Barcia v Costco Wholesale Corp.
2023 NY Slip Op 31642(U)
May 16, 2023
Supreme Court, New York County
Docket Number: Index No. 159881/2015
Judge: Lori S. Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI S. SATTLER** **PART** **02TR**

Justice

---X

GRACE BARCIA,

Plaintiff,

- v -

COSTCO WHOLESALE CORPORATION, COSTCO WHOLESALE MEMBERSHIP, INC.

Defendant.

---X

INDEX NO. 159881/2015

MOTION DATE 11/28/2022, 11/28/2022

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 330, 331, 332, 333

were read on this motion to/for SET ASIDE VERDICT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 334, 335, 336

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

This personal injury action arises out of an incident that occurred on July 3, 2015, when Plaintiff Grace Barcia ("Plaintiff") slipped on a wet condition at a Costco store in New Rochelle, New York, sustaining injuries. A trial was held in October 2022, after which the jury found that both parties were negligent, assigned fault 87% to Defendants Costco Wholesale Corporation and Costco Wholesale Membership, Inc. (collectively, "Defendant") and 13% to Plaintiff, and awarded damages totaling $1,604,996.

In Motion Sequence #008, Plaintiff moves pursuant to CPLR §§ 4404(a) and 5591(c) to set aside the verdict and increase her past and future pain and suffering awards, arguing the jury's award is a material deviation from reasonable compensation and not rationally related to the evidence. In Motion Sequence #009, Defendant moves to set aside the verdict and for an order directing a new trial on both liability and damages, arguing that the jury's award for future

medical expenses was not based on competent evidence and that the Court made three erroneous evidentiary rulings that, when taken together, necessitate a new trial. The motions are consolidated for disposition herein.

At trial, Plaintiff, who was 56 years old on the date of the incident, testified that on July 3, 2015, she and her sister visited a Costco store in New Rochelle. Upon arriving, they discovered that her sister's membership card had expired. They went to the customer service desk, where Plaintiff saw a puddle which looked like water. Plaintiff and her sister decided that the line to speak to a customer service representative was too long, and that they would return after completing their shopping. About an hour and a half later, Plaintiff's sister went to the check-out area while Plaintiff returned to the customer service desk. She waited on the line, and when a representative called her to the desk, Plaintiff stepped into the same puddle she had seen earlier and slipped and fell backwards (NYSCEF Doc. No. 304, 53-57). She testified that there were no wet floor signs and nothing roping off or blocking the wet area (*id.* at 61).

A maintenance worker at the Costco store, Alberto Perez, testified on behalf of Defendant. He stated that at around 3:00 pm on the date of the incident he received a call on his radio about the spill. He was "in the back" at the time, responded on his radio, "ETA two or three minutes," and arrived at the spill with cleaning supplies within that time frame (NYSCEF Doc. No. 307, 644-645). He testified that upon arriving: "There's three people sitting at the picnic table. And I saw [Plaintiff] get up. And she saw me, she hopped over the puddle, turned around, hopped over again, and that's when she fell" (*id.* at 647). He stated there was already a wet floor sign in the area (*id.*).

Neither party presented video footage of the incident. Plaintiff introduced photographs of the area of the store and at trial identified what she believed to be two security cameras visible in those photographs (NYSCEF Doc. No. 304, 58-60). Mr. Perez testified that he was aware of a

surveillance camera facing the store exit, but did not think that camera could capture footage of where Plaintiff fell, and he was not aware of whether or not there was a camera in the area near the customer service desk (NYSCEF Doc. No. 307, 648, 660-661).

As to damages, Plaintiff testified to "feeling pain" immediately after the fall (NYSCEF Doc. No. 304, 64). She went home that day, and "kept feeling the pain," so she decided to go to the hospital four days later (*id.* at 65). The pain, specifically pain in Plaintiff's neck, worsened, and she then saw her primary care physician, Dr. Patel, who took x-rays, gave Plaintiff an injection, told her to get an MRI, and referred her to physical therapy (*id.* at 68-69). In the time following the incident, Plaintiff went to physical therapy, saw various doctors, was prescribed various pain medications, and received injections in her neck (*id.* at 69-74). Ultimately, Plaintiff had surgery on her neck in July 2017, after which she wore a neck brace for three months, followed by a soft neck brace "on and off." Plaintiff returned to physical therapy after the surgery for six to eight weeks (*id.* at 75-78). She began seeing Dr. Ali Guy, to whom she was referred by her counsel, in 2018 for additional pain management treatment, including injections. That treatment largely concluded in 2019, however Plaintiff returned to Dr. Guy in April 2022, and then three times to receive injections in the two months leading up to trial (*id.* at 117).

