Bronx County Clerk's Index No. 18057/06

Court of Appeals

STATE OF NEW YORK

THERESA DEVITO,

Plaintiff-Appellant,

against

DENNIS FELICIANO and PARAGON CABLE MANHATTAN,

Defendants-Respondents.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a bar association, whose purpose is to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated civil cases and whose representation in such cases is primarily for the defense; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standards of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools in emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and

legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques for the defense; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just claim and to present effective resistance to every non-meritorious or inflated claim; and to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This is an action to recover damages for personal injuries stemming from an automobile accident. The issue at trial was whether plaintiff-appellant sustained a "serious injury" within the meaning of §5102(d) of the Insurance Law. Specifically, plaintiff alleged that she satisfied the threshold requirement by reason of a nasal fracture and a fracture to her spine.

The issues raised in this appeal are a matter of concern to DANY. As noted by the trial court, counsel for defendants chose not to offer testimony of any defense medical experts since the doctors who testified for plaintiff "were so bad." A defendant in a tort case should be entitled to engage in such reasoned trial strategy without fear of incurring a missing witness charge.

As will be shown in this brief, plaintiff failed to meet her burden of showing that a missing witness charge should be given.

The judgment of the Supreme Court and the decision and order of the Appellate Division should be affirmed.

STATEMENT OF FACTS

On February 13, 2006, plaintiff Theresa DeVito was a front-seat passenger in a motor vehicle operated by her daughter, Margaret DeVito. She testified at trial that the vehicle was struck in the rear by a van (A 73-74)(References are to the Appendix). Following the accident, Ms. DeVito was transported by ambulance to New York Presbyterian Hospital (A 78).

Plaintiff alleged she sustained serious injuries from the February 13, 2006 accident, including a nasal fracture and compression, or wedge, fracture of the twelfth thoracic vertebrae, resulting in her being confined to a wheelchair (A682, A685, and A91). She initially also claimed to have sustained a wrist injury as a result of the accident (A 80).

Plaintiff testified at trial that upon impact, her nose struck the visor (A 75) and that her back hurt (A 77). She further testified on direct examination that upon arrival at the hospital, she reported that her head and back hurt (A 79, 80). On cross-examination, however, she admitted that she received no treatment at that facility for the alleged facial injuries, nor were any diagnostic studies of her back conducted (A 123-124). Medical records of her visit to the New York Presbyterian emergency room on February 13, 2006, indicated that plaintiff had no evidence of head trauma, facial trauma, or of any ear, nose to throat problems (A 502-503). She claimed that the

hospital's emergency room was so busy that only an x-ray of her wrist was taken and that she was sent home without further treatment, other than Motrin (A 81, 126). At no time during her testimony was plaintiff asked if she was examined by any doctors on behalf of the defendants.

The evidence introduced at trial indicated that the next time plaintiff saw any medical professional was one month after her accident, when she had an appointment with Dr. Kacker, an otolaryngologist (ear, nose and throat specialist) for a lymph node issue (A 527). Shortly thereafter, plaintiff returned to her home in New Hampshire.

Plaintiff's daughter, Margaret DeVito, also testified on her mother's behalf (A 240). According to Margaret DeVito, upon their return to New Hampshire, her mother was in severe pain, was unable to move, confined to her bed and unable to sleep through the night because of the pain (A 306). However, it was not until April 19, 2006 that she took her mother for further medical treatment (A 305). At that time, plaintiff presented at Portsmouth Regional Hospital Emergency Room, complaining of back pain (A 86, 141-142). While plaintiff testified that she informed the doctors at the hospital that her back pain had been continual since the accident in February, the hospital records indicate that she reported the pain began approximately two weeks prior to her visit (A 443). These records also indicate

that plaintiff was in a motor vehicle accident in March 2006, and make no mention of the February 2006 accident giving rise to this litigation (A 455-456).

Plaintiff's daughter, who resided with her throughout the relevant time period, also denied having any knowledge of her mother falling in the Fall of 2005, or sustaining any fractures as a result of such a fall (A 241, 283). However, also introduced into evidence were other records from Portsmouth Regional Hospital. Those records reveal that plaintiff sought treatment from the emergency room in October 22, 2005, having sustained both a concussion and a fractured wrist in a fall (A 295–297). Plaintiff's counsel never asked Margaret DeVito, who testified that she accompanied her mother to all of her doctor's appointments after the accident (A 256), whether she had been present when any doctor examined her mother on behalf of the defendants.

