

To Be Argued By:  
DAVID D. HESS, ESQ.

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# New York Supreme Court

APPELLATE DIVISION-FIRST DEPARTMENT

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New York County Clerk's Index No. 111940/07

**BILL BOUZAS and DOROTHY BOUZAS,**

*Plaintiffs-Appellants,*

*-against-*

**KOSHER DELUXE RESTAURANT and MIDTOWN FOOD CORP.,**

*Defendants-Respondents.*

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## BRIEF FOR DEFENDANTS-RESPONDENTS KOSHER DELUXE RESTAURANT and MIDTOWN FOOD CORP.

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**DEFENDANTS-RESPONDENTS' BRIEF ON APPEAL**

**Preliminary Statement**

Plaintiff's appeal from the jury verdict awarding Plaintiff \$10,000 for past pain and suffering, \$5,000 of loss of consortium, and \$0 for future pain and suffering<sup>1</sup> for a dislocated shoulder from a slip-and-fall in a building at 10 West 46<sup>th</sup> Street, New York, New York, owned by Midtown Food Corp. and operated by Kosher Deluxe Restaurant ("the Building") boils down to his disagreement with the jury's findings, and specifically, the jury's acceptance of defendant's expert's findings regarding Plaintiff's injury. The Defense Expert opined that Plaintiff did not suffer a torn rotator cuff as a result of the fall, but rather Plaintiff suffered a 100% rotator cuff tear before the accident as evidenced by Plaintiff's medical records, his medical examination, and his review of the case. While the jury verdict should be affirmed for this reason alone, the fact is that even Plaintiff's expert testified that the torn rotator cuff was in place before

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<sup>1</sup> Plaintiff does not appeal from that portion of the verdict which awarded him \$10,000 for past medical expenses, and the appeal, as limited by its moving brief, does not challenge the \$5,000 award to Plaintiff's wife for loss of services, leaving the jury's award of \$10,000 for past pain and suffering of \$0 for future pain and suffering as the only issues before this Court.

the accident, and that he could not tell if surgery would have been needed if no fall had taken place. Under the circumstances, the jury was free to accept that Plaintiff's injuries from the fall amounted to a dislocated shoulder that was fixed that very day. Thus, the jury acted well within its purview in finding \$10,000 for past pain and suffering and no monies for future pain and suffering.

**Counter-Question Presented**

Did the jury correctly make findings of fact concerning the evidence, witnesses, and did Supreme Court correctly deny Plaintiff's motion to set aside a verdict based on the jury's weighing of the evidence, when the jury, having heard all the evidence, properly applied the law to the facts in reaching its verdict and compensating Plaintiff for a dislocated shoulder?

Supreme Court answered yes.

## Counter-Statement of Facts

### The Trial

#### A. Plaintiff's Case

Respondents own and operate a restaurant at the Building. (R. 144).<sup>2</sup> Respondents' employee began mopping the floor of the restaurant at around 9:00 a.m. On February 1, 2007. (R. 188).

Earlier that day, Respondents called Plaintiff, a plumber with whom they had worked for approximately one year, to repair a water leak from a kitchen wall. (R. 156).

In the course of fixing the leak, Plaintiff slipped and fell onto his right shoulder near the front door to the kitchen. (R. 188, 191, 201, 268). An ambulance took him to St. Vincent's hospital approximately 15 to 20 minutes after he fell. (R. 273). A Doctor diagnosed Plaintiff with a dislocated shoulder after an x-ray revealed that his shoulder was "out of place." (R.273, 289). The Doctor put his shoulder back in place. (R. 274).

Seven to ten days after the accident Plaintiff saw his "regular doctor" who recommended that he see an orthopedic specialist. (R. 276).

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<sup>2</sup> References to "R" refer to the record on appeal.

After some physical therapy, the orthopedic specialist referred Plaintiff for an MRI. (R. 278-9). The MRI revealed a torn rotator cuff. (R. 290). Approximately two months after the accident, Dr. Klion operated on Plaintiff's shoulder. (R. 280).

Plaintiff's present complaints include difficulty in doing work on ceilings, so his son does the ceiling work. (R. 283-285).<sup>3</sup> Plaintiff makes no claim for lost wages (R. *passim*).

He also claims a burning sensation in his arm, and an inability to play tennis or ride a motorcycle. (R. 286-7). At his 2008 deposition, Plaintiff deposed that he had slight pain and numbness in his body (R. 305).

**B. Dr. Mark Klion's Testimony**

Dr. Klion operated on Plaintiff's shoulder, and during the operation, he noted two distinct, degenerative abnormalities: arthritic changes, and wear and tear on Plaintiff's shoulder:

. . .there were two distinctive abnormalities.

One is that he had some arthritic change, some wear and tear issues inside of the shoulder, and unfortunately, even with modern science and technology, we don't have great solutions for

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<sup>3</sup> Plaintiff does not pay his son a salary for working for Plaintiff; rather, Plaintiff would give his son \$20 or \$50 when asked. (R. 253).

that. That's the analogy of a street that has a lot of potholes in it, very sharp edges. We can go in and kind of smooth those edges out, but we can't fill in the defects.

(R. 330).

Dr. Klion diagnosed Plaintiff with a "chronic massive right shoulder rotator cuff tear," which he defined as a degenerative condition caused by wear and tear in individuals over 40 years old:

Interestingly enough, what we are learning more so now than ever before, after the age of 40, due to wear and tear issues, individuals will start to develop rotator cuff tearing.

It does not mean that you are painful. And that's the kind of puzzle that we all have to worry about, but as we ascend the decades of life, there are individuals that have rotator cuff tears that don't ever know they have it. They don't complain of anything, they don't describe any issues related to their shoulder, but it is an entity that is part of aging.

(R. 335-6).

Dr. Klion further opined that Plaintiff's March 1, 2007 accident was a "competent producing cause" of Plaintiff's rotator-cuff injury (R. 337), but he could not tell if surgery would have been needed had the fall not taken place, opining:

"if he [Plaintiff] never had that fall, I mean, this is, you know, no one has a crystal ball to predict the future, but if he never had that fall, there is no telling whether or not he would have ever have had surgery on that shoulder."

(R. 339).

Dr. Klion also testified that Plaintiff sustained a dislocated shoulder as a result of the February 1, 2007 fall based on his review of Plaintiff's medical records.

(R. 337-8).

Dr. Klion's notes from Plaintiff's September 6, 2007 visit - - approximately four months post-surgery -- revealed:

improvement. [Plaintiff] had no night pain at this time. He had minimal discomfort. His active range of motion was noted to be increasing to 160 degrees of forward flexion, 100 degrees of abduction, 60 degrees of external rotation, and internal rotation of 30 degrees. His passive range of motion was noted to be almost full. His rotator cuff strength was noted to be acceptable. He was noted to have a mild shrug sign. He had no damage. Radiographic examination at that time revealed no significant internal change.

(R. 566).

On cross-examination, Dr. Klion admitted that the medical evidence supported a finding that Plaintiff suffered a rotator cuff tear before the slip and fall in our case:

Q. Okay; notwithstanding the claim that the accident caused the rotator cuff tear, this rotator cuff tear was there long before the fall on February 1, 2007, isn't that correct?

A. We know that via the MRI, that he has evidence for a chronic rotator cuff tear.

Q. Thank you; the answer then is, yes, it did precede the accident?

A. The rotator cuff did precede.

Q. And, in fact, Doctor, at the hospital, he was treated for a dislocation of the shoulder, is that correct?

A. That is correct.

Q. The shoulder was put back in and he was sent on his merry way?

A. That's correct.

(R. 355).

Dr. Klion also testified that his review of Plaintiff's medical records revealed rotator cuff arthropathy, which is "a degenerative disease of the joint caused by rotator cuff abnormality." (R. 356). Dr. Klion defined "degenerative" as "wear and tear." (R. 356).

Dr. Klion also opined:

Q. So he's got osteoarthritic disease, he's got bone spurs, he's got - - I'm sorry - - arthropathy and he's got - - I think I said osteophyte - - extensive degenerative changes. All of these things were there before this accident ever took place, right?

A. I would say a good portion of it was there, yes.

(R. 365).

C. Defendants' Case

Respondents called one witness, Dr. Jerry Lubliner, a board-certified orthopedic surgeon and chief of sports medicine at Beth Israel Hospital who studied microsurgery with the Toronto Blue Jays and the Canadian Olympic Team. (R. 399-400).

Dr. Lubliner examined Plaintiff on May 27, 2008. (R. 402). After reviewing Plaintiff's medical records and examining his upper extremities Dr. Lubliner found the only abnormality on Plaintiff was the surgical scar, and that Plaintiff suffered a dislocated shoulder as a result of the slip and fall, and that Plaintiff's shoulder has not dislocated since the accident:

The only abnormality is over the scar that he had on his right shoulder, he complained of decreased sensation.

So I tested for range of motion, I measured the scar, which was five centimeters, and he had arthroscopic scars. I measured strength. He had some weakness - - he had weakness of extension rotation which means that his rotator cuff on the right was weaker than the left. There was no instability, meaning his shoulder wasn't coming out of the socket. That's what happened on the date of the accident. He had a dislocation. And he complained of tightness of the shoulder.

Q. What is a dislocation, Doctor?

A. The shoulder is a joint. It has two bones in it. It has the humeral head which was round and a glenoid which is the socket, okay, which is the concave. And a dislocation is when the

humeral head comes out of the socket one hundred percent.

Q. And on the day of the accident when he was treated at St. Vincent's, what specifically did they do for him regarding the dislocation?

A. They put it back in place. It is called a reduction.

Q. Anything in any of the records you reviewed or during your examination that would indicate the shoulder was ever dislocated again?

A. No.

(R. 403-5).

After reviewing Dr. Klion's records, Dr. Lubliner testified that Plaintiff had extensive degenerative changes in his shoulder, which developed over the course of years:

He [Dr. Klion] found extensive degenerative changes over the glenoid surface. The glenoid is the socket of the shoulder, and degenerative changes means arthritis, as well as the articular cartilage of the humeral head. That means the ball had extensive arthritis.

The biceps tendon was noted to be torn through its entire undersurface and extremely flattened in this region. What that means is it's been torn for a long period of time because flattening takes a long period of time, years to develop, and - -

Q. Excuse me, Doctor, did you say years to develop?

A. Yes. And it is commonly found in conjunction with a large rotator cuff tear.

[R. 409-10]

He also opined that the torn rotator cuff was not related to Plaintiff's February 1, 2007 fall:

[t]he incident of 2-1-07 is not related to the arthritis, the spur, and rotator cuff.

Q. And do you have an opinion with a fair degree of medical certainty as to whether or not the accident of 2-1-07 aggravated these pre-existing conditions?

A. From reading the doctor's operative report, there is no indication that he aggravated the condition because there was nothing in the operative report that was new.

(R. 417-8).

On cross-examination, Dr. Lubliner explained that the rotator cuff was 100% torn prior to the accident based on his review of Dr. Klion's operative report:

Q. Sir, he could have a 50 percent tear, he could have a 60 percent tear, he could have a 70, 80 percent, 90 percent tear - -

A. Not in this case.

Q. -- and you wouldn't know that?

A. You would know in this case because if I had a 50, 60 or 70 percent tear and then it became 100 percent tear, it wouldn't have been so retracted, it wouldn't have been scarred in, and it wouldn't have been adherent to bone. There would be no yellowing and no fibrotic changes. There would be no fatty infiltration, so because all that appeared he did have a full thickness tear prior.

(R. 526).

**D. The Jury's Verdict**

After finding defendant negligent and that defendant's negligence was the proximate cause of the action, the jury awarded to Plaintiff \$10,000 for medical expenses, \$10,000 for past pain and suffering, \$5,000 for loss of services to Plaintiff's wife, and \$0 for future pain and suffering. (R. 682-692).

**E. Plaintiff's Motion to Set Aside The Verdict**

Plaintiff moved to set aside the verdict, arguing that the verdict deviated from what would be reasonable compensation, requesting a new trial unless the defendants stipulate to \$300,000 for future pain and suffering, \$200,000 for past pain and suffering, and \$30,000 for loss of services. (R. 693-789, 944-955). The "debilitating rotator cuff injury", Plaintiff argued, was worth more than the jury's award here, relying on four Supreme Court decisions (without their index numbers) in which those jury awards ranged from \$250,000 to \$500,000 for various, severe rotator cuff injuries. (R. 707, 719-721).

Supreme Court denied the motion, holding that:

assuming the jury did reject the testimony of Bill Bouzas to the extent that he claimed he had no pain or limitation of motion in his right shoulder prior to the accident, their award of \$10,000 for pain and suffering for the dislocated shoulder alone is not against the weight of the evidence. Rather, it is consistent with an acute

injury, which was reduced in the emergency room, and which required immobilization and physical therapy, but produced minimal pain post reduction.

(R. 14).<sup>4</sup>

#### ARGUMENT

#### POINT I

**The Jury's Verdict Awarding Plaintiff \$10,000 For Past Pain And Suffering, \$5,000 For Loss Of Consortium and \$0 for Future Pain And Suffering Was Not Against The Weight of the Evidence, is Consistent With The Evidence, and Should Be Upheld**

For a Court to conclude that as a matter of law that a jury verdict is not supported by sufficient evidence and should be set aside, "[i]t is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493, 499 (1978).

"In reviewing a trial court's decision to overturn a jury's verdict in favor of the defendants, the standard to be applied is whether the evidence preponderates so greatly in the plaintiffs' favor that the verdict could not have

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<sup>4</sup> Supreme Court also noted that the award may deviate from what would be reasonable compensation, but that both parties refused to stipulate to increase the verdict to \$80,000, and that Supreme Court is not empowered to adjust the verdict. (R. 14).

been reached upon any fair interpretation of the evidence." Martin v. McLaughlin, 162 A.D.2d 181, 557 N.Y.S.2d 1 (1<sup>st</sup> Dep't 1990). Plaintiff has not met that burden, and therefore the jury's unanimous verdict should be upheld.

Plaintiff's argues that "[i]n a single word, this appeal is about adequacy of damages for aggravation of a preexisting, yet asymptomatic, medical condition into one which became symptomatic and restrictive." (Plaintiff's Br., p.2).

Wrong. This appeal involves a case where the jury was free to find Plaintiff's rotator cuff injury had nothing to do with the fall and that Plaintiff only suffered a dislocated shoulder which was fixed very soon after the accident. That Plaintiff disagrees with the jury finding that the torn rotator cuff was not causally related to Plaintiff's slip and fall is not grounds to disturb a jury's verdict.

More of the same is Plaintiff's argument that a jury can consider the aggravation of a pre-existing condition. A jury could of course consider that theory of the case. But it also could consider defendants' theory of the case that the injuries were limited to a dislocated shoulder fixed almost immediately after the accident, and that the

torn rotator cuff and surgery had nothing to do with this accident. A jury is free to find that Plaintiff's injuries resulted from pre-existing conditions and not award monies to Plaintiff for those injuries. Batchu v. 5817 Food Corp., 56 A.D.3d 402, 866 N.Y.S.2d 755 (2<sup>nd</sup> Dep't 2008).

Seeking to usurp the jury's function, Plaintiff tortures the record to portray the Building Owner's witness in a bad light. This is not grounds to reverse a jury verdict, since issues of credibility are for the jury. Martin v. McLaughlin, *supra*. Moreover, the Building Owner's witness is a renowned professional.

Plaintiff resorts to liability arguments, irrelevantly arguing, over and over again, that Defendants did not place a yellow warning sign near the area where Plaintiff was working. (Plaintiff's Br., pages 8, 9, 10, 10 fn1, and 20). But liability is not at issue on this appeal, which concerns damages, and which should be affirmed for the reasons already stated.

Plaintiff's argument that trial counsel conceded that Plaintiff has a rotator cuff injury during closing argument (Plaintiff's Br. p.2, 36) is incorrect as counsel -- who was at the time opposing liability in this unified trial -

- was assuming that liability was found, the only injury was a dislocated shoulder:

At absolute best, this is a pre-existing injury. It was aggravated, okay. And it was there long before. *The only thing - - if you find liability the only thing we would be responsible for is the dislocation.* After the dislocation, he went to various doctors and the doctors say, oh, yeah, you have this, that and the other thing. You have the osteophyte, you have the arthritis, you have the degenerative disease, and because he had those things, that was the reason for the operation.

(R. 462) (Emphasis Added).

It borders on the absurd to argue that trial counsel conceded Plaintiff's case when, in fact, he did nothing of the sort. In any event, closing arguments are not evidence, as Supreme Court correctly instructed the jury with no exception taken. (R. 123).

The simple, stubborn fact is that Dr. Lubliner found that Plaintiff sustained a dislocated shoulder as a result of the fall, but there is "no indication that he aggravated the condition because there was nothing in the operative report that was new." (R. 418). The jury agreed, and compensated Plaintiff for this dislocated shoulder. There are no grounds to disturb this finding as it was based on evidence in the record. At most, Plaintiff's damages case boils down to conflicting expert testimony. But under such

circumstances, the jury is free to credit one parties' proof - - in this case Dr. Lubliner's - -over the other's. Diaz v. Avis Rent A Car System, Inc., 225 A.D.2d 390, 638 N.Y.S.2d 665 (1<sup>st</sup> Dep't 1996). The jury credited Dr. Lubliner's conclusion over Dr. Klion's, and, therefore, the jury's verdict should stand.<sup>5</sup>

Notably, Plaintiff makes reference to Dr. Marx in its closing argument, in its motion to set aside the verdict, and in its brief. (R. 512,717, Plaintiff's Br., pp. 6, 12, 31). However, Plaintiff - - for reasons known only to him - - did not call Dr. Marx as a witness; rather, only a two-page report was offered into evidence. (R. 654-5). The jury did not have the benefit of Dr. Marx's testimony because Plaintiff failed to call him. Regardless, the jury was free to consider or not consider Dr. Marx's report.

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<sup>5</sup> It is worth noting that even Plaintiff's expert conceded that Plaintiff had a pre-existing rotator cuff tear and that Plaintiff's expert further conceded that he could not tell if Plaintiff would have needed surgery even if the fall had never occurred. Viewed in the light most favorable to defendants, the evidence is consistent that Plaintiff's "major" injuries - - his rotator cuff tear and surgery - - had nothing at all to do with the slip and fall at issue in our suit. Certainly, the jury was free to believe, as it did, Plaintiff's theory of the case on this point, mandating that the verdict be affirmed.

## Point II

### **The Verdict For Past Pain And Suffering Does Not Deviate Materially From What Constitutes Reasonable Compensation So There Is No Basis For Increasing The Jury's Award For Past Pain And Suffering**

The Court should give considerable deference to the jury's award. (See, Point I, *supra*). Previous awards may provide guidance to the appropriateness of a jury's award (see Senko v. Florida, 53 A.D.2d 638, 639 (2<sup>nd</sup> Dep't 1976), but the Court "should nonetheless be wary of substituting its judgment" for that of the jury. So v. Wing Tat Realty Inc., 258 A.D.2d 373, 374 (1<sup>st</sup> Dep't 1999). This court further held in So:

Modification of damages, which is a speculative endeavor, cannot be based upon case precedent along, because comparison of injuries in different cases is virtually impossible.

Id. at 374.

Nonetheless, a review of prior jury verdicts provides some basis of comparison, and a standard by which to measure the reasonableness of this verdict.

Indeed, a jury awarded \$12,500 for a dislocated shoulder to the Plaintiff in Quintanilla v. D'Angelo, Supreme Court, Nassau County, 014054/02. A New York County jury awarded \$20,000 to a Plaintiff for a left-shoulder dislocation and a head injury in Walsh v. Bowlmor Lanes,

LLC, Supreme Court, New York County, 100137/08. Notably, in Walsh, just as here, the jury awarded \$0 for future pain and suffering, and also found that the Plaintiff's knee injury was part of the natural aging process.

Plaintiff's cited cases on which they rely to persuade this Court to increase the jury's verdict have little to do with the jury's finding that Plaintiff sustained a dislocated shoulder which was reduced in the emergency room, and causes him no further problems. Indeed, none of Plaintiff's cases even mention a dislocated shoulder; rather, those cases deal with severe shoulder and other unrelated injuries and are therefore inapposite.

For example, Plaintiff cites Elescano v. Eighth-19<sup>th</sup> Co., LLC, 17 A.D.3d 250, 794 N.Y.S.2d 316 (1<sup>st</sup> Dep't 2005) to support its argument that the verdict here was inadequate. However, in Elescano, the Plaintiff suffered a "ruptured rotator cuff" resulting in worsening chronic pain, so much so that defendant's expert "acknowledged that plaintiff has a permanent partial disability." Id at 251. In this case, Plaintiff's injury, based on the competent evidence in the record, is that he suffered a dislocated shoulder with an immediate recovery.

The story is the same with Lipton v. New York City Transit Authority, 11 A.D.3d 201, 782 N.Y.S.2d 269 (1<sup>st</sup>

Dep't 2004) (massive rotator cuff injury to polio victim/Dr.; \$815,000.00 verdict for pain and suffering and past lost earnings upheld); Caban v. City of New York, 46 A.D.3d 319, 848 N.Y.S.2d 40 (2<sup>nd</sup> Dep't 2007) (plaintiff sustained labral tears to both shoulders related to an accident, and underwent arthroscopic surgery; \$50,000 for past pain and suffering and \$150,000 for future pain and suffering were adequate verdicts); Claudio v. City of New York, 280 A.D.2d 403, 720 N.Y.S.2d 504 (1<sup>st</sup> Dep't 2001) (unrefuted proof that the Plaintiff sustained a wrist fracture that was in a cast for six weeks and cortisone shots to her shoulder; new trial if defendant would not stipulate to increase award to \$75,000 for past pain and suffering and \$40,000 for future pain and suffering); DeSimone v. Royal GM, Inc., 49 A.D.3d 490, 856 N.Y.S. 2d 628 (2<sup>nd</sup> Dep't 2008) (\$353,000 verdict upheld for Plaintiff who sustained herniated cervical disc and rotator cuff because the jury found that the injury resulted in a "significant limitation of use of bodily function or system"); Bernstein v. Red Apple Supermarkets, 227 A.D.2d 264, 642 N.Y.S.2d 303 (1<sup>st</sup> Dep't 1996) (plaintiff suffered unspecified "serious personal injuries" including a rotator cuff tear where the Court reduced past pain and suffering

from \$750,000 to \$600,000, and reduced future pain and suffering from \$1 million to \$500,000).

Plaintiff's attempt to view these cases through the same lens as our case fails. Each of these Plaintiff's injuries were far more serious than the Plaintiff here, and the verdicts reflected that.

In any event, verdicts for rotator-cuff injuries are far lower than the cases which Plaintiff cites. For example, a jury awarded \$12,500 to Plaintiff for a tear of his right rotator cuff and spinal injuries in Morales-Rogel v. Motor Vehicle Accident Indemnification Corp., Civil Court, Bronx County, 329-BTX-2008. There, just as here, the jury awarded \$0 for future pain and suffering.

### POINT III

#### **The Jury's Finding of \$0 For Future Pain And Suffering Is Justified By The Record**

Plaintiff's testifying physician, Dr. Klion, found that Plaintiff fully recovered just four months after the surgery was performed, noting Plaintiff's:

improvement. [Plaintiff] had no night pain at this time. He had minimal discomfort. His active range of motion was noted to be increasing to 160 degrees of forward flexion, 100 degrees of abduction, 60 degrees of external rotation, and internal rotation of 30 degrees. His passive range of motion was noted to be almost full. His rotator cuff strength was noted to be acceptable. He was noted to have a mild shrug sign. He had

no damage. Radiographic examination at that time revealed no significant internal change.

(R. 566).

Dr. Lubliner found that Plaintiff sustained a dislocated shoulder as a result of the fall, but there is "no indication that he aggravated the condition because there was nothing in the operative report that was new."

(R. 418).

Even if the jury causally related Plaintiff's rotator-cuff tear to his slip and fall, an award of no future pain and suffering is proper based on Dr. Klion's September 6, 2007 examination alone. Indeed:

In evaluating conflicting testimony of expert witnesses, the jury is entitled to accept or reject an expert's testimony in whole or in part (Mejia v. JMM Audobon, 1 A.D.3d 261, 767 N.Y.S.2d 427 [2003]). If the jury credited defendant's expert, there is no inconsistency in the award of damages for past pain and suffering but none for future pain and suffering, in light of plaintiff's full recovery.

Crooms v. Sauer Bros., Inc., 48 A.D.3d 380, 853 N.Y.S.2d 29, (1<sup>st</sup> Dep't 2008).

The jury here made such a finding, awarding \$10,000 to Plaintiff for past pain and suffering for the dislocated shoulder he sustained as a result of the accident. The jury, finding that Plaintiff fully recovered, did not award damages for future pain and suffering. Plaintiff, of

course, does not agree with that finding, but that opinion does not outweigh the jury's finding that Plaintiff was not entitled to future pain and suffering.

Conclusion

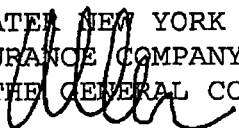
Kosher Deluxe Restaurant and Midtown Food Corp. requests that this Court uphold the jury verdict, and that the Court award to Respondents such further relief as is just and proper.

Dated: New York, New York  
March 1, 2011

Respectfully submitted,

GREATER NEW YORK MUTUAL  
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