SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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ANTHONY PACELLA,

Plaintiff,

- v -

BEACON CONSTRUCTION MANAGEMENT, LLC, and OMAR SANCHEZ-PEREZ,

Defendants.

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INDEX NO. 159240/2020

MOTION DATE 11/24/2025

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186

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

Appearances:
Plaintiff: Kelner & Kelner, Esqs. (Joshua D. Kelner, Esq.)
Defendants: Kelly, Rode & Kelly LLP (Eric P. Tosca, Esq.)

Upon the foregoing documents, and after oral argument on December 17, 2025, Defendants' motion for a setting aside the jury's verdict and dismissing Plaintiff's Complaint, or ordering a new trial, or reducing the damages awarded to Plaintiff is denied.

I. Background

On June 29, 2020, a motor vehicle operated by Defendants rear ended a motor vehicle occupied by Plaintiff. The impact was described as "heavy", and Plaintiff felt his head snap back. He experienced immediate pain in the base of his neck, in the middle of his back, and his right shoulder, and the following day bruises developed on his chest (Tr. 48; 51). Plaintiff was 32 years old at the time of the accident with no medical history of prior injuries. After years of attempting to alleviate his symptoms with conservative treatment, which included physical therapy, home exercises, and epidural injections, Plaintiff was recommended cervical disc replacement surgery.

Plaintiff received disc replacement surgery but still experiences neck pain daily alongside throbbing back pain, which he claims makes it difficult to focus and makes him irritable (Tr. 81-83). Plaintiff still experiences restricted range of motion in his back and limitations in moving his back and shoulder, which makes carrying out his activities of daily living more difficult (Tr. 84-86). He continues to take over the counter pain medication daily, is unable to engage in the recreational activities he previously enjoyed, and he even has difficulty taking short walks. He claims the pain and restrictions on his daily life make him feel isolated and cause him to go into a "dark place" (Tr. 92).

Plaintiff sued Defendants to recover for his injuries. On October 18, 2024, Plaintiff was granted summary judgment on the issue of liability (NYSCEF Doc. 120). A trial on damages commenced on October 20, 2025, and on October 24, 2025, the jury returned a verdict. The jury found Plaintiff sustained a permanent, consequential limitation of use of a body organ or member, and also found Plaintiff sustained a significant limitation of use of a body function or system as a result of the accident. The jury awarded Plaintiff $500,000.00 for past pain and suffering, and 4,800,000.00 for future pain and suffering over the span of 38 years.

Now, Defendants seek post-trial relief. First, Defendants ask the Court to set aside the verdict and enter judgment in their favor dismissing Plaintiff's Complaint. Alternatively, Defendants ask the Court to order a new trial on the limited issue of the no-fault threshold. Finally, Defendants ask the Court to reduce the total amount of damages awarded. Plaintiff opposes the motion in all respects. The motion is denied in its entirety.

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II. Discussion

A. Standard

Pursuant to CPLR § 4404(a), any party may set aside a verdict, or any judgment entered thereon, where the verdict is contrary to the weight of the evidence or in the interest of justice. A verdict is against the weight of the evidence where it is "utterly irrational for a jury to reach the result it has determined" (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 [1978]). Absent this high bar, the Court may not conclude that the verdict is, as a matter of law, not supported by the evidence (*New York City Asbestos Litig. (McWilliams)*, 224 AD3d 597 [1st Dept 2024]). Likewise, where an issue of fact exists, the Court may not direct a verdict (*Resnick v Socolov*, 5 AD3d 125, 126 [1st Dept 2004] citing *Cohen, supra*; *see also Weiss v City of New York*, 306 AD2d 64 [1st Dept 2003]).

The jury is to be afforded great deference, and the jurors may reject and assess the credibility of witnesses (*Rozon v Schottenstein*, 204 AD3d 94 [1st Dept 2022]). In determining whether a verdict is against the weight of the evidence, the non-moving party is afforded "every inference which may properly be drawn from the facts presented, and the facts must be considered in the light most favorable to the nonmovant" (*KBL, LLP v Community Counseling & Mediation Services*, 123 AD3d 488 [1st Dept 2014] quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Where there is conflicting testimony, the jury is entitled to determine which fact witnesses it finds most credible (*Gonzalez v NYC Department of Citywide Administrative Services*, 190 AD3d 416 [1st Dept 2021]).

