No. 17-1571

In The

Supreme Court of the United States

MICHAEL MARRANCA,

Petitioner,

v.

VALERY LOYTSKER,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey Appellate Division

PETITION FOR REHEARING

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REASONS FOR GRANTING REHEARING

Constitutional Issue of Fundamental Fairness

The due process guarantee expressed in the Fourteenth Amendment to the United States Constitution requires assurance of fundamental fairness during legal proceedings. In my case, however, I did not receive fundamental fairness because the correct facts were not used by the trial court and by the appellate division.

The New Jersey Appellate Division's opinion is deeply flawed. They relied on an unchecked record. Their facts are erroneous and misleading. They also disregarded the legal precedent in *Edwards v. Walsh*, 397 N.J. Super. 567 (App. Div. 2007), and in *Davidson v. Slater*, 189 N.J. 166 (2007). Their decision is in conflict with the same or a higher court.

Point I

The Appellate Division erroneously reports that "in deciding the motion [for a new trial for damages], Judge Currier applied *Jastram v. Kruse*, 197 N.J. 216 (2008).

The standard was never applied because the judge did not remember what my doctors said during their testimonies. Judge Currier said that "there wasn't anything, as I recall testimony from his doctors, as to projected impact on the – of the injury on his – in his future." Vol. 2, p. 38, 5-10.

However, Dr. Alan Epstein and Dr. Steven Nehmer did testify regarding the impact of my permanent injuries on my future. Dr. Epstein stated:

> In his case pro – prognosis if you – if you wanted to label it would be guarded to poor, which means in the best case scenarios the pain stays the way it is. In the worst case scenarios he gets injury progression, which would give him atrophy, a weakening of the muscles in – in the arms, the back, the neck, and the legs. He would get increased nerve root compression.
>
> As an end result you can – you can get foot drop or bowel/bladder dysfunction, it's called Cauda Equina Syndrome. That's when the disc herniation progresses to a point where the fibers not only leak out to the side, they actually break off. And depending on how far they get passed [sic] the annular fibers, if they were to break off they become a free fragment and they can lodge themselves into the spinal cord.
>
> When that happens you get sudden onset paralysis, those are true surgical emergencies that damage typically is – is permanent. That is the worst possible result of a long term herniated. Is – could it happen? It could happen. Did it happen right now? No. But it's a weakened area, and once an area is weakened it's always weakened.

Vol. 2, p. 137, 2-22.

Dr. Steven Nehmer also provided a projected impact the injuries would have on me. Dr. Nehmer testified that "Basically I think he is going to have ongoing problems for the remainder of his life." Vol. 3, p. 36, 25. When addressing my spine, Dr. Nehmer stated that "I think he's going to always have some limitations, some varying amounts of pain depending on what he does, depending on the day, and his back." Vol. 3, p. 43, 14-17.

The Appellate Division failed to recognize the trial court's failure to appropriately apply the standard of *Jastram v. Kruse*: The judge is to evaluate the nature and extent of the injury, the medical treatment that the plaintiff underwent and might be required to undergo in the future, the impact of the injury on the plaintiff's life from the date of the injury through the date of the trial and the projected impact of the injury on the plaintiff in the future.

As noted above, Judge Currier did not apply the standard of *Jastram v. Kruse* because she did not remember Dr. Epstein's testimony, and also Dr. Nehmer's testimony. In addition, Judge Currier did not acknowledge my testimony on the impact of these injuries on my life. I stated that I have pain every day in my neck, back, and knees, which is aggravated by physical activity. Vol. 2, p. 41, 1-15. I testified regarding activities I can no longer perform. Vol. 2, p. 41, 2-15. I also testified that my injuries affected my ability to care for my father. Vol. 2, p. 38, 5-10.

Point II

The Appellate Division erroneously reports a false credibility issue against me

The opinion claims that "Marranca had a credibility issue because he did not tell Dr. Nehmer about his injuries from a 1996 accident." This is easily proven to be false.

