At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the day of 23rd day of December, 2004

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

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KISNET BROOKS,

Plaintiff,

- against - Index No. 49128/97

MAINTENANCE SERVICE RESOURCES, INC.

Defendant.

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MAINTENANCE SERVICE RESOURCES, INC.

Third-Party Plaintiff,

- against - Index No. 81564/99

ALLIED EXTERMINATING,

Third-Party Defendant.

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The following papers numbered 1 to 9 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-6
Opposing Affidavits (Affirmations)	7
Reply Affidavits (Affirmations)	8-9
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Allied Exterminating (Allied) moves for an order, pursuant to CPLR 4404(a): 1) reconsidering the court's prior order denying a directed verdict or setting aside the jury verdict as unsupported by legally sufficient evidence and directing a verdict in its favor or, in the alternative, 2) for a new trial on damages on the grounds that (a) the verdict was against the weight of the evidence or, in the alternative, (b) that the jury charge and special verdict sheet on substantial cause was error and the court failed to charge mitigation of damages, or in the alternative, (c) that the court erred in permitting plaintiff's treating physician to testify about MRIs and reports not in evidence or, in the alternative, 3) for an order reconsidering the court's prior order denying a mistrial based upon plaintiff's testimony about her right leg or, in the alternative, 5) for an order reducing the amount of the verdict pursuant to CPLR 5501(c) and ordering an Article 50-B hearing if necessary. Defendant Maintenance Service Resources, Inc. (MSR) separately moves for an order, pursuant to CPLR 4404, setting aside the verdict as against the weight of the evidence and for a judgment in defendants' favor or, in the alternative, granting a new trial on damages on the grounds that the verdict was excessive and was not supported by legally sufficient evidence.

Plaintiff Kisnet Brooks (plaintiff) commenced this action against defendants to recover damages for personal injuries she sustained to her left knee and lower back when she fell into a hole in the floor of the HIP Center where she worked. The hole was created by a non-party flooring contractor. Defendant MSR, which had been hired by HIP to perform

cleaning, security, and pest control, hired Allied to perform extermination in the hole. The liability phase of the trial found in favor of plaintiff and against defendants. After the damages trial, the jury awarded plaintiff $2,516,000.00, consisting of $14,000.00 for past medical costs, $287,000.00 for past lost earnings, $450,000.00 for past pain and suffering, $25,000.00 for future medical costs for 37 years, $1,000,000.00 for future lost earnings for 20 years, and $740,000.00 for future pain and suffering for 37 years.

In addressing defendants' motions insofar as they seek to set aside the verdict for legal insufficiency of the evidence, the court must determine whether there was "no valid line of reasoning and permissible inferences which could possibly [have led] rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). "'The test is not merely whether the jury erred in its interpretation of the evidence, but whether any evidence exists to support the verdict'" (*Kinney v Taylor*, 305 AD2d 466, 466 [2003], quoting *Barker v Bice*, 87 AD2d 908, 908 [1982]).

As to defendants' motions insofar as they seek to set aside the verdict as against the weight of the evidence, it is settled that "[a] jury verdict should not be set aside [on this basis] unless the jury could not have reached its verdict on any fair interpretation of the evidence" (*id.* at 467). In this regard, "[g]reat deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of the witnesses are for the fact-finders, who had the opportunity to see and hear the witnesses" (*id.*).

Here, Allied argues that the jury's award of damages must be set aside as unsupported by credible evidence or, in the alterative, as against the weight of the evidence on the grounds that plaintiff failed to provide sufficient proof to establish 1) that her injuries were caused by her fall and were not degenerative and/or had not resolved prior to trial to support an award for past and future pain and suffering; 2) loss of earnings after surgery was performed on her left knee and a projected rate of increase in lost earnings prior to trial (past lost earnings); 3) loss of future earnings and a projected rate of increase of her future lost earnings and the duration therefor; and 4) loss of future medical expenses and the duration therefor.

Insofar as MSR moves to set aside the verdict or, in the alternative, for a new trial, MSR limits its arguments to the damage awards for pain and suffering and loss of past and future earnings.

Addressing defendants' claims in seriatim, viewing the evidence in a light most favorable to plaintiff, and affording plaintiff every favorable inference which may properly be drawn therefrom (*Butler v N.Y.State Olympic Reg'l Dev. Auth.*, 292 AD2d 748, 750 [2002]), there was sufficient evidence to support the jury's conclusion that plaintiff's injuries to her left knee and lower back (collectively "plaintiff's injuries") were caused by her accident and were not degenerative and/or had not resolved prior to trial to support a claim for past and future pain and suffering. Moreover, the verdict was not against the weight of the evidence.

