Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

ZAYAT STABLES, LLC,
Plaintiff,

-against-

NYRA, INC.,
Defendant.

Index Number 26215/08

Motion Date July 29, 2013

Motion Cal. Number 132

Motion Seq. No. 8

The following papers numbered 1 to 4 read on this motion by defendant NYRA, Inc. for, inter alia, an order limiting the triable issues of fact to whether its employees intentionally or recklessly increased the usual risks that are inherent in the sport of thoroughbred horse racing.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Answering Affidavits - Exhibits.....	2
Reply Affidavits.....	3
Memoranda of Law	4

Upon the foregoing papers it is ordered that the motion is disposed of as follows:

On August 6, 2007, Phone Home, a thoroughbred race horse owned by plaintiff Zayat Stables, LLC suffered a serious injury while participating in the fifth race at Saratoga Springs Thoroughbred Racing Track which is owned and operated by defendant NYRA. The plaintiff's horse was assigned to the start race gate with John Velasquez as the jockey. Once inside the gate, the horse's behavior caused the jockey to dismount. According to the plaintiff, the assistant starter straightened the horse's head so that it was

pointed down the track, thereby signaling to the head starter that the horse and jockey were ready to race. The plaintiff alleges that the head starter opened the start gate before Velasquez had his feet in the stirrups and the reins securely in his hand. The jockey fell from the horse, which galloped off without a rider and thereafter injured its right knee attempting to jump the outer rail of the race track. Phone Home allegedly cannot race anymore.

The plaintiff began this action on or about October 27, 2008 by the filing of a summons and a verified complaint. The plaintiff asserted causes of action based on negligence, breach of the covenant of good faith and fair dealing, and promissory estoppel. The plaintiff alleged, inter alia, that the starting gate crew negligently opened the starting gate before Velazquez was ready for the start of the race.

On August 4, 2009, defendant NYRA moved for, inter alia, summary judgment dismissing the complaint against it on the ground that the plaintiff's claims were barred by the doctrine of primary assumption of the risk. The plaintiff argued in opposition that the conduct of the defendant's employees unreasonably increased the risks that are inherent in the sport of thoroughbred racing. Pursuant to a decision and order dated November 18, 2009, this court granted that branch of the motion which was for summary judgment and dismissed the complaint in its entirety. The plaintiff appealed, and on September 20, 2011, the Appellate Division, Second Department, reversed this court's order, stating "the defendant's motion for summary judgment dismissing the complaint is denied." (*Zayat Stables, LLC v. NYRA, Inc*., 87 AD3d 1063). "[W]e conclude that the motion should have been denied," the appellate court wrote, " because the defendant failed to establish, prima facie, that the conduct of its employees did not unreasonably increase the usual risks that are inherent in the sport of thoroughbred racing ***." (*Zayat Stables, LLC v. NYRA, Inc*., *supra*, 1063). After the conduct of further discovery, the defendant submitted a second motion for summary judgment on January 17, 2013 which the court denied by decision and order dated March 18, 2013 upon finding that there were issues of fact pertaining to whether the defendant's employees unreasonably increased the usual risks that are inherent in the sport of thoroughbred racing.

That branch of the motion which is for an order in limine finding that the only issue of fact pertaining to liability that must be tried is whether the conduct of the defendant's employees intentionally or recklessly increased the usual risks that are inherent in the sport of thoroughbred racing is denied. The defendant raises two matters which must be discussed: (1) the standard of care owed by the defendant to the plaintiff on the negligence cause of action and (2) the survival of the second and third causes of action. In regard to the first matter, the Appellate Division, in its decision in this case did not use the standard of reckless and intentional, but instead framed the issue as whether