The record confirms that plaintiff expert, Dr. Steven Nehmer, knew about my 1996 accident and injuries. I told him. I also gave him written documentation, including the report and notes by my treating physician, board certified orthopedic surgeon, Dr. Albert B. Thrower, who documented my neck and back strain, and chondromalacia of both knees. For my neck, I did not require any treatment. For my knees, I had arthroscopic surgery.

Regarding my 1996 back strain, the opinion erroneously reports: "Records of his chiropractor, Dr. Robert R. Weber, documented that Marranca was treated for neck, knee, and back pain." It is not in Dr. Weber's report that he treated me for neck and knee pain. He only did some back adjustments. In my testimony, I also confirmed this fact. Vol. 2, p. 62, 18-24.

Dr. Nehmer confirmed in his testimony that I told him about my 1996 accident and injuries:

> Did you – in your report you indicate that he told you about the prior accident he had in 1990 – approximately 1997 you indicated;

> correct? Dr. Nehmer confirmed: Yes. Vol. 3, p. 79, 21-24.
>
> And he also indicated to you that he had arthroscopic surgery on both knees in 1998, that was performed by Dr. Thrower; correct? Dr. Nehmer confirmed: Yes. Vol. 3, p. 79, 25; p. 80, 1-3.

Dr. Nehmer confirmed in his testimony that he knew about my prior back and neck strain. I told him and I gave him written documentation from doctors' reports.

> The patient while he had a prior back problem ten years earlier he did not have herniations at that time. Vol. 3, p. 41, 13-14.
>
> He never had a significant injury to his neck, he never had a prior MRI of his neck. Vol. 3, p. 31, 17-19.

The written evidence I gave to Dr. Nehmer on my 1996 accident and injuries included Dr. Thrower's report and notes, reports from Dr. Epstein, Dr. Reiber, Dr. Friedman, and Dr. Ratzker. Additionally, I gave Dr. Nehmer MRI reports, x-ray reports, and even the police accident report. Furthermore, I brought films along for Dr. Nehmer to see, which he reviewed in front of me.

Dr. Nehmer confirmed in his testimony that he reviewed the documents I gave him, including Dr. Thrower's report, which deals exclusively with my 1996 injuries: "The records I reviewed were the police accident report, and report of Dr. Alan Epstein, notes of Dr. Al Thrower, including his report from 1998,

evaluation of Dr. Lieber [Reiber], of Dr. Friedman, MR reports, and the actual films from AP Diagnosic Imaging and DMI, and the consultation of Dr. Paul Ratzker." Vol. 3, p. 11, 17-22.

These series of documents, providing written evidence of my 1996 injuries, are called "a paper trail." It is significant to note that I am the only person who had these old records on my 1996 accident in my file cabinets in my basement. These documents went directly from me to Dr. Nehmer. I freely gave copies of my medical reports to all my other doctors, to my counsel, and to the defense counsel.

Point III

The Appellate Division erred in failing to find fault in the trial court's failure to provide the aggravation of the pre-existing disability jury instruction.

It should initially be noted that my claims were subject to the so-called verbal threshold of the Automobile Insurance Cost Reduction Act (AICRA). N.J.S.A. 39:6A-1.1 to 35. In the circumstance of this case, the "limitation on lawsuit option," N.J.S.A. 39:6A-89(a), required that I prove a permanent injury caused by the motor vehicle accident in order to recover non-economic personal injury damages such as emotional, mental, and physical pain and suffering. *Davidson v. Slater*, 189 N.J. 166, 174 (2007).

Model Jury Charge 8.11(F), "Aggravation of the Pre-existing Disability" provides:

> In this case, evidence has been presented that [plaintiff] had illness/injury(ies)/condition before the accident/incident – that is [describe the alleged pre-existing injury.] I will refer to this condition as the pre-existing injury. There are different rules for awarding damages depending on whether the pre-existing injury was or was not causing plaintiff any harm or symptoms at the time of this accident.
>
> Obviously, the defendant in this case [is] not responsible for any pre-existing injury of [plaintiff]. As a result, you may not award any money in this case for damages attributable solely to any pre-existing illness/injury(ies)/condition.
>
> If you find that [plaintiff's] pre-existing illness/injury(ies) condition was not causing him any harm or symptoms at the time of the accident, but that the pre-existing condition combined with injuries incurred in the accident to cause him damages, then [plaintiff] is entitled to recover for the full extent of the damages he sustained.