B. Judgment Notwithstanding the Verdict

Defendants' motion to set aside the jury's verdict, dismissing Plaintiff's Complaint, and entering judgment in favor of Defendants is denied. Defendants argue that Plaintiff did not meet his *prima facie* burden of establishing a threshold injury. However, Defendants did not move for

a directed verdict in their favor at any time before the issue was submitted to a jury. By failing to move for a directed verdict in their favor on the threshold injury issue, Defendants conceded the issue was one for the jury and waived the right to seek this relief on a post-trial motion (*see Miller v. Miller*, 68 NY2d 871, 873 [1986]; *Wittorf v City of New York*, 144 AD3d 493, 494 [1st Dept 2016]; *Lamana v Jankowski*, 13 AD3d 134, 136 [1st Dept 2004]).

C. Motion for a New Trial

Defendants' motion for a new trial is denied. Defendants argue that they are entitled to a new trial because their request for a missing witness charge was denied. This Court repeatedly directed Defendants to provide the Court with a document containing their requests to charge (NYSCEF Docs. 152 and 173-174). Plaintiff had no issue in submitting the requested trial documents on time, but Defendants repeatedly disobeyed and flouted the Court's orders, instead engaging in the sloppy and unorthodox practice of requesting closing charges in piecemeal fashion scattered across various e-mails. This was despite multiple opportunities to submit a formal request to charge document.

Nonetheless, the Court considered Defendants' requests to charge, even though it was submitted in a non-compliant manner. However, Defendants did not request a missing witness charge until 11:30 p.m. the night before closings, after all evidence had been presented, and after the charging conference was completed. Defendants never raised the issue beforehand despite receiving Plaintiff's witness list prior to opening statements, at which time they should have put the Court and Plaintiff on notice of their intention to seek a missing witness charge. Defendants failed to offer an iota of justification for their dilatory and unacceptable behavior at the time of trial and fail to do so again in their post-trial motion. As stated by the Court of Appeals, "[a] party seeking a missing witness instruction has the burden of making the request 'as soon as

practicable'" (*People v Carr*, 14 NY3d 808, 809 [2010] quoting *People v Gonzalez*, 68 NY2d 424, 428 [1986]). Defendants utterly failed in meeting this burden. Therefore, the request for a new trial based on the denial of a missing witness charge is denied.

Defendants' argument that they are entitled to a new trial because the deposition testimony of the Mostafas was read to the jury is without merit. The Mostafas were co-plaintiffs[1] and the other occupants of the motor vehicle with Plaintiff at the time of the accident. Their testimony was read for the purpose of illustrating the impact of the collision, which was a central issue in the case based on Defendant's argument that the collision was minor and could not have caused Plaintiff's injuries. The Mostafas' testimony about their experience in the collision was therefore highly probative and touched on issues of credibility. This Court's limits on the scope of the testimony read ameliorated any prejudicial effect. Moreover, the reading of the deposition was proper pursuant to CPLR 3117(a)(3)(ii). That provision allowed the use of the Mostafas' deposition because Defendants were present at the Mostafas' deposition and the Mostafas are residents of New Jersey making them "witness[es] [who]...[are] out of state". Defendants have made no showing that Plaintiff intentionally caused the Mostafas to be absent from the trial, and Defendants have failed to show that they made any efforts to cause the Mostafas to be available for trial through voluntary cooperation or an interstate subpoena.

Defendants' argument that the Court was required to read Defendants' medical expert to the jury when the jury only requested Plaintiff's medical expert testimony to be read during deliberations is without merit. During its deliberations the jury specifically asked for Plaintiffs' medical expert's testimony only. It would have been undue interference in the jury's deliberation for the Court to *sua sponte* force completely different evidence before the jury during deliberations

[1] The Mostafas settled their claims prior to trial.

when the jury did not ask for that evidence. Finally, Defendants' argument that medical records from Korunda Medical were improperly admitted into evidence because they had insufficient time to review the records is completely without merit. Defendants were provided with a trial authorization for these records as early as June 23, 2025, months prior to the trial (NYSCEF Doc. 175). Moreover, the records were in this Court's subpoenaed records room since September 24, 2025, a month prior to trial, providing ample time for Defendants to review the records prior to trial. Defendants' argument that a new trial is warranted because this Court refused to ameliorate Defendants blunder in the months leading up to trial is unavailing.

D. Reduction of Jury Award

Defendants' motion to reduce the jury's award for past and future pain and suffering is denied. CPLR 5501(c) allows a court to review a jury award to determine if is excessive or inadequate. The standard to be applied is whether the award "deviates materially from what would be reasonable compensation."

Defendants' argument about the weight of Dr. Guy's testimony is without merit considering Defendant did not object to Plaintiff's subpoenaed medical records being admitted into evidence, and the jury was entitled to consider not only Dr. Guy's testimony and opinion based on the medical record, but also the medical records themselves, which, again, were submitted for the jury's consideration without objection. Moreover, it was within the providence of the jury to hear from both experts and the extent to which they examined Plaintiff, weigh both experts' credibility, and determine which of the conflicting opinions they found more credible. Simply because there is some evidence which may support "each party's position with regard to liability does not mean that the jury exceed[s] its province in determining which evidence to accept and which to reject" (*Demetro v Dormitory Authority*, 199 AD3d 605 [1st Dept 2021]).

The Court finds Defendants' argument that an award of $500,000 for past pain and suffering deviates materially from what would be reasonable compensation to be unavailing. This award for five years of pain and suffering, which included a disc replacement surgery, multiple epidural injections, physical therapy and home exercises, and the loss of enjoyment of life arising from Plaintiff's chronic pain. Plaintiff provided an explanation for lapses in treatment, which included difficulty obtaining insurance approval after moving to different states, which the jury was entitled to credit. He also testified he did not seek immediate medical treatment because he was taking care of his elderly mother undergoing chemotherapy and he was injured during the height of the Covid-19 pandemic before Covid-19 vaccines were even available.

The jury also was entitled to credit Plaintiff's testimony that he continues to experience severe pain in his neck, back, and right arm, and the jury was entitled to believe Plaintiff's testimony that at the age of 38 he is no longer able to go on bike rides, runs, bowl, or enjoy a normal social life. Plaintiff's expert, Dr. Guy, opined that Plaintiff's injuries were permanent and progressive, and will get worse overtime, requiring multiple future surgeries and epidural injections over the span of his 38-year future life expectancy. In a similar case from over a decade ago, the Second Department found a $3,000,000 award for future pain and suffering for a 27 year old in a motor vehicle accident who suffered severe lower back pain, replaced a spinal disc, experienced continued restrictions to her range of motion which precluded the plaintiff from engaging in athletic activities and other daily tasks, did not deviate materially from what would be reasonable compensation (*Halsey v New York City Transit Auth.* 114 AD3d 726, 727 [2d Dept 2014]). Considering inflation and the value of money today, an award of $4,800,000 today does not deviate materially from a similarly situated Plaintiff who was awarded $3,000,000 from a verdict rendered in 2012.

Considering other comparable awards and factoring in inflation into the jury verdict awarded in this case in October of 2025 further highlights why an award of $4.8 million over 38 years does not deviate materially from reasonable compensation (*see also Cabrera v New York City Tr. Auth.*, 171 AD3d 594, 595 [1st Dept 2019] [2018 jury verdict awarding $3,000,000 for future pain and suffering over 10 years was reasonable where plaintiff would need further cervical fusion in the future and suffered hip and neck arthritis caused by accident]; *Mata v City of New York*, 124 AD3d 466, 467 [1st Dept 2015] [award of $2,000,000 for future pain and suffering for 27 year old suffering wrist and lower back injury based on jury verdict from 2013 was reasonable]; *Stewart v New York City Tr. Auth.*, 82 AD3d 438, 440-41 [1st Dept 2011], *lv denied* 17 NY3d 612 [2011] [$2.7 million for future pain and suffering over 29 years affirmed where plaintiff would require laminectomies and fusions followed by physical therapy and rehabilitation based on jury verdict from 2009]). Considering Plaintiff's young age, medical evidence of his poor prognosis and need for future surgeries and injections, and his testimonial evidence about his ongoing pain and loss of enjoyment of life, the jury's award of $4.8 million over 38 years was reasonable.

The Court denies without prejudice Defendants' request for an Article 50-B hearing. Plaintiff shall submit his proposed judgment after which, if necessary and if the appropriate objections are made, the Court can hold an Article 50-B hearing. The Court has considered the remainder of Defendants' contentions and finds them unavailing.

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Accordingly, it is hereby,

ORDERED that Defendants' motion to set aside the verdict and enter judgment in its favor, or order a new trial, or reduce the damages awarded as excessive is denied in its entirety; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

12/22/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	x	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	x	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE