

STATE OF NEW YORK  
SUPREME COURT :: GREENE COUNTY

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[REDACTED]

Plaintiff,

-vs-

[REDACTED]

Defendants.

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ARBITRATOR'S DECISION

Index No. [REDACTED]  
RJI No. [REDACTED]

APPEARANCES: MICHAEL C. HOWARD, ESQ.  
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**PATRICK D. MONSERRATE, ARBITRATOR**

Respective counsel for the parties to the captioned personal injury action have designated the undersigned as an Arbitrator to review documentary submissions, to hear Plaintiff, her mother, and her physical therapist testify at an Arbitration Hearing (held in the City of Hudson on March 21, 2011), and to decide the amount of compensatory damages to be awarded Plaintiff for injuries sustained in a May 2010 motor vehicle accident, for which the defense has conceded liability.

Following the Hearing, counsel agreed to March 28<sup>th</sup> as a final submission date to complete the Arbitration Record.

**Plaintiff's Pre-Accident Health and Lifestyle**

Plaintiff [REDACTED] worked for fourteen years (1990-2004) as an Administrative Assistant to the Director in the Claverack office of the restoration division of Sotheby's Auction House. By all accounts she was good at what she did, worked hard ("80 hours a week", she estimated), and was paid well (\$20± an hour).

Her world as she lived in it changed drastically on October 12, 2004 when she suffered a nervous breakdown and she has not worked since at anything other than sporadic "temp" jobs.

In November 2004 (during which she turned 38) Plaintiff applied (successfully) for Social Security Disability benefits. Through the administrative fact-finding inherent to that process, certain conclusions were reached which, at the time and for the years which followed, benefited Plaintiff.

It was determined that Plaintiff was "disabled" from a combination of medically diagnosed mental illness (bipolar disorder) and a history of substance abuse (alcohol, marihuana, and cocaine/crack) spanning two decades. It was further determined that the nature and extent of her impaired condition prevented her from doing "physical and mental work activities on a sustained basis" and that she had insufficient "residual functional capacity" either to perform the requirements of her past work or "any other work" consistent with her age, education, and work experience.

Based upon those findings, Plaintiff has been receiving monthly benefits since some time in 2006. At the time of the subject accident she was receiving a "net" tax-free monthly benefit (after a Medicare deduction for her continuing psychiatric care) of some \$1,553.00.

A periodic (and, coincidentally, post-accident) review of Plaintiff's case in August 2010 found her "disabled" condition unchanged. She is scheduled for another review in July 2013.

During the period of July 2007 until October 2009, Plaintiff was in contact with the State Office of Vocational and Educational Services for Individuals with Disabilities (VESID) about finding suitable employment (at the suggestion of her therapist).

In disclosing her psychiatric history, Plaintiff described herself as bipolar, subject to panic attacks, and suffering from depression and agoraphobia. VESID immediately classified her as "Most Significantly Disabled for Supported Employment" and set about trying to find some sort of "temp" office work that she could/would perform.

After a series of unsuccessful placements, the experiment ended with an October 6, 2009 letter from VESID:

"This is to let you know that your Individualized Plan for Employment (IPE) has ended and your case was closed on 10/6/2009 because your current medical conditions are interfering with your ability to pursue your IPE work goal".

Then, in January 2010, Plaintiff sustained a heart attack. While hospitalized, it was determined that she has coronary artery disease with 80% blockage in her mid-coronary artery. She has been on a regimen of daily medications for her coronary condition and advised to lose a substantial part of the 265± pounds she has been carrying.

In February 2010 she received medical treatment after an altercation with her boyfriend. She was diagnosed with fractures of her right shoulder (non-displaced greater tuberosity fracture) and left wrist (minimally displaced intra-articular distal radius fracture). The fractures were treated conservatively (a sling for the shoulder; a splint for the wrist) and had both resolved by the time of her May accident.

### **The Accident and Its Aftermath**

On the afternoon of May 21, 2010 Plaintiff (then 44) was returning to Greene County from a shopping trip to Albany with two female friends (and passengers). Her plan was to drop her friends off in the Village of Catskill and continue on to the Town of Athens, where she was living with her sister. She was driving her 2000 Dodge Stratus sedan.<sup>1</sup>

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<sup>1</sup> She had been able to purchase the vehicle "used", with installments from her monthly S.S.D. payments.

