To commence the statutory time 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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ANTHONY DALLI,

Plaintiff,

-against-

WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION and ANTHONY MASSARO, JR.,

Defendants.

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DECISION and ORDER
Motion Sequence No. 2
Index No. 50551/2013

RUDERMAN, J.

The following papers were considered in connection with defendants' post-trial motion pursuant to CPLR 4404(a) for an order setting aside the jury verdict as to liability and damages, and granting judgment for defendant, or directing a new trial, or reducing the jury's damages award as excessive and contrary to the weight of the evidence, or, in the alternative, setting this matter down for a collateral source hearing and related relief:

Papers	Numbered
Order to Show Cause, Affirmation, Exhibits A - S	1
Affirmation in Opposition, Supplemental Affirmation in Opposition[1]	2
Reply Affirmation	3

This action arose out of an accident that occurred on August 16, 2011 in which plaintiff was struck by a Liberty Lines bus driven by defendant Anthony Massaro, Jr. It was plaintiff's position that at the time of the accident, while he was working within a cordoned-off work area

[1] Plaintiff's "Supplemental Affirmation in Opposition," while submitted in violation of the agreed-on schedule and standard procedures, will be accepted and considered by this Court in the absence of any perceptible prejudice to defendants.

on Jerome Avenue near 208th Street in the Bronx, a portion of defendants' bus entered the work area and struck him, knocking him down and causing injuries. Defendants took the position that Massaro was not negligent, and that the accident was caused when plaintiff unknowingly backed into the street outside the cordoned-off area, where he was struck by the bus. The jury found that Massaro was negligent and that defendants were 90% liable, while plaintiff was 10% liable.

In the damages portion of the trial, plaintiff presented his own testimony and that of his treating physician, Dr. David Zelefsky, in support of his claim that he suffered chronic shoulder, back and neck injuries as a result of the accident. He also described that on December 14, 2014 he experienced an exacerbation of his original back injury, such that he became unable to continue working as he had up to that date. Defendants presented as witnesses orthopedist Dr. John Buckner and neurologist Dr. Adam Bender who testified as to their opinions that the accident had not caused plaintiff any significant physical injuries.

The jury award in plaintiff's favor was as follows:

past medical expenses	$ 65,500.00
past lost earnings	$ 207,500.00
past pain and suffering	$ 213,000.00
future lost earnings	$ 960,000.00 (for 16 years)
future pain and suffering	$ 634,800.00 (for 34 years)
TOTAL	$2,080,800.00[2]

Defendants now move to set aside the verdicts.

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[2]Defendants' moving papers have incorrectly reported the verdict amounts: they state that the award for plaintiff's past medical expenses was $65,000 rather than $65,500, that the future pain and suffering award was $634,500 rather than $634,800, and that the total is $2,079,500 rather than $2,080,800.

Discussion

The Liability Verdict

Turning first to the liability verdict, it was not against the weight of the evidence.

> "A jury verdict is contrary to the weight of the evidence when the evidence so preponderates in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence. Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors. We accord deference to the credibility determinations of the factfinders, who had the opportunity to see and hear the witnesses"

(*Peterson v MTA*, 155 AD3d 795, 798 [2d Dept 2017]).

Plaintiff and two of his co-workers, John Delligatti and Jesus Garcia testified that defendants' bus swerved into the area in which plaintiff was working, which area was marked by traffic cones, and struck plaintiff within that area. Another eyewitness, Bart Xhackli, testified on defendants' case that it was plaintiff who backed into the bus's path while it was within the roadway. While defendants challenged the credibility of plaintiff's witnesses and emphasized the reliability of the neutral eyewitness in support of their argument that plaintiff was actually outside the marked-off area when the bus struck him, "[i]ssues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence[,] [and] [i]ts resolution is entitled to deference" (*Cicola v County of Suffolk*, 120 AD3d 1379, 1382 [2d Dept 2014]), quoting *Lalla v Connolly*, 17 AD3d 322, 323 [2d Dept 2005]). Defendants' arguments do not justify a rejection by this Court of the testimony of plaintiff and his co-workers as a matter of law; nor may it be said that the liability verdict could not have been reached on any fair interpretation of the evidence.

There is no merit to defendants' other arguments challenging the liability verdict.

Damages Verdict

The verdict in favor of plaintiff on damages was supported by plaintiff's testimony and that of his treating physician, Dr. David Zelefsky. Plaintiff testified regarding his injuries, the treatments he underwent and the pain he experienced; Zelefsky introduced and explained medical records regarding plaintiff's testing, diagnosis and treatment.

Several of defendants' challenges to the damages verdict are related to plaintiff's claim that his original injuries caused by the subject accident were exacerbated or aggravated while he was working on December 14, 2014, after which he became unable to work at all. Defendants maintain that this was actually a new injury caused by a subsequent accident, for which plaintiff is not entitled to any damages here.

Defendants contend that plaintiff should have been precluded from making a claim at trial for an award of damages for the period after the December 14, 2014 incident, relying on the decision and order issued in this case on October 24, 2017 (Joan Lefkowitz, J.), denying plaintiff's motion to strike the note of issue in order to permit additional discovery. However, that decision and order explained that plaintiff had failed to establish that unusual or unanticipated circumstances had arisen since the note of issue was filed, justifying a need for further discovery. Nothing in the language of that order precluded plaintiff from claiming that his injury was exacerbated or aggravated on December 14, 2014, or from seeking damages for pain and suffering and lost earnings, for the period after December 14, 2014.

Defendants also rely on a determination of the Social Security Administration dated December 5, 2017, which determination was not received in evidence, in which the agency found that plaintiff has been disabled, for purposes of the Social Security Act sections 216(i) and

223(d), since December 12, 2014[3]. That determination specifically acknowledged that plaintiff was initially injured in April 2011 when he was struck by a vehicle in the course of his employment, but had been able to return to work before being reinjured on December 12, 2014. It does not find that the December 12, 2014 injury is a new injury resulting from a separate accident, rather than an aggravation of the original injuries. Even if the agency had so found, plaintiff would not be precluded from claiming damages for the period after December 12, 2014 based on the application of the doctrine of collateral estoppel, since defendant has failed to establish that the issue decided in the agency proceeding was identical to that presented in the personal injury action (*see Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013]).

Defendants next contend that Dr. Zelefsky was improperly allowed to testify without MRI films in evidence. This contention is built on a false premise. Review of the trial transcript confirms that the MRI films *were* admitted in evidence (*see* Defendants' Exhibit B, Trial Transcript at 175). It is worth noting that defendants' medical experts also testified with respect to the MRIs. Accordingly, *Wagman v Bradshaw* (292 AD2d 84, 87 [2d Dept 2002]), upon which defendants rely, does not require setting aside the verdict here. The Court there ordered a new trial on the issue of damages because "[t]he plaintiff was ... allowed to place in evidence, by way of the treating chiropractor, a subjective interpretation of [unproduced] MRI films, from an inadmissible report written by a nontestifying healthcare professional" (*id.* at 86).

While defendants challenged Zelefsky's expertise, the doctor was properly permitted to

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[3] The SSA determination refers to the reinjury date as December 12, 2014, while plaintiff testified that it occurred on December 14, 2014. However, the Court concludes that the minor discrepancy is immaterial.

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