the conduct of NYRA's employees "unreasonably" increased the usual risks that are inherent in the sport of thoroughbred racing. This is not mere loose language by the appellate court. NYRA owed Zayat "the duty to exercise 'reasonable care under the circumstances' ***." (*Turcotte v. Fell,* 68 NY2d 432, 442, quoting *Akins v. Glens Falls City School Dist.*, 53 NY2d 325, 329). This ordinary negligence standard, not a gross negligence standard, is the one that prevailed after *Turcotte*. In *Underwood v. Atlantic City Racing Ass'n* (295 N.J.Super. 335), the Superior Court of New Jersey, Appellate Division, discussing *Turcotte*, concluded that an ordinary negligence standard, not a gross negligence standard, applied in a case brought by a jockey against a racing association and an operator of lights at a racetrack to recover for injuries he suffered at the track. "We are confident," the appellate court wrote, " that the New York Court of Appeals would have applied an ordinary negligence standard under the conditions on which [an expert's] opinion was based, even though this jockey participated in another race on the same day under similar conditions." (*Underwood v. Atlantic City Racing Ass'n., supra,* 343). In *Morgan v. State* (90 NY2d 471, 485), a case involving sports injuries decided after *Turcotte*, the New York Court of Appeals stated the rule as follows; " participants will not be deemed to have assumed the risks of reckless or intentional conduct *** or concealed or unreasonably increased risks." (Emphasis added.) In *Morgan*, the appellate court permitted a tennis player who snagged his foot on a torn net to recover for personal injury, hardly a situation involving reckless or intentional conduct on the part of the defendant. In *Custodi v. Town of Amherst (* 20 NY3d 83, 88), the Court of Appeals recently repeated this statement of the rule: " participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced ***." (Emphasis added.) In *Charles v. Uniondale School Dist. Bd. of Educ. (*91 AD3d 805,805), the Appellate Division, Second Department, also recently repeated the rule: "Participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent, or reasonably foreseeable consequences of participation, but not to unassumed, concealed, or unreasonably increased risks ." "[T]he defendant," the appellate court wrote in *Charles*, "failed to eliminate all triable issues of fact as to whether it unreasonably increased the risk of harm to the plaintiff by failing to provide him with head and face protection during preseason high school lacrosse practice ." (*Charles v. Uniondale School Dist. Bd. of Educ.*, *supra*, 806.) It is clear from the appellate precedent that the standard to be applied to the plaintiff's first cause of action is that of ordinary negligence. In regard to the second matter, the Appellate Division did not modify and affirm this court's order thereby preserving only the first cause of action for trial, but instead reversed and stated "the defendant's motion for summary judgment dismissing the complaint is denied." The defendant was denied summary judgment as to the entire complaint.

That branch of the motion which is for an order finding that the relevant value of Phone Home was the value of the horse on the date of his injuries is granted. "Mere conjecture, surmise or speculation is not enough to sustain a claim for damages." (*Fiederlein v. New York City Health and Hospitals Corp*., 56 NY2d 573, 574). Considering all the risks and uncertainties in the career of a racehorse, Phone Home's value cannot be determined as of some future date based on conjecture that, for example, he would have won a graded stakes race. However, the plaintiff is not precluded from offering proof that Phone Home's potential as a racehorse is a factor that is properly taken into account in determining his present value on the date of his injury. Potential is a factor that is commonly taken into account in making valuations (*see*, *McSparron v. McSparron*, 87 NY2d 275).

That branch of the motion which is for an order precluding the testimony of Patricia Miller, the plaintiff's expert witness, based on a "fatigue curve analysis" is granted. The plaintiff has indicated that it intends to call Patricia Miller as an expert witness. Miller utilizes a "logarithmic velocity decay assessment" to determine the value of a horse, and her own company, EQB, Inc., developed this technique. As shown by an article co-authored by Miller, the technique involves, inter alia, making two dimensional echocardiac measurements of horses. According to the defendant, " Plaintiff has not proffered any scientific data or studies utilizing her company's assessment methods." The defendant's expert, Anthony Cobitz, has submitted an affidavit stating "Ms. Miller's appraisal of the subject horse's value rest almost entirely on a proprietary, quasi-scientific formula that, in sharp contrast to her claims, is not widely used or accepted within the thoroughbred racing industry." The plaintiff did not submit an affidavit from Miller contradicting Cobitz, and the only indication that Miller's technique might have some general acceptance in the scientific community is a line in the plaintiff's memorandum of law indicating that the technique is used for Olympic swimmers. Novel scientific evidence requires a determination as to its reliability (*People v. Wesley,* 83 NY2d 417). "New York courts evaluate the admissibility of expert testimony under the Frye test ***pursuant to which such testimony must be based on principles that are generally accepted in the relevant scientific community (*People v. Wilson,* 107 AD3d 919, 920). "While foundation concerns itself with the adequacy of the specific procedures used to generate the particular evidence to be admitted, the test pursuant to *Frye v. United States*, 293 F. 1013 poses the more elemental question of whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally" (*People v. Wesley, supra*, 422; *People v. LeGrand*, 8 NY3d 449). A *Frye* hearing is not necessary in this case because the plaintiff failed to create a genuine issue of fact pertaining to whether a "logarithmic velocity decay assessment" generates results accepted as reliable within the scientific community. A *Frye* hearing is not necessary because there is no issue of fact pertaining to the reliability of the scientific evidence

proffered by Miller (*see*, *Page v. Marusich*, 51 AD3d 1201).

Those branches of the motion which are for an order precluding Patricia Miller from testifying at the trial concerning the valuation of Phone Home are denied. Damages must be capable of measurement based upon known reliable factors, and their determination must be made without undue speculation (*see*, *Ashland Management Inc. v. Janien* 82 NY2d 395; *Presler v. Compson Tennis Club Associates*, 27 AD3d 1096). The defendant did not show on this motion that Miller's proposed testimony will be entirely speculative on the valuation issue. Moreover, the defendant failed to show on this motion that Miller cannot qualify as an expert in the valuation of racehorses.

That branch of the defendant's motion which is for an order precluding the plaintiff from introducing any evidence pertaining to Richard Brosseau's employment is denied. The witness has relevant testimony to give. The defendant employed Richard Brosseau as a head starter responsible for opening the starting gate at the beginning of races from 2004 to 2007. It is true that Brosseau did not work on August 6, 2007, the date of Phone Home's accident. However, the plaintiff intends to call Brosseau to give testimony concerning the racetrack's policies and procedures for the start of a race and concerning admissions allegedly made by Velasquez to him.

That branch of the motion which is for an order precluding the plaintiff from offering newspaper articles into evidence is granted to the extent that the plaintiff is precluded from offering such articles for the truth of their content. Newspaper articles constitute inadmissible hearsay *(see*, *Young v. Fleary*, 226 AD2d 454; *In re Eighth Judicial Dist. Asbestos Litigation,* 197 AD2d 901). The plaintiff's reliance on *Peckman v. Mutual Life Ins. Co. of New York* (125 AD2d 244) is misplaced because there the newspaper articles were considered under the more lenient evidentiary rules pertaining to the opposition of a summary judgment motion. The court notes that newspaper articles may be used for certain purposes on cross examination (*See*, *People v. Strewl*, 246 App Div. 400).

That branch of the motion which is for an order precluding the testimony of newspaper reporters is denied. The defendant did not show on this motion that newspaper reporters would only have hearsay testimony to offer.

That branch of the motion which is for an order precluding the plaintiff from offering evidence that Phone Home was insured for $500,000 is denied. As a general rule, evidence of insurance coverage is not admissible in a negligence action (*Sobie v. Katz Const. Corp*., 189 AD2d 49). Evidence that an alleged tortfeasor carries liability

insurance is generally inadmissible (*Salm v. Moses*, 13 NY3d 816) for two reasons: (1) the increased likelihood that a jury will find against the defendant because an insurance company will be responsible for payment and (2) evidence of liability insurance raises collateral issues (*Salm v. Moses, supra*). In the case at bar, the plaintiff does not propose to show that the defendant carried liability insurance, but that the former insured Phone Home for $500,000. The usual policy reasons barring the introduction of evidence of insurance are not applicable here. According to the plaintiff, it is customary in the racing industry to insure a horse for one-third of its actual value. Contrary to the contention of the defendant, such evidence is relevant and admissible. "When from the nature of the case, the amount of damages cannot be ascertained with certainty, it is proper to place before the trier of fact all the facts and circumstances of the case having a tendency to show the damages or their probable amount, so as to enable him or her to make the most intelligent and accurate estimate which the nature of the case will permit ***." (*Lager Associates v. City of New York,* 304 AD2d 718, 721; *Duane Jones Co. v. Burke*, 306 NY 172). The insured value of property may be received into evidence in making a valuation (*see, e.g., . Red Star Barge Line, Inc. v. Nassau County Bridge Authority,* 683 F.2d 42, 44 [" We believe, however, that the ultimate figure can be sustained on the basis of all of the properly admitted evidence, including the vessel's insured value."]; *Complaint of North American Trailing Co.*, 763 F.Supp. 152).

This constitutes the decision and order of the court.

Dated: December 17, 2013

Howard G. Lane, J.S.C.