

## SUPREME COURT OF THE STATE OF NEW YORK

## Appellate Division, Fourth Judicial Department

1171

800185/2012

CA 16-00522

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

ANITA L. CASTRO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PROFESSIONAL GOLF SERVICES, INC., DOING  
BUSINESS AS SARATOGA SPA GOLF,  
DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL M. CHELUS OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (PHILIP J. O'SHEA, JR., OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered January 14, 2016. The order granted a new trial on damages for past and future pain and suffering and future medical expenses unless the parties stipulate to specified increases in damages.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order that granted plaintiff's motion to set aside the jury verdict on damages in this personal injury action. The jury awarded plaintiff, inter alia, the sum of \$200,000 for past pain and suffering, \$100,000 for future pain and suffering, and \$125,000 for future medical expenses. Supreme Court vacated those parts of the award and ordered a new trial on the issue of damages for past and future pain and suffering and future medical expenses unless the parties stipulated to increase the award to \$300,000 for past pain and suffering, \$600,000 for future pain and suffering and \$207,850 for future medical expenses. Contrary to defendant's contention, the court did not abuse its discretion in granting plaintiff's motion. "Although a jury's assessment of damages generally is afforded great deference and will not be overturned unless it deviates materially from what would be reasonable compensation . . . , 'the trial court retains the discretion to set aside a verdict under appropriate circumstances' " (Carter v Shah, 31 AD3d 1151, 1151; see CPLR 5501 [c]; Warnke v Warner-Lambert Co., 21 AD3d 654, 657). Here, " '[g]iven [the court's] superior opportunity to evaluate the proof and the credibility of the witnesses,' " we conclude that the court did not abuse its discretion in determining that the award of damages should be increased (Carter, 31 AD3d at

1151-1152; see generally *Prunty v YMCA of Lockport*, 206 AD2d 911, 912).

Entered: December 23, 2016

Frances E. Cafarell  
Clerk of the Court

**Supreme Court**  
**APPELLATE DIVISION**  
Fourth Judicial Department  
Clerk's Office, Rochester, N.Y. }

*I, FRANCES E. CAFARELL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*



*IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this* **DEC 23 2016**

*Frances E. Cafarell*  
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Clerk