Plaintiff further testified that she is still "in a lot of pain and discomfort" particularly in the winter, while in the summertime she feels better, but still feels pain on some days. She continues to do neck exercises and takes over-the-counter painkillers as needed. She testified she returned to Dr. Guy just prior to trial because it started getting cold and she was in pain (*id.* at 80). She states she has lost full range of movement in her neck (*id.* at 79-81). She testified to doing fewer things outside the house, to being less independent, and to getting less enjoyment out of life because of her neck pain (*id.* at 84). She conceded that she still tries to garden, clean her house, and do her laundry because she likes to do these things and wants to be independent

(*id.* at 82-83). Plaintiff testified that she did not have any neck injuries prior to the accident but conceded that she was told by her spinal surgeon, Dr. Gerling, that she had degenerative disk disease (*id.* at 105-106).

At an earlier stage of litigation, Plaintiff had also claimed injuries to her back as a result of the fall, but she later withdrew that claim. Plaintiff sought via pre-trial motion in limine an order precluding cross-examination about claims that were withdrawn, i.e. the back claim, which the Court granted (NYSCEF Doc. No. 326, 3). The Court clarified that, as the request was related solely to the withdrawal of the claim, preclusion was limited to questioning about the fact that Plaintiff withdrew her claim, and that Defendant was not precluded from questioning Plaintiff about any back injuries she might have or testimony she gave as to whether she had a prior back injury (*id.* at 3-4). The parties agreed that there might be some instances where Defendant could question Plaintiff about her back and that the Court and counsel would "take those when they come" (*id.* at 4).

At trial, Plaintiff called Dr. Ali Guy, one of her treating doctors who also prepared a life care plan as part of the litigation. Dr. Guy is a licensed medical doctor who is board certified in physical medicine and rehabilitation (NYSCEF Doc. No. 306, 350-351). Dr. Guy first saw Plaintiff as a patient on October 15, 2018, more than a year after Plaintiff's surgery (*id.* at 362). Based on his initial examination, Dr. Guy diagnosed Plaintiff with "[s]tatus post anterior cervical diskectomy with fusion with a permanent scar, cervical radiculopathy, and traumatic myofascial pain syndrome" as a result of the fall in Costco (*id.* at 377). He elaborated:

> Q: Can you tell us what each of those things are in terms of your diagnosis?
>
> A: Yes. So "status post" means the condition after the [neck] surgery. . . . There is permanent scarring to the neck with keloid formation. Cervical radiculopathy . . . means damage to a nerve root. And traumatic myofascial pain syndrome is when you have two or more trigger points in two [or] more body parts you meet the criteria of traumatic myofascial, which is damage to the muscle fibers.

> Q: And when you use the word "traumatic" before the word "myofascial," what does that mean?
>
> A: It came from trauma. The accident of 2015.
>
> Q: Okay. And did you make that determination based upon your exam?
>
> A: Yes, sir.

(*id.* at 378). Dr. Guy conceded that, regardless of any injury, disks degenerate naturally as part of the aging process, which begins for females around age 26 to 28. He stated that degeneration can be asymptomatic, and also makes one more prone to injury (*id.* at 382-383, 397, 437).

Dr. Guy went on to describe Plaintiff's neck surgery based on the medical records he reviewed. He testified that the surgery replaced herniated disks with artificial disks between the sixth and seventh vertebrae in the cervical spine ("C6" and "C7" respectively) and between the seventh vertebra in the cervical spine and first vertebra in the thoracic spine ("T1") (*id.* at 379-380). He explained: "They removed the entire disk. They replaced it with [an] artificial disk. They then put the metal plates and screws so the disk doesn't pop out of place . . . you fuse the bones, C6 to C7, C7 to T1 with the metal plates. So the disk, the new artificial disk, does not pop out of place" (*id.* 380-381). He stated that a person who gets this surgery "automatically" loses 10-15% range of motion and, because of the presence of metal, "when the weather is cold, rain, snow, and humidity, the patient is going to feel more pain, more discomfort, and the range of motion will be lost even more" (*id.*).

