Williams v County of Westchester
2024 NY Slip Op 35121(U)
October 10, 2024
Supreme Court, Westchester County
Docket Number: Index No. 70866/2018
Judge: Nancy Quinn Koba
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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NICOLE WILLIAMS,

Plaintiff,

-against-

THE COUNTY OF WESTCHESTER, WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION, WESTCHESTER COUNTY DEPARTMENT OF PUBLIC WORKS AND TRANSPORTATION, W.S. GOODMOND, III, LEPRECHAUN LINES, INC. and MORTON MARSHALL,

Defendants.
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DECISION & ORDER

Index No. 70866/2018

Mot. Seq. Nos. 11,12 & 13

QUINN KOBA, J.

By notice of motion (the "County Motion" [Mot. Seq. No. 11]), defendants, The County of Westchester, Westchester County Department of Transportation, Westchester County Department of Public Works and Transportation and W.S. Goodmond III (collectively the "County Defendants") seek: 1) an order, under CPLR § 4404 (a), setting aside the jury's verdicts for future pain and suffering and future medical expenses as inconsistent, excessive and against the weight of credible evidence and reducing the verdicts for future pain and suffering and future medical expenses to zero; or 2) alternatively, an order directing that a new trial be held on future damages; 3) an order scheduling a collateral source hearing if the court does not set aside the verdict as to future medical expenses; and 4) granting such other and further relief as the court deems just and proper. Plaintiff opposes the County Motion, and the co-defendants support it.

By notice of motion ("Plaintiff's Motion" [Mot. Seq. No. 12]), plaintiff seeks an order, under CPLR §§ 4401, 4404 and 5501 (c), (1), setting aside the jury's zero award for past pain and suffering and $210,000 award for future pain and suffering (over 29 years); 2) ordering a new trial on those elements of damages; and 3) granting such other, further or different relief as the court may deem just, proper and equitable. The defendants oppose the Plaintiff's Motion.

By notice of motion (the "Leprechaun Motion" [Mot. Seq. No. 13]), defendants, Leprechaun Lines, Inc. and Morton Marshall (collectively "Leprechaun Defendants") seek: 1) an order pursuant CPLR § 4404 (a)

setting aside the jury's verdicts for future pain and suffering and future medical expenses as inconsistent, excessive and against the weight of the credible evidence; 2) reducing the verdicts for future pain and suffering and future medical expenses to zero; or 3) alternatively, for an order directing a new trial be held on damages. Should the court decline to set aside the verdict, the Leprechaun Defendants request that the court schedule a collateral source hearing pursuant to CPLR § 4545 and direct such other and further relief as the court deems just and proper herein. Plaintiff opposes the County Motion, and the County Defendants support it.

The following papers were considered in determining the Motions:

Papers	NYSCEF DOC. No.
Motion Seq. No. 11	
Notice of Motion, Affirmation in Support, Exhibits A to O Affidavit of Service	263-280
Affirmation in Opposition Exhibit A Affidavit of Service	328-330
Reply Affirmation	335
Affirmation in Support of Robert J. Yenchman	336
Motion Seq. No. 12	
Notice of Motion, Affirmation in Support, Exhibits 1 to 2 Affidavit of Service	281-298
Affirmation in Opposition of Howard Altman Exhibit A	316-317
Affirmation in Opposition of Robert J. Yenchman Exhibits A to B	325-327
Reply Affirmation Affidavit of Service	337-228
Motion Seq. No. 13	
Notice of Motion,	299-315

Affirmation in Support, Exhibits A to O	
Affirmation in Support of Howard B. Altman Exhibit A	318-319
Affirmation in Opposition Exhibit A Affidavit of Service	331-333
Reply Affirmation	334

The motions are consolidated for resolution. Upon the foregoing papers and for the reasons set forth below, the plaintiff's motion seeking to set aside the damage awards for past and future pain and suffering as inadequate and against the weight of the evidence and for a new trial on those issues is granted unless within 20 days after the date of this decision and order, defendants serve and file on NYSCEF a written stipulation consenting to increase the award for past pain and suffering from the sum of zero to the sum of $500,000 and to increase the award for future pain and suffering from the sum of $210,000 to the sum of $750,000, and the branches of the defendants' respective motions seeking to set aside the award for future medical expenses as excessive and against the weight of the evidence and for a new trial on that issue is granted unless within 20 days after the date of this decision and order plaintiff serves and files on NYSCEF a written stipulation consenting to decrease the award for future medical expenses from the sum of $1,290,000 to the sum of $750,000 with the judgment to be entered accordingly following any collateral source hearing.

FACTUAL AND PROCEDURAL BACKGROUND

This is a personal injury action arising out of a bus accident. Liability was found in plaintiff's favor, and a trial on damages only was conducted over a period of 7 days commencing September 20, 2023 and concluding with a verdict on October 2, 2023.

Summary of The Trial Testimony

Plaintiff's Witnesses

Nicole Williams

Ms. Williams testified in sum and substance as follows: she was born on March 4, 1970 and is the mother of three adult children (T [9/22/24] at 30).[1] In a typical day, she will go to work, return home and work through her pain. Currently, she does not have a very active

[1]T refers to the trial transcript while the date following the letter T refers to the date the testimony was given.

life (*id.* at 31). She is employed full time (*id.* at 31, 35-36).

On May 24, 2018, plaintiff was sitting on a Leprechaun bus in the window seat of the last row on the driver's side adjacent to the bathroom on her way home from work (T [9/22/24] at 39-40, 106). The bus she was riding in pulled away from the curb to the left to return to the traffic lane. At that point, she heard one of the passengers scream: "Oh, my God! The bus. The bus" (*id.* at 41). She looked up and saw the mirror of another bus come through the window of her bus; it continued moving toward the rear (*id.* at 42-43). She jumped up turned to her right to get out of the way and hit into the bathroom wall. She bounced back from the bathroom wall and caught herself on the seat in front of her, so she did not fall to the ground (*id.* at 42-44, 109-113). She left the bus and called her daughter. She completed a form provided by the bus driver in which she indicated she was feeling some back pain (*id.* at 48-50). She sought treatment at Vassar Hospital later that evening because her back pain was intensifying, and she had developed tingling burning pain across both shoulders and down her right arm. She underwent x-rays and was discharged with pain medication (*id.* at 52-55, 101, 103).

She took pain medication and went to work the next day. She sought treatment with her primary care physician about six days after the accident and with a physical therapist (*id.* at 57-58). She stated she continued to experience pain in her shoulders and shooting pain down her right arm to her elbow and pain in her lower back (*id.* at 58, 60-63). She went to California for one month about one month after the accident, a prescheduled trip, to help her daughter who was expecting her first child. She did not seek treatment in California. In August, she started treating at Citimed for the same complaints and was referred to Dr. Lerman (*id.* at 68-71). He recommended she continue physical therapy and undergo epidurals in her neck (*id.* at 71-72). The epidurals provided temporary relief.

