IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lacey v. Petrovic,* 2023 BCSC 509

Date: 20230331
Docket: M1811435
Registry: Vancouver

2023 BCSC 509 (CanLII)

Between:

Kyla Lynn Lacey

Plaintiff

And

Helena Petrovic and Goran Petrovic

Defendants

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiff:	N. Hartney
Counsel for the Defendants:	M. O’Meara
Place and Date of Trial/Hearing:	Vancouver, B.C. January 16–20, 2023
Place and Date of Judgment:	Vancouver, B.C. March 31, 2023

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[1] The plaintiff was involved in a motor vehicle accident on June 12, 2018 (the "Accident"). She claims damages resulting from her injuries. Due to the nature of the accident, her physical injuries were restricted to her knees.

[2] The defendants admit liability for the accident. The parties have also been able to reach agreement on the claim for past income loss and special damages.

[3] The issues for me to decide are the proper measure of non-pecuniary damages, as well as compensation for future loss of capacity to earn income, loss of housekeeping, and cost of future care.

[4] As discussed below, there is a divergence of opinion between two expert witnesses retained on this case. The plaintiff retained, Dr. Kei, a specialist in physical medicine and rehabilitation. His report is dated October 20, 2022. The defendants retained Dr. Rickards, an orthopedic surgeon. His report is (also) dated October 20, 2022. A wrinkle in this case is that the defence expert made a specific diagnosis that the plaintiff's expert did not. As a result, paradoxically, the defence expert recommends more treatment (including surgery) than the plaintiff's expert. The defence expert also provides the evidentiary basis for future losses of capacity. I address these issues below.

<u>**The Plaintiff's Background**</u>

[5] The plaintiff is 42 years old at trial. She married her husband in 2013. They have two children in elementary school.

[6] The plaintiff was born in Saskatchewan but primarily raised in Burnaby and Maple Ridge. She graduated from high school in 1999. Despite some earlier learning issues, she testified that she graduated on the honour role. In the six months after graduation, the plaintiff worked at her former high school while she upgraded some of her courses.

[7] The plaintiff's entry into the workforce after high school was delayed by a significant episode of depression commencing in February 2000. She was

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hospitalized, on and off, for a period of two years, followed by a further two years of counselling.

[8] Since 2004 the plaintiff has had a series of jobs, most of the “entry-level” variety. She started in fast-food jobs, then became a janitor for a school district. She moved to a ski resort where she worked in housekeeping and laundry. By her account, all of these positions were very physical. The plaintiff testified that her jobs at both the school district and the ski resort were terminated by her employer (*i.e.*, not her decision).

[9] In 2005 the plaintiff embarked on a one-year course in “practical” massage therapy. This schooling was aimed at making her a “spa” masseuse, not a registered massage therapist. She completed the program and attempted to work in the field. However, she found that she was not earning much money and she lacked a clientele. By her account, she was mainly providing massage services in barter exchange for other personal services. She continued do this level of massage during the period up to 2012. She then returned to it in 2015–2016.

[10] Between 2005 and 2008, the plaintiff worked at a grocery store and a movie rental store. Both jobs involved stocking shelves and customer service. In 2008, she shifted to more sedentary work. The first was a brief job as a receptionist at a professional firm. The second job, which ran from 2008 to 2012, was as the administrative assistant to the principal at an accounting office.

[11] The plaintiff left her administrative job in December 2012 when her first child was born. She took a one-year maternity leave. Her prior employer did not keep the position open for her. She received a severance payment. Her next employment was at the front desk at another accounting firm where she started in late 2014. Her duties involved working at the front desk (phone and personal greeting of clients), data entry, and general care of the lobby area (vacuuming etc.). She worked in that position until the birth of her second child in January 2016.

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[12] Following the birth of her second child, the plaintiff again took a one-year maternity leave (through 2016). She suffered from some degree of postpartum depression. She told Dr. Lam, her family physician, that her time off work was extended by this condition. Again, her prior employer did not keep her position open for her.

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[13] The plaintiff testified that she became bored and took an evening shift job at Walmart commencing April 2017. Her normal shifts were 5:00 pm to midnight. During this time, she shared childcare duties with her husband, who worked day shifts.

[14] In late January 2018, the plaintiff obtained an administrative, receptionist position with a construction company known as the Lark Group. She held that position at the time of the subject Accident on June 12, 2018. By all accounts she enjoyed the work, and she was well-liked by her co-workers. Her duties involved typical receptionist work (phones, clients, couriers) as well as data entry. There were also some physical duties including the cleaning of boardrooms between meetings, re-filling water coolers, and photocopiers. I return to these duties below when discussing the claim for future loss of capacity. She earned approximately $47,000 per year.

[15] The plaintiff was laid off from the Lark Group in May 2022. The decision was not related to any of her health concerns. It was driven by a restructuring of the office. She was paid three months' severance.

[16] Following her termination from the Lark Group, the plaintiff took the summer of 2022 off work to spend time with her family. She then obtained a receptionist position at Ocean Park Mechanical in September 2022. She achieved a slight increase in her pay. As of the trial date, she was earning $48,000 per year.

<u>The Plaintiff's Health</u>

[17] The plaintiff says that, in the period before the June 12, 2018 Accident she did not have any physical restrictions. She also says that her mood was good.

[18] The defence position is that the evidence points to two pre-existing problems:

a) Ongoing ankle instability due to two injuries in her teens.

b) Some level of depression that started in early 2016.

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[19] The plaintiff concedes that she had the pre-existing ankle issues, but says that her ankle instability was only an annoyance. On this point, I do not accept the defence submission that the plaintiff's ankle issue might have presented a future limit on her earning capacity. Instead, based upon the evidence, I find that the net impact of the pre-existing ankle injury relates to the plaintiff's inability to wear high-heeled shoes. The plaintiff says that she wore high-heels in the period before the Accident. I have no reason to think she is incorrect about that statement. There is no evidence to the