In this regard, plaintiff testified that on March 3, 1995, her left leg entered the hole in

the floor up to her knee or thigh "hard" while her right leg bended and twisted on the floor's surface; that she felt pain in her hip, back and legs, including "tearing" and "jerking" in her left leg; that both legs began to swell; and that, unable to walk, she was taken by ambulance on a gurney to Beth Israel Hospital emergency room, where her legs, back and hand were x-rayed and she was sent home with instructions to soak, take Tylenol for pain, and consult a doctor if her symptoms worsened.

Plaintiff further testified that six weeks after the accident, when she was first seen by orthopedist and treating physician Dr. Joseph D'Angelo, her left knee was painful and swollen and she had numbness and pain in her back. Dr. D'Angelo testified that his examination of plaintiff's left knee revealed objective findings of crepitation, swelling, and torn menisci. His examinations of plaintiff's lumbar spine revealed objective findings of spasm in the muscles and radiculopathy, namely irritation of the nerve root due to pressure from a bulging or protruding disc. In addition, he said that his findings supported plaintiff's subjective complaints of pain.

Trial testimony further reveals that plaintiff underwent physical therapy for her left knee and back; that Dr. D'Angelo performed arthroscopic surgery on plaintiff's left knee, which revealed chondromalacia of the patella (traumatic damage to the surface of the kneecap) and a degenerative tear of the lateral meniscus (an initial traumatic tear which degenerated because it was "chewed up" due to continued walking during the two-year period between the accident [3/3/95] and the surgery [6/27/97]; and that after surgery, plaintiff

continued to suffer pain, swelling, atrophy, and buckling in her left knee, requiring intermittent use of a cane, as well as pain in her lower back, up until the time of trial. Finally, Dr. D'Angelo testified that plaintiff's injuries were traumatic and caused by her fall, were permanent and completely disabling, and plaintiff testified that she had never had an injury to her lower back, knee or ankle prior to this accident.

Defendants' argue that there were numerous conflicts in the trial testimony demonstrating that the award for past and future pain and suffering was not supported by credible evidence and/or that the verdict was against the weight of the evidence. Specifically, Allied asserts, *inter alia*, that before the accident plaintiff engaged in sports and other activities, which purportedly subjected plaintiff to knee and back injuries; that Beth Israel's x-rays were of plaintiff's *tibia* (shinbone), not her knee, and only revealed a previously healed left *ankle* fracture; that Dr. D'Angelo made a post-operative finding of a "*degenerative*" tear, as opposed to a *traumatic* tear of plaintiff's left knee; and that Dr. Taylor, defendant's examining physician, testified that plaintiff did not tear the meniscus as a result of her fall because if she had, the tear would have appeared during surgery, which it did not, as indicated on the postoperative report which stated "*degenerative* tear" and "*degenerative* and frayed free margin" (emphasis added).

Allied also points to testimony which purportedly undermined the credibility of plaintiff and Dr. D'Angelo, including plaintiff's testimony that she had not read her signed verified bill of particulars alleging that the injuries she sustained were "aggravated and

exacerbated by the underlying occurrence," and that she had never broken her ankle; the testimony of a HIP employee that the hole into which plaintiff fell was only six inches; and Dr. D'Angelo's testimony that he initially diagnosed plaintiff's back injury as a sprain and admitted that tests for diagnosing plaintiff's injuries were partly subjective.

Similarly, MSR cites testimony indicating that plaintiff only took prescription pain medication after surgery; that the surgery lasted only a few hours; and that plaintiff never received injections or used crutches or braces, received an epidural during her knee surgery, suggesting minimal back pain, admitted and then denied that her pain and swelling had diminished after her surgery, and did not provide x-rays taken by Dr. D'Angelo or call a radiologist at trial to read her MRIs.

