

## And The Defense Wins

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### Paul Caleo and Aimee Hamoy-Perera



Plaintiff Martin Olvera Anguiano, a 53-year-old restaurant owner from Ridgecrest, California, alleged that he suffered a slip/trip-and-fall at the Home Depot in Ridgecrest on June 12, 2013, while shopping on an aisle where a Home Depot employee was working. Plaintiff testified at trial that he was looking at some products on a shelf and took a step backwards. As he stepped backwards, Plaintiff testified that he felt “something” under his foot, lost his balance, and landed across the aisle onto a large pallet of tile that a Home Depot employee was stocking onto another shelf.

As he fell, Plaintiff claimed he struck his lower back, his shoulder, and his head before coming to rest between the pallet and the shelf. The pallet was moved out of the way and paramedics arrived to provide emergency care to Mr. Anguiano at the store. He was transported to the local emergency room and then eventually to a trauma hospital in Bakersfield. All radiological studies, including CT Scan and MRI of the brain were normal. After 36 hours, he was discharged from the hospital with a diagnosis of possible syncope.

Because there was no evidence as to what actually caused Plaintiff to fall, the parties bifurcated the trial as to liability and damages. During the liability phase, Plaintiff and his wife testified that he had suffered a blow to his head during the fall, claiming he had a large red and swollen area on the back of his head in the weeks following the accident. It was this purported head trauma that Plaintiff relied upon to support his claim that he suffered a mild traumatic brain injury (mTBI). Plaintiff’s liability expert/safety engineer, Brad Avrit, testified that the aisle was messy and that Defendant had failed to maintain a safe shopping environment for Plaintiff.

Defendant Home Depot disputed both liability and the extent of Plaintiff’s injuries, particularly his mTBI. Plaintiff had no idea what caused him to lose his balance, therefore Defendant argued that there was no evidence of any dangerous condition and therefore Defendant was not negligent. Even if there was “something” on the aisle that caused Plaintiff to fall, Defendant’s employee had also warned Plaintiff to be careful while traversing the aisle.

The Kern County jury of four men and eight women deliberated for three days on the issue of liability and found Plaintiff 60 percent at fault for the accident and Defendant 40 percent at fault.

The case then proceeded to the damages phase. After being released from the hospital, Plaintiff sought treatment three weeks after the accident from Dr. David Ledesma, a Ridgecrest chiropractor. At trial, Dr. Ledesma, testified that he also recalled seeing a swollen, red area on the back of Plaintiff’s head, even though no such observation was noted anywhere in Plaintiff’s medical records. On cross-examination, Dr. Ledesma admitted that his notes indicated Plaintiff was mostly pain free and back to work within a few months after the accident.

Defendant presented evidence from Dr. Tony Strickland (neuropsychologist) and Dr. David Hoenig (neurologist) to support its theory that Plaintiff suffered only orthopedic injuries in the fall. Dr. Strickland testified extensively that Plaintiff gave poor effort during his neuropsychological testing and that Plaintiff suffered from depression related to his lower back and shoulder pain from the accident. In addition, Dr. Hoenig testified that Plaintiff also gave poor effort during his physical examination and 1) that Plaintiff did not suffer a concussion or mTBI, and 2) that the orthopedic

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injuries from the accident resolved in a few months. Defendant also called the paramedics and emergency department doctors who all confirmed they saw no sign on head trauma

### **Motion In Limine to Exclude Quantitative EEG**

Defendant moved to exclude any reference to a quantitative EEG performed on Plaintiff by Dr. Michael Mark over two years after the incident. Plaintiff intended to introduce this evidence to support the claim of mTBI and to support a claim for future medical expenses estimated at \$1 million related to further qEEG and brain mapping treatment. Both sides completed extensive briefing and the Court heard expert testimony and lengthy argument. Ultimately, the Court agreed that qEEG is an unreliable method for diagnosing mTBI and therefore any reference to it must be excluded. Plaintiff's claim for \$1 million in treatment related to qEEG was also excluded.

### **Damages**

Plaintiff also sought damages for injuries to his lower back and shoulder, and for past and future wage loss. He presented expert testimony that he would need ongoing treatment for his mTBI for the next 20 years. Plaintiff ultimately asked the jury to award him \$11.8 million, of which over \$10 million was sought for pain and suffering. Plaintiff blackboarded economic damages (past and future medical expenses, as well as past and future wage loss) at \$800,000.00.

Defendant argued that Plaintiff did not suffer an mTBI and that his orthopedic injuries resolved after chiropractic care, citing the medical records and the lack of any objective evidence that Plaintiff suffered any head trauma in the fall. Defendant also pointed out the inconsistencies among witnesses regarding Plaintiff's demeanor and ability to work. Defendant asked the jury to award up to \$208,000.00 for his orthopedic injuries.

The jury awarded damages as follows

- Past wage loss = 0
- Past medical expenses = 98,517.31
- Future wages = 36,000.00
- Future medical = 285,000.00
- Past Noneconomic = 150,000.00
- Future Noneconomic = 350,000.00
  
- TOTAL AWARD = 919,517.31
- REDUCED BY PLAINTIFF'S COMPARATIVE of 60% = TOTAL JUDGMENT = \$367,806.92

Defendants were represented by DRI members [Paul Caleo](#) and [Aimee Hamoy-Perera](#) of **Burnham Brown, PLC** in Oakland, California.

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