Dr. Silvester Lango testified on plaintiff's behalf (A 157). An orthopedic surgeon, Dr. Lango examined Mrs. DeVito on two occasions, the first being more than two years after her accident (A 198, 158). Dr. Lango testified that he reviewed reports from other doctors regarding radiographic films taken after the accident, but not the films themselves (A 167–170). He further testified that he ordered an MRI of plaintiff's spine and after reviewing those MRI films, diagnosed a fracture of the

twelfth thoracic vertebra ("T-12"), along with significant spinal stenosis in the lower portion of her spine (A 170, 172). Dr. Longo described the T-12 fracture as a "wedge fracture" or "compression fracture" (A 223). He also testified that she did not have a fracture of her wrist (A 224).

Ultimately, Dr. Longo conceded on cross-examination that his determination that the T-12 compression fracture sustained by Mrs. DeVito was based on "limited and frankly incorrect information" provided by the plaintiff, as he had not been informed that she had fallen at least once prior February 13, 2006 and had not been provided with any records relating to the treatment she received for injuries sustained in the prior incident (A 461, 471). He also conceded that despite having first examined plaintiff two years after the accident, he never saw the records from the hospital at which plaintiff was treated on the date of the accident (A 500). Dr. Lango also testified, as did other physicians, that plaintiff was a "poor historian", conceding that the information she provided was possibly not correct (A 456, 471). Moreover, he also conceded that the medical records did not support the conclusion that plaintiff sustained a nasal fracture as a result of the accident on February 13, 2006 (A 503).

Plaintiff also offered the testimony of Dr. James Naidich, a radiologist (A 327). Dr. Naidach never met or examined the

plaintiff (A 369–370). He testified that he reviewed a CT examination of plaintiff's face and nose, as well as X-rays of her lower back (A 328). The nasal CT scan was taken on March 30, 2006 (A 338). Dr. Naidach testified that the CT Scan showed a nasal fracture (A 339). He also testified that the vertebral x-rays showed a compression or wedge fracture of the twelfth thoracic vertebrate (A 345). He testified on direct examination that both fractures were traumatically induced (A 349), and assuming no prior trauma, could have been caused by the accident which occurred on February 13, 2006 (A 351).

On cross-examination, however, he qualified his diagnosis with respect to the nasal fracture, noting that the radiologist at the facility where the tests were done noted not a definitive fracture but rather a "possible small, non-displaced fracture" of one of the bones in the nose (A 365). Like Dr. Longo, Dr. Naidach also testified that he was unaware of plaintiff's history prior to the date of the accident, including her fall in October 2005 (A 372). He testified that he could not definitely determine when a fracture occurred by examining a radiographic image (A 373). He also conceded that the emergency room record from the date of the accident indicated that plaintiff had no tenderness on her nose (A 385-386) and testified that had a patient suffered a non-displaced nasal fracture, as plaintiff alleged, the area would have been tender when the doctor touched

it (A 386). In addition, Dr. Naidach testified that the radiologic studies indicated plaintiff had degenerative changes in her vertebra and discs, spinal stenosis, and chronic arthritic changes which likely existed before the accident (A 400-403). While testifying that these conditions might predispose an individual to a spinal fracture, he also conceded that spinal stenosis and chronic degenerative arthritis could be painful conditions that could, unrelated to any trauma, result in a patient being confined to a wheelchair (A 400-403).

Thereafter, defendant introduced the deposition testimony of Dr. Kacker, plaintiff's otolaryngologist (A 521). Like Dr. Lango, Dr. Kacker characterized plaintiff as "not a very reliable historian" (A 532). Dr. Kacker testified that he first saw plaintiff on March 13, 2006, when she was being seen for issues relating to lymph nodes but was otherwise "asymptomatic" (A 526–527). He also testified that plaintiff and her daughter had told him that plaintiff was a passenger in a cab which was struck in the rear, causing her face to strike the divider (A 527-528).

According to Dr. Kacker, a person who sustained a nasal fracture would feel pain at the time of the trauma and thereafter (A 528-529), and he observed that the records from the hospital on the date of the accident contained no such notations but rather reflected a "normal exam" (A 529, 532-533).

