# NEW YORK SUPREME COURT - COUNTY OF BRONX
## PART IA-25

NANCY CRUZ,

Plaintiff,

-against-

BRONX LEBANON HOSPITAL CENTER,

Defendant.

**MEMORANDUM DECISION/ ORDER**
Index No.24402/06

HON. MARK FRIEDLANDER:

Defendant Bronx-Lebanon Hospital Center ("BLH") moves, pursuant to CPLR 4404, for an order setting aside the jury verdict rendered herein as based on evidence which was legally insufficient to support such verdict; or, in the alternative, for an order directing a new trial as to the claims against BLH on the ground that the jury verdict was against the weight of the credible evidence and/or was inconsistent, and on the further ground that the jury was prejudiced by improper summation remarks on the part of plaintiff's counsel; or, in the further alternative, for an order directing a new trial as to damages, on the ground that the jury's award was excessive and contrary to the eight of the evidence.

This matter was tried before the undersigned in August and September 2012. The action arose out of injuries sustained by plaintiff Nancy Cruz when she tripped and fell in the courtyard of BLH in August 2006, while playing with her grandson. Plaintiff claimed that her fall was caused by a hole in a rubber mat, which resulted from a part of the mat having been worn away. The jury heard testimony from plaintiff, from an employee and former employee of BLH, and from medical experts called by each side. The injuries claimed by plaintiff involved a dislocated elbow, which was repaired, and chip fractures within the elbow joint, which remain to the present. After deliberations, the jury awarded plaintiff $300,000 in damages for past pain and suffering ("PPS"), and $270,000 in future pain and suffering ("FPS"). The FPS award was intended to cover a

period of 27 years.

**I. Proof as to Liability.**

Movant's initial contention is that plaintiff's claim must fail because there is no proof of notice to BLH as to the claimed defect in the rubber mat. Movant stresses that BLH's employee testified as to his regular and frequent inspections of the premises, including the mats, and denied ever seeing any defect. Plaintiff herself did not see the alleged defect before she fell, but claims to have seen it after her fall. BLH asserts that there is no proof as to how long the defect was present, if it ever existed.

Despite the foregoing contentions, it was within the jury's province to determine that plaintiff's account was the correct one, and that she did see the area at which she tripped to be worn away, causing a depression which precipitated her accident. Further, the very description of a worn out area pre-supposes a slow process, and can support a jury inference that the defect should have been discovered. Thus, the nature of the claimed defect, if believed, sufficiently supports a jury finding of constructive notice, and thus, of negligence.

Movant also argues that plaintiff's fall was caused by tripping over a ball, and not by any defect in the mat. For this purpose, movant cites to quotes from plaintiff's direct testimony, which the Court finds to be taken out of context. Movant claims that plaintiff testified, at page 7 of the trial transcript ("Tr."), that she "tripped, slipped over the ball, hit the ground." The actual, complete statement by plaintiff at that cite is: "There was a hole in the foam in the rubber and I tripped, slide (sic) over the ball..." Movant further quotes plaintiff (Tr.11) as saying that she "fell right over the ball and rolled off and went plop." The actual, complete statement by plaintiff at that cite is: "There was a ball right in front that that the kids were playing with, but when I tripped over the hole nobody was there and I fell right over the ball and rolled off and went plop."

In short, it is perfectly clear from plaintiff's testimony that she claimed to have fallen as a result of a worn out hole in the rubber mat, and, only after tripping, to have hit the ball on her way down, and to have then rolled off of it. In fact, plaintiff once again testified clearly to this effect (Tr.10) in a statement properly quoted

in full in movant's own moving affirmation (par. 10), and again in a brief response to her counsel (Tr.12). By contrast, plaintiff only once answered "yes" when her counsel asked if she had tripped "over a ball," (Tr.11), but it is clear from the follow-up question and answer (Tr.12), that plaintiff either misunderstood the question (at Tr.11), or simply meant that she had tripped at a point where the ball was nearby. The totality of the testimony bears out that plaintiff asserted a consistent set of facts constituting a cognizable claim which, if believed, could have sustained a jury finding of liability on the part of BLH.

BLH produced a former employee (Sharon Stringfield, a social worker) who testified at trial that she saw plaintiff fall over a ball. However, this testimony was impeached by the reading of the deposition transcript of another BLH employee (Veronica Mesadieu, who was not available to testify at trial) to the effect that Mesadieu and Stringfield were sitting together at the time of the accident, that they were not seated near the scene of the accident, that they did not witness the actual fall, but only came over after plaintiff was on the ground. The jury would not have been acting unreasonably in crediting the account of Ms. Mesadieu over that of Ms. Stringfield, on the basis, inter alia, that it was more likely for the two women to have been alerted to the accident by the noise of its occurrence, rather than to have been focused on the event from afar at the precise moment it happened.

Furthermore, Ms. Stringfield testified that she saw plaintiff fall backward, while plaintiff stated that she fell forward. There is no dispute that plaintiff sustained an injury in the fall, and there was undisputed medical testimony that such injury was compatible with a fall in the forward direction. On the whole, therefore, the testimony of Ms. Stringfield could have been appropriately discounted by the jury. It should be noted that the Court was at a disadvantage in considering the testimony of Ms. Stringfield, as movant has provided no transcript of such testimony, and, contrary to movant's supposition, the Court does not have its own copy.

The cases cited by movant for the purpose of setting aside the liability portion of the verdict are entirely inapposite. Several examples should suffice. In Early v. Hilton, 73 A.D.3d 559, discussed at length by movant,

the alleged defect was a strap on the street, which could have been placed, moved or removed at arbitrary times, undermining proof of notice to the defendant that the item was present, unlike the case here, in which a mat admittedly present at the scene became worn down progressively

In Cruz v. NYCTA, 31 A.D.3d 688, the alleged constructive notice was based on the claim that a particular greasy page of newsprint had remained in the exact same place on a busy public thoroughfare for days between the time that the injured party first noticed it and the time that such party slipped on it. A court correctly found that claim to be patently incredible. Another case, Rubin v. Cryder House, 39 A.D.3d 840, involved a trip and fall over a raised portion of floor covering, wherein the injured party could not establish whether such purported defect had existed before the fall, or had been created precisely when the fall occurred, caused by the impact of the plaintiff's footwear. By contrast, the claim of the instant plaintiff suffers from neither the overwhelming unlikelihood of Cruz, cited above, nor the uncertainty as to origin of the defect in Rubin. It is certain that plaintiff did not wear out the alleged hole in the mat all by herself.

Other cases cited by movant deal with slips caused by wet spots, or grease, conditions which can appear or be fixed rapidly, as opposed to conditions which self-evidently develop over time. In addition, many of movant's citations are of court decisions on summary judgment motions, which are not entirely useful here, where a jury has already spoken. It matters not that employees of BLH claimed to have seen no hole. They did not provide proof of their claimed, self-serving observations, in the form of photographs, or any other objective evidence. Under the circumstances, the jury was entitled to give greater weight to plaintiff's account, which they evidently did, and to find in her favor on the issue of liability.

**II. Summation of Plaintiff's Counsel.**

Movant also asserts that it was prejudiced by the closing remarks of plaintiff's counsel, who attempted to inflame the jury by suggesting that plaintiff was being persecuted for pressing her claim. While plaintiff's counsel was certainly treading on questionable ground in that single portion of his remarks, it is noteworthy that

the Court responded by giving the jury a curative instruction, reminding them that the deposition of plaintiff was a part of the legal process, and that her examination by defendant's doctor was also a required procedure - in other words, a normal part of litigation. Under the circumstances, it would have been inexcusably wasteful to declare a mistrial at that point in the proceedings, even if one had been requested. In the Court's view, any impropriety, if it existed in the first place, was cured and, in any event, was not so prejudicial when spoken as to taint the jury's ability to arrive at a fair verdict.

**III. Credibility of Plaintiff.**

Movant contends that plaintiff's trial testimony was patently incredible, because of the many times that she was shown to have misspoken, or that she refused to accept evidence with which she was impeached. The cases cited by movant to support this contention deal with instances wherein plaintiff's account as to the happening of the alleged incident, or the presence of the alleged defect, was itself suspect (see Cruz v. NYCTA, cited supra). Here, such lack of credibility as may be imputed to plaintiff does not relate to her claim of falling over a worn portion of mat, but only to more ancillary areas, such as her general health issues, which she seemed predisposed to minimize or deny, to the injuries she may have sustained in another accident, and to legal documents which she would not acknowledge having signed.

Plaintiff responds that credibility is a matter entirely within the jury's province. While this is generally the case, there are surely occasions wherein the manifest lack of credibility of a witness or party may be noted as a matter of law. However, as indicated supra, in the instant situation such conclusion could only be justified as to the area of damages, not as to liability issues.

There is another observation that the Court would make, and that was perhaps too impolitic to have expected in the opposition papers presented by plaintiff's counsel. Plaintiff herself seemed to be disadvantaged by certain manifest cognitive and/or intellectual deficits, perhaps induced or aggravated by very serious cardio-vascular conditions. Her deficits can be discerned from a careful review of the transcript, and were even more

obvious to those observing her testimony. To an extent, an inability to adjust to reality could be observed, as, for instance, when plaintiff first testified that she had no mental problems, but then readily conceded that she suffered from depression, for which she was medicated.

It was also clear that plaintiff could not always follow the attempt by opposing counsel to question her about her previous statements at deposition. When asked if she recalled making certain statements in the past, she became confused by the end of the question and thought the quoted statement referred to what she had just previously said at trial.

Plaintiff would not acknowledge her signature on legal documents which were served by her counsel on various motions, in earlier years. However, it seemed doubtful that she could have remembered those documents, or even understood them properly when she signed them. Thus, her unwillingness to accept her own involvement in their submission seemed to stem from a refusal to acknowledge her part in something she could not comprehend. Whether the jury sensed this or not, the Court cannot conclude that plaintiff's denials were part of a scheme to mislead.

Plaintiff denied ever feeling dizzy, but was shown a medical record containing a complaint of dizziness. Whether or not this affected her credibility is, in this instance, less significant than the realization that defendant produced the record for the purpose of implying that plaintiff's fall was produced by dizziness, while the jury, in finding no comparative negligence, did, and was entitled to, draw the conclusion that an occasional complaint of dizziness did not necessarily suggest dizziness at the time of plaintiff's fall.

Plaintiff's deficits may also account for the issue raised by BLH's counsel when he cross-examined plaintiff on the wording of her description of her pain. In 2007, the year following the trip and fall at BLH, plaintiff fell again in the street and broke her left wrist. She brought suit as a result of that fall as well, and that matter was tried in 2011. Apparently, in characterizing both the injury to her right elbow in 2006 and the injury to her left wrist in 2007, she described the immediate pain as similar to having a knife stuck into her. BLH's

counsel sought to demonstrate on cross-examination that the use of identical language was symptomatic of a contrived description of her injury. However, the Court received the distinct impression that plaintiff was not capable of remembering contrived phrases, even if such phrases had been fed to her. Rather, it is more likely that she has a limited capacity to vary her descriptive language. It cannot be gainsaid that both a dislocated elbow and a broken wrist cause immediate very sharp pain. What emerged from plaintiff's testimony is simply that she knows only one way to describe that kind of pain.

Plaintiff's lack of credibility as to the aftereffects of her injury raises a more serious issue, albeit only as to the permissible damages. Plaintiff claimed under oath, at the instant trial, that, after dislocating her elbow at BLH, she lost the ability to carry heavy packages and to lift her grandchildren. However, one year earlier, at the trial which resulted from her broken wrist, she testified under oath that she lost those same abilities as a result of her broken wrist, implying that, before breaking her wrist in 2007, she had no problem with those tasks. It became clear from a comparison of these statements that plaintiff was claiming the same physical deficits resulted from two distinct injuries.

It is true that the injuries were to different arms, and it is possible, if not particularly likely, that plaintiff could have experienced pain in lifting packages, as well as pain in lifting grandchildren, on her right side after 2006, and on her left side only after 2007. But that is not what she said, and the Court cannot speculate as to what she may have meant to say, had she been a more capable witness. Further, plaintiff's general condition did not suggest that she would have been capable of lifting children with one good arm, so that any suggestion that she lost that ability only after 2007 would still seem less than credible. Finally, in her testimony at the 2011 trial, she acknowledged that she fell while carrying heavy bags in both hands, thus undermining as well her claim that her right arm would not support a heavy load after her fall at BLH in 2006.

## IV. The Appropriate Level of Damage Award.

In sum, serious questions were raised as to the extent of plaintiff's injuries resulting from the fall in

2006. Plaintiff's counsel seeks to support the level of damages awarded in the verdict by citing to various awards sustained in the past by the appellate courts. This Court will not go through those instances one by one, because it is readily apparent that they all deal with situations far more serious than the instant one. In most of those, there were comminuted fractures, followed by surgery, in some instances, by multiple surgeries. Here, by contrast, there was merely a dislocation, followed by the finding that certain chip fragments remained in the elbow. Plaintiff underwent no surgery. There was no suggestion that she would require future surgery. As a result, those cases cited as precedent by plaintiff offer no guidance here.

Nevertheless, it cannot be denied that plaintiff sustained an injury, as a result of a fall for which BLH was properly found to be responsible. Both the physician called to testify by plaintiff, and the physician called to testify on behalf of defendant, agreed as to the following: Plaintiff suffered a dislocated elbow, which was painful but was repaired; plaintiff also suffered the presence in her elbow of chip fragments, which can be painful and will not disappear. Plaintiff has certain limitations of motion in her elbow. There is thus no reasonable dispute that plaintiff can be awarded damages for PPS.

The jury also found that plaintiff will sustain FPS. This, in itself, is not an unsupportable finding. However, when asked to set forth the number of years to which the FPS award applied, the jury entered the figure of 27 years, which was exactly equal to plaintiff's statistical life expectancy as a woman of 55 at the time of trial. While the jury is given certain latitude, and, for instance, may consider a life expectancy other than that suggested by statistics, its members are also instructed that they can deviate from the statistical norm based on the evidence they have as to plaintiff's health and other conditions.

In this instance, plaintiff acknowledged having been disabled from work for more than thirty years. She admitted having chronic obstructive pulmonary disease, as well as diabetes and high blood pressure. She has angina, for which she takes nitroglycerin. She has suffered from depression, for which she receives psychiatric care and steady medication. She has smoked cigarettes for decades and continues to do so at the present time.

Medical records from the year of her accident, which were in evidence, indicated that she had a history of smoking two to three packs a day, of stroke and of recent cocaine use. She also had chronic asthma. An earlier medical record indicated suicidal ideation, and cocaine and alcohol dependence.

A conclusion that someone with the above combination of conditions could possibly be expected to live as long as the average woman of the same age cannot be defended on any rational basis. If jurors believed that plaintiff had a reasonable possibility of surviving even an additional fifteen years, they must have been attending a different trial. Either the jury failed to follow the instructions as given, or they chose not to give any real attention to the meaning of the final question.

As a result of the foregoing, the Court concludes that the maximum sustainable damages for this plaintiff's injury would be an award of $140,000 for PPS, and an award of $60,000 for FPS, covering a period of 13 years.

## V. Procedural Propriety of this Motion.

Plaintiff argues that the instant motion cannot be entertained because it was not accompanied by a complete transcript of the trial. Defendant responds that this is not a requirement, but that, even if it is, the motion included such portions of the transcript as were available at the time that the motion was due, and that the remaining portions would be forwarded when available.

In any event, according to defendant, the Court already had the entire transcript in its possession.

In the first instance, defendant is in error in presuming that the Court had a copy of the full transcript. Only such portions as were provided with the moving papers were available to the Court. Second, defendant never followed up on its commitment to provide the remainder of the transcript at any time before this Decision was prepared, and several months have elapsed since final submission of motion papers. As stated supra, it would have been helpful to have the transcribed testimony of witness Sharon Stringfield and the transcribed deposition excerpts of deponent Veronica Mesadieu, even thought the Court is satisfied that a just and complete

result can be reached without such transcript.

More troubling, though, is the assertion by plaintiff that a post-trial motion cannot be made without a full trial transcript. Plainly, the CPLR imposes no such requirement, and there are many instances in which a voluminous transcript would make submitted papers so unwieldy as to constitute no favor to the Court. Plaintiff bases her argument on the decision in Tesciuba v. Cataldo, 189 A.D.2d 655, a twenty-year-old First Department decision which is one paragraph in length, and contains brief reference to what appears to be a sweeping requirement for submission of the full transcript. In Tesciuba, though, there were several other, more compelling, reasons cited for upholding the denial of the right to bring a post trial motion. Movant had delayed two years following the trial without offering any excuse, the opposing party had died, and the trial judge had retired. Under the circumstances, the lack of a trial transcript seems the least of the issues precluding the motion.

Furthermore, the court in Tesciuba cited, as its precedent, Robinson v. Carpenter, 31 A.D.2d 665, a 1968 decision in which the Third Department upheld a trial court's denial of an appellant's motion to settle a record of appeal which did not contain a trial transcript. The appeal was from a bench trial. It is quite clear that the basis for the denial of the motion was that the Appellate Division, not having sat at the trial, could not possibly decide factual issues on appeal without a full transcript of the proceedings below. Nothing in that decision speaks to the necessity of providing a full trial transcript on a post-trial motion made to a judge who has sat on the trial and heard the testimony. Similarly, the requested post-trial motion in Tesciuba could not have been submitted to the judge who heard the trial, because that judge had already retired. Consequently, the Court does not read the precedent cited by plaintiff as requiring the submission of a full transcript on each and every post-trial motion.

In any event, even if there were a requirement for submission of the full transcript, such rule would not change the result reached here, as the Court is denying movant's application on substantive grounds, except for the adjustment of the amount of damages awarded, and that adjustment would have been made by the Court sua

sponte, even in the absence of a motion, because the award was so clearly impermissibly excessive.

It should be noted that plaintiff objected as well to defendant's current motion on the ground that this Court had already ruled on the matter from the bench immediately after the verdict. In the first instance, the Court at that time specifically invited written submissions from the parties on the issue of damages. Even as to liability, though, CPLR 4406 seems to permit an omnibus post-trial motion on papers in addition to motions made orally following verdict.

**VI. Conclusion.**

Such portion of defendant's motion as seeks to set aside the jury's verdict on liability is therefore denied in all respects. The Court concludes that the verdict is sustainable as a matter of law and is not against the weight of the evidence. Such portion of the motion as seeks to set aside the jury's award of damages is granted to the following extent: The Court directs a new trial as to damages, unless plaintiff agrees to accept an award of damages in the amount of $140,000 for past pain and suffering and $60,000 for future pain and suffering.

This constitutes the Decision and Order of the Court.

Dated: 5/10/13

**MARK FRIEDLANDER, J.S.C.**