

SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY - CIVIL TERM - PART 8

-----X
 FRANCISCO SANTAELLO,

PLAINTIFF ,

-against-

UNITED PARCEL SERVICE, INC., UNITED PARCEL SERVICE
 GENERAL SERVICES CO., UNITED PARCEL SERVICE OASIS
 SUPPLY CORPORATION, and S&S CONTRACTING, INC.,

DEFENDANTS
 -----X

Index No. 114864/07
 Trial excerpt

71 Thomas Street
 New York, New York
 April 28, 2010

B E F O R E:

HONORABLE JOAN B. KENNEY, Justice, and a jury

A P P E A R A N C E S:

TROLMAN, GLASER & LICHTMAN, P.C.
 Attorneys for the Plaintiff
 777 Third Avenue
 New York, New York 10017
 BY: MICHAEL A. MADONNA, ESQ.

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 BY: MALCOLM STEWART, ESQ.

Summation - Mr. Madonna

(Whereupon, other proceedings were held
in open Court, not herein transcribed.)

4 MR. MADONNA: May I proceed, Your
5 Honor?

6 THE COURT: Certainly.

7 MR. MADONNA: Thank you.

8 Good morning, again. It's nice to have
9 an opportunity to speak with you. And I want to
10 take a moment before I get started to talk about
11 my summation, to thank you on behalf of myself,
12 and Mr. Santaella. I also want to thank the
13 Court and the Court staff, here, who have been
14 wonderful throughout the course of this trial.

15 We have been able to finish up the
16 testimony a little bit quicker than we had
17 anticipated when we were talking to you last week
18 about jury selection and today is the day that
19 you are finally going to be able to participate,
20 more than just watch and make your decision in
21 this case.

22 As I go through my summation, I also want
23 to do one thing that I feel is necessary before I
24 start talking about what I think the evidence
25 showed and what I anticipate your job is going to
26 be to do justice for Mr. Santaella, and that is

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2 apologize in advance in case I start to bore you
3 or if I start to repeat things, or if I start to
4 talk a little bit too much.

5 What I have right now here is an awesome
6 responsibility. I have been representing
7 Mr. Santaella for the last three years since this
8 accident happened, when he came to my office to
9 be represented, and my job is about to end and
10 I'm about to pass that torch to you.

11 It's a very difficult thing to stand in
12 front of six, seven strangers and try to explain
13 in a matter of a couple of days of testimony,
14 maybe an hour or two of what you heard him talk
15 about how this event changed his life. And you
16 have a little bit of a flavor of it that you got
17 here, today.

18 As far as myself, I'm not going to be
19 able to sleep at night if I don't feel that I
20 have gotten every argument out that I could. If
21 I leave everything in my briefcase, I didn't do
22 Mr. Santaella justice in giving him everything
23 that I could give to you. So if for some reason
24 I talk a little bit too much, I say something two
25 or three more times than I should have, I
26 apologize. Hold that against me. After the

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2 trial you can come and tell me, "You bored me to
3 tears", but do the right thing by Mr. Santaella.

4 Now, let me start a little bit by talking
5 about what this case was about and what it is
6 about, now.

7 This case is about responsibility. As we
8 talked about during jury selection, there was a
9 particular statute that was involved, that we
10 claimed the Defendants violated in failing to
11 provide Mr. Santaella with a safe place to work.
12 The Defendants at no time, from when we started
13 this lawsuit three years ago until we started
14 jury selection last week, throughout the course
15 of this trial and even during Mr. Stewart's
16 summation stands up and says, we take
17 responsibility. They haven't. They haven't, not
18 yet.

19 What you're going to learn in a few
20 minutes is it took us to put in the evidence of
21 this case before you until Justice Kenney was
22 able to tell them as a matter of law, you're
23 responsible for Mr. Santaella's accident and all
24 of his injuries that he sustained as a result of
25 that.