Notwithstanding the foregoing, it is well established that the resolution of conflicting evidence and the credibility of the witnesses are for the jury to determine (*Swensson v New York, Albany Despatch Co., Inc.*, 309 NY 497, 505 [1955]; *Kinney,* 305 AD2d at 467 ["Great deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the fact-finders, who had the opportunity to see and hear the witnesses"]; *St. Hilaire v White*, 305 AD2d 209 [2003] ["Plaintiff's contentions regarding the permanency and severity of his injuries turned largely on conflicting medical evidence and other issues of credibility that were properly resolved by the jury"]). Here, the jury was afforded an opportunity to listen to the testimonial and other evidence and arguments of both sides, to evaluate this evidence, and to make appropriate findings of fact and credibility as to

each side's witnesses. Based upon the verdict, the jury clearly found that the accident was the proximate and/or substantial cause of plaintiff's injuries and that plaintiff's injuries were not degenerative and/or had not resolved prior to trial, and that the evidence was sufficient to support the award for past and future pain and suffering.

Defendants also argue that the evidence does not support the jury's award for past and future loss of earnings and must therefore be set aside as speculative. Specifically, defendants contend that there was no proof that the injuries plaintiff sustained rendered her permanently unemployable or disabled from her occupation. They also argue that plaintiff worked after the accident, but failed to make reasonable efforts to obtain employment using the skills she had acquired from taking college and other vocational courses.

In support of this argument, defendants cite plaintiff's trial testimony that she only returned to her job as an imaging clerk[1] at HIP for two days shortly after the accident and then voluntarily resigned from HIP in February, 1997 in exchange for a modest severance agreement ($5,000 plus limited benefits), despite some evidence of HIP's accommodations for her injuries. In addition, defendants note that before surgery, plaintiff worked at Home Depot for six weeks and that after the surgery, she styled hair at home for pay five or six times. Further, defendants cite trial testimony that plaintiff never returned to HIP seeking reasonable accommodations for her disability; quit her job at Home Depot as too debilitating without attempting to use her cane, explain her disability, or seek a different position;

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[1]Plaintiff's job entailed, *inter alia*, scanning information into a computer and verifying records.

contacted the Vocational and Educational Services for Individuals with Disabilities (VESID) in 2001 for employment yet failed to follow-up; purportedly attempted to obtain work on several occasions but produced no employment documentation or resumes at trial; and had taken college and vocational courses and received good grades in bookkeeping, accounting, typing, computers and belly dancing but failed to use these skills when seeking employment. Finally, defendants note that plaintiff failed to call a vocational expert or economist to testify with respect to her lost earnings.

"The basic rule is that loss of earnings must be established with reasonable certainty, focusing, in part, on the plaintiff's earning capacity both before and after the accident" (*Johnston v Colvin*, 145 AD2d 846, 849 [1988]; *Davis v City of New York*, 264 AD2d 379 [1999]). "Recovery is allowed not only for actual lost wages, but for any diminution in future earning capacity" (*Johnson*, 145 AD2d at 848). "[T]he initial burden of proving lost wages is on the claimant" (*Faas v State*, 249 AD2d 731, 733 [1998]).

The evidence supports an award for past and future loss of earnings based upon plaintiff's yearly salary of $21,927.60 at the time the accident occurred, but does not support the award to the extent that it includes a projected salary increase. In this regard, Dr. D'Angelo testified that plaintiff, who was 44 years old at the time of trial, was disabled after the accident and unable to return to work; that in August 1996, he instructed her to restrict all activities until he received permission from Workers' Compensation to perform surgery, which meant she was not permitted to work, lift, or engage in excessive walking or stair

climbing; and that she remained disabled while he treated her before her knee surgery was performed in June, 1997.

Dr. D'Angelo further testified that after he performed surgery on plaintiff's knee, plaintiff was permanently, totally disabled as a result of her injuries, and that he told plaintiff that he did not think she would be able to return to work, that it would be a "futile effort," and that "she should try to arrange her life according to that."

In addition, plaintiff testified that she was unable to work at Home Depot and style hair because she had pain standing on her legs. Further, plaintiff's testimony, supported by HIP pay stubs, was that she was earning $11.36 per hour working 35 hours per week at the time of her accident, and the court instructed that she had a work-life expectancy of 13 more years.

Thus, the evidence was legally sufficient to support an award of damages for past and future loss of earnings based upon the yearly salary plaintiff was earning at HIP at the time of her accident. Defendants argue that if plaintiff had in fact been downsized, as she testified, and could only earn $7.00 per hour at a Home Depot-type job, her salary would be less than $21,927.60 per year. However, it was not irrational for the jury to reject plaintiff's testimony that she was downsized, and to credit the evidence that she voluntarily resigned.

