

<b>Deleon-Barrera v Bartlett Dairy, Inc.</b>
2020 NY Slip Op 34672(U)
October 9, 2020
Supreme Court, Queens County
Docket Number: Index No. 701510/2016
Judge: Leslie J. Purificacion
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39  
Justice

FILED

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LEYDI DELEON-BARRERA,

10/14/2020  
11:11 AM

Plaintiff,

Index  
Number 701510/2016

COUNTY CLERK  
QUEENS COUNTY

- against-

Motion Seq. No. 3

BARTLETT DAIRY, INC. and JORGE A.  
VANEGAS,

Defendants.

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The following papers numbered 1 to 10 read on this motion by defendants pursuant to CPLR 4404(a), 5501(c) and Article 50-B to (1) set aside the verdict and for a new trial on the issue of damages or, in the alternative, substantial *remittitur* of the pain and suffering portion of the award; (2) for substantial *remittitur* of the future medical expenses award, and; (3) for a hearing to structure payment of the judgment unless the parties reach an agreement on this issue.

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

Plaintiff commenced this action to recover damages for injuries sustained as a result of a motor vehicle accident that occurred on November 25, 2015. By order dated December 15, 2016 (Buggs, J.), plaintiff was granted summary judgment in her favor on the issue of liability. A jury trial on the issue of damages was held before the undersigned. After a two-week trial, the jury returned a verdict in plaintiff's favor, with unanimous agreement that she had sustained a "serious injury" based

upon each of the three "serious injury" threshold questions presented. The jury also rendered unanimous verdicts on each of the items for monetary damages.

Defendants contend the jury's damages award should be set aside and a new trial on the issue of damages ordered, or alternatively, substantial *remittitur* of the award, on the grounds that it deviates materially from what would be reasonable compensation for plaintiff's injuries and was tainted by inflammatory and improper remarks by plaintiff's counsel in his opening statement and summation. Defendants also contend that the jury's award for future medical expenses is unsupported by legally sufficient evidence, materially deviates from what would be reasonable compensation for plaintiff's future needs and was tainted by inflammatory and improper remarks by plaintiff's counsel in his opening statement and summation.

Plaintiff contends that sufficient evidence was presented to the jury as to the nature, extent and permanency of plaintiff's injuries to support the jury's damages award, and defendants' argument that it was tainted by plaintiff's attorney's remarks during opening statements and summation is erroneous and unpreserved. In addition, plaintiff further notes that the testimony presented on future medical expenses and life care plan was supported by the medical evidence and unrefuted by any expert testimony offered by the defendants.

#### Plaintiff's Testimony

Plaintiff testified that she sustained injuries on November 25, 2015, when her stopped truck was struck in the rear by defendants' truck, which then caused her vehicle to strike the rear of a lead vehicle. At the time, plaintiff was twenty-seven years old and the mother of two young children. After the accident, plaintiff testified that she complained of head, neck and back pain. She underwent conservative treatment for a period of approximately two and one half years, which consisted of physical therapy and injections for pain management. During this period, she testified that she continued to experience pain in her neck, both shoulders and back and was eventually recommended surgery to her left shoulder and to her neck. Plaintiff told the jury that in June 2016, she underwent a surgical procedure to her left shoulder and in March 2017, she underwent a surgical procedure to her neck. She further testified that surgery has been recommended for her right shoulder and back.

Plaintiff told the jury about an automobile accident that happened two months prior to the November 15, 2015, accident, where she backed her vehicle into another car while parking. She testified that she was uninjured and sought no medical attention. She told the jury that prior to the November 15, 2015, accident she did not

experience protracted neck or shoulder pain. She informed the jury that she sought medical attention for back pain during her two pregnancies and for hip and leg pain. She also informed the jury that she sought medical attention in 2013 when she strained her left shoulder while performing her duties as a home attendant. She received an injection that alleviated the pain. She stated that her left shoulder had been pain free until the accident of November 15, 2015.