26 So, all of these questions about falling

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2 from the ladder and failing to provide safety
3 devices, those are things that were known through
4 the course of this litigation, and not at one
5 time did the Defendant stand up and say, you know
6 what, we're responsible for it. It took us to
7 put the proof in, in front of you and took the
8 Judge to tell them under the law, according to
9 the law, because you violated the law, you're
10 responsible to this man who is an innocent
11 victim, whose life changed dramatically on
12 July 26, 2007, dramatically. He is not the same
13 man today as he stands here before you, that he
14 was the day before this accident happened.

15 And what they're doing now is they're
16 still not taking full responsibility. What I
17 need you to do as the jurors here is to make them
18 take full responsibility by making sure that you
19 fully and justly compensate Mr. Santaella, not
20 only for what they did to him, for what they took
21 away from him, as well, for the harm that they
22 caused him for failing to provide a safe place
23 for him to work, for the harm that they caused
24 him to suffer on a daily basis with these
25 injuries that he sustained.

26 Now, how do we know that? Well, let's

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2 look at a couple of things that happened
3 throughout the course of this trial.

4 Mr. Stewart, the Defendants in this case -- well,
5 Mr. Stewart likes to --or I shouldn't say it that
6 way. Mr. Stewart brought in a very nice
7 gentleman, Francisco's boss, Jerome Semler who is
8 one of the Defendants in this case,
9 S&S Contracting, Inc., to put a face on his
10 client, a good man who continued to employ
11 Frankie as he calls him, through his work. He
12 didn't bring anybody from UPS. UPS is
13 responsible, as well.

14 Why? Simple; he wants you to be
15 sympathetic to their client. That's what they
16 hired Mr. Stewart for, is to minimize their
17 exposure, to minimize the damages that they owe
18 Mr. Santaella. How do we know that? They hired
19 a doctor to examine him, and they're entitled to
20 have a doctor examine him.

21 And what did Dr. Varriale say? One of the
22 few questions I asked him, you understand when
23 you're asking Mr. Santaella, in this case, on
24 behalf of the attorneys for the Defendant that
25 their position is to minimize the Plaintiff's
26 injuries, to make them seem less, to make them

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2 seem smaller, why, so that they don't have to be
3 held completely and fully accountable of all the
4 measure of damages that could cause him. And
5 Mr. Stewart has done an excellent job in doing
6 that. His firm has done an excellent job in
7 trying to portray this case as one, oh, yeah,
8 liability is not really a big issue.

9 Well, why didn't he stand up in front of
10 you and say, we're at fault, we did this. We're
11 sorry it happened, but we violated the law and
12 caused these damages.

13 They made us come to Court, select each
14 and every one of you, put in the proof and they
15 had to wait until Justice Kenney told them,
16 you're responsible.

17 So what do they do now? Well, okay,
18 we're responsible, but not for everything that he
19 deserves. Let's hold that value down, let's
20 minimize his damages.

21 Well, what I'm going to ask you to do,
22 and what the law demands that you do is to fully
23 and justly, the word is "just", because it is
24 justice; do justice for Mr. Santaella, make him
25 whole in the only way that you can can, here.
26 And the only way that you can, unfortunately, in

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2 today's society is to hit UPS, the Defendants in
3 this case, where it counts. Hit them in the
4 checkbook, hit them in the wallet, hit them in
5 the bank account because we can't do anything to
6 make Mr. Santaella's pain go away.

7 We talked about that. There is no magic
8 wand, there is no time machine that we can go
9 back in and change this day that happened. But
10 what we can do is tell UPS by your verdict that
11 they have to keep their employees safe so that an
12 innocent victim like this, an innocent accident
13 like this doesn't happen to somebody else. Tell
14 them that. And how do you tell them that? By
15 fully and justly compensating him and hitting UPS
16 and putting UPS, putting their checkbook on the
17 line, making them take full responsibility. And
18 full responsibility is not just paying for the
19 medical expenses and lost earnings. Those, as we
20 told you in jury selection are easy to calculate,
21 that's why we were able to stipulate to that.
22 That's \$69,000 for his past medical treatment,
23 and past lost earnings is easy to figure out.
24 The hard part to figure out is how to compensate
25 him for the change that took place in his life.

26 Now, Francisco, you saw him testify here

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2 before you. You heard from his boss, he's a
3 proud man. He's not somebody who is coming in
4 here exaggerating, guilting the lilly saying, I'm
5 going to sit at home and wait until my case is
6 over. He went back to work. Why? He had to.
7 What does he do? He tries his best.

8 Is he going to complain to his boss, I
9 can't do this job, my arm hurts? How many times
10 is his boss, as good a man as he is, how many
11 times is he going to take that excuse if
12 Francisco continued to complain about, I can't do
13 my job because of my pain? Eventually, like any
14 boss, I'm sorry, I'm going to have to hire
15 somebody who can. And in this economy, there's a
16 lot of people out there, who are ready to jump
17 into his spot or any other spot to take that job.
18 Mr. Santaella needs that job, that's why he goes
19 back to work. He needs that job to put food on
20 his table, to pay his rent. He needs that job to
21 live, to live the life that he has left.

22 So what is that harm worth? What is
23 taking away from him a pain-free day worth,
24 because he doesn't have a pain-free day anymore.
25 What is that worth? It's going to be the most
26 difficult task that you're going to have to do as

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2 prospective jurors. And I am going to suggest a
3 number to you, I'm going to suggest an amount and
4 when you make your decision, you're going to see
5 the only thing that you are going to have to
6 decide on this verdict sheet is an amount for the
7 following items of damage, pain and suffering
8 including the loss of enjoyment of life from the
9 day of the accident to the day of your verdict,
10 today or tomorrow, whenever you decide in the
11 future, pain and suffering and the permanent
12 effect of the injury from the date of the verdict
13 as far as into the future as you expect
14 Mr. Santaella to live and any future medical
15 expenses that you decide may be necessary for
16 him.

17 And now, let's talk a little bit about
18 his injuries before I do that.

19 First of all, this is the right wrist, I
20 think you remember the reduction fracture of the
21 right wrist. This is the right wrist injury that
22 Dr. Varriale --and it's a very calculated move on
23 his part --came in and told you was not an
24 intraarticular fracture. And why did he want to
25 tell you it was not an intraarticular fracture?
26 Because as you saw during my cross examination of

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2 him, an intraarticular fracture means there's
3 damage to that smooth surface in the joint and
4 with the continued use of that joint, continued
5 working, using, moving that joint, that joint is
6 going to continue to deteriorate faster than it
7 would have if there was no damage to it.

8 So if he's able to tell you there was no
9 intraarticular damage he can stand up there and
10 say his wrist is not going to get any worse. But
11 I think we can tell from Dr. Bullek and from
12 taking a look at the x-rays that he showed you
13 that there is damage to that joint surface, and
14 not only to the right wrist, but to the left
15 wrist, as well.

16 And isn't that curious, too, that
17 Dr. Varriale didn't even take a minute to look at
18 the x-ray of the left wrist? Because I don't
19 think when he looked at that x-ray that he would
20 have been able to dispute the fracture lines that
21 Dr. Bullek showed you all when he did.

22 Now, I'm not a doctor but I remember when
23 Dr. Bullek was talking about the fracture that
24 went across the bone and the one that went up
25 into the joint surface of the left wrist.
26 Dr. Varriale never looked at this x-ray, because

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2 open fracture and that was partially put back
3 into place at Elmhurst Hospital.

4 That fracture also had a crack through
5 the joint but had a large crack, here."

6 And he's talking about moving back the
7 top half of the bone and it sort of moved back.

8 He continues and my question to him was:

9 "QUESTION: Now, Doctor, with regard to
10 the joint that you're talking about, can you
11 explain to the jury how the joint functioned and
12 what the significance of the articular surface in
13 the joint involvement that you indicated with
14 regard to these fractures.

15 "ANSWER: A joint is a juncture between
16 two bones. The easiest way for people to see it
17 is if you're at home, if you have a bone and-- a
18 chicken leg because that is -- and the white end
19 of the bone, the smooth surface is what we have
20 on the normal joint before we become arthritic.
21 If we crack it, even if we put it back together
22 again it's been injured and so doesn't function
23 completely normal, and our job as a surgeon is to
24 get it back exactly as it started, but even if we
25 do that, there's been damage to the ends and it's
26 sort of a little bit like an eggshell, roughness,

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2 serrated. If anybody has a car repair with rust
3 on it, wearing, it squeaks, so it's sort of a
4 mild squeaking. If we're outside the joint,
5 repair is-- it's less likely to become arthritic
6 over time."

7 And this is when he showed you the x-ray
8 from Elmhurst.

9 "QUESTION: Now, Doctor, we have from
10 Elmhurst Hospital shown the x-ray of the wrist.
11 Can you, the best you can on this little
12 computer, show the jury how the right wrist was
13 fractured?

14 "ANSWER: This is the wrist fracture
15 before it was reduced."

16 This surface here, he's talking about the
17 joint surface, I don't know if you guys can see
18 that or not. This surface should be down here
19 indicated, and I will show you some x-rays.
20 After we put the plate on it you will be able to
21 see it more clearly.

22 (Pause.)

23 MR. MADONNA: I'm just looking for more.
24 All these injuries long term can have
25 degenerative arthritis associated with it. So,
26 when you get an arthritic finger, he's talking

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2 gentlemen of the jury, I hope that you don't
3 minimize the effect that these injuries have had
4 on Francisco, because as we stand here today,
5 this 53-year old man who has a very good work
6 ethic, a lot of pride, and has gone back to work
7 and shouldn't be punished for that, he does have
8 a future ahead of him. And Justice Kenney is
9 going to tell you what the statistics show of his
10 future life expectancy to be. It's going to be
11 approximately 25 years that he can be expected to
12 live.

13 Now, again, we don't have a crystal ball,
14 we can't see into the future. We don't know if
15 he walks out of the Courthouse today, and God
16 forbid has a heart attack or gets hit by a car or
17 something like, that we don't know if he's going
18 to live another 40 years, and he could. And I
19 have to tell you this, too, when you bring a
20 personal injury case like this, they know
21 everything about him. Your life is an open book,
22 especially today with the internet and computers,
23 you can find out everything and anything you want
24 about anybody else.

25 There was nothing that was put before you
26 about Francisco's past, about his medical

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2 often anymore, maybe writes down on a piece of
3 paper. My joints are not going to go through the
4 same type of daily struggle and use as somebody
5 like Francisco's because he needs to lift, he
6 needs to pull, he needs to push, he needs to
7 work, manual, physical labor. And that's all he
8 does know how to do, that's all he can do, and
9 that's what he wants to do, and again he
10 shouldn't be punished for that.

11 But if you're going to look into the
12 future with a reasonable degree of medical
13 certainty, Dr. Bullek told you that because these
14 fractures were intraarticular, he's going to
15 develop arthritis and that arthritis could
16 progress. Worst case scenario they're going to
17 have to progress to the point where Francisco is
18 going to have to make a decision; do I want to
19 give away my movement for the pain, for the pain
20 relief in my finger joint or my wrist joint? And
21 that's the last chance procedure, to fuse the
22 bones so that you can't use them anymore, you
23 can't have use at all, or live with the pain. So
24 to fuse the finger, so you can't grip and move it
25 anymore or live with the pain.

26 We know from his testimony that the

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2 arthritis, the post-traumatic arthritis in these
3 joints is going to continue to progress and is
4 going to continue to get worse over time, over
5 that 20-year window, and we know even from
6 Dr. Varriale that if those injuries are
7 intraarticular, and again he wouldn't admit it
8 because he was trying to minimize these injuries,
9 he agreed that the progression of the arthritis
10 could go down to the point of a joint fusion.
11 And you know, it was a little bit tongue-in-cheek
12 and I apologize, it didn't mean to come out that
13 way, but I asked the doctor is there any cure for
14 arthritis, and he knew there's not and it was
15 kind of a trick question because there is no
16 cure, you can only treat the symptoms. And what
17 were the symptoms; pain, swelling, limited
18 motion, and Francisco told you about that. He
19 told you how he lives on a daily basis now,
20 taking the pain killers, the Motrin, that his
21 hand swells, that he uses his left more than his
22 right, and now because of that use over the last
23 three years, the left hurts more.

24 The way our system works, again, today is
25 his day in Court. We can't bring the six of you,
26 seven of you, back ten years from now and have

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2 Francisco come in and testify: Well, you know
3 what, Mr. Semler kept me on, I kept the job, I
4 continued working, my right wrist got so bad,
5 it's more painful now. I do need another surgery
6 on it. The doctor is telling me I have to make
7 that choice between pain or motion and it's a
8 difficult one. Whether it's ten years,
9 fifteen years, twenty years, we can't bring you
10 back and make you decide that.

11 We have to take that and it's not
12 speculation, these are opinions based on a
13 reasonable degree of medical certainty looking
14 into that twenty plus year range into the future.
15 It's fair, and that's their fault, and so he
16 should be fully and justly compensated for that.

17 Now, I've been thinking about how to
18 explain to you what the dollar value of the harm
19 that they caused him is worth. And if we were
20 just talking about the right wrist with the
21 screws that were drilled into the bone and the
22 metal sitting there in his wrist for the rest of
23 his life that causes him pain on the rainy and
24 damp days, and even as his boss says, in the cold
25 weather which was consistent with what Francisco
26 said, if we were just talking about that surgery

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2 and the deterioration of that joint because of
3 the surface involvement over the next
4 twenty years, I could easily stand here and tell
5 you that's worth a million dollars, no problem,
6 absolutely, that wrist, the value of that for the
7 past two plus years and the future 24, 25 years,
8 that's a million dollar injury.

9 But that's not all he has. On top of the
10 worst injury on his right wrist he has a
11 dislocated and damaged finger which, as he told
12 you gets swollen, doesn't let you grip things
13 that well, and he has a damaged shoulder which
14 means he can't lift up above his head or push or
15 pull anything with any weight to it, but he does,
16 and he works and he does. And what is it that
17 bothers him the most about it? If it's just the
18 wrist-- now, it's the whole arm and the doctor
19 says he still has symptoms coming down from the
20 arm in this fall from the shoulder -- I can't
21 bathe myself the same way I used to. That's
22 something to think about that you do every single
23 day, every single day, the simplest task, to
24 clean yourself and feel good about who you are.
25 He has trouble doing that, every single day.

26 What are the injuries worth; the left

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2 wrist, the finger, the shoulder? I submit to you
3 that if the right wrist itself with the hardware,
4 the worst injury is a million dollar injury, the
5 other injuries on top of that, taking away from
6 the man that he used to be is at least another
7 \$500,000.

8 Now, how do you break that up in the
9 numbers that we have? Well, the past pain and
10 suffering for the past almost three years that
11 we're talking about from July of '07 until now,
12 April of 2010, taking into account his entire
13 body for those three years taking into
14 consideration the the fall, the fear that he had
15 when he turned over and saw the ground below him
16 and thought he was going to die when he came
17 crashing down to the floor, bleeding from his
18 head, his body, his wrist, walking out of the
19 doctor's office one day with two casts on his arm
20 and one arm in a sling for the next month, two
21 and a half months, going through the work that it
22 was to regain some of the motion in his hands
23 from the past two and a half years that's -- that
24 has to be somewhere between 350, \$550,000 for the
25 past. And if you look at what the next 25 years
26 holds for him, working every day, working with

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2 the pain that he has every day, not being able to
3 lift up his grandchildren. I mean, think about
4 that for a minute. I don't know if we discussed
5 during jury selection if any of you have any
6 young children at home or grandchildren at home,
7 in your family, nephews, nieces. Think about the
8 joy you have when you pick up that little baby
9 and hold him, and you can't do that. That's been
10 taken from him, too, again through no fault of
11 his own because he was trying to do his job that
12 day with the tools that they gave him and the law
13 said that they were supposed to provide.

14 For the next 25 years, again, if you're
15 going to break it down that way, a million
16 dollars for the future, a \$1.2 million, \$1.3
17 million, something like that. I'm going to leave
18 it up to you.

19 But when you go back into that juryroom,
20 remember for me, and remember for Francisco that
21 what you're going to do for him today is what
22 he's going to have to live with for the rest of
23 his life. So, do for him what justice demands.
24 Make him whole, give him back from them what they
25 took from him.

26 Again, I want to thank you for your time.