He further testified that his examination of plaintiff's nose, which occurred one month after the accident, revealed no pain (A 539–540). In fact, Dr. Kacker testified that it was not possible to state with any degree of certainty that plaintiff's alleged fractured nose was caused by the February 2006 automobile accident (A 544).

During an on-the-record discussion out of the presence of the jury and witnesses, the issue of whether plaintiff would request a missing witness charge if defendants failed to produce the doctors who examined plaintiff on defendants' behalf was raised for the first time (A 490–495). It was in the context of discussing whether, on redirect, plaintiff's counsel could ask Dr. Lango whether he had reviewed the reports of certain doctors who examined plaintiff at defendants' behest prior to drafting his own report on plaintiff's condition (A 490–495). At that time, plaintiff's counsel did not request the charge, nor did he make any offer of proof (A 490-495). Defendants' counsel noted during that portion of the proceeding that "there (was) no evidence (before the jury) whatsoever that Mrs. DeVito was seen by any defendants' doctors" as neither plaintiff nor her daughter had testified to such facts (A 492).

After the close of defendants' case, plaintiff's counsel requested a missing witness charge (A 570). In support of his application, plaintiff's counsel did not offer the names of

defendants' physicians who were not called to testify at trial, the substance of the reports they had issued, the findings of those reports, or the subject matter of their testimony. Rather, he merely:

> state[d] for the record [that he] believe[d] all the criteria as far as plaintiff's concerned has been met to compel defendants to produce their doctors. And if they don't produce their doctors, missing witness charge [sic] should be given to the jury advising they can draw the strongest possible inference against what those doctors would have had to say.
>
> And had they been called to testify, they would not have been able to controvert anything that plaintiff's doctors have testified to.

(A 574-575)

The trial court denied plaintiff's counsel's application and no missing witness charge was included in the jury instructions.

In so doing, the court observed that "[defense counsel] decided not [to call his medical witness] in the middle of trial because he thought your guys [plaintiff's doctors] were so bad" (A 572).

The jury found for the defendants and judgment was entered dismissing the complaint (A 4a-5a).

The Appellate Division unanimously affirmed (A 730-731).

POINT I

SIMILAR TO THE BURDEN OF PROOF AT TRIAL, PLAINTIFF WAS SADDLED WITH THE BURDEN OF PROVING HER ENTITLEMENT TO HAVING THE MISSING-WITNESS CHARGE GIVEN TO THE JURY. SHE FAILED TO SATISFY ANY ELEMENT NEEDED FOR THE GIVING OF THE CHARGE, AND THE SUPREME COURT AND UNANIMOUS APPELLATE DIVISION CORRECTLY DENIED HER APPLICATION

At trial, plaintiff bore the burden of proof. See, S.L. Benfica Transp., Inc. v. Rainbow Media, Inc., 13 A.D.3d 348, 786 N.Y.S.2d 98 (2d Dep't 2004). As a result of the two-vehicle accident in this case, plaintiff claimed she sustained a nasal fracture and a fracture to her spine, and at trial it was plaintiff's burden to prove that she had sustained a "serious injury" in the accident within the meaning of Insurance Law §5102(d). But she failed to do so, and defendants did not have to call their examining doctors because plaintiff's own evidence and physicians raised sufficient questions of fact and credibility to support the jury's determination in favor of defendants.

The totality of the facts in record and the controlling precedent undermine plaintiff's arguments on appeal. She demands, in conclusory fashion, that she was entitled to have the missing witness charge given to the jury. But demanding it and proving that it is applicable and warranted are two entirely different things. The facts before this Court show that

plaintiff never satisfied her burden of proof.

And that is the crux of the issue on appeal: it was *plaintiff's burden* to show her entitlement to the charge. As a general rule, the party seeking a missing witness charge must satisfy three elements: identify a particular uncalled witness believed to be knowledgeable about a material issue pending in the case; demonstrate that the witness can be expected to testify favorably to the opposing party; and that the party has not called the witness. See, People v. Kitching, 78 N.Y.2d 532, 577 N.Y.S.2d 231 (1991). And it is only after the party seeking the charge makes that requisite showing that the burden shifts to the opposing party. See, People v. Gonzalez, 68 N.Y.2d 424, 509 N.Y.S.2d 796 (1986).

In opposing the application for the missing witness charge, the party must prove that the witness was not knowledgeable about the issue; that the testimony was not material or relevant; that the witness's testimony was material and relevant, but it would be cumulative of other evidence; that the witness is not available; or that the witness is not under the party's control. Id., 68 N.Y.2d at 427-28, 509 N.Y.S.2d at 799.

It is respectfully submitted that plaintiff never satisfied her burden of proof on this issue. Plaintiff made no showing regarding the substance of defendants' doctors' reports, their findings, the scope of their examinations of plaintiff, or the

subject matter to which they would testify at trial. Plaintiff's counsel never even identified the purported witness or witnesses for which she sought the charge (A 570-75). The record actually showed that plaintiff rejected the court's suggestion that the elements be proven. Therefore, the burden never even shifted to defendants.

On appeal, however, plaintiff has complained that the trial court committed reversible error by refusing to give the missing witness charge to the jury. Specifically, plaintiff asserts that the charge should have been given to the jury based solely upon defendants' failure to call their IME doctors to testify. Respectfully, the facts and law do not support this assertion. According to Pattern Jury Instruction 1:75, a party is not required to call any particular person as a witness. And contrary to plaintiff's wishes, the failure to call a witness does not automatically call for the missing witness charge being given to the jury. The charge states that it "may be" the basis for an inference against the party who failed to call the witness.

The issues on this appeal concern whether plaintiff preserved her right to demand the charge be given, and whether it was warranted. The facts and law show that the answer to these two issues is in the negative. In Getlin v. St. Vincent's Hosp. & Med. Ctr., 117 A.D.2d 707, 498 N.Y.S.2d 849 (2d Dep't

1986), the plaintiff was admitted to the hospital following a hit-and-run accident and treated for his injures over a six-month period. He later brought a medical-malpractice action against the hospital, alleging that it was negligent in its failure to diagnose and properly treat an infection that developed in his knee. The jury in Getlin found the hospital liable for malpractice only with respect to the allegation that it failed to timely diagnose the infection that developed in the plaintiff's knee. The trial testimony established that the defendant's malpractice probably caused the plaintiff to undergo several painful debridement and skin-grafting procedures and may have required further surgery.

The plaintiff complained that the trial court committed several errors, including erroneously refusing to grant his request for a missing witness charge. Plaintiff sought the charge after the defendant failed to call the physician who examined him. The Appellate Division held that a party's failure to call a witness under their control who was shown to be in a position to give material evidence *may* result in an inference that the witness's testimony would be unfavorable to that party. Id., 117 A.D.2d at 708, 498 N.Y.S.2d at 850-851. While the inference may arise where a doctor examined the plaintiff on the defendant's behalf, if the "testimony would be merely cumulative and would not constitute substantial evidence, the inference *may*

not be drawn". (emphasis added) (citation omitted) Id., at 708-9, 498 N.Y.S.2d at 851 (citations omitted).

The Appellate Division rejected the plaintiff's argument that he was entitled to a missing-witness charge. Id., at 709, 498 N.Y.S.2d at 851. The Second Department ruled that there was "nothing to indicate that the doctor's testimony would not have been merely cumulative of the testimony of plaintiff's treating physician and of the two experts." Id.

Plaintiff herein argues on appeal that defendants' doctors' testimony could not have been considered cumulative unless it would have been favorable to her. But as the voluminous record in this case shows, the jury heard conflicting testimony from plaintiff, her witnesses, and her doctors as to whether she sustained a serious injury. And it was plaintiff's burden to prove by a preponderance of the evidence that she sustained a "serious injury" under the No-Fault Law that was causally related to the accident. If she failed to meet her burden, defendants did not have to call any witnesses. But they did not simply rest. Defendants read portions of the deposition of plaintiff's treating physician, Dr. Kacker, who plaintiff chose not to call. Defendants' IME physicians would not have added anything more than what was already before the jury. And as plaintiff's counsel conceded, they would not have been helpful to plaintiff's case. Rather, the doctor's testimony would have

been cumulative of the opinions elicited from plaintiff's own treating physician and the medical experts she called at trial.