Nevertheless, while plaintiff's HIP pay stubs indicate that she earned over $7.00 per hour in 1991/1992 and $11.36 per hour in 1995, demonstrating an average increase of 15% per year in her hourly wages, but for plaintiff's unsupported testimony that she was being considered for a management position, there was no testimony, either from an economist, a

vocational expert or a HIP employee that plaintiff would have continued to receive similar raises in the future. Thus, the evidence of her potential wage increases was too speculative to support an award in excess of plaintiff's yearly salary multiplied by the number of years for which those damages were awarded (*McKay v Ciani*, 288 AD2d 587, 591 [2001] [Since the $85,000 award given by the jury is not supported by the evidence introduced at trial, this award cannot exceed $285,082 - the amount supported by plaintiff's expert]). Further, to the extent the award included the projected raise increase, it was against the weight of the evidence. Thus, limiting the award to plaintiff's yearly HIP salary multiplied by the number of years for which the damages were awarded results in an award for past lost earnings of $197,753.54 ($21,972.60 x 9 years) and an award for future lost earnings in the amount of $439,452 ($21,972.60 x 20 years [the number of years the jury awarded for future lost earnings]), subject to any further reductions which may be appropriate.

Allied next argues that plaintiff did not provide any expert evidence to support her claim for future medical expenses because she failed to provide sufficient objective evidence that her injuries were caused by her fall. This argument is rejected as the court has already found that the evidence was legally sufficient to establish that the accident caused plaintiff's injuries (*see Jones v Davis*, 307 AD2d 494, 497 [2003], *appeal dismissed*, 1 NY3d 566 [2003]).

Allied also contends that the only evidence to support the award for future medical expenses was Dr. D'Angelo's testimony that plaintiff would "most likely" require future

treatments from him, but did not know when, and that plaintiff would require future physical therapy "as frequently as one or two, or three months, or maybe as infrequently as every six months," and that the knee could require "treatment periodically, three months, four months." He also testified that the cost of physical therapy was $50.00 per treatment, and that plaintiff would likely require treatment for the rest of her life.

The evidence was too speculative to support the award for future medical costs. In this regard, Dr. D'Angelo failed to indicate the number of treatments plaintiff might require from him, the cost of such treatments, or the length of time those treatments would be needed (*see Jackson v Chetram*, 300 AD2d 446, 447 [2002] [claim for future medical expenses speculative where, *inter alia*, there was no evidence as to the actual cost of any such future medical expenditures]), and failed to specify with any certainty the number of months per year of physical therapy plaintiff would require, or the number of visits required per month. Thus, the award for future medical expenses was based upon "'uniformed speculation'" (*Cramer v Kuhns*, 213 AD2d 131, 139 [1995], *appeal dismissed without opinion* 87 NY2d 860 [1995] quoting *Buggs v Veterans Butter & Egg Co.*, 120 AD2d 361 [1986]), and must be set aside.

In the alternative, Allied moves for a new trial on the grounds that the court failed to charge the jury and submit a special verdict sheet containing a two-part interrogatory requiring a separate determination as to causation for *each* of plaintiff's injuries. In this regard, the court charged the jury "[i]f you decide that the occurrence of March 3[], 1995 was a substantial factor in causing an injury to the plaintiff, Kisnet Brooks's' [sic] left knee *and or*

lower back, the plaintiff is entitled to recover a sum of money which would justly and fully compensate her ... ." Plaintiff asserts that the jury should have had the opportunity to state whether it was basing its damages award on both claims of injury or only one, and that if the award had only been for one of the injuries, "the issue of the extent of the grossly excessive award would have been set forth in the verdict." In support of its position, Allied relies upon *Hoffman v S.J. Hawk* (258 AD2d 618 [1999]), where the plaintiff, as a result of a motor vehicle accident, allegedly sustained a torn meniscus and bulging discs in his lower back. On appeal, it was held that the trial court erred in failing to submit to the jury a special verdict sheet containing a two-part interrogatory requiring a determination of "(1) whether the accident caused the injury to the injured plaintiff's knee, and (2) whether the accident caused the injured plaintiff's bulging discs." Allied also relies upon the cases cited by *Hoffman*, which condemn the use of general verdicts in cases where the plaintiff seeks recovery on several different theories of liability.

"Generally, the failure to object to the charge at trial and before the jury retires precludes review . . . However, review may be had if the error claimed may be regarded as so 'fundamental' in nature as to warrant a new trial" (*Makovitzky v Spataro*, 139 AD2d 704 [1988]). At trial, plaintiff failed to object to the court's ruling, although the court invited the parties to raise objections before instructing the jury. In any event, "[t]he rule is well settled that a general verdict in favor of a plaintiff can stand only if each and every theory presented to the jury was adequately supported by the proof" (*Papa v City of New York*, 194 AD2d 527,

530 [1993]; *see also Steidel v County of Nassau*, 182 AD2d 809, 812 [1992]). Here, the charge and question on the verdict sheet as to whether plaintiff's fall was a substantial cause of her injuries was supported by legally sufficient evidence and thus there is no merit to Allied's contention that a new trial is required (*see Arpino v Jovin C. Lombardo*, P.C., 215 AD2d 614, 615 [1995]).

In the alternative, Allied argues that a new trial is warranted because the court erred in permitting Dr. D'Angelo, plaintiff's treating physician, to testify about MRIs taken of plaintiff's left knee and lower back because they were not admitted into evidence. Allied also asserts that the court erred in declining its request to charge mitigation of damages with respect to future loss of earnings. In opposition, plaintiff contends that Allied failed to object to testimony concerning the MRI of plaintiff's left knee and that Allied's objection with respect to plaintiff's lower back was sustained. Plaintiff does not address Allied's mitigation argument.

The record reveals that prior to trial, Allied moved in limine to preclude Dr. D'Angelo from testifying about plaintiff's back MRI unless the MRI was admitted into evidence, and from testifying about a meniscus tear to the *right* knee without an MRI. Allied later objected when plaintiff's counsel questioned Dr. D'Angelo about plaintiff's back MRI on the grounds that Dr. D'Angelo was reading from an MRI report authored by another and that the MRI had not been produced, and the court sustained the objection and instructed the jury that it had

made a ruling that precluded further inquires as it related to that testimony through Dr. D'Angelo.

Inasmuch as Allied did not object to the testimony about plaintiff's *left* knee MRI, this claim has been waived. Further, since the court sustained Allied's objection to testimony about plaintiff's back MRI, and plaintiff failed to request an additional instruction, Allied's claim with respect to this testimony is waived (*Panzarino v Weisberg*, 257 AD2d 483, 484 [1999], *appeal dismissed* 93 NY2d 998 [1999]). In any event, plaintiff properly argues that any error with respect to Dr. D'Angelo's testimony about plaintiff's left knee MRI was harmless since Dr. D' Angelo testified that he saw the injuries which appeared on plaintiff's MRI from his own observation when he performed plaintiff's arthroscopic surgery, and since the operative report, which was properly admitted into evidence, corroborated Dr. D'Angelo's testimony about the plaintiff's MRI (*see Ferrantello v St. Charles Hosp. and Rehabilitation Ctr.*, 275 AD2d 387, 388 [2000]).

Allied next argues that the court erred in denying its request for a charge on mitigation of damages on the ground that plaintiff had skills, resumes, post-accident work experience, and "finances." This claim is rejected. Although plaintiff testified that despite her severance payment, she did not buy a computer because she could not afford it, that she did not follow-up with VESID for employment opportunities because she was told she would be contacted, and had skills she learned in college and vocational classes, there was no evidence, from a vocational expert or otherwise, that plaintiff was able to utilize these skills to engage in

employment. In this regard, Dr. D'Angelo testified that plaintiff was totally disabled and unable to work. In addition, plaintiff testified that she was unable to work at the two jobs she had attempted after the accident because of the pain she suffered from standing, and also testified that sitting for long periods of time caused pain and numbness in her back. As such, there was insufficient evidence in the record to allow the jury to make the determination which would have been called for by the instruction (*Carr v Third Colony Corp.*, 2001 NY Slip Op 40400 [U], * 30-32). In any event, any error in failing to charge mitigation was harmless since Allied argued during its summation that plaintiff only worked ten weeks during the nine years since her accident, had skills and knew how to do things others did not know how to do, and that according to the law, "this country" provided for people with disabilities at the work place

Allied also contends that the court erred in refusing to give an adverse inference charge with respect to plaintiff's failure to produce the ambulance call report and the Beth Israel emergency room records. There is no evidence in the record, nor has Allied demonstrated in its moving papers, that the *unproduced* documents in question actually exist, that they were under plaintiff's control, and that plaintiff had no reasonable explanation for not producing these documents (*Scaglione v Victory Mem. Hosp.* , 205 AD2d 520 [1994], *lv denied* 85 NY2d 801 [1995]). In any event, any error in failing to so instruct the jury was not prejudicial. In this regard, even Allied recognizes that evidence adduced at trial was that the x-rays taken at Beth Israel were of plaintiff's shinbone, and not her knee, and that they

showed an old ankle fracture, rather than a knee injury. In addition, plaintiff testified that she was released from the hospital without a finding that she sustained any serious injury. Finally, Allied emphasized, in almost three pages of summation, that it was "mysterious" that these records from a "reputable" hospital had not been produced by plaintiff at trial.

Allied next argues that the court should reconsider its order denying its motion for a mistrial on the grounds that plaintiff testified about pain in her right leg, despite the court's pretrial ruling precluding such testimony, and that plaintiff improperly made "constant" references to Workers' Compensation, allowing the jury to conclude that the same Workers' Compensation carrier insured it or MSR.

The court is unpersuaded the plaintiff's testimony with respect to her right leg required a mistrial. First, plaintiff's initial testimony about pain and swelling in her legs - to which Allied made only one unelaborated objection - was made in response to her counsel's good faith inquiry about how the accident occurred, and essentially constituted background information. Second, once Allied requested striking this testimony pursuant to the court's prior ruling, the court issued a curative instruction that the jury disregard plaintiff's comments as to both legs because there had only been a claim in the case for plaintiff's left leg and back, and that it would only hear future inquiries as it related to those injuries. Thus, "[Allied's] motion for a mistrial based upon the erroneous admission of evidence was 'directed to the sound discretion of the trial court' and the giving of sufficient curative instructions . . . justif[ied] the denial of the motion" (*Dennis v Capital Dist. Transp. Auth.*, 274 AD2d 802,

803 [2000] quoting *Harris v Village of E. Hills*, 41 NY2d 446, 451 [1977]), particularly in the absence of any further objection to the curative instruction by Allied (*id.*). As to the remaining instances wherein plaintiff referred to pain or swelling in both her legs, including references made during Allied's cross-examination, Allied raised no further objections to such testimony, and thus its claim as to the admission of this testimony is waived.

Nor does the court find that references made by Dr. D'Angelo about plaintiff's Workers' Compensation carrier to explain the delay in obtaining permission for plaintiff's MRI and surgery warranted a mistrial. Review of the trial transcript fails to reveal any objections made by Allied to references of Workers' Compensation, nor does Allied cite to any such objections. In fact, Allied cross-examined Dr. D'Angelo about Workers' Compensation, and only objected to the admission of one of Dr. D'Angelo's office notes which referenced Workers' Compensation on the grounds that it was not in evidence, went beyond the scope of direct and cross-examination, and improperly stated a legal conclusion by Dr. D'Angelo, namely that the risk incurred due to the delay of Workers' Compensation in approving plaintiff's surgery was the carrier's responsibility.[2] Thus, Allied's current claim that it was prejudiced by references to Workers' Compensation because it led the jury to conclude that the same Workers' Compensation carrier insured it or MSR is waived.

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[2]Although Allied's counsel at one point objected to admission of the office note because the last sentence referred to an insurance carrier, he later indicated that reference to the carrier without the above-described legal conclusion would be "fine" (T459, 461).

Even assuming the argument was not waived, it is without merit. First, "'[r]eference to insurance is condemned only where the fact of its existence is irrelevant to the issues and where such reference is, in all likelihood, made for the purpose of improperly influencing the jury'" (*Galuska v Arbaiza*, 106 AD2d 543 [1984], quoting *Oltarsh v Aetna Ins. Co.*, 15 NY2d 111, 118 [1965]). Here, the testimony elicited with respect to Workers' Compensation was relevant to the issue of whether plaintiff's injuries were exacerbated by the delay in receiving permission for surgery from Workers' Compensation or whether the injuries were degenerative in nature. Second, it is likely that the jury was aware that Workers' Compensation benefits constituted a particular species of compensation provided to injured workers by a *worker's* employer, and were not connected with any insurance defendants might have maintained, making the "the possibility of any prejudice by such . . . reference[s] . . minimal" (*id.* [in action arising out of three-car collision, reference to defendant's insurance not prejudicial because, *inter alia*, "it must be recognized that in this age of compulsory automobile liability insurance, it is a rare individual who is not aware that a defendant is insured"]). Finally, plaintiff correctly asserts that Allied opened the door to testimony about Workers' Compensation when he cross-examined Dr. D'Angelo on the issue of delay, rendering any subsequent testimony about Workers' Compensation admissible (*Homin v Cook*, 239 AD2d 580 [1997]).

Lastly, as to defendants' argument that the jury's award of damages should be reduced as excessive, it is settled that a jury's award is excessive if it "deviates materially from what

would be reasonable compensation"(CPLR 5501[c]; *Garcia v Seigel*, 248 AD2d 586, 588 [1998], *lv denied* 92 NY2d 817 [1998]); *Nevarez v New York City Health & Hosps.*, 248 AD2d 309 [1998], *lv denied* 92 NY2d 815 [1998]). Where the trial court finds a jury's award excessive, the court must order a new trial on the issue of damages unless the plaintiff stipulates to reduce the verdict by the amount found to be excessive (CPLR 4404[a]). "Review of the adequacy of a damage award entails its comparison to awards in similar cases as well as consideration of various factors, including the life-threatening nature of the injuries, the length of hospitalization, surgeries required, complications experienced, medication needed to stabilize the patient and relieve pain, postconfinement convalescence, rehabilitative efforts and the success of treatment" (*Edwards v Stamford Healthcare Soc'y Inc.*, 267 AD2d 825, 827 [1999]).

Here, plaintiff's injuries are not life threatening, her knee surgery was performed on an outpatient basis, she only required prescribed pain medication after the surgery, and she did not undergo surgery for her back. However, plaintiff's knee surgery revealed chondromalacia of the patella (traumatic damage to the surface of the kneecap) and a tear of the lateral meniscus, she underwent physical therapy before surgery, she still experiences pain, swelling and buckling in her knee, which at times necessitates the use of a cane, and pain and numbness in her back. She can no longer engage in various activities, such as dancing and sports, and her treating physician testified that plaintiff suffered from swelling of her left knee, atrophy of her left quadriceps, a bulging disc with radiculopathy, chronic muscle

spasms, that she was completely and permanently disabled, and that he detected a bone spur on her left knee, which was an early sign of arthritic change.

Upon a review of similar cases and the factors noted above, the court finds that the award for past and future pain and suffering of $450,000 and $740,000, respectively, are excessive and materially deviates from what would be reasonable compensation under the circumstances of this case (*see Barlatier v Rollins Leasing Corp* ., 292 AD2d 480 [2002] [where plaintiff awarded $140,000 and $50,000 for past (5-year period) and future pain and suffering, respectively, new trial ordered unless award of $50,000 for future pain and suffering increased to $250,000 where plaintiff, with a life expectancy of 31.6 years, underwent three corrective knee surgeries, suffers from Grade 4 chondromalacia patella and atrophy of one inch in the right calf, and requires a crutch or a cane to walk]; *Van Ness v N.Y. City Transit Auth.*, 288 AD2d 374 [2001] [award of $700,000 and $1,000,000 for past and future pain and suffering, respectively, reduced to $200,000 and $400,000, respectively, where plaintiff, with life expectancy of 45 years, underwent two arthroscopic surgeries on right knee for torn medical meniscus and traumatically-induced flap tear on the femoral condyle, had grade three chondromalacia, pieces of cartilage hanging beneath her kneecap, suffered from spasms and severe myofascial pain in her lower back, was treated with different types of medications, including muscle relaxants, anti-inflammatory medication, anti-depressants and narcotics, and received "trigger point injections" directly into the spasmatic muscle]; *Ferrantello v St. Charles Hosp. & Rehabilitation Ctr* ., 275 AD2d 387

[2000] [principal award of $275,260 where plaintiff suffered torn meniscus requiring surgery under general anesthesia, resulting in permanent injury]; *Frascarelli v Port Auth.*, 269 AD2d 422 [2000] [award of $300,000 and $400,000 for past and future pain and suffering, respectively, reduced to $225,000 and $225,000, respectively, where plaintiff suffered a torn medial meniscus, which was removed during arthroscopic surgery, thereafter experienced muscle atrophy, which reduced at time of trial, could develop arthritis due to the loss of the meniscus, had trouble squatting, experienced pain when he walked more than 45 minutes, and could no longer play basketball]; *Myers v. S. Schaffer Grocery Corp.*, 281 AD2d 156 [2002] [award of $0 for past and future pain and suffering increased to $300,000 and $120,000, respectively where plaintiff, 33 years-old at the time of the accident, suffered a tear in the posterior cruciate ligament and underwent arthroscopic surgery and several months of physical therapy, knee got progressively worse, was subject to buckling, and he was no longer able to participate in strenuous sporting activities, as he had in the past, without feeling pain]; *Jordan v Donat,* 255 AD2d 242 [1998] [award of $175,000 where 31 year-old plaintiff would suffer substantial pain from her back injuries, which injuries included one herniated and four bulging discs, did not deviate from reasonable compensation under the circumstances]; *Maisonaves v Friedman*, 255 AD2d 494 [1998] [principal award of $ 426,000 for pain and suffering reduced to $100,000 for past pain and suffering and $ 75,000 for future pain and suffering where plaintiff suffered from four bulging discs in the cervical spine and two bulging discs in the lumbosacral spine, and bulges impinged upon the thecal sac]; *Walsh v*

Kings Plaza Replacement Serv., 239 AD2d 408 [1997] [awards of $100,000 and $300,000 for past and future pain and suffering, respectively, reduced to $40,000 and $60,000, respectively where plaintiff suffered a herniated disc at the L5-S1 level and aggravated her previous injury at the L4-L5 level]; [*Porcano v Lehman*, 255 AD2d 430 [1998] [award of $650,000 for pain and suffering reduced to $175,000 where plaintiff suffered from multiple herniated discs, one which was surgically excised, bilateral carpal tunnel syndrome, which also required surgery, depression, and pain in both arms, both hands, his lower back, and across shoulders]; *Adams v Romero*, 227 AD2d 292 [1996] [award of $350,000 and $400,000 for past and future pain and suffering, respectively, and $50,000 for loss of consortium reduced to principal amount of $450,000 where plaintiff sustained two herniated discs, and developed hypertrophic posterior spurs, causing pain and permanent disability in that he cannot freely move his neck from side to side]).

The court finds that the award for past and future pain and suffering should not exceed $175,000 for past pain and suffering and $300,000 for future pain and suffering.

The only remaining award subject to review on the ground of excessiveness is that for future lost earnings. The court has already found that there was sufficient evidence to support the award for loss of future earnings to the extent it does not include damages for a projected increase in plaintiff's salary. Thus, the court addresses defendants' contention that there was insufficient evidence for the jury to conclude that plaintiff had a work-life expectancy of 20 years, as opposed to 13 years, as charged by the court. It is true that the court's statistical

and/or actuarial work-life expectancy was merely a guideline which the jury could reasonably accept or reject, based upon their own evaluation of the evidence. Moreover, plaintiff was only 44 years old at the time of trial, held a job with a reputable firm at the time the accident occurred, and her doctor testified that she was "built for heavy work" because she had big knees. However, projecting that plaintiff would work until the age of 62, based on an 18-year work-life expectancy, is more realistic than retirement at age 64, as the jury found based upon a work-life expectancy of 20 years (*see Lopiano v Baldwin Transp* ., 248 AD2d 161, 162 [1998]). Thus, the award for future loss of earnings is excessive to the extent it exceeds $395,506.80 ($21,972.60 x 18 years).

Conclusion

Those branches of defendants' motions seeking to reduce or set aside the verdict are granted only to the extent of striking the award for future medical expenses; striking the award for future loss of earnings to the extent it includes a projected yearly increase, and thus reducing the award to $439,452.80, and as to this award, modifying it by deleting the provision in the judgment for future loss of earnings and substituting a provision severing plaintiff's cause of action to recover these damages and granting a new trial with respect thereto, unless the parties stipulate, within 30 days of the date of service upon plaintiff of this order with notice of entry, to a reduced award for future loss of earnings of $395,506.80; and modifying the judgment by deleting the provision thereof which awarded plaintiff $450,000 and $740,000 for past and future pain and suffering, respectively, and substituting therefor

a provision severing plaintiff's cause of action to recover these damages and granting a new trial with respect thereto, unless the parties stipulate, within 30 days of the date of the service upon plaintiff of this order with notice of entry, to a reduced award for past and future pain and suffering of $175,000 and $300,000, respectively.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

HON. BERT A. BUNYAN