

ROSE *v.* STEPHENS & CONDIT TRANSP. CO.

Circuit Court, S. D. New York. April 8, 1882.

NEW TRIAL—DAMAGES—PERSONAL INJURY—NEWLY-DISCOVERED EVIDENCE.

In an action to recover damages for a personal injury a motion by defendant for a new trial because of newly-discovered evidence as to the extent of plaintiff's injuries will not be granted where it does not appear that defendant, before the trial, made any investigation as to the character of the injuries received.

Motion for New Trial.

Chauncey Shaffer, for plaintiff.

Thomas E. Stillman, for defendants.

WALLACE, J. The motion for a new trial upon the ground of newly-discovered evidence should not be granted, because the defendant has failed to show that by the exercise of reasonable diligence the evidence newly discovered could not have been obtained and used upon the trial. The evidence relates to the extent of the injuries received by the plaintiff through the negligence of the defendant. The plaintiff alleged in his complaint that he had sustained severe injuries, and claimed \$5,000 damages. It does not appear that prior to the trial the defendant made any investigation to ascertain the character or extent of these injuries. Its officers seem to have contented themselves, in their preparation for a defense of the action, with accepting the plaintiff's case as it might appear upon the trial, so far as this issue is concerned. If it had been shown, upon this motion, that an effort had been unsuccessfully made upon their part, by inquiry of such persons as would be likely to have knowledge of the facts, to ascertain the character of the plaintiff's injuries, a very different case would be presented, and one which might appeal with some force to the favorable consideration of the court. To grant the

motion upon such a case as is made would encourage fsupineness on the part of defendants. The precedent would encourage defendants 809 to ignore proper preparation upon one material issue, in order to obtain the chances of a second trial in case of failure upon the other issues.

The motion is denied.

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