Starting with the hospital records from the date of the accident, the evidence undermined plaintiff's allegations. These records showed that on the date of the accident when she presented, she exhibited no head trauma; no ear, nose, or throat problems; and she had *no facial trauma* (A 502-3).

Plaintiff testified that she did not recall telling anyone at the hospital that she injured her wrist in the accident (A 127) But records from Portsmouth Regional Hospital from four months before the accident evidence that plaintiff had sustained a concussion and a fractured left wrist in a separate incident (A 395-97). Despite this proof, the jury heard plaintiff and her daughter incredulously deny knowledge of any incident where plaintiff had fractured any part of her body before the accident.

With respect to her back, plaintiff said she told doctors in Portsmouth that her back had been hurting since the date of the accident. Hospital records, however, indicated that plaintiff had advised doctors that her back pain started two weeks before her visit (A 443).

The contradictory accounts of whether or not plaintiff had sustained a "serious injury" in the car accident in question did not end with her testimony. Plaintiff called Dr. Lango to

testify. He saw plaintiff on two occasions, June 11, 2008 and June 27, 2008 (A 196). This first visit was more than 28 months after the accident. Despite this lengthy lapse, Dr. Lango opined that plaintiff's spinal fracture was caused by the accident (A 177-80). Dr. Lango, however, also testified that there was no way to date how old a fracture was by simply looking at films (A 465). Further, when Dr. Lango made his diagnosis of plaintiff, he had not seen any of the records from Portsmouth Hospital pertaining to her prior fall, and the injuries she had sustained (A 448, 450).

Dr. Lango conceded before the jury that plaintiff was a bad historian, who was "confused in many ways", and that it was possible she did not give him the correct facts (A 456, 471). And he admitted to the jury that his diagnosis of a spinal fracture, that was made two and a half years after the accident, was based on "limited and frankly incorrect information" that plaintiff had given him (A 461).

As for plaintiff's nose, Dr. Lango never indicated anything in his records about a nasal fracture, and he did not remember ever diagnosing plaintiff with a fractured nose (A 468). Indeed, Dr. Lango testified that his records showed that plaintiff had not suffered an injury to her nose in the February 13, 2006 accident (A 503).

Plaintiff also called Dr. Naidich, who testified based upon

his review of plaintiff's radiological records. While he claimed on direct examination that plaintiff's spinal and nasal fractures were causally related to the accident, on cross-examination he admitted that he was unable to determine the date plaintiff's alleged fractures happened by simply looking at the films (A 372, 405). He conceded that it was possible plaintiff could have sustained her nasal fracture before the auto accident (A 418). Dr. Naidich acknowledged that plaintiff's films evidenced back problems that were likely present before her accident, including degenerative conditions, bones spurs at multiple locations, spinal stenosis, and chronic degenerative arthritis (A 400-3). The conditions could have been painful enough to result in wheelchair confinement (A 400-3).

The evidence before this jury at that point of the trial raised significant questions of fact and credibility as to whether plaintiff has sustained a "serious injury" in the accident as plaintiff's medical experts had given testimony on cross-examination that she had not. After plaintiff rested, defendants did not simply rest, they read portions of the testimony of Dr. Kacker, who confirmed plaintiff's questionable ability to reliably advise the physicians she sees of her past medical history (A 532, 545). Dr. Kacker also agreed with Dr. Lango that there was no nasal fracture (A 539). Nor could Dr. Kacker attribute plaintiff's purported nasal fracture to the car

accident with any degree of medical certainty (A 544).

The record before this Court does not show that any testimony from defendants' IME physician would have been anything but merely cumulative of the testimony the jury had already heard. Thus, the Supreme Court correctly refused to give a missing witness charge. See, Batchu v. 5817 Food Corp., 56 A.D.3d 402, 866 N.Y.S.2d 755 (2d Dep't 2008).

According to plaintiff, however, the mere fact that a defendant fails to call their doctors automatically requires the giving of a missing witness charge. The PJI and appellate precedent, however, do not set such a low burden. As the First Department correctly found, plaintiff was obligated to satisfy the elements that are a prerequisite for receiving the charge. See, Devito v. Feliciano, 84 A.D.3d 654, 924 N.Y.S.2d 330 (1st Dep't 2011). Here, plaintiff failed to even attempt to satisfy her burden.