The New Jersey Court has held that "when aggravation of a pre-existing injury is pled by a plaintiff, comparative medical evidence is necessary as part of the plaintiff's prima facie and concomitant verbal threshold demonstration in order to isolate the physician's diagnosis of the injury or injuries that are allegedly "permanent" as a result of the subject accident. *Davidson v. Slater*, 189 N.J. 166, 170 (2007). There is no such requirement when a plaintiff does not plead

aggravation of pre-existing injuries. Id. at 185. However, a pre-existing injury jury charge may become necessary if the issue is raised at trial. In *Edwards v. Walsh*, 397 N.J. Super. 567, 572 (App. Div. 2007), aggravation of a pre-existing condition became an issue at trial when the defendant's attorney brought the issue up on cross-examination. The Court noted that "aggravation of a pre-existing condition may become an issue, and the trial judge may charge the jury about aggravation, if either party raises the issue during the litigation." Id. In *Walsh*, when the defendant objected to charging the jury on pre-existing condition during the charge conference, "the trial court correctly noted that the defendant was 'the one who put it in play here'." Id.

Here, plaintiff did not plead or pursue before trial compensation for an aggravation of his pre-existing disability. However, as in *Walsh*, aggravation of a pre-existing condition became an issue during the trial when the defendant "put it in play." During direct examination, the following exchange took place:

> Czuba: Let me ask you this. Is that finding in any way an aggravation of the pre-existing degenerative conditions?
>
> Dr. Fried: Depending on the severity of injuries to those tissues, you can have residual problems. For example, if you severely sprain your ankle, you can have instability in the future, the ligaments may not function properly, and the ankle may constantly have a wobble

to it. That's why you have to correlate that with your physical examination.

Czuba: Did you find that – that he had an aggravation in this particular case?

Dr. Fried: No, I didn't – well, I didn't see him before.

Vol. 3, p. 143, 23-25; Vol. 3, p. 144, 1-9.

During cross examination, Dr. Fried testified as follows:

Tunnero: Now, you – you talked today about that the prior MRIs of his knees showed degeneration in his – in his meniscus,

Dr. Fried: By report yes, I didn't see those.

Tunnero: Right. Would a person who has – who has some degeneration in his knees like that less able – be less able to withstand trauma without sustaining an injury? That – that –

Dr. Fried: I'm not sure what you – what you stated there.

Tunnero: You don't understand the question?

Dr. Fried: No.

Tunnero: All right. Would – would he – would a person with that condition, if he has some – if we have some degeneration to that meniscus, wouldn't that person be more likely to tear that meniscus in a traum – traumatic

> situation, then [sic] somebody whose meniscus was fine?
>
> Dr. Fried: That's possible.
>
> Tunnero: And wouldn't a person who has degeneration, a 50 year old, 55 year old man be more likely to experience pain from say the same trauma that say a 25 year old might not?
>
> Dr. Fried: I don't know how to answer that. I think the – if – if two individuals have the same amount of trauma they should experience pain, although different people experience pain in different ways. So, I'm not exactly sure what you're looking for there.
>
> Tunnero: Well, you just said that degeneration could make them more prone to –
>
> Dr. Fried: Well, if the –
>
> Tunnero: – to pain.
>
> Dr. Fried: – if the joint isn't functioning properly perhaps a good way to put it would be the same trauma that might not have caused an injury in a 20 year old might cause some sort of soft tissue injury in a 50 something year old.

Vol. 3, p. 158, 17-25; Vol. 3, p. 159, 1-25.

Defendant's attorney, Mr. Czuba, brought aggravation of a pre-existing condition "into play" when he specifically asked Dr. Fried if the doctor found an aggravation of a pre-existing condition in my case. Based upon Dr. Fried's testimony on direct examination and

cross examination, a reasonable jury could have concluded that there was an aggravation of a pre-existing disability in this case. The instruction was necessary for the jury to understand the standard for which to determine if an aggravation of a pre-existing condition was present. For that reason, my counsel, Mr. Tunnero, requested an instruction on aggravation of a pre-existing disability. But Judge Currier refused to provide the instruction because she did not remember Dr. Fried talking about this. "I just didn't recall him going anywhere on that," she said. Vol. 3, p. 183, 14-15. Judge Currier made a legal error in not giving the instruction. The transcript above proves this issue came "into play" at trial.

The Appellate Division held that the trial court's failure to provide the instruction was not error. They relied on my pro se submission to the court that I did not have any pre-existing neck and back conditions, and that my injuries were resolved by 1999. The panel found that there was no testimony by any expert that I had a pre-existing injury that was made permanent, or an aggravation of a pre-existing permanent injury; and that I failed to present any comparative medical analysis that a portion of my injury was caused by aggravation of the pre-existing injury.

The Appellate Division ignores the holding from *Edwards v. Walsh*, supra. Here, as in *Walsh*, aggravation of a pre-existing condition became an issue during trial when the defendant "put it in play" by asking Dr. Fried, "Is that finding in any way an aggravation of the pre-existing degenerative conditions?" The Appellate

Division failed to distinguish or even address the holding from *Walsh*.

The Appellate Division further erred by relying on my pro se submission to determine the applicability of the pre-existing condition jury instruction. My pro se submission to the Appellate Division is irrelevant to determine the correctness of the decision of the trial court during trial.

What is important is that the defendant introduced the possibility that a pre-existing disability was present. In such a situation, an instruction on aggravation of a pre-existing condition can be appropriate and necessary for a jury to understand how a party can be liable based upon an aggravation of a pre-existing condition.

It is not relevant if said plaintiff denies that a pre-existing condition was present. A plaintiff may take the position that there was no pre-existing condition, but accept that a jury may find otherwise. Therefore, when a defendant brings an alleged pre-existing condition into play, the instruction regarding aggravation becomes necessary.

It should be noted that in *Edwards v. Walsh*, the plaintiff also denied that there was a pre-existing condition. The Appellate Division in *Walsh* did not find the plaintiff's position relevant to the appropriateness of the jury instruction. The Appellate Division's reliance on that fact in this case represents another diversion from the holding in *Edwards v. Walsh*.

Finally, the Appellate Division erred by relying on *Polk v. Daconceicao*, 268 N.J. Super. 568 (App. Div. 1993) in finding fault in my not providing any comparative medical analysis evidence that a portion of my injury was caused by aggravation of the pre-existing condition. However, as noted above, when a plaintiff does not plead aggravation of a pre-existing condition, there is no requirement to provide comparative medical analysis evidence. The lower court ignored *Davidson v. Slater* and *Edwards v. Walsh*, and found the lack of comparative medical evidence fatal in this case.

———♦———

CONCLUSION

For many years now, I have been trying to receive justice for the permanent injuries I sustained in a freak accident when the defendant, Mr. Loytsker, drove his truck into a traffic light pole. I have cervical disc herniations at C2/C3, C3/C4, C4/C5, C5/C6, C6/C7, with impingement to my spinal cord. Lumbar disc herniations at L3/L4 and L5/S1, and torn meniscus to my knees. I also sustained a broken neck, with cervical compression fractures at C4 and C5.

The trial court made errors, and the appellate division made errors, which prevented the true facts from being evaluated. So I did not receive fundamental fairness. These serious injuries have definitely affected the quality of my everyday life in a significant way. Also, as was documented in my supplemental brief, pp. 7-11, the defense witness, Dr. Fried, did not testify honestly. His testimony does not meet the threshold the expert must meet under New Jersey Rule of Evidence 702.

In the interest of justice, I respectfully request that my Writ of Certiorari be granted. I believe the Justices of the Supreme Court of the United States have a great capacity to see the truth in my case.

Respectfully submitted,

MICHAEL MARRANCA

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this Petition for Rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court of the United States, and is presented in good faith and not for delay.

Respectfully submitted,

_____

MICHAEL MARRANCA