Plaintiff recounted that prior to the surgeries she experienced "terrible" pain in her neck down her arm that felt like burning and electricity and numbness in her extremities. She described similar symptoms with respect to the pain in her shoulders and back. She further testified that after the surgeries the symptoms lessened. She no longer experienced numbness or feeling of electricity in her limbs. However, the pain in her neck, shoulders and back has not fully gone away. She stated that the pain in those parts, while at first alleviated by the surgeries, has remained, though to a lesser degree, and she now experiences increasing pain in her right shoulder and back that feels like a "knife stuck in my back". She testified that immediately following the accident, she could not bathe or dress herself or do household tasks. She testified that she now performs these tasks with pain. Her bouts with pain also have affected her ability to physically interact with her two infant children. She told the jury that the prospect of surgery frightened her, but elected to undergo surgery because of the pain and her desire to get well for her family. She recounted that she is disappointed that the surgeries did not completely stop the pain and she has feelings of desperation. She told the jury she was no longer able to drive a truck, a job she enjoyed prior to the accident of November 2015.

### The Medical Evidence

Orthopedic surgeon Randall Erlich testified that he first saw plaintiff seven months after the accident. Upon physical examinations, he found restricted range of motion of both shoulders, "a little bit worse" on the left than the right. His review of an MRI taken in December 18, 2015, of the left shoulder revealed a tear of the labrum. He testified that on June 20, 2016, he performed arthroscopic surgery on plaintiff's left shoulder. During surgery, Dr. Erlich testified that he visualized a tear of the anterior labrum, which he debrided, and he also performed a bursectomy and subacromial decompression. He testified that the surgery was necessary because of plaintiff's complaints of continued pain despite conservative treatment.

Post-operatively, Dr. Erlich prescribed formal supervised physical therapy. He noted that plaintiff's associated injury to her neck could affect plaintiff's ability to rehabilitate her shoulder. On August 14, 2018, Dr. Erlich re-evaluated plaintiff and performed range of motion testing of her left shoulder. Upon examination he found

restrictions from the normal range of motion, which he opined were permanent decreases.

Dr. Erlich also opined that plaintiff would require surgery in the future to her right shoulder. He based his opinion on his review of an MRI of plaintiff's right shoulder, which he testified revealed a posterior tear of the labrum and restrictions in plaintiff's range of motion. He concluded that plaintiff's complaints of continued pain in her right shoulder, coupled with lack of progress from conservative treatment, would require surgical intervention. He also testified that plaintiff may need additional surgery to her left shoulder.

The jury heard also that on March 28, 2017, plaintiff's witness, orthopedic surgeon Andrew Merola, performed a cervical discectomy and one-level fusion of plaintiff's cervical spine at C5-C6, that included a bone graft, insertion of a plate and screws and removal of the C5-C6 disc. Dr. Merola testified that he first saw plaintiff on September 12, 2016, on referral from her pain management doctor. He also testified that upon physical examination he found restricted range of motion of plaintiff's cervical spine. His review of an MRI of plaintiff's cervical spine taken on January 6, 2016, revealed a herniation of the cervical spine at C5-C6 with no indication that it was degenerative in nature. A follow up MRI of plaintiff's cervical spine done in October 2016 revealed a progression of the herniation. Dr. Merola concluded that surgery was warranted because of plaintiff's persistent pain and the necessity of stabilizing her neck to avoid further damage. Dr. Merola testified regarding each step of the operation and his confirmation of the herniation.

One year post-operatively, Dr. Merola noted restrictions in the range of motion of plaintiff's cervical spine. He opined that these restrictions were permanent. He further opined that plaintiff would require continued maintenance physical therapy and pain management. He further testified that in about ten years plaintiff would require some type of revision surgery.

With respect to plaintiff's claimed back injury, Dr. Merola testified that he reviewed plaintiff's lumbar MRI taken on January 26, 2016. He opined that it revealed disc herniations at L-4-L5 and L5-S1 with no indication of degeneration. He further testified that these herniations were also present on a follow up MRI conducted in October 2016. Dr. Merola testified that he found positive signs of nerve impingement in plaintiff's lower back and restrictions in plaintiff's range of motion when he conducted his first physical examination in 2016 and again one year post-operatively. He opined that the restrictions were permanent.

The cause of plaintiff's complaints and necessity of surgical intervention were disputed by defendants' expert medical witnesses. Defendant's neuroradiologist, Dr. Alain Hyman, testified that plaintiff's cervical MRI of January 16, 2016, and of October 2016, showed only degenerative changes that caused a mild disc bulge to form at C5-C6 and no impingement of the surrounding nerves. Likewise, Dr. Hyman's review of plaintiff's lumbar MRI of January 2016 and of October 2016, showed no herniations. He noted that the images demonstrated degenerative changes, including a degenerative disc bulge at L5-S1, that did not impinge on the surrounding nerves. Dr. Hyman also testified that MRIs of plaintiff's left and right shoulders showed only degenerative changes and no evidence of a tear to the labrum or any signs of impingement.

Defendants' neurologist, Dr. Daniel Feuer, testified that he examined plaintiff on November 7, 2017. On that date, he found signs of muscular injuries to plaintiff's neck, back and shoulders, which he characterized as sprains. He found no neurological injuries permanent in nature. Dr. Jonathan Glassman, defendants' orthopedic surgery expert, examined plaintiff on March 1, 2017, and on November 8, 2017. He testified that in March, plaintiff exhibited pain upon palpation of the neck and limitations of range of motion. He opined that plaintiff's pain responses were not musculoskeletal in nature. He found limitations during provocative test of plaintiff's lower spine, but concluded there was no nerve impingement. His examination of plaintiff's right shoulder revealed normal range of motion. The left shoulder, which he examined post-operatively, revealed limitations from the normal range of motion. On re-examination in October, post plaintiff's neck surgery, Dr. Glassman noted limitations from the normal range of motion in her cervical spine. His results of examination of plaintiff's right shoulder were essentially the same as previously tested. With respect to plaintiff left shoulder, Dr. Glassman noted some improvement in range of motion testing, but still recorded restrictions from the normal range of motion. He opined also that plaintiff's injuries to her lumbar spine had resolved.

The jury also heard the testimony of plaintiff's witness Dr. Barry Root, a physical medicine and rehabilitation specialist, who outlined a life care plan for plaintiff based upon his review of plaintiff's medical records and two physical examinations performed by him. He projected future medical care and treatment, which included the costs for doctor's visits, pain management, diagnostic imaging, durable medical equipment, physical therapy, future surgery to plaintiff's right shoulder, cervical and lumbar spine, as well as home care attendant assistance. Dr. Debra Dwyer, plaintiff's economist, calculated those costs over plaintiff's life expectancy to be: \$170,839.00 doctor's visits; \$290,882.00 diagnostic testing; \$16,252.00 over the counter pain medication; \$48,753.00 steroid injections;

\$174,968.00 revision surgery cervical spine; \$319,668.00 lumbar surgeries; \$319,617.00 physical therapy; \$15,475.00 right shoulder surgery; and, \$13,135.00 durable medical equipment, for a total of \$1,369,589.00 over 50.5 years.

### Counsels' Statements

Plaintiff's counsel, during his opening statement, told the jury that defendants had failed to take responsibility for the accident and it was up to the jury to hold them responsible for their actions. In summation, he repeated that the case was about defendants' failure to take responsibility and noted their absence during the trial. He told the jury that the defense strategy was "to blame the victim". He attacked the credibility of defendants' experts, noting that they are not treating doctors and did not dispute any of the operative findings, despite their disagreement regarding the interpretation of plaintiff's MRIs. Counsel criticized the testimony of defendant's testifying radiologist, Dr. Feuer, who he characterized as "Dr. God". On the issue of future damages, counsel noted that defendants did not produce any witnesses to refute the recommendations of plaintiff's experts. On the question of damages, plaintiff's counsel suggested that the jury award plaintiff the sum of \$2,465,000.00 for past pain and suffering and double that amount (\$4,930,000.00) for future pain and suffering.

Defense counsel's comments in summation focused on the credibility of the plaintiff and that of her treating doctors. He told the jury that plaintiff was referred to a medical provider by her attorney suggesting that she received medical treatment with "a lawsuit in mind". He noted that plaintiff's complaints of pain, from the day of the accident to the days of trial were "exaggerated" and "not supported by the credible evidence". He pointed out that the emergency room records with respect to examination of plaintiff's neck revealed no spasm and normal range of motion on the day of the accident. With respect to plaintiff's complaints of back and shoulder pain, counsel told the jury that plaintiff had been treated for those complaints before the accident. Counsel pointed out the differing testimony of plaintiff's and defendants' experts regarding their interpretation of plaintiff's MRIs and whether they revealed herniations or degeneration. With respect to the testimony of plaintiff's experts, he commented plaintiff "had degeneration in her neck and demonstrated to you by her own films not by testimony by hired guns or people who make millions of dollars." Commenting on the need of future surgery on plaintiff's right shoulder, counsel noted that the orthopedic's records make no mention of plaintiff needing right shoulder surgery. He told the jury it was only brought up at trial "to blowup the value of what you can and they hope you will award".

### Counsel's Comments

Initially, the court finds that the comments, argument and conduct of plaintiff's counsel at trial was not of such an egregious, persistent and prejudicial nature to warrant setting aside the jury's damages award on that basis. Counsel's comments did not divert the juror's attention from the issues to be determined or deprive the defendants of a fair trial (see Matamoros v Tovbin, 82 AD 3d 941). The court does not agree with defendants' characterization that plaintiff's counsel engaged in impermissible vouching or making himself an unsworn witness; rather, plaintiff's counsel made fair comment on defense counsel's questioning of the plaintiff during cross examination. With respect to comments by both counsel, the court instructed the jury during opening instructions and during the final charge that what the lawyers say at trial is not evidence and reminded the jurors that their decision must be based on the evidence admitted at trial.

### The Jury Verdict

As noted, on the issue of "serious injury" and permanency, the jury resolved these questions in favor of plaintiff. The jury rendered unanimous verdicts awarding plaintiff the sum of \$1,500,000.00 for past pain and suffering, \$3,000,000.00 for future pain and suffering,<sup>1</sup> \$121,087.25 for past medical expenses<sup>2</sup>, and \$1,369,589.00 for future medical expenses, all totaling \$5,990,676.25. All future awards were intended to cover a period of 50.5 years.

### Standard of Review

It is well-settled that a jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the credible evidence (CPLR 4404(a); see Obey v City of New York, 29 NY3d 958; Killon v Parrotta, 28NY3d 101). "Furthermore, in reviewing the record to ascertain whether the verdict was a fair reflection of the evidence, great deference is accorded to the fact-finding function of the jury, as it is in the foremost position to assess the witnesses' credibility" (McDonagh v. Victoria's Secret, Inc., 9 AD3d 395, 396).

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<sup>1</sup>Past pain and suffering 1.5 million dollars to date of verdict over 3 years; future pain and suffering \$58,252.48 per year over 51.5 years.

<sup>2</sup>Pursuant to stipulation of the parties the jury's award for past medical expenses in the amount of \$121,087.25 was reduced by \$50,000.00, representing the total sum paid by no-fault insurance, to a total sum of \$71,087.25.

Likewise, a jury's finding on the amount of damages to be awarded is accorded considerable deference. That finding, however, may not stand where it materially deviates from what would be reasonable compensation (CPLR 5501(c); see Day v Hosp. For Joint Diseases Ortho. Inst., 11 AD3d 505; Rappold v Snorac, Inc., 289 AD2d 1044). In determining whether an award constitutes a material deviation, the court is required to compare the jury's verdict to those verdicts resulting from factually similar situations (see Starkman v City of Long Beach, 148 AD3d 1070; see also Donlon v City of New York, 284 AD2d 13).

In this case, the evidence adduced at trial supports the jury's findings that plaintiff sustained a "serious injury" as that term is defined by Insurance Law 5102(d), and this court finds no reason to disturb that finding (in fact, defendants do not assert on these papers that portion of the verdict was contrary to the weight of the evidence).

In support of that branch of the motion for substantial *remittitur* of the jury's pain and suffering award, defendants cite a number of appellate-reviewed awards: jury's 1.05 million dollar damages award reinstated in Kowalsky v County of Suffolk, 139 AD3d 906 [2<sup>nd</sup> Dept.] (33 year-old awarded \$200,000.00 past pain and suffering and \$850,000.00 future pain and suffering over 41 years for injury requiring L4-L5 lumbar laminectomy and fusion and arthroscopic knee surgery); jury's \$800,000.00 damages award affirmed in Robles v Polytemp, Inc., 127 AD3d [2<sup>nd</sup> Dept] (35 year old awarded \$400,000.00 past pain and suffering and \$400,000.00 future pain and suffering over 37 years for injury requiring a two-level lumbar fusion and a single-level cervical fusion); jury's \$1.25 million damages award reduced to \$250,000.00 in Cicola v County of Nassau, 120 AD3d 1379 [2<sup>nd</sup> Dept] (35 year-old awarded \$150,000.00 for past pain and suffering, \$100,000.00 future for two cervical discectomies and fusions); jury's \$5 million damages award reduced to \$800,000.00 in Conlon v Foley, 73 AD3d 836 [2<sup>nd</sup> Dept] ( 31 year-old awarded \$700,000.00 for past pain and suffering and \$100,000.00 future pain and suffering for injuries requiring lumbar laminectomies at several levels); jury's award increased to \$700,000.00 in Baird v VIP Mgt. Co. Inc., 60 AD3d 608 [2<sup>nd</sup> Dept] (plaintiff in her 30s awarded \$400,000.00 for past pain and suffering and \$300,000.00 future pain and suffering for injuries to her cervical spine as a result of a fall requiring emergency spinal surgery and two subsequent fusions); jury's \$750,000.00 award reduced to \$400,000.00 in Sanz v MTA-Long Island Bus, 46 AD3d 867 [2<sup>nd</sup> Dept] (41 year-old \$200,000.00 for past pain and suffering and \$200,000.00 future pain and suffering for injuries requiring cervical discectomy at C4-C5); and, jury award reduced from 5 million to \$800,000.00 in Johnson v Freihofer Baking Co., Inc., 16 AD3d 461 [2<sup>nd</sup> Dept] (33 year old suffered injuries requiring a two-level lumbar fusion surgery).

Defendants further cite to two appellate-reviewed cases involving awards for arthroscopic shoulder surgery: \$250,000.00 jury award affirmed in Nicholas v C&F Trading Co., 107 AD3d 769 [2<sup>nd</sup> Dept] (plaintiff awarded \$250,000.00 for past pain and suffering, \$100,000.00 future pain and suffering); and, \$350,000.00 jury award affirmed in DeSimone v Royal GM, Inc., 49 AD3d 490 [2<sup>nd</sup> Dept] (30 year-old award \$100,000.00 for past pain and suffering, \$250,000.00 future pain and suffering).

In comparison, on the issue of reasonable compensation for plaintiff's shoulder injuries, plaintiff cites Peterson v MTA, 155 AD3d 795 [2<sup>nd</sup> Dept] (future pain and suffering award reduced from 1.5 million dollars to \$800,000.00 and past pain and suffering affirmed in the amount of \$800,000.00, where plaintiff suffered injury requiring surgery to both of her shoulders); Molina v NYCTA, 115 AD3d 416 [1<sup>st</sup> Dept] (\$600,000.00 past pain and suffering award affirmed and future pain and suffering award of 1.3 million dollars reduced to \$800,000.00 over 27 years, where plaintiff underwent surgeries to his left and right shoulders); Guillory v Nautilus, 208 AD2d 336 [1<sup>st</sup> Dept] (1.2 million dollar pain and suffering, past and future award affirmed where plaintiff sustained very extensive rotary cuff tear necessitating involved operation); Bernstein v Red Apple Supermarkets, 227 AD2d 264 [1<sup>st</sup> Dept] (torn rotator cuff award reduced from 1.75 million dollars to 1.1 million dollars); Ernish v City of New York, 2 AD3d 256 [1<sup>st</sup> Dept] (award reduced to 1.8 million dollars for plaintiff who sustained serious head injuries, as well as injuries to both shoulder and right arm); Capuccio v City of New York, 174 AD2d 543 [1<sup>st</sup> Dept] (\$997,690.00 awarded to plaintiff who suffered fractured humerus and permanent pain and limited mobility of her right shoulder); Vertsberger v City of New York, 34 AD3d 453 [2<sup>nd</sup> Dept] (past pain and suffering reduced from 1 million dollars to \$600,000.00 and future pain and suffering reduced from 3 million dollars to \$800,000.00 over 22 years, where plaintiff sustained shattered left elbow), and; Rubio v NYCTA, 99 AD3d 532 [1<sup>st</sup> Dept] (\$750,000.00 past pain and suffering and 1.7 million dollar future pain and suffering award reduced to \$500,000.00 and \$500,000.00, respectively, where plaintiff suffered unsuccessful torn rotator cuff repair).

Plaintiff further cites: Halsey v NYCTA, 114 AD3d 726 [2<sup>nd</sup> Dept] (3 million dollar award for future pain and suffering over 55 years sustained (the award of \$578,000.00 for past pain and suffering not appealed), where plaintiff underwent a lumbar disc laminectomy and fusion, that did not improve her condition requiring continued physical therapy, pain medications, and epidural injections); Jing Xue Jiang v Dollar Rent a Car, Inc., 91 AD3d 603 [2<sup>nd</sup> Dept] (3 million dollar past pain and suffering award reduced to 2.5 million dollars, 3 million dollar future pain and suffering award reduced to 2.5 million dollars over 44 years, where plaintiff suffered a "contrecoup" brain injury and fractures to his right arm, left leg, lumbar and cervical

spine and ribs); Kayes v Liberati, 104 AD3d 739 [2d Dept] (\$500,000.00 past pain and suffering, 1.5 million dollars for future pain and suffering affirmed where plaintiff suffered herniated disc requiring surgery and rendering him unable to work in any significant capacity). Plaintiff also cites a number of cases for the proposition that multi-million dollar awards have been sustained by appellate courts for future damages, particularly where the plaintiff's life expectancy is projected to be another 40 to 50 years.

None of the above cited cases involve the same injuries suffered by plaintiff and her surgical history; nor do they reflect the non-physical and intangible subjective elements associated with plaintiff's pain and suffering or loss of enjoyment of life that are peculiar in each case. However, we are instructed that "[t]he reasonableness of compensation must be measured against relevant precedent of comparable cases" (Halsey v New York City Tr. Auth., 114 AD3d 726, 727 [2<sup>nd</sup> Dept] citing Kayes v Liberati, 104 AD3d 739) and "[a]lthough prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (Vainer v aiSalvo, 107 AD3d 697, 698-699 [2013] [internal quotation marks omitted]).

Considering the nature and the extent of the injuries sustained by the plaintiff, the court finds that the jury's award for past pain and suffering deviates materially from what would be reasonable compensation. Likewise, the award for future pain and suffering deviates materially from what would be reasonable compensation.

#### Future Medical Expenses

Defendants assert that the \$1,369,589.00 for future medical expenses awarded by the jury should be substantially reduced, where various items of anticipated expenses projected by plaintiff's economist were not sufficiently supported by medical testimony from plaintiff's *treating* doctors.

Specifically, defendants claim that the expenses of: \$170,839.00 for doctor's visits; \$319,617.00 for physical therapy; \$319,668.00 for lumbar surgeries; \$48,753.00 for steroid injections; \$290,882.00 for diagnostic testing; and, \$13,135.00 for durable medical equipment, are not supported by any or sufficient testimony by plaintiff's treating doctors with a reasonable degree of medical certainty and are therefore speculative. Defendants thus seek a reduction of the jury's award to a total sum of \$304,017.00. No objection is set forth for the costs for future over the counter medications, cervical revision surgery or right shoulder surgery.

In opposition, plaintiff cites Dr. Merola's testimony that plaintiff would require future surgery to other sections of her cervical spine due to stresses resulting from the C5-C6 fusion and eventual C5-C6 revision surgery. Dr. Merola also testified that plaintiff would require maintenance physical therapy, pain management, and observational care and management from a surgical prospective "up until and after the revision surgery". With respect to the revision surgery, Dr. Merola stated his opinion was based upon a reasonable degree of medical certainty. With respect to lumbar surgery, Plaintiff further argues that Dr. Merola opined that plaintiff would require surgery due to a herniated disc at L5-S1. Plaintiff also asserts that defendants did not present any expert testimony to refute Dr. Root's testimony regarding any of the items of anticipated future medical expenses.

### Standard of Review

An award for future medical expenses must be supported by sufficient evidence in the record (O'Donnell v Blanaru, 33 Ad3d 776). The need for future medical care must be established by a preponderance of the credible evidence and are compensable only to the extent that they do not materially deviate from what would be reasonable compensation in light of the evidence presented (see Kavanaugh v Nussbaum, 129 AD2d 559). Evidence submitted at trial that the plaintiff will incur medical expenses when, and if, future conditions develop that require treatment is speculative and does not support an award of damages for future medical expenses (see Pilgrim v. Wilson Flat, Inc., 110 A.D.3d 973).

Here, the court finds that the award for future medical expenses as presented by plaintiff's economist,<sup>3</sup> to the extent objected to by defendants, either are not supported by the record or materially deviate from what would be reasonable compensation.

The court reaches this conclusion in part on the testimony regarding plaintiff's pre-trial record of medical treatment required as a result of the accident -- which includes the frequency and duration of her physical therapy and pain management history, the testimony of her treating doctors regarding her future needs -- measured against Dr. Root's testimony regarding his future medical care recommendations. The court's determination is also guided from review of the cases cited by defendants and plaintiff on the issue of future medical expenses.

As indicated above, defendants take no issue with the anticipated costs of future right shoulder surgery (\$15,475.00), or revision surgery (\$174,968.00) or the

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<sup>3</sup> The jury adopted the recommendation without modification.

cost of over the counter medications (\$16,252.00). With regard to back surgery, Dr. Merola testified that "...at some point in time when her condition warrants low back surgery in terms of decompression [it] could be indicated." Notwithstanding the foregoing, Dr. Root's testified that plaintiff would have to undergo two lumbar procedures. In addition, Dr. Root's recommendations regarding the frequency of steroid injections, diagnostic testing, physical therapy and frequency of doctor's visits and durable medical goods, when contrasted against plaintiff's actual treatment history and in the absence testimony that her prior treatment regimen was insufficient, renders much of the recommendation speculative or materially deviates from what would be reasonable compensation.

Therefore it is;

ORDERED, that defendants' motion is granted to the extent that this matter shall be set down for a new trial on the issue of damages for the plaintiff's past and future pain and suffering and on the issue of damages for plaintiff's future medical expenses, unless within 30 days after service upon the plaintiff of a copy of this decision and order, the plaintiff serves and files in the office of the Clerk of the Supreme Court, Queens County, a written stipulation consenting to reduce the verdict as follows: damages for past pain and suffering from the amount of \$1,500,000.00 to the amount of \$750,000.00; future pain and suffering from the amount of \$3,000,000.00 to the amount of \$1,500,000.00; future medical expenses from the amount of \$1,369,589.00 to the amount of \$500,000.00 (the award for past medical expenses, as stipulated to by the parties in the amount of \$71,087.25 is not modified). If so stipulated, the parties are directed to contact the Part for a hearing pursuant to Article 50-B unless the parties reach an agreement on this issue

This is the decision and Order of the Court.

Dated: October 9, 2020

  
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Hon. Leslie J. Purificacion, J.S.C.

**FILED**

**10/14/2020**

**11:11 AM**

**COUNTY CLERK  
QUEENS COUNTY**