Plaintiff underwent a cervical spine fusion on April 9, 2019 (T [9/22/24] at 76-77). She was out of work for three weeks after the surgery, had two or three post-surgical visits with Dr. Lerman and underwent physical therapy. Dr. Lerman told her the surgery was successful. She no longer had radiating pain in her shoulders. However, she continues to have pain in her neck, tightness and soreness, especially when it is going to rain or it is humid, but the pain is significantly reduced (*id.* at 81-82).

Plaintiff indicated that as her neck pain diminished her back pain began to increase. She saw Dr. Lerman toward the end of 2019 for increased back pain that was shooting into her buttocks. He recommended physical therapy and epidural injections. She did not start physical therapy due to COVID. She resumed treatment in November 2020 (T [9/22/24] at 84-85). She continued to have the same back complaints (*id.* at 87). She underwent a second lumbar MRI in 2021. Dr. Lerman compared this MRI to the one taken in 2018 and told her the herniations in her lower back had increased on her right side. She underwent two injections in her back without any lasting relief, so Dr. Lerman recommended surgery.

In May 2022, plaintiff underwent lower back surgery. Dr. Lerman told her the surgery was not as successful as he would have liked it to be, which explained the pain she continued to experience. She underwent physical therapy for approximately two months and treated with Dr. Lerman and Dr. Mandelbaum (T [9/22/24] at 90-93). She last received a trigger point injection in her lower back the same month as the trial (*id.*).

Plaintiff denied any prior neck or lower back injury (*id.* at 93-94). As a result of the accident, plaintiff stated she can no longer participate in her social club, go bowling due to pain and difficulty traveling or host family gatherings. She stated she is in constant pain and uses pain medication and cream daily.

Naquera Welcome

Ms. Welcome testified in sum and substance as follows: she is plaintiff's thirty-year old daughter, who lives with her. Her mother called her right after the accident and said she was in a bus accident and she hit into the side of the wall. She seemed upset (T [9/21/24 p.m.] at 19, 30-33, 36). Her mother took the late bus home. Her mother looked like she was in pain and looked tired. She helped her mother into the car; her mother could not sit, so she laid down in the rear seat. She took her mother to Vassar Hospital where she was seen in the emergency room (*id.* at 20, 40). After they returned home, she helped her mother get ready for bed. Her mother took some pain relievers. Her mother went to work the next day. She denied her mother had injured her neck and back before the accident (*id.* at 21).

She recalled her mother started physical therapy the week after the accident and subsequently underwent neck and back surgeries (T[9/21/24 p.m.] at 23). Before the accident, Ms. Welcome stated she split the household chores with her mother. She assumed more chores after the accident as her mother could no longer bend over to clean the tub, vacuum, etc. (*id.* at 24). Her mother was also outgoing, social, family-oriented and belonged to a social club. Since the accident, she has not bowled or ridden on roller coasters and resigned from the social club (*id.* at 24-26). Now, in her free time, her mother stays home and reads or relaxes (*id.* at 26).

Thomas Kolb, M.D. – Diagnostic Radiologist

Dr. Kolb testified in sum and substance as follows: He was retained by plaintiff's counsel's firm to review plaintiff's diagnostic films. He read plaintiff's cervical spine MRI of September 3, 2018, which he said showed disc herniations at C-2/C-3, C-3/C-4 and "big" herniations of the C-4/C-5 and C-5/C-6 discs that were pushing on the spinal cord and neural foramen due to a complete tear on the annulus (T [9/21/23 a.m.] at 25, 46, 52, 55-58). He did not see any significant age-related changes (*id.* at 59). He did not observe bone spurs or loss of disc height in plaintiff's cervical spine (*id.* at 79, 81). In his opinion, within a reasonable degree of medical certainty, plaintiff's cervical injuries were caused by the bus incident and are permanent (*id.* at 66-68, 85).

On the June 2, 2023 cervical MRI, he saw the surgical hardware, a complete fusion at C-4/C-5 and C-5/C-6, a little residual or recurrent herniation at C-4/C-5 and larger herniations at both C-3/C-4 and C-6/C-7. He did not observe a herniation at C-6/C-7 in the 2018 MRI (*id.* at 59-65).

Dr. Kolb testified plaintiff's lumbar spine MRI of September 3, 2018 showed disc herniations at L-3/L-4 and L-4/L-5 and small disc bulges, partial tears, at L-2/L-3 and L-5/S-1 (T [9/21/23 a.m.] at 68-70). He did not observe bone spurs or loss of disc height in plaintiff's lumbar spine (*id.* at 79, 81). He compared plaintiff's lumber spine MRI of December 2021 to the 2018 MRI and observed the herniation between L-3/L-4 had gotten larger and there was a new herniation pushing on the L-4 nerve root on the right between L-4/L-5. In his opinion, the tear of the annulus in 2018 had worsened over time to the condition shown on the 2021 scan (*id.* at 74), and the plaintiff's lumber injuries were caused by the bus accident and are permanent (*id.* at 75-76, 85).

Dr. Kolb reviewed x-rays of plaintiff's lumbar spine taken in May 2018 which showed bone spurs, age-related changes, at the front of the cervical spine at L-2, L-3 and L-4 and slippage of the L-2 bone. He stated these changes predated the accident, but based on plaintiff's history, the degeneration was not bothering her before the accident. He stated the degeneration of the spine was separate from the herniations that were caused by the trauma *(id.* at 82-85).

Vadim Lerman, M.D. – Orthopedic Spinal Surgeon

Dr Lerman testified in sum and substance as follows: He is a board certified orthopedic spinal surgeon who first saw plaintiff on August 29, 2018 for complaints of neck pain that was radiating into her right upper extremity and for lower back pain (T [9/27/23 a.m.] at 5). She stated her symptoms were aggravated by prolonged sitting, standing, bending and lifting. She was undergoing physical therapy (*id.* at 6). He conducted a physical examination and noted decreases in plaintiff's cervical range of motion (about 50%), muscle tenderness, straightening of her cervical lordosis, which is indicative of muscle spasms, and significant decreased strength and sensation on her right side in the area of C-5/C-6 (*id.* at 9-13). He also noted decreases in plaintiff's lumbar range of motion (about 30%), muscle tenderness, and muscle spasms with a normal neurological examination (*id.* at 13-14). She had an antalgic gait (*id.*). His diagnosis was "a herniated disc at C-5/C-6 with cervical radiculopathy" (*id.* at 16). He recommended continued physical therapy, avoiding activities that exacerbated her pain, i.e. bending, standing, lifting or twisting, continued use of Motrin and MRIs of her neck and lower back, which were performed on September 3, 2018 (*id.* at 16-17, 38). In his opinion, the incident described by plaintiff could herniate discs in her neck and back (*id.* at 25).

Dr. Lerman read the September 2018 cervical MRI as showing the discs at C-4/C-5 and C-5/C-6 pressing against the spinal cord in the center and a little bit more to the left, shifting the spinal cord to

the right, pressing against the foramen, which explained the symptoms on plaintiff's right side (*id.* at 28-29). She was referred to a pain-management doctor for epidural injections, but he continued to see her (*id.* at 31-32). The first injection gave her temporary relief (id.). Plaintiff underwent conservative treatment between November 2018 and February 2019. She made the same complaints at that time. He performed an anterior cervical discectomy fusion at C-4/C-5 and C-5/C-6, which required the insertion of plates and screws in plaintiff's cervical spine (*id.* at 44-53). He saw plaintiff post-operatively; she continued to experience neck pain but her symptoms had improved (*id.* at 58). The surgery was successful.

Dr Lerman testified the fusion changed the mobility of plaintiff's neck at the surgical levels causing the other levels start to work extra, referred to as adjacent level degeneration. He told plaintiff there was a 15-20% chance that within the next fifteen to twenty years she might have additional surgery due to the degeneration at the levels above and below the fusion (T [9/27/23 a.m.] at 59-60).

He also read the September 2018 lumbar MRI, which showed some disc bulging at L-5/S-1 and L-4/L-5 and a tiny annular tear at L-4/L-5. At that time, he said physical therapy was adequate to treat plaintiff's back (T [9/27/23 a.m.] at 38-39). He did not see any degeneration in her lower back (*id.* at 39). When he saw plaintiff on November 18, 2020, she informed him her lower back pain had worsened and was now between 7.5 and 10; when he first saw her it as about 6 on a scale of 1 to 10 (*id.* at 58-59). The pain continued to worsen and was a 9 out of 10 when he saw her in November 2021 (*id.* at 60). A lumber MRI was performed in December 2021, which showed a larger annular tear in the same spot where the tear was noted on the 2018 MRI. He stated it was a continuation of the tear present in 2018; the herniation was now impinging on the L-5 nerve root on the right side. Plaintiff had two lumbar epidural injections which did not relieve her pain. On May 3, 2022, he performed a minimally invasive discectomy at L-4/L-5 (*id.* at 63-67). In his opinion, plaintiff will need additional surgery if her lumbar pain persists due to part of the disc being adhesed to the nerve root. This procedure, a neurotomy, would have to be performed by a neurosurgeon (*id.* at 68).

Dr. Lerman last saw plaintiff on January 11, 2023. On that date, she continued to rate her pain as 6 on the pain scale, was continuing physical therapy, continued to have some numbness and tingling in her lower extremities and was working. It was his opinion that plaintiff's neck and lumbar complaints and subsequent surgeries were caused by the subject accident (T [9/27/23 a.m.] at 68-72). He further opined that as a result of the accident plaintiff sustained a significant limitation of use and a permanent consequential limitation of use of her cervical and lumbar spine and that the injuries and resulting pain prevented her from carrying out her usual and customary activities for 90 of the first 180 days after the accident (*id.* at 72-75). He opined she would require future treatment for her neck and back and would require future surgeries, i.e. a 15 to 20% chance of surgery due to adjacent level

degeneration in the neck, a 50% chance of re-herniation in her lower back that will require surgery and, potentially, a neurotomy (*id.* at 75; cross at 82).

It was his opinion that the herniation at C-6/C-7 identified by Dr. Kolb on plaintiff's June 2, 2023 MRI is the beginning of adjacent level syndrome. The cost of revision cervical surgery would be about $100,000 (*id.* at 76). He also stated she would need MRI testing to monitor her spine every eighteen months and annual orthopedic examinations (*id.* at 77). He stated the most common herniation in the neck is at C-5/C-6, and the most common herniation in the lumbar spine is at L-5/S-1 (T [9/27/23 Cross] at 18-19). He did not review the emergency room records (*id.* at 28).

Chaim Mandelbaum, M.D. – Pain Management

Dr. Mandelbaum testified in sum and substance as follows: He is a pain management practitioner who treats patients with chronic pain that has not responded to conservative therapy or treatment (T [9/28/23 a.m.] at 13-14). He was retained by plaintiff's counsel to examine plaintiff, review her medical records and create a life care plan regarding her future medical needs. He first saw her on August 20, 2022. She told him she had not injured her neck or back before the accident and that she had pain in those parts of her body after the accident (*id.* at 18). She complained of spasm, limited range of motion in her neck and radiating pain to the upper shoulder area and spasm in her lower back with radiating pain into her legs (*id.* at 19). At that time, she stated she was taking oral anti-inflammatory medication and a muscle relaxant and using a Lidocaine patch (*id.* at 21).

During his physical examination, Dr. Mandelbaum noted significant spasm in plaintiff's cervical spine from C-3 through C-7 bilaterally, limitations on her range of motion - both extension (30 degrees) and flexion (30 degrees), noticeably weaker right-arm rests (20.9 pounds) versus the left (53 pounds), and decreased sensation along the C-6/C-7 nerve distribution (*id.* at 22-23). He gave his opinion that this finding was consistent with the finding on the June 2, 2023 cervical MRI that the adjacent segment at C-6/C-7 is herniated (*id.* at 24). During his examination of plaintiff's lumber spine, Dr. Mandelbaum stated she had limitations on bending forward and backward and a positive straight leg raising test on the right (*id.* at 24-25, 28). His diagnosis was of a post-fusion patient with continued myofascial pain, i.e. spasm, of the cervical spine and post lumbar laminectomy with continued lumbar radiculopathy (*id.* at 26). He recommended lumbar and cervical transforaminal injections and muscular injections – trigger point injections - in both the cervical and lumbar spine to help with her chronic pain (*id.* at 28-29). If her pain persisted despite the injections, he told her a spinal cord stimulator may be used as a last resort. He recommended she continue with anti-inflammatory medication or a topical anesthetic such as Pennsaid or a ZT Lidocaine patch and muscle relaxants (*id.* at 29-31).

Plaintiff returned to Dr. Mandelbaum in January 2023 to get trigger-point injections (T [9/28/23 a.m.] at 36). She received six injections in her lumbar spine–three on each side. She underwent five series of trigger-point injections in her lumber spine as well as one lumbar epidural series injection (*id.* at 36-39). The last time he saw plaintiff before the trial was on September 6, 2023. She was wearing Lidocaine patches on her back and using gel on her back. She complained the Naproxen irritated her stomach. She told him she had temporary relief following the trigger point injections. She also had some relief with Pennsaid. She was still complaining of neck and lower back pain, which was radiating into her right lower extremity (*id.* at 40).

Dr. Mandelbaum set forth his recommended care plan for the rest of plaintiff's life to address her symptoms, maintain her current condition and alleviate periodic exacerbations of her pain. His plan includes: a set of trigger point injections every three months at a cost of $300 per set; epidural injections in the neck and lower back once every two years at a cost of $2,000 plus a facility fee of $2,500; ZT Lidocaine patches – 2 per day per month at a cost of $650 per month, Pennsaid anti-inflammatory gel at a cost of $1,000 per month, or alternatively, Diclofenac Gel at a cost of $200 per month for a total monthly cost of $750; twelve pain management visits per year at a cost of $200 per visit; two visits per year with an orthopedist at a cost of $200 per visit; on average ten physical therapy sessions per year at a cost of $120 per session; spinal cord stimulator trial run at a cost of $16,020; a permanent spinal cord stimulator if the trial is successful at a cost of $55,559 with the replacement of the battery every 10 years at a cost of $24,094.80 three times, the surgeon fee of $3,000 and facility fee of $5,000 for each replacement; joint lubrication injections - three per session at a cost of $400 per injection once annually; cervical MRI every 5 years at a cost of $1,500 per scan; further cervical surgery at a cost of $100,000; lumber neurotomy at a cost of $30,000 to $50,000 (T. [9/28/23 a.m.] at 42-62, 106). It was his opinion with a reasonable degree of medical certainty that plaintiff's injuries, pain and symptoms were caused by the subject accident (*id.* at 62). He further opined that plaintiff has a permanent disability related to her neck and back, that she has a permanent consequential limitation of the use and a significant limitation of the use of her neck and of her back (*id.* at 62-64). Although plaintiff was currently using Lidocaine patches and the Pennsaid, he believed she would benefit from the other recommended treatment in the future (*id.* at 85-86). He opined there was a 30% chance she would require further cervical surgery (*id.* at 86-87).

Testimony of Mark Zaporowski, Ph.D - Economist

Dr. Zaporowski testified in sum and substance as follows: He is a Professor of Economics and Finance at Canisius College and was retained by plaintiff's counsel to perform an analysis regarding Dr. Mandelbaum's life care plan for plaintiff (T [9/29/23 a.m.] at 11-12). He adjusted the current costs provided in the plan by various inflation rates to determine the future costs of the plan (*id.* at 13). He used the growth rate of each category and medical expense over the past twenty years

(*id.* at 14). He also used the average life expectancy of a woman plaintiff's age, which was 30.57 years, and applied the growth rate to the cost over that period of years *(id.* at 16).

He used a growth rate of 2.7% per year for medication and increased the same by that percentage yearly after 2023 resulting in a projected future cost of $421,228 (*id.* at 18). He applied a growth rate of 2.3% for pain management and orthopedic office visits at $200 per visit resulting in a projected future cost of $105,020 and $17,603 (*id.* at 19-20). He applied a growth rate of 2.1% for physical therapy visits resulting in a projected future cost of $55,874 (*id.* at 21-22). He applied a growth rate of 2.3% for lumbar and cervical epidural injections resulting in projected future costs of $46,003 and applied a growth rate of 3.6% to facility costs resulting in a projected future cost of $71,664 (*id.* at 22-23). Similar future costs would be incurred for cervical epidural injections. A growth rate of 2.3% percent was applied to the cost of joint lubrication injections and trigger point injections resulting in projected future costs of $52,610 and $52,510 (*id.* at 24). He indicated the insertion of a trial spinal cord stimulator was a single cost so it was not adjusted for inflation. He applied a growth rate of 3.6% for one year to the cost of a permanent spinal cord stimulator resulting in a projected future cost of $57,559 (*id.* at 25). He applied a growth rate of 2.5% to the spinal cord stimulator replacement battery resulting in a projected future cost of $72,084 (*id.* at 26). He applied a growth rate of 2.3% to the physician fee to insert the spinal cord stimulator replacement battery resulting in a projected future cost of $8,689 and a growth rate of 3.6% to the facility fee for said procedure resulting in a future projected cost of $17,886 (*id.* at 26-27). He applied a growth rate of 3.6% to the cost of cervical and lumbar MRIs resulting in projected future costs of $18,995 each (*id.* at 27). The potential cervical surgery and neurotomy would be a one-time expense of $100,000 and $40,000 (*id.* at 27-28). In his opinion, the total future cost of the proposed life care plan would be $1,290,387 (*id.* at 29). He conceded he could not confirm whether any of the treatment recommended would be provided to plaintiff (*id.* at 30).

Defense Witnesses

Testimony of Scott Haig, M.D. – Orthopedic Surgeon

Dr. Haig testified in sum and substance as follows: He is a general orthopedic surgeon whose practice includes the treatment of patients with spinal conditions; he is not a spine surgeon (T [9/27/23 p.m.] at 8-10, 37). He was retained by counsel for the County Defendants to conduct two physical examinations of plaintiff and to review her medical records. He first examined her on July 2, 2020. She gave him a history of bumping the right side of her body against the wall of the bus bathroom (*id.* at 18). He examined plaintiff's neck, shoulders and low back (*id.* at 21-24). The examination lasted approximately two minutes. He said plaintiff had full range of motion in his neck, but agreed her extension equaled 25 degrees, which is less than 50% of the normal 60 degrees. He found flexion in her lumbar spine was 70 degrees, which was a 22%

reduction in motion. He did not review her MRI films (*id.* at 35-36, 52).

The second examination was performed on December 15, 2022 and was focused on plaintiff's lumbar spine. He found the range of motion in her lumbar spine was basically normal, but she did have a 50% reduction in extension (*id.* at 25-26, 52). In his opinion, plaintiff's prognosis was good (*id.* at 26). He also stated her neck was moving even better than it had during his first examination. She was able to work and drive without restrictions (*id.* at 26-27). In his opinion, plaintiff does not require any further medical treatment (*id.* at 27). He did not offer an opinion on causation (*id.* at 12, 30).

Testimony of Michael Weintraub, M.D. – Neurologist

Dr. Weintraub testified in sum and substance as follows: He was retained by counsel for the County Defendants to conduct two neurological examinations of the plaintiff, which examinations were completed on October 6, 2020 and December 21, 2022 (T [9/28/23 p.m.] at 16-18). His neurological examination included taking a history, review of medical records and a physical examination of the plaintiff (*id.* at 19). During his December 21, 2022 examination, he did not observe spasm in either her cervical or lumbar spine. Plaintiff had surgical scars, her gait was normal with a little pitch on the right side that he assumed was from the surgery, her strength was 5 over 5 in her arms and legs, and her sensation was intact in all degrees (*id.* at 31-35). She had a normal neurological examination (*id.* at 38). Her range of motion had improved since the first examination. She had subjective complaints only at the time of his examination but indicated her pain had lessened (*id.* at 38, 84-85). In his opinion, plaintiff can continue to perform her activities of daily living, including her work (*id.* at 38-39). He did not provide an opinion on causation (*id.* at 16, 43). He stated her straight leg test had shown pain at 35 degrees as compared with 50 degrees in 2020 as well as asymmetry in her legs (*id.* at 76-79).

It was also his opinion that before the accident plaintiff had findings of degenerative spine disease that were reported in the MRI reports. He did not know whether she was in pain before the accident, had undergone MRIs of her neck or back or had previously been hospitalized for neck or back pain (T [9/28/23 p.m.] at 48-51).

Testimony of Alan Greenfield, M.D. – Radiologist

Dr. Greenfield testified in sum and substance as follows: He was retained by counsel for the County Defendants to comment on plaintiff's diagnostic films (T [9/29/23 a.m.] at 39, 44). He reviewed MRI films of plaintiff's cervical, thoracic and lumbar spine obtained in September and October 2018. It was his opinion that the films did not contain any findings that could be attributed to the accident (*id.* at 50-54). The September 3, 2018 cervical MRI showed a straightened cervical lordosis which may or may not be significant due to patient positioning in the machine, and degenerative bone spurs in the front mid and lower neck.

He is not disputing plaintiff had pathology in her neck; he is disputing the age and cause of the pathology (*id.* at 57). Based on the films, it was his opinion the pathology shown therein did not start at the time of the accident (*id. at* 57-58). The films show degenerative disc disease and underlying degenerative disc bulging that was present for years from C-3 through C-7 (*id.* at 59-60). It is possible to have this pathology without any pain or prior accident (*id.* at 61).

Dr. Greenfield stated the September 3, 2018 lumbar MRI also showed degenerative disc disease and underlying degenerative disc bulging at the L-3/L-4, L-4/L-5 and L-5/S-1 levels and bone spurs. There was also bony overgrowth at the facet joints (T [9/29/23 a.m.] at 65-67). Degenerative disc disease was also seen throughout the thoracic spine (*id.* at 69). He did not observe any acute injuries on the films (*id.* at 76-78).

The Verdict

On October 2, 2023, the jury reached the following unanimous verdict (NYSCEF Doc. No. 207):

1) Did plaintiff, NICOLE WILLIAMS, sustain a permanent consequential limitation of use of a body organ or member as a result of the accident on May 24, 2018? X NO

2) Did plaintiff, NICOLE WILLIAMS, sustain a significant limitation of use of a body function or system as a result of the accident on May 24, 2018? X YES

3) Did plaintiff, NICOLE WILLIAMS, sustain a medically determined injury or impairment of a non-permanent nature as a result of the accident on May 24, 2018 that prevented her from performing substantially all of the material acts that constituted her usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the accident? X NO

4) State the amount to be awarded to plaintiff, NICOLE WILLIAMS, for pain and suffering, if any, from the date of the accident, May 24, 2018, up to the date of your verdict. $ 0

5) State the amount to be awarded to plaintiff, NICOLE WILLIAMS, for pain and suffering, if any, from the date of your verdict to be incurred in the future. $ 210,000

6) If you made an award intended to compensate the plaintiff, NICOLE WILLIAMS, for pain and suffering to be incurred in the future, then state the period of years over which such amount is intended to provide compensation. 29 years

7) State the amount to be awarded to plaintiff, NICOLE WILLIAMS, for medical expenses and services, if any, from the date of the accident, May 24, 2018, to the date of your verdict. $ 0

8) State the amount to be awarded to plaintiff, NICOLE WILLIAMS, for medical expenses and services, if any, from the date of your verdict to be incurred in the future. $ 1,290,000

9) If you made an award intended to compensate the plaintiff, NICOLE WILLIAMS, for medical expenses and services to be incurred in the future, then state the period of years over which such amount is intended to provide compensation. 29 years (T.[10/2/24 p.m.] at 20-24]).

The court inquired whether any party wished to raise any issue regarding the verdict before the jury was discharged. All parties declined, and the jury was discharged (*id.* at 24-25).

The Motions

The Plaintiff's Motion

Plaintiff seeks an order, pursuant to CPLR §§ 4401, 4404 and 5501(c), setting aside the jury's awards for past and future pain and suffering as irrational, against the weight of the credible evidence, adequate and a deviation from material compensation (Issac Aff. at ¶¶ 2, 4).[2] While plaintiff contends the jury's verdict on special damages is amply supported by the evidence, she argues its failure to award any damages for past pain and suffering after finding she had sustained a "serious injury" within the meaning of Insurance Law (NYIL) §§ 5102 and 5104 is unsupportable under applicable case law (*id.* at ¶ 4). Relying on *Califano v Automotive Rentals, Inc.*, 293 AD2d 436 [2d Dept 2022]), plaintiff contends that "where the jury necessarily concludes that the plaintiff was injured as a result of the accident, the jury's failure to award damages for pain and suffering is contrary to a fair interpretation of the evidence and constitutes a material deviation from what would be reasonable compensation" (*id.* at 437 [internal quotation marks and citations omitted]). Plaintiff further relies on *Sescila v Garine*, 225 AD2d 684 [2d Dept 1996]), which holds that where a jury finds a plaintiff sustained "a significant limitation of use of a body function and system" and that the accident was a proximate cause of such injures, such as in the case at bar, "the failure to award future damages cannot be reconciled with the jury's findings that the plaintiff sustained a serious injury under the Insurance Law because the evidence reveals that the plaintiff must continue her treatments for the same injuries and must continue to regularly take anti-inflammatory pills to reduce the pain from those injuries" (*id.* at 685 [internal quotation marks and

[2]Issac Aff. refers to the Affirmation of Brian J. Issac, Esq. in Support, dated May 15, 2024 (NYSCEF Doc. No. 282).

citations omitted]). As the jury awarded her substantial future medical expenses over a period of 29 years, plaintiff contends the jury's low award of future pain and suffering must be set aside (Issac Aff. at ¶ 9).

In the event defendants assert the future pain and suffering award is defensible, plaintiff argues the award cannot be sustained where the jury found plaintiff suffered a continuing injury and implicitly rejected defendants' argument that the claimed injuries were not related to the accident but were pre-existing, citing *Hadjidemetriou v Juarez*, 187 AD3d 1156, 1157 [2d Dept 2020] (*id.* at ¶¶ 17-19). Plaintiff cites numerous appellate division decisions regarding pain and suffering awards involving plaintiffs who suffered injuries similar to those suffered by Ms. Williams.

Plaintiff further contends the better option would be to set aside the awards and grant a new trial on damages for pain and suffering rather than conditionally increasing the pain and suffering awards (*id.* at ¶ 20).

All defendants oppose plaintiff's motion and contend "the parties all agree on one thing: the jury's verdict, finding the Plaintiff sustained no permanent injury (Question 1), no medically determined injury (Question 3), no past pain and suffering (Question 4), yet awarding $210,000 for future pain and suffering and a staggering $1,290,000 for future medical expenses is inconsistent, wholly irrational, and not supported by the weight of the evidence" (Altman Opp. Aff. at ¶ 4; Yenchman Opp. Aff. at ¶ 4).[3] The Leprechaun Defendants, moreover, expressly adopt and support the arguments in opposition made by the County Defendants in their papers (Yenchman Opp. Aff. at ¶ 3). Defendants contend the jury's zero award for past pain and suffering is supported by the evidence but the future damages awards are not. Rather, they argue the weight of the evidence requires the setting aside of the awards for future pain and suffering and medical expenses (Altman Opp. Aff. at ¶ 5). Specifically, defendants argue the evidence showed the condition of the plaintiff's spine was the result of degenerative changes that long predated the accident and note she only sought treatment for pain in her shoulders, not her neck and back, after the accident. They further contend the evidence did not show any causally related permanent injury supporting the jury's finding that plaintiff did not sustain a permanent injury (*id.* at ¶ 6) or any objective proof of a significant injury stemming from this minor accident (*id.*).

Defendants contend the facts of the cases cited by plaintiff are distinguishable from the facts of the case at bar as they involve construction workers who fell from significant heights suffering debilitating injuries while this case involves a "7 mile per hour

[3]Altman Opp. Aff. refers to the Affirmation of Howard B. Altman, Esq. in Opposition to Plaintiff's Motion, dated May 31, 2024 (NYSCEF Doc. No. 316), and Yenchman Opp. Aff. refers to the Affirmation of Robert J. Yenchman, Esq. in Opposition to Plaintiff's Motion, dated June 26, 2024 (NYSCEF Doc. No. 325).

sideswipe" where the plaintiff "claimed only shoulder soreness after bumping into a bathroom stall on the bus" (Altman Opp. Aff. at ¶ 7). Thus, they contend the jury's verdict awarding zero for past pain and suffering is supported by the weight of the evidence and should not be disturbed (*id.* at ¶¶ 8, 11-13). They argue plaintiff's reliance on *Califano v Automotive Rentals, Inc.*, 293 AD2d at 436 and *Pares v LaPrade*, 266 AD2d 852 (4th Dept 1999]) is misplaced as those cases found the weight of the evidence supported the jury's finding that the plaintiff sustained a significant injury caused by the accident while the evidence does not support such a finding in this case (*id.* at ¶¶ 14-17). Defendants further emphasize the jury did not find that plaintiff sustained a "permanent consequential limitation of use of a body organ or member" as a result of the accident, which distinguishes it from the facts of the plaintiff's cases and which establishes the jury "*accepted* Defendants' argument that there was no objective evidence of any significant causally-related injury and that all of plaintiff's complaints were subjective and magnified for sympathy [emphasis in original] (*id.* at ¶¶ 17-18). They contend all the objective evidence showed the condition of plaintiff's spine was degenerative and long predated the accident and that said condition has resolved and healed (*id.* at ¶¶ 24-25, 35). In the absence of such evidence, defendants assert the plaintiff failed to meet her burden to demonstrate there is no valid line of reasoning and permissible inferences that could lead the jury to award zero sums for past pain and suffering (*id.* at ¶¶ 25-26; Yenchman Opp. Aff. at ¶¶ 62-63).

Even if the court denies the defendants' motion to set aside the awards for future damages, defendants contend the court should still deny the plaintiff's motion to increase the award for future pain and suffering given the jury's finding that the plaintiff did not suffer a permanent injury as a result of the accident and given her own expert's testimony there is only a 15% chance she will require future spinal surgery (Altman Opp. Aff. at ¶¶ 27-32).

In addition, the Leprechaun Defendants argue the jury's inquiry during deliberations as to whether plaintiff would be covered by medical insurance in the future demonstrates the jury's verdict for future damages was made out of sympathy and speculation that she may seek medical treatment in the future (*id.* at ¶ 8). They also argue plaintiff fails to accurately cite the trial record regarding the mechanism of injury described by plaintiff, which included plaintiff's testimony that "she 'just turned and started to go out normally' when she alleged contact with the bathroom wall occurred" and ignores the differing versions plaintiff told to her medical providers (Yenchman Opp. Aff. at ¶¶ 9-10). They assert the plaintiff did not complain of neck and back pain on the date of the accident, did not miss any time from work immediately thereafter, traveled to California approximately one month after the accident where she visited for one month, did not seek treatment in California, sought physical therapy upon her return to New York and signed an affidavit in January 2021 in which she described her injuries that did not mention any injuries to her lumbar spine (*id.* at ¶¶ 15-19, 58-60).

The Leprachaun Defendants argue plaintiff's reliance on *Sescila v Garine*, 225 AD2d at 684 is equally misplaced as in *Sescila*, unlike in the case at bar, there was evidence that the plaintiff must continue her treatment for the same injuries at issue in that case so it was error for the jury to not award any sum for future pain and suffering (*id.* at ¶ 54).

In reply, plaintiff asserts the defendants' opposition papers actually support her arguments that the awards for past and future pain and suffering must be set aside as against the weight of the evidence. Moreover, plaintiff contends that not one case cited by the defendants supports a zero award for past pain and suffering, where, as here, the jury found the plaintiff sustained a serious injury and awarded damages for future pain and suffering (Issac Reply Aff. at ¶¶ 3-4).[4] Plaintiff reiterates her argument that the jury implicitly rejected defendants' argument that the plaintiff's injuries were degenerative and unrelated to the subject accident when it rendered its damages verdict (*id.* at ¶ 8) and that a zero award for pain and suffering cannot be sustained when the jury finds the plaintiff sustained a serious injury in accordance with NYIL § 5102 (*id.* at ¶¶ 11-12, 21). Moreover, plaintiff notes the fact she continued to work shows she is not a malinger and asserts defendants ignore settled legal precedent that injuries can evolve over time (*id.* at ¶¶ 9, 23-25). Lastly, plaintiff asserted defendants do not contest that any inconsistency argument has been waived (*id.* at ¶ 27).

The Defendants' Motions

The County defendants and the Leprechaun Defendants each filed motions seeking an order setting aside the jury awards for future pain and suffering and future medical expenses as inconsistent, excessive and against the weight of the evidence and reducing the awards to zero (Mot. Seq. No. 11 and 12 respectively). Alternatively, if the court does not set aside said awards, all defendants seek a new trial on said damages. In the event the court declines to set aside the monetary awards, all defendants request the court schedule a collateral source hearing pursuant to CPLR § 4545. The plaintiff jointly opposed both Motions while each defendant supported the other's motion (*see* NYSCEF Doc. Nos. 300, 318, 331, 336). As the defendants seek the same relief, adopt each other's arguments, support each other's motion and raised similar arguments in opposition to Plaintiff's Motion and in the interests of judicial economy and to avoid duplication, the court will address the defense motions jointly.

Defendants essentially reiterate the arguments made in opposition to the Plaintiff's Motion to support their motions to set aside the future damages awards (Altman Aff. at ¶¶ 22-23,97-101; Yenchman Aff. at ¶¶ 22-23, 67-69).[5] They further reiterate the awards are excessive and

[4]Issac Reply Aff. refers to the Reply Affirmation of Brian J. Issac, Esq. in Connection with Plaintiff's Motion to set Aside the Jury Verdict, dated July 9, 2024 (NYSCEF Doc. No. 337).

[5]Altman Aff. refers to the Affirmation of Howard B. Altman, Esq. in Support, dated May

against the weight of the evidence since in the immediate aftermath of the accident plaintiff complained of pain in and sought treatment only for her shoulders, the jury found she had not suffered a causally related permanent injury and any injuries caused by the accident have healed (*id.* at ¶¶ 24 102-111; *id.* at ¶¶ 70-75). They also argue that even if plaintiff had proven her pre-existing spinal conditions were causally related to the accident, which they maintain she did not, her own expert admitted there is only a 15% chance that she would require future surgery (*id.* at ¶ 25). Thus, defendants contend the awards for future pain and suffering and future medical expenses are grossly excessive (*id.*; Yenchman Aff. at ¶ 74). Lastly, they argue the monetary awards for future damages was an impermissible compromise verdict (Altman Aff. at ¶¶ 112-114; *id.* at ¶¶ 79-80).

In opposition, plaintiff makes the same arguments raised in Plaintiff's Motion and in her reply to defendants' opposition to her motion (Issac Opp. Aff. at ¶¶ 4-6).[6] Plaintiff further highlights statements she asserts misstate the record, including the assertion that her own expert said she only had a 15% chance of future surgery. Rather, plaintiff states that "Dr. Lerman testified unequivocally in his direct examination that plaintiff will have pain for the rest of her life (54-60) and because a cervical fusion eliminates joint movement (58-60) she would need further treatment for her neck or back. Dr. Lerman affirmed that "It's not a matter of if, it's a matter of when' (75) such treatment will be required after which he set forth the need for and the cost of such surgery (76-77)" (*id.* at ¶¶ 8-11). Moreover, plaintiff asserts Drs. Kolb, Lerman and Mandelbaum all testified that her conditions and injuries resulted from the subject accident (*id.* at ¶ 17). Plaintiff contends the defendants waived any inconsistency argument and cannot rely upon it in their post-trial motions (*id.* at ¶ 23-28). Plaintiff further argues there is no evidence that the jury reached a "compromise verdict" (*id.* at footnote no. 4).

In reply, the County Defendants reiterate their arguments that the future awards are excessive and against the weight of the evidence and stress the applicability of *Pecoraro v Tribuzio*, 212 AD3d 646 [2d Dept 2023]) to the facts herein.

ANALYSIS

"A motion for judgment as a matter of law pursuant to CPLR 4404(a) may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving

8, 2024 (NYSCEF Doc. No. 264), and Yenchman Aff. refers to the Affirmation of Robert J. Yenchman, Esq. in Support, dated May 16, 2024 (NYSCEF Doc. No. 300).

[6]Issac Opp. Aff. refers to the Affirmation in Opposition to Defendants' Motions to set Aside the Jury Verdict of Brian J. Isaac, Esq., dated June 28, 2024 (NYSCEF Doc. No. 331).

party" (*Schneider v. Hanasab,* 209 A.D.3d 684, 687 . . . [internal quotation marks omitted]) (*Shouldis v Stange*, 227 AD3d 743, 745 [2d Dept 2024]; *see also Angeles v County of Suffolk*, 222 AD3d 923 [2d Dept 2023]). "If the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view . . . When conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and reject that of another expert" (*Angeles v County of Suffolk*, 222 AD3d at 925)[internal quotation marks and citations omitted]). Moreover, "[a] successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence" (*Cicola v County of Suffolk*, 120 AD3d 1379, 1382 [2d Dept 2014][internal citation omitted]), and the court must "afford the nonmoving party every favorable inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant (*Telesco v Blackman*, 139 AD3d 709, 711 [2d Dept 2016][internal citations omitted]). Accordingly, "[t]he discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution" (*Pecoraro v Tribuzio*, 212 AD3d 646, 647 [2d Dept 2023][internal citation omitted]).

In a personal injury action, the amount of damages to be awarded is a question for the jury, and its determination of the same is entitled to great deference (*Chung v Shaw*, 175 Ad3d 1237, 1239 [2d Dept 2019][internal citations omitted]). However, the damages award may be set aside if it "deviates materially from what would be reasonable compensation" (CPLR 5501 [c]; *Nieva-Silvera v Katz*, 195 AD3d 1035 [2d Dept 2021]). "Although 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" (*Id.*, citing *Miller v Weisel*, 15 AD3d 458, 459 [2d Dept 2005]; *Nutley v New York City Tr. Auth.*, 79 AD3d 711 [2d Dept 2010]). Courts also consider other factors, including the nature, extent and duration of the injuries (*see Nieva-Silvera v Katz*, 195 AD3d at 1037]; *Kusulas v Saco*, 134 AD3d 772 [2d Dept 2015]; *Tarpley v New York City Tr. Auth.*, 177 AD3d 929 [2d Dept 2019])).

In a personal injury action arising out of a motor vehicle accident, the plaintiff must establish she sustained a "serious injury" as defined in NYIL § 5102 (d) before she may recover any damages arising out of the accident from a covered person (*see* NYIL §§ 5102 (d) & 5104 (a); *Nussbaum v Chase*, 166 AD3d 638 [2d Dept 2018]). If a plaintiff establishes that one of multiple injuries sustained in the accident is a "serious injury" as defined in NYIL § 5102 (d), the plaintiff is then "entitled to seek recovery for all injuries incurred as a result of the accident" (*Id.* at 639 [internal citations omitted]; see also, Kapassakis v Metropolitan Tr. Auth., 193 AD3d 835 [2d Dept 2021]). That finding satisfies the no-fault threshold, which issue is thereafter eliminated from the case (*Kapassakis v Metropolitan Tr. Auth.*, 193 AD3d at 835).

Here, the jury found the plaintiff suffered a serious injury under the "significant limitation of use of a body function or system" as a result of the subject accident (*see* NYIL § 5102 (d)). This finding

entitled her to recovery for all injuries and damages proximately caused by the subject accident. Thus, the jury's failure to find plaintiff suffered a serious injury under either the "permanent consequential limitation of use of a body organ or member" or the "90/180-day" categories of NYIL § 5102 (d) is not pertinent to the pending motions as plaintiff met the no-fault threshold and that jury finding is supported by a fair interpretation and reasonable view of the evidence presented.

As a result of the accident, the plaintiff's treating spinal surgeon and pain management physician testified regarding the injuries to her cervical spine, including herniated discs at C-4/C-5 and C-5/C-6 with radiculopathy into her right arm, decreased range of motion, strength and sensation on her right side, which continued despite taking pain medication and undergoing physical therapy and epidural injections, requiring an anterior cervical discectomy fusion at C-4/C-5 and C-5/C-6, which required the insertion of plates and screws in her cervical spine, thereby permanently decreasing the range of motion in her cervical spine, which surgery reduced but did not eliminate her cervical pain that continued through the trial. They also testified to the impact of the reduced the mobility and range of motion in plaintiff's cervical spine on the levels abutting the fusion and that she would require future surgery at the adjacent level during her lifetime. Her expert radiologist testified to the presence of the cervical herniations as shown by the September MRI and identified a new herniated at the abutting C6/C7 level in the June 2023 MRI, which herniations he causally related to the accident and not to any pre-existing condition of her spine since he did not see degenerative changes in the MRI scans. Her treating doctors also causally related the cervical injuries to the accident.

They also testified that her lumbar injuries, including disc bulging at L-5/S-1 and L-4/L-5 and a tiny annular tear at L-4/L-5, which increased in size over time pressing on the L-5 nerve root and requiring a minimally invasive discectomy that was not entirely successful as a piece of the disc remained and was adhesed to the nerve root, were causally related to the accident and not to any pre-existing condition of her spine. Her pain management doctor also testified regarding her ongoing symptoms, chronic pain, and use of oral pain medications, creams, lidocaine patches, epidurals and five series of trigger point injections in her lumbar spine, the last series given weeks before the trial, to lessen her continued myofascial pain of the cervical spine and lumbar radiculopathy and opined regarding her need for lifetime medical care. Defendants' examining orthopedist and neurologist did not provide opinions on causation.

Both plaintiff and defendants called radiologists to testify, who provided differing opinions regarding the age and/or cause of the pathology shown in plaintiff's MRIs. Plaintiff's expert denied there were degenerative changes shown in the MRIs and stated the findings were related to trauma. However, to the extent any degeneration was present, he noted it was asymptomatic before the accident and unrelated to the traumatic disc herniations shown on the MRIs. While defendants' expert

testified the pathology shown in the MRIs was age related and long pre-existed the accident, he did not refute plaintiff's evidence that if it pre-existed the accident it was asymptomatic and failed to account for the same.

Thus, the jury was presented with conflicting expert testimony and was entitled to accept one expert's opinion and reject that of another expert (*Quijano v American Transit Ins Co,* 155 AD3d 981 [2d Dept 2017]), which happened here. The jury was free to reject defendants' expert radiologist's testimony that preexisting degenerative disc disease in plaintiff's spine was the cause of her spinal injuries, especially as he, and defendants' other experts, failed to account for the plaintiff being asymptomatic pre-accident (*see Cicola v County of Suffolk*, 120 AD3d at 1382). Given the nature and extent of the plaintiff's injuries detailed above, including an anterior cervical discectomy and fusion surgery as a result of the accident, lumbar laminectomy, physical therapy, epidural and trigger point injections and pain medication and creams, given the unrefuted evidence she continues to experience pain and limitations in her neck and lower back that is lessened but not eliminated by the oral medications, pain creams and trigger point injections, the testimony she will require surgery at C-6/C-7 due to adjacent level syndrome in her lifetime and likely a neurotomy due to the adhesion of some of the disc material to the nerve at L3-L4 and given her ability to work but inability to continue her pre-accident social activities, perform household chores and host family gatherings, the jury's failure to award any sum for past pain and suffering, a period of approximately five and one half years, and its award of $210,000 for future pain and suffering for a period of 29 years, were not based upon a fair interpretation of the evidence, were inadequate and deviated materially from what would be reasonable compensation (*see Carter v City of New Rochelle*, 208 AD3d 843 [2d Dept 2022]; *Sescila v Garine*, 225 Ad2d 684 [2d Dept 1996]).

Based upon a review of verdicts for comparable injuries and the evidence adduced at trial, an award of $500,000 for past pain and suffering and an award of $750,000 for future pain and suffering would be reasonable compensation of the injuries plaintiff sustained in the subject accident (*see Nieva-Silvera v Katz*, 195 AD3d at 1035 [past pain and suffering award reduced from $5 million to $750,000 and future pain and suffering award reduced from $36 million to $1.5 million where plaintiff sustained a herniated disc at C6-C7 requiring a spinal fusion with further surgery at C5-C6 in his lifetime and meniscal tears requiring arthroscopic repair and future knee replacement]; *Petit v Archer*, 218 AD3d 695 [2d Dept 2023][held awards of $600,000 for past pain and suffering and $1.2 million for future pain and suffering over a period of 25 years were reasonable compensation for bus passenger who sustained loss of range of motion in cervical and lumbar regions of her spine, underwent a cervical fusion and injections in her neck and back, was unable to return to work, and would require surgery and additional treatment to address further complications]; *Guallpa v Key Fat Corp.*, 98 AD3d 650 [2d Dept 2012][held award of $791,000 for past pain and suffering and $1,428,571.43 for future pain and suffering over 28 years

for a plaintiff who sustained an ankle fracture which required two surgeries, a herniated disc at the L4-L5 or L5-S1 level, which also required surgery, and a rotator cuff injury did not deviate materially from reasonable compensation]; *Kayes v Liberati*, 104 AD3d 739 [2d Dept 2013]][held award of $500,000 for past pain and suffering and $1.5 million for future pain and suffering for a plaintiff who sustained a herniated disc with surgery and will continue to experience significant pain, require future surgery and medical treatment, including pain management and physical therapy for the rest of his life, can no longer work in any significant capacity or engage in activities he previously enjoyed]); *Kusulas v Saco*, 134 AD3d at 772][held award of $1 million for past pain and suffering and $1 million for future pain and suffering for a plaintiff who sustained herniated discs at C4-5 and C5-6 requiring spinal fusion surgery, a second surgery after the bone graft between C5-6 failed to properly fuse, causing the adjacent disc at C6-7 to herniate, who suffers from chronic and severe neck pain, despite physical therapy, epidural injections, and pain medications and is unable to engage in many athletic activities that she previously enjoyed]).

Future medical Expenses

Awards of damages for future medical expenses "must be supported by competent evidence which establishes the need for, and the cost of, medical care" (*Pilgrim v Wilson Flat, Inc*, 110 AD3d 973, 974 [2d Dept 2013][internal citations omitted]). "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" (*Id.* [internal citations omitted]). Here, the jury was again presented with conflicting evidence regarding plaintiff's need for future medical care. Her experts testified she required medical care for the rest of her life, and the defense experts denied she needed any further medical treatment. Accordingly, the jury was free to reject defendants' experts' testimony that she did not require any further medical treatment. However, the jury 's award for future medical expenses is excessive and against the weight of the evidence to the extent it exceeded the sum of $750,000. Plaintiff presented competent evidence regarding the need for and cost of medications, MRIs, physical therapy, visits with pain management and orthopedic physicians and future cervical surgery through the testimony of Drs. Lerman, Mandelbaum and Zaporowski, and defendants did not present any evidence refuting plaintiff's estimated costs for the same. Plaintiff failed to establish with competent evidence the need for the other medical expenses, which were speculative, "last resorts," or possible alternatives if other treatments were not effective.

Inconsistent Argument

Defendants' contention that the verdict was inconsistent was waived by their failure to object to the verdict on that ground before the jury was discharged (*see Young v Heller*, 201 AD3d 1018 [2d Dept 2022]; *McAdams v Esposito*, 35 AD3d 552 [2d Dept 2006]).

All other arguments raised on the motions and evidence submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED the plaintiff's motion, Mot. Seq. No. 12, seeking to set aside the damage awards for past and future pain and suffering as inadequate and against the weight of the evidence and for a new trial on those issues is granted unless within 20 days after the date of this decision and order, defendants serve and file on NYSCEF a written stipulation consenting to increase the award for past pain and suffering from the sum of zero to the sum of $500,000 and to increase the award for future pain and suffering from the sum of $210,000 to the sum of $750,000; and it is further

ORDERED that the branches of the defendants' motions, Mot. Seq. Nos. 11 and 13, seeking to set aside the damage award for future medical expenses as excessive and against the weight of the evidence and for a new trial on that issue is granted unless within 20 days after the date of this decision and order plaintiff serves and files on NYSCEF a written stipulation consenting to decrease the award for future medical expenses from the sum of $1,290,000 to the sum of $750,000; and it is further

ORDERED that the branches of the defendants' motions seeking a collateral source hearing is granted in the event a stipulation is filed in accordance with this decision and order consenting to the decreased award for future medical expenses; and the motions are otherwise denied; and it is further

ORDERED that the parties shall appear for a conference on November 1, 2024 at 10:00 a.m. in Courtroom 1602 to discuss further proceedings, i.e. collateral source hearing or new trial, consistent with this decision and order.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
October 10, 2024

ENTER:

HON. NANCY QUINN KOBA, J.S.C.

TO: All Counsel VIA NYSCEF