He stated that the average longevity of a disk replacement is seven years, "plus or minus two years" (*id.*). He testified:

> The condition is permanent and progressive. We are seeing progression. The surgery helps her for some time, but surgery is not permanent. It's not a cure. There is no cure for disk herniation. There is only treatments. So now the pain is coming back, is reoccurring. So there is adjacent segmental pathology setting in.

(*id.* at 433).

Dr. Guy detailed Plaintiff's pre-surgery treatment history as reflected in her medical records, which included pain treatment, injections, treatment of muscle spasms, and physical therapy (*id.* 384-400). As set forth in this testimony, Plaintiff went to St. Luke's Roosevelt Hospital complaining of pain on the left side of her neck and was given muscle relaxants. She followed up with Dr. Patel, to whom she reported the onset of numbness and tingling. She was given muscle relaxants and pain killers and an x-ray was taken. She had full range of motion at the time. Dr. Guy opined that "this one week after the trauma. We have not yet seen the full incubation period. As time goes on, this will worsen over time" (*id.* at 387). She returned multiple times over a period of weeks, complaining of increased pain, and was given a stronger pain medication and a stronger anti-inflammatory medications and creams. She was then given trigger point injections. She later went to physical therapy, where an EMG test revealed damage to the nerve root. She was prescribed additional pain medications and a muscle spasm medication and given additional trigger point injections. Dr. Gerling's surgical records reflect that he diagnosed Plaintiff, both pre- and post-operation, with cervical myeloradiculopathy, which Dr. Guy stated means compression on the spinal cord and nerve roots. Dr. Guy described the surgery in detail (*id.* at 401-420).

Dr. Guy began treating Plaintiff after the surgery, a treatment which included physical therapy, and new MRIs and EMGs (*id.* at 421). This imaging confirmed Dr. Guy's diagnosis that Plaintiff has "multiple disk herniations," "permanent scarring," and "persistent cervical radiculopathy damage to the nerve roots" (*id.* at 422). He has continued to treat Plaintiff, including giving her trigger point injections the month of the trial (*id.* at 424).

Dr. Guy prepared a life care plan for Plaintiff in connection with this litigation, which he detailed (*id.* at 439-442). The plan, the cost of which Dr. Guy conceded is based on the "optimal level of care," included seeing a spinal surgeon three to four times per year at a cost of $300 per

visit; a physiatrist at least 12 to 16 times per year at $200 per visit; physical therapy once a week at $200 each; MRIs every two to three years costing $1,500 each; EMGs of her neck every one to two years costing $2,000-$2,500 per study; various injections and pain management treatments for the next three to five years costing $5,000-$6,000 each. He opined that Plaintiff would need further surgery and stated that Dr. Gerling had also recommended additional surgery in 2018. He estimated that this surgery would cost more than $200,000. He opined Plaintiff would need post-operation physical therapy for four to six months at $200 per visit; periodic medication costing $4,000 to $11,000; and, at some point, a home health aide. Dr. Guy estimated the total cost of his life care plan to be $1.9 million in today's dollars. On cross-examination, he stated "I'm just talking about the neck. . . . There's a lot of stuff I removed for the lower back, because I was told to do so" (*id.* at 468).

Plaintiff also called Debra Dwyer, an economist Plaintiff hired to estimate the Plaintiff's future economic damages. She testified that she prepared a report in which she relied on Dr. Guy's life care plan to determine "how much money the plaintiff will need to cover those costs" (NYSCEF Doc. No. 305, 143-144). Dr. Dwyer used a life expectancy age of 84.3 based on data from the National Center for Health Statistics for Females (*id.* at 154) and inflation rates based on data from the United States Bureau of Labor Statistics (*id.* at 151). However, she left the cost of a second surgery in current dollars "because the timing of the surgery is indefinite" (*id.* at 153). Dr. Dwyer concluded that the total cost of Plaintiff's future treatment for the rest of her life is $1,908,186 (*id.* at 148).

As part of her report, Dr. Dwyer created a chart itemizing the cost of each expense Dr. Guy anticipated. When Plaintiff moved to enter the chart into evidence, Defendant objected on the grounds that it was hearsay, not a business record, and cumulative of Dr. Dwyer's testimony. Defendant did not object to using the chart for demonstrative purposes during her testimony.

The Court allowed it into evidence (*id.* at 145-147). Dr. Dwyer also verbally testified to the amounts set forth in the chart: $28,505 for spinal surgeon visits; $76,013 for physiatrist visits; $264,290 for physical therapy visits; $16,289 for MRIs; $40,721 for EMGs; $48,767 for epidural injections; $352,194 for medication; $825,907 for home health aide services; and $255,500 for surgery (*id.* at 154-155).

Defendant called Dr. Arnold T. Berman, an orthopedic surgeon whom Defendant hired to conduct an Independent Medical Examination ("IME") of Plaintiff. Dr. Berman testified that as part of the medical history he took of Plaintiff, he learned that Plaintiff had a work-related neck injury in 1995 (*id.* at 179). He further reviewed Plaintiff's MRI films and stated that they "showed she had very extensive degeneration of the spine, and there was disk space narrowing" that had been there "for many years . . . at least 10 or 15 years, for sure" (*id.* at 186, 188). He testified: "I had no choice but to conclude that the problem was degeneration of disks, very extensive" and that "there was no evidence" that any neck condition Plaintiff had was related to incident at Costco (*id.* at 188-189).

Defendant also called Dr. Robert April a neurologist whom Defendant also hired to conduct an IME of Plaintiff. Dr. April examined Plaintiff once prior to her surgery, and one time after her surgery (NYSCEF Doc. No. 306, 498). He testified that after conducting a full neurological exam the first time, she was "totally normal," was independent in activities of daily living and had no restriction of range of motion in her neck and no atrophy (*id.* at 501). He opined that Plaintiff's MRIs "show effects of the degenerative changes on the spine, wear and tear, nothing that looked like there had been an injury or a fracture or displacement, anything of force" (*id.* at 507).

Defendant further called Dr. Mark Decker, a musculoskeletal and spine radiologist with an orthopedic and spine specialty who also performed an IME (NYSCEF Doc. No. 307, 681-

682). Dr. Decker reviewed Plaintiff's MRIs from 2015 and prior to her surgery in 2017. Dr. Decker testified that the 2017 images showed that the disks in Plaintiff's cervical spine had lost fluid, and were less than the standard height, particularly between C6 and C7 and C7 and T1, which he testified "means that they're ageing, they're degenerating, they're drying up" (*id.* at 690). He testified that these findings were also present in the 2015 images and were "pretty much unchanged" in the 2017 images (*id.* at 692). Dr. Decker did not see any evidence of traumatic disk herniation in any portion of Plaintiff's neck on the 2015 MRI (*id.* at 697). He saw disk herniation between C7 and T1, which he described as "a degenerative, broad herniation, superimposed bulge. . . . This is, again, all degenerative, in nature" (*id.* at 697-698). He testified: "I can tell you with 100 percent certainty, there's no evidence of either traumatic injury on either films I reviewed from 2015, or, on this study from 2017" (*id.* at 698). Dr. Decker conceded that a person with films showing degeneration, herniations, and bulges might be asymptomatic while a person with a subtle MRI finding might have severe symptoms, so MRI films, while accurate in what they show, do not indicate whether or not the showings are clinically significant to that patient (*id.* at 723).

Defendant retained Noreen Bruen, a private investigator, to conduct surveillance of Plaintiff in connection with this matter. Ms. Bruen testified that on four days she observed Plaintiff from her surveillance vehicle positioned outside of Plaintiff's home and captured video footage of Plaintiff's activities outside (NYSCEF Doc. No. 307, 615). The videos captured footage of Plaintiff gardening, taking out her garbage, and carrying a full laundry bag.

Prior to summations, just after Defendant had rested and two days after Plaintiff had rested, Plaintiff sought to introduce Dr. Gerling's medical bills received the day before. The medical bills reflected charges totaling approximately $71,000. Defendant sought to preclude these bills as they were not put in on Plaintiff's case in chief (NYSCEF Doc. No. 308, 729-732).

In part, Defendant conceded its position amounted to a "tit-for-tat" insofar as Plaintiff had successfully objected to Defendant introducing Plaintiff's 2015 MRI films (*id.* at 731). Defendant also maintained they would be prejudiced, having not had the opportunity to review the bills (*id.*). The Court permitted Plaintiff to reopen her case for the purpose of introducing these bills into evidence.

The jury was charged on October 27, 2022. The charge included the following:

> You will remember that during the trial the attorneys made a stipulation in which they agreed to certain facts. This means that there is no dispute as to these facts and that these facts are established for the purposes of this case. You must consider the agreed facts along with all the other evidence presented and give the agreed facts such weight as you find is appropriate. You will remember that the parties agreed that the plaintiff's back injury is not in question and that she has degenerative disk disease in her spine.

(NYSCEF Doc. No. 309, 833-834).

During deliberations the jury asked for "All Award requests (past and future)" (NYSCEF Doc. No. 324), for a list of items in evidence (NYSCEF Doc. No. 321), and to review the EBTs of Plaintiff and Mr. Perez, the accident log, ER medical records, and Dr. Patel's reports (NYSCEF Doc. No. 320, 321, 323). They asked, "what if jury can't come to an agreement?" (NYSCEF Doc. No. 321) and whether the Verdict Sheet's questions related to Defendant's notice of and failure to correct the condition could be rephrased (NYSCEF Doc. No. 322). As to the latter question, the jury was instructed, *inter alia*, to treat them as written and apply the facts as they determine (NYSCEF Doc. No. 309, 872-874).

On October 28, 2022, the jury rendered a verdict determining that both Plaintiff and Defendant were negligent and that each of their negligence was a substantial factor in accident. The jury apportioned 87% of the fault to Defendant and 13% of the fault to Plaintiff. As to damages, the jury awarded $250,000 for past pain and suffering for a period of seven years and four months, $93,000 for past medical expenses, and $0 for past rehabilitation services. The jury

awarded $60,000 for future pain and suffering, $817,989 for future medical expenses, $251,862 for future homecare expenses and $132,145 for future rehabilitation services, for a period of 21 years.

CPLR 4404(a) provides:

> After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

Both Plaintiff and Defendant contend the verdict should be set aside because the jury's damages award was contrary to the weight of the evidence, with Plaintiff arguing the verdict as to past and future pain and suffering was penuriously low, and Defendant arguing the award for future medical expenses was too high.

A jury verdict may not be set aside as against the weight of the evidence unless "the evidence so preponderate[d] in favor of the [moving party] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Killon v Parrotta*, 28 NY3d 101, 107-108 [2016] [citation omitted]). To succeed on a CPLR 4404(a) motion, the movant must establish that the jury's verdict was "utterly irrational," and the Court must determine that "there is simply no valid line of reasoning and permissible inferences which could possibly lead [a] rational [person] to the conclusion reached by the jury" (*Matter of New York City Asbestos Litig.*, 32 NY3d 1116, 1121 [2018], citing *Killon*, 28 NY3d at 108; *Campbell v City of Elmira*, 84 NY2d 505, 509-510 [1994]). "Great deference is accorded to the [jury, which] had the opportunity to see and hear the witnesses" and was "in the best position to assess the credibility of the witnesses" (*Rozon v Schottenstein*, 204 AD3d 94, 101 [1st Dept 2022] [citations omitted]). "[A] trial court may not interfere with a jury's fact-finding process simply because it disagrees with its

finding or would have reached a contrary conclusion based on different credibility determinations" (*Cholewinski v Wisnicki*, 21 AD3d 791 [1st Dept 2005]).

A jury's determination with respect to awards for past and future pain and suffering will not be set aside unless the awards deviate materially from what would be reasonable compensation (*see* CPLR § 5501[c]; *Harvey v Mazal Am. Partners*, 79 NY2d 218, 225 [1992]; *Harrison v New York City Tr. Auth.*, 113 AD3d 472, 476 [1st Dept 2014]). Courts must look to awards approved in similar cases in order to determine whether an award is a material deviation from reasonable compensation, "bearing in mind that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification" (*Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003]).

In support of her motion to set aside the verdict and increase her past and future pain and suffering damages, Plaintiff argues that "serious spinal injuries that require fusion surgery can command pain and suffering awards of close to $5,000,000" and cites cases sustaining awards between $2,000,000 and $3,500,000. She argues that because the jury awarded most of the future medical expenses that were estimated, the pain and suffering award, which she contends is too low, is inconsistent. She further argues that the pain and suffering award is inconsistent because the future pain and suffering award compensates Plaintiff at a lower annual rate than the past pain and suffering award does. In response, and in addition to opposing the motion on the merits, Defendant argues Plaintiff's motion was untimely, and that she waived her right to argue that the verdict was inconsistent because the argument was not raised before the jury was discharged.

In support of its motion to set aside the verdict and direct a new trial on liability and damages, Defendant argues that the jury's questions to the Court during deliberation (NYSCEF

Doc. Nos. 320-324) demonstrate that they were confused about the evidence they were reviewing, and that they based their award of future medical expenses on speculation rather than competent evidence, and incorrectly awarded expenses for treatment to Plaintiff's back.

At the outset, Plaintiff's motion was timely made as the Court gave the parties thirty days to file the instant motions (NYSCEF Doc. No. 310, 893-894). The fact that the request for an extension of the time to do so was made by Defendant and was not explicitly joined by Plaintiff does not mean it did not also apply to Plaintiff.

Turning to the merits, the jury's finding of liability and apportionment of fault was not against the weight of the evidence. Plaintiff claimed that she slipped on a wet condition in Costco that had not been cleaned after a period of an hour and a half. Defendant's employee claimed that he arrived to clean the condition less than three minutes after he was notified, and that a wet sign had already been placed in the area. Defendant concedes that no video footage is available to corroborate either story, however evidence was presented indicating the presence of cameras in that area of the store. Under the circumstances, the jury weighed the witnesses' credibility and interpreted the evidence fairly in concluding that both parties were at fault and attributing 87% of the fault to Defendant.

Furthermore, there was testimony to support a finding that the fall was a substantial factor in Plaintiff's injuries, even when accounting for naturally occurring degeneration in Plaintiff's cervical spine. Specifically, Dr. Guy's testimony supports a finding that Plaintiff's naturally occurring degeneration, which was conceded, could have become symptomatic because of the fall. Dr. Decker also testified that degeneration can be asymptomatic, and that degeneration evidenced by MRI films is not necessarily indicative of the pain a patient feels. The conflicting evidence the parties presented as to whether Plaintiff's condition stemmed from a traumatic injury which accelerated the normal age-related degenerative process or whether it

was attributable solely to degeneration raised issues of credibility which the jury resolved (*Daniels v Simon*, 99 AD3d 658, 659 [2d Dept 2012]). As the jury's conclusion is supported by a fair interpretation of the evidence, there is no basis for disturbing that conclusion (*id.*).

As to the pain and suffering awards, many of the cases on which Plaintiff relies involve injuries not exclusive to the neck or far more serious spinal injuries (*see, e.g.*, *Mata v City of New York*, 124 AD3d 466 [1st Dept 2015][$3 million in pain and suffering damages where 27 year-old plaintiff required arthroscopic surgery to her wrist and a laminectomy to her lower back]; *Stewart v New York City Tr. Auth.*, 82 AD3d 438 [1st Dept 2013][$4.7 million in pain and suffering damages where plaintiff required a laminectomy and fusion of vertebrae in cervical spine, suffered compression factures in his thoracic spine, required a laminectomy in his lumbar spine, and can no longer walk]). On the other hand, in the case primarily relied upon by Defendant, the Court reduced the award to $300,000 for past and $0 for future pain and suffering where plaintiff had returned to his orthopedic surgeon after surgery and did not complain of any additional pain (*Trezza v Metro. Transp. Auth.*, 113 AD3d 402, 404 [1st Dept 2014]). Here, Plaintiff required surgery and treatment for pain, testified she is still in pain, continues to receive treatment and will require additional surgery, however she had significant age-related degeneration and the surgery was less serious. The Court finds that the jury's award of $310,000 in pain and suffering damages did not materially deviate from what is reasonable under the circumstances.

The Court further finds that Plaintiff waived the argument that the award was inconsistent by failing to raise it before the jury was discharged, thereby preventing the Court from taking corrective action (*Stanford v Rideway Corp.*, 161 AD3d 505, 506 [1st Dept 2018]). The facts here are different from those in *Paucay v D.P. Group Gen. Constrs./Devs., Inc.*, 187 AD3d 496

(1st Dept 2020), cited by Plaintiff, where the jury did not award any future pain and suffering damages despite awarding damages for past pain and suffering future medical expenses.

As to the award of future medical expenses, the jury appears to have partially credited the testimony of Dr. Guy as to Plaintiff's treatment needs, as well as Dr. Dwyer's economic projections, while also partially crediting the testimony of Defendant's expert witnesses that Plaintiff's pre-existing degeneration contributed to her treatment needs. Defendant's argument that Dr. Guy's life care plan was based on opinion and speculation is unavailing, as he testified about his ongoing treatment of Plaintiff, and his determination that Plaintiff would need an additional surgery is consistent with his testimony that a disk replacement surgery lasts between five and nine years, a non-speculative statement which is within the scope of his expertise. Likewise, the contention that the jury did not understand the evidence or its objective is not supported by the juror notes. Therefore, the Court finds that the jury's award of future medical expenses is not contrary to the weight of the evidence.

Defendant further contends the Court made erroneous evidentiary rulings and because of those rulings the verdict should be set aside in the interest of justice pursuant to CPLR 4404(a). A motion pursuant to CPLR 4404(a) to set aside the verdict in the interest of justice "encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" (*Russo v Levat*, 143 AD3d 966, 968 [2d Dept 2016]). Specifically, Defendant contends Plaintiff should not have been able to submit medical bills into evidence after she had already rested, Defendant should not have been precluded from cross-examining Plaintiff as to her withdrawn back claim, and the chart that was part of Dr. Dwyer's report should not have been admitted into evidence.

Trial courts have discretion to reopen a case to allow a party to submit additional evidence after that party has rested, which is to be exercised sparingly (*King v Burkowski*, 155

AD2d 285 [1st Dept 1989]; *see also Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980]). Whether the failure to introduce such evidence was inadvertent, whether that failure is subsequently sufficiently explained, and whether the evidence is newly discovered and its nature is then disclosed are factors to be considered in determining whether to permit a party to reopen its case (*see, e.g.*, *Kennedy v Peninsula Hosp. Ctr.*, 135 AD2d 788, 791 [2d Dept 1987]; *Matter of John Jay Coll. of Criminal Justice of the City Univ. of N.Y.*, 74 AD3d 460, 462 [1st Dept 2010]; *Fischer v RSWP Realty, LLC*, 62 AD3d 878 [2d Dept 2009]). Here, Plaintiff's counsel represented it received the medical bills the day before the request to reopen was made, after Plaintiff had already rested. It is undisputed that the medical bills are properly certified as business records in accordance with CPLR 4518, and that Plaintiff promptly informed Defendant of the receipt of the bills on the day they were received. Under the circumstances, the Court finds that it did not err in permitted Plaintiff to reopen her case to include medical bills received by her counsel after she had rested.

With respect to the Court's order precluding Defendant from questioning Plaintiff about her withdrawn back claim, the record makes clear that that ruling was limited to the withdrawal of the claim, not the injury itself. Defendant contends its inability to question Plaintiff as to her withdrawn back claim resulted in the jury mistakenly including treatment for back injuries in its award, however Defendant was not prevented from questioning Plaintiff or any witness for the purpose of parsing out whether any past or future treatment related to Plaintiff's neck or back. Moreover, the jury was specifically told that "plaintiff's back injury is not in question" and Dr. Guy indicated that future back treatment had been removed from his life care plan. Therefore, the Court's ruling on this motion in limine was not improper.

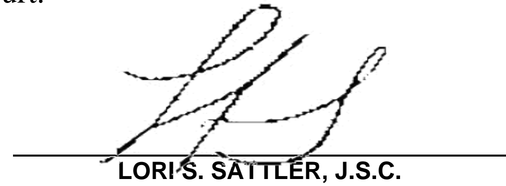
The Court further did not err in allowing a portion of Dr. Dwyer's report into evidence. "Testimony is properly precluded as cumulative when it would neither contradict nor add to that

of other witnesses" (*Segota v Tishman Constr. Corp. of N.Y.*, 131 AD3d 851, 853 [1st Dept 2015]). Here the chart of Plaintiff's estimated future medical costs was consistent with and demonstrative of Dr. Dwyer's testimony as to those costs. To the extent it was erroneously permitted into evidence, the error is harmless.

Even assuming if the Court were to agree with Defendant that one or all of these rulings were improper, the Court finds that their cumulative effect, if any, does not warrant a new trial (*see Harding v Noble Taxi Corp.*, 182 AD2d 364 [1st Dept 1992]).

Accordingly, for the reasons set forth herein it is hereby ordered that the motions are denied.

This constitutes the Decision and Order of the Court.



5/16/2023				LORI S. SATTLER, J.S.C.
DATE				
CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
APPLICATION:	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE