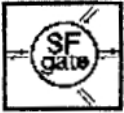




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99-7518.sum

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of January two thousand.

PRESENT:

HON. RALPH K. WINTER, Chief Judge,

and

HON. FRED I. PARKER,
HON. SONIA SOTOMAYOR,

Circuit Judges,

DELLA HOUGH-SCOMA,

Plaintiff-Appellant-Cross-Appellee,

v. 99-7518 (L)
 99-7592 (XAP)

WAL-MART STORES, INC.,

Defendant-Appellee-Cross-Appellant.

Appearing for Appellant: PHILIP A. MILCH, Law Office of Robert D
N.Y., for Plaintiff-Appellant-Cross-Appellee.

Appearing for Appellee: JANET D. CALLAHAN, Hancock & Estabrook, LLP,
N.Y., for, Defendant-Appellee-Cross-Appellant.

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Western District of New York (Hugh B. Scott, Magistrate Judge), it hereby

ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff-Appellant-Cross-Appellee, Della Hough-Scoma ("plaintiff"), brought this action in the District Court for the Western District of New York against defendant-appellee-cross-appellant Wal-Mart Stores, Inc. ("Wal-Mart"), seeking damages for a neck injury suffered on the premises of a Wal-Mart store in Lakewood, New York. (A 277)

The jury returned a verdict in favor of plaintiff, awarding \$1,054,077.00 in damages which \$512,275.00 was attributed to future lost wages. (A 277) Wal-Mart moved for judgment as a matter of law and amendment of the judgment, claiming that (1) plaintiff failed to prove negligence; (2) the award for future lost wages should be set aside because the testimony of a vocational expert, Alan Winship, was inadmissible; and (3) the jury award was excessive. (A 15-17; A 280) On April 16, 1999, Magistrate Judge Scott entered an order denying defendant's motion on the negligence and excessive jury award issues, and granting defendant's motion to set aside the future lost wages award because the work-life expectancy tables upon which Mr. Winship's testimony was based (the "Gamboa Tables") were unreliable. (A 6, 282) Plaintiff appeals the part of the order setting aside the future lost wages award, and Wal-Mart cross-appeals the denial of its motion on the negligence and excessive jury award issues.

To prove negligence under New York law, a plaintiff must show that the defendant either created the unsafe condition or had actual or constructive notice of the condition. See *Meegan v. Westbury Property Inv. Co.*, 651 N.Y.S.2d 152, 153 (2d Dep't 1996); *Pirillo v. Longwood Assoc., Inc.*, 579 N.Y.S.2d 120, 121 (2d Dep't 1992). At trial, plaintiff presented testimony of three witnesses to prove Wal-Mart's negligence. Paul Coxford, an assistant manager at the time, testified that Wal-Mart's carpet holding device was full at the time of the accident, that unsecured carpets were lying on the floor and against a counter, and that common practice for Wal-Mart was to leave extra carpets outside of the carpet holding device because Wal-Mart "wanted to have as much merchandise on the floor as you could possibly have on the floor." (SA 57-58, 66-67, 90) The other two witnesses, plaintiff's fiancé and daughter, testified that at least one carpet that injured the plaintiff was standing outside the carpet holding device when it fell on the plaintiff's head. (SA 3, 8, 22, 24-25) In light of this testimony, we agree with the district court that there was sufficient evidence adduced at trial for a reasonable jury to infer that Wal-Mart created the carpet hazard. We therefore deny Wal-Mart's cross-appeal on the negligence issue.

We find that plaintiff's appeal on the future lost wages issue lacks merit. At trial, plaintiff moved the court to take judicial notice of the Gamboa Tables and to admit them as evidence. (A 38) The defendant objected, contending that plaintiff failed to lay a sufficient foundation, and the court ultimately excluded the tables (and Mr. Winship's testimony, which relied thereon) in its April 16, 1999 order. We conclude that the Gamboa Tables are not subject to judicial notice. See Fed. R. Evid. 201(b) (stating that a "judicially noticed fact is one not subject to reasonable dispute"). Moreover, we find that the plaintiff failed to lay a sufficient foundation for the admissibility of the Gamboa Tables under any theory, judicial or otherwise. See, e.g., *Moretti v. Commissioner of Internal Revenue*, 77 F.3d 637, 645 (2d Cir. 1996) (noting that litigant was required to lay the proper foundation for the admission of evidence); *United States v. Starzeczpyzel*, 880 F. Supp. 1027, 1031 (S.D.N.Y. 1995) (stating that, in respect to expert testimony, that the proponent of evidence bears the burden of introducing sufficient foundational facts to support its reliability). We therefore deny plaintiff's appeal of the court's order setting aside the award for future lost wages.

Finally, we note that Magistrate Judge Scott applied the incorrect standard in denying Wal-Mart's claim that the jury award was excessive. In his April 16, 1999 order, Magistrate Judge Scott stated that a jury's damage award cannot be set aside as excessive unless "It is so high as to shock the judicial conscience and constitute a denial of justice." *Hough v. Wal-Mart Stores, Inc.*, No. 96CV0707, 1999 WL 261857, at *5 (Apr. 15, 1999) (quoting *O'Neil v. Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1988)) (internal quotation marks omitted). Sitting in diversity, however, the district court was required to apply the New York standard, which mandates a comparison of the jury's award with awards in similar cases to determine whether it "deviates materially from what would be reasonable compensation," a test which accords less deference to the jury's award than the traditional common law standard of "shocks the conscience." *Consorti v. Armstrong World Indus., Inc.*, 103 F.3d 2, 4-5 (2d Cir. 1996) (en banc) (quoting N.Y. C.P.L.R. § 5501(c)). Applying the correct standard, we conclude that in light of the permanence of plaintiff's injuries and her chronic back pain, the jury award of \$1,054,077.00 (including \$500,000 in future lost wages and \$554,077.00 in past lost wages) did not deviate materially from reasonable compensation. See, e.g., *Vasquez v. Chase Manhattan Bank, N.A.*, 697 N.Y.S.2d 611, 612 (1st Dep't 1999) (upholding \$1,550,000 jury award for lifetime pain and suffering where plaintiff fractured left heel and ruptured a disc as a result of a scaffolding collapse).

Lamot v. Gondek, 558 N.Y.S.2d 284, 285-86 (3d Dep't 1990) (finding that a \$243,900 award physical and mental pain and suffering was reasonable considering plaintiff's permanent a chronic back pain and the severe restrictions on plaintiff's activities). We therefore d defendant's appeal on the excessive jury award issue.
For the reasons set forth above, the judgment of the district court is hereby
AFFIRMED.

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