The Third Department considered a similar scenario in DeFreese v. Grau, 192 A.D.2d 1019, 597 N.Y.S.2d 230 (3d Dep't 1993). The facts in DeFreese arose out of an accident between the plaintiff, a bicyclist, and the defendant, who was operating her car. The plaintiff sustained mild contusions and an injury to her right knee. She claimed that the latter injury qualified as a "serious injury" under the No-Fault Law, and the matter went to trial.

At the trial in DeFreese, the jury heard "seemingly contradictory interpretations of plaintiff's" knee x-rays from the radiologist who performed the initial reading and plaintiff's expert witness. The Appellate Division ruled that this presented "credibility issues upon which reasonable minds could differ, thus creating the classic jury question." Id., 192 A.D.2d at 1020, 579 N.Y.S.2d at 231. During the defense's case, the defendant did not call his examining physician, and the plaintiff argued that the trial court erred in not given a missing witness charge. The Appellate Division rejected this argument, holding "we see no abuse of discretion" in the Supreme Court's refusal to provide a missing witness charge where the defendant failed to call his medical expert to testify at trial because "there is simply nothing to indicate that the doctor's testimony would not have been merely cumulative of the testimony of plaintiff's treating physician." Id., at 1021, 597 N.Y.S.2d at 232.

Here, plaintiff made no attempt to show that defendants' examining physicians would have given any testimony that differed from that given by Drs. Lango, Naidich, and Kacker. The evidence is similar to that presented to the jury in DeFreese; *i.e.*, plaintiff's own treating physicians provided equivocal evidence as to whether plaintiff actually sustained a serious injury in the accident.

It is indeed questionable whether this issue is even preserved for review. At trial, plaintiff's counsel was afforded the opportunity to make a record and demonstrate why the charge should be given (A 574-75). Counsel was asked to place on the record evidence as to the substance of the doctors' opinions that were contained in their reports, the nature of the opinions they would supply at trial, or how their testimony would not be cumulative. But counsel chose not to and simply argued that defendants' failure to call their examining doctors alone supported the giving of the charge.

Significantly, plaintiff also could have subpoenaed the doctors or a custodian of the records from their offices. Once again, plaintiff's counsel rejected this overture, advising the court "Why would I call these as my witnesses? I don't need them. I don't want them" (A 573).

Additionally, the record before this Court shows that plaintiff's counsel attempted to insert his own version of a missing witness charge during summation by asking the jurors to "draw the strongest inference based on the nature to call witnesses . . . Why wouldn't they call a doctor who's examined on their behalf who's read the record and issued findings, if those findings could not possibly refute what Dr. Lango and Dr. Naidich said" (A 653-654).

Unfortunately for plaintiff, however, Drs. Lango and

Naidich failed to prove that plaintiff had sustained a "serious injury" in the accident. The record is replete with instances where plaintiff and her witnesses contradicted themselves. During cross-examination, plaintiff's doctors supported defendants' arguments. And there is no dispute that plaintiff's doctors had no knowledge of her prior history of injuries. Indeed, plaintiff and her daughter denied the undisputed medical evidence that plaintiff had fallen and fractured her wrist less than four months before the car accident. As the Third Department in DeFreese aptly held under similar circumstances, the evidence without the defendant's doctor created "credibility issues upon which reasonable minds could differ, thus creating the classic jury question." Id., 192 A.D.2d at 1020, 597 N.Y.S.2d at 231.

The testimony of plaintiff's doctors herein was contradictory, equivocal and seriously undermined on cross-examination. The trial court aptly noted that "[defense counsel] decided not [to call his medical witness] in the middle of trial because he thought your guys [plaintiff's doctors] were so bad" (A 572). The record in this case shows that defense counsel employed sound trial strategy which should not be penalized with a missing witness charge.

Under the facts and circumstances of this case, plaintiff failed to satisfy her burden at trial in all respects. She did

not prove that she sustained a "serious injury." The evidence she presented to the jury was equivocal, at best. And as to her entitlement to the missing witness charge, it was nonexistent. The Supreme Court and the unanimous Appellate Division correctly refused to grant plaintiff’s request for the missing witness charge, and this Court should affirm.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Dated: Jericho, New York
April 8, 2013

Respectfully submitted,

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