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306 A.D.2d 133, 761 N.Y.S.2d 645, 2003 N.Y. Slip Op. 15274
(Cite as: 306 A.D.2d 133)

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Hayes v. Normandie LLC
N.Y.A.D. 1 Dept.,2003.

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

Thomas HAYES, et al.,

Plaintiffs-Appellants-Respondents,

v.

NORMANDIE LLC, et al.,

Defendants-Respondents-Appellants.

Normandie LLC, et al., Third-Party Plaintiffs,

v.

Civetta Cousins JV, Third-Party

Defendant-Respondent.

June 17, 2003.

Worker brought action to recover for injuries under scaffold law. Following summary judgment against defendants on the issue of liability, and a jury verdict as to damages, the Supreme Court, New York County, 2002 WL 1748675, Kibbie Payne, J., granted defendants' motions for a new trial on the issue of future pain and suffering and for collateral source offsets for Social Security and union pension benefits. Worker appealed. The Supreme Court, Appellate Division, held that: (1) medical evidence that future fusion surgery or implantation of an artificial wrist joint might be necessary to alleviate pain from worker's fractured right radius was sufficient to support damage award of \$750,000 for future pain and suffering, and (2) social security payments, but not pension benefits, received by worker and his family members could be treated as collateral source payments for which amounts defendants were entitled to an offset from jury award for lost earnings.

Affirmed as modified.

West Headnotes

[1] 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

(Formerly 115k132(2), 115k130.2)

Medical evidence that future fusion surgery or implantation of an artificial wrist joint might be necessary to alleviate pain from worker's fractured right radius was sufficient to support damage award of \$750,000 for future pain and suffering, in action under scaffold law. McKinney's Labor Law § 240, subd. 1.

[2] Damages 115 ↪60

115 Damages

115III Grounds and Subjects of Compensatory
Damages

115III(B) Aggravation, Mitigation, and
Reduction of Loss

115k60 k. Benefits Incident to Injury.
Most Cited Cases

Social security payments, but not pension benefits, received by worker and his family members could be treated as collateral source payments for which amounts defendants were entitled to an offset from jury award for lost earnings, in action under scaffold law; social security payments were intended to compensate for lost earnings, while pension benefits were not. McKinney's Labor Law § 240, subd. 1; McKinney's CPLR 4545(c).

**645 Alexander J. Wulwick, for
Plaintiffs-Appellants-Respondents.

Shaub, Ahmuty, Citrin & Spratt, LLP (Steven J. Ahmuty, Jr., Timothy Capowski and Christopher Simone) for Defendant-Respondent-Appellant Normandie LLC.

Peter Riggs, for Third-Party Defendant-Respondent.

MAZZARELLI, J.P., ELLERIN, WILLIAMS,
LERNER, and GONZALEZ, JJ.

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*133 Order, Supreme Court, New York County (Kibbie Payne, J.), entered July 17, 2002, which, in an action pursuant to Labor Law § 240(1), inter alia, granted defendants' motions for (1) a new trial to the **646 extent of directing a new trial on the issue of future pain and suffering only unless the parties stipulated to reduce the award for future pain and suffering from \$750,000 to \$350,000, and (2) collateral source offsets for Social Security and union pension benefits, unanimously modified, on the law, to deny defendants' motions so as to reinstate the damage award for future pain and suffering to \$750,000 and to vacate the offset for pension benefits, and otherwise affirmed, without costs.

[1][2] The trial court properly disposed of defendant's various challenges to the jury's award of damages. Plaintiff sustained a comminuted fracture of the right radius extending into the right wrist that required the insertion of a metal plate and screws that will have to be removed in the future. The award for future pain and suffering is adequately supported by medical evidence that future fusion surgery or implantation of an artificial wrist joint might be necessary to alleviate pain (CPLR 5501[c]; cf. *Cabezas v. City of New York*, 303 A.D.2d 307, 756 N.Y.S.2d 566). Plaintiff's earnings for 1999 were established by testimony from a union member as to plaintiff's hourly wage and hours worked; thus, defendants were not prejudiced by the trial court's reopening plaintiff's case for the limited purpose of receiving his W 2 form for that year so as to allow a more exact computation (see *Feldsberg v. Nitschke*, 49 N.Y.2d 636, 643, 427 N.Y.S.2d 751, 404 N.E.2d 1293; see *Guarracino v. Central Hudson Gas & Elec. Corp.*, 274 A.D.2d 551, 553, 712 N.Y.S.2d 389, *lv. dismissed* 96 N.Y.2d 727, 722 N.Y.S.2d 789, 745 N.E.2d 1012). That plaintiff continued to work for a year after his accident does not negate the finding that his injuries were ultimately disabling, as found by the Social Security Administration. Defendants' claim that they were deprived of a fair trial by plaintiff's attorney's improper comments was not preserved by *134 timely objection or a motion for a mistrial, and we decline to review the alleged misconduct (see *Figuroa v. Maternity Infant Care Family Planning Project*, 243 A.D.2d 424, 665 N.Y.S.2d

257, *lv. denied* 91 N.Y.2d 807, 669 N.Y.S.2d 260, 692 N.E.2d 129; compare *Rodriguez v. New York City Hous. Auth.*, 209 A.D.2d 260, 261, 618 N.Y.S.2d 352; *Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 53-54, 558 N.Y.S.2d 511). While the Social Security payments received by plaintiff and his family members were intended to compensate for lost earnings (see *Bryant v. New York City Health & Hosps. Corp.*, 93 N.Y.2d 592, 608, 695 N.Y.S.2d 39, 716 N.E.2d 1084) and thus properly treated as collateral source payments (CPLR 4545[c]; see *Rodgers v. 72nd St. Assoc.*, 269 A.D.2d 258, 703 N.Y.S.2d 456; *Manfredi v. Preston*, 246 A.D.2d 580, 667 N.Y.S.2d 288), the same cannot be said about plaintiff's pension benefits (see *Oden v. Chemung County Indus. Dev. Agency*, 87 N.Y.2d 81, 88-89, 637 N.Y.S.2d 670, 661 N.E.2d 142). Accordingly, we modify to reinstate the damage award for future pain and suffering and to vacate the offset of such pension benefits against the award for lost earnings. We have considered the parties' other arguments for affirmative relief and find them unavailing.

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