As plaintiff entered the Village on Route 23-B (Main Street), the Defendants' car (a 2005 Toyota Highlander) pulled into her path from her right. Unable to stop in time, the front of Plaintiff's car struck the driver's side of defendants', her airbag deployed, and she was taken from the scene to the hospital by ambulance.

At the hospital, x-rays showed mid-shaft fractures of both the ulna and radius bones of her right arm (Plaintiff is right-handed). After clearance from her cardiologist (regarding her heart condition and medications), Dr. Louis DiGiovanni performed ORIF surgery at both sites, inserting customary hardware (plates and screws) after incising both the top and underside of her forearm. At the time of the Arbitration Hearing, the two scars were plainly visible; the hardware is still intact, with no present plans for its surgical removal.

By late August, the fractures had healed to the point where Dr. DiGiovanni felt that a course of physical/occupational therapy would be helpful in regaining normal range of motion in her wrist and normal grip strength in her hand.

Between September 2, 2010 and March 14, 2011 Plaintiff participated in some 30 sessions. Her therapist, Susan Sheldon, testified that at the beginning Plaintiff had no functional use of her wrist, but by March had progressed to a point where she had regained

45% (of a normal 70%) forearm supination. Sheldon felt that her progress had “plateaued” and recommended cessation of formal therapy sessions, but continuing with her home exercise program.

In December, Dr. DiGiovanni had felt that Plaintiff’s recovery had progressed to the point where she could drive a car, and cleared her medically for that activity. She has not driven yet because her car was totaled in the accident and her mother won’t let her drive hers.

### **Damages**

Plaintiff’s lawyer makes claims on her behalf for the awarding of both economic and noneconomic damages as a result of the subject accident. While the latter is understandable and certainly warranted, the former seems to lie somewhere between the abstract and the speculative. The critical element present in the one and missing in the other is causation.

The accident certainly caused Plaintiff to experience pain and suffering of a type and from a source that was not present before the accident. While she had physical and emotional problems affecting the functioning of other parts of her body, she had the full use of her dominant arm and hand and (aside from the minor “chip” fracture in February) she was pain-free from that source. Since the accident she has known virtually daily pain as

her fractures healed and she engaged in painful therapy sessions to improve the diminished functioning of her hand and wrist.

Moreover, certain negative aspects of the injury (some diminished functional capacity and the surgical scarring) will be part of her life for years into the future.

**However**, it is unclear upon what factual basis anyone could claim that the accident *caused* Plaintiff to sustain any economic loss. Her medical bills have been paid through the no-fault carrier. She wasn't working for five and a half years before the accident. In point of fact, she had applied for and had been adjudicated to be "disabled" from working during that period, and had received – and accepted – monthly payments to compensate her for that disability.

She has not worked since the accident, but has continued to receive and accept her disability payments. There is simply no credible evidence that "but for" the subject accident she would have obtained gainful employment during that time.

One small sample (from Plaintiff's Hearing testimony) to illustrate the point: She claims that it has long been her dream to write a cook book, but that her accident-related injuries have shattered that dream (because she has difficulty typing). The truth is that she has



written as much – or as little – of that cook book in the 10 months since the accident as she wrote during the 66 months that preceded it.

As for the claim that the accident injuries have adversely affected Plaintiff's future capacity to be gainfully employed and that she should be compensated for that "loss", it is subject to the same analysis and yields the same conclusion. *Since the accident* she has had her "disability" re-certified (into 2013). If she doesn't work for *that* period, but continues to accept her monthly benefits, how/why should defendants be held responsible to pay her additional monies for not working?

No damages will be awarded for economic loss.<sup>2</sup>

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<sup>2</sup> As a final observation, if, as she says, Plaintiff is serious about regaining her status as a fulltime employee of someone and doing work which she considers useful, the price she may have to pay is to say to the government, to the world – and to herself – "I am no longer disabled".

**CONCLUSION**

By reason of the foregoing, it is the considered judgment of the undersigned that the Plaintiff should be awarded the following amounts as fair and reasonable compensation for her injuries:

Past pain and suffering (10 months):	\$ 75,000.00
Future pain and suffering (20 years):	<u>\$ 125,000.00</u>

TOTAL DAMAGES	\$ 200,000.00
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Dated: April 4, 2011  
Loudonville, New York



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PATRICK D. MONSERRATE, ARBITRATOR