N.Y.3d 702, 790 N.Y.S.2d 648, 824 N.E.2d 49 [2004]). The award for future medical expenses, however, is excessive to the extent above indicated, given that the only evidence of such costs was the testimony of plaintiff's treating orthopedic surgeon that plaintiff will likely require future surgery at a cost of \$40,000 to \$50,000, exclusive of hospital costs, and future physical therapy at a cost of "tens of thousands of dollars." We find the award for future lost earnings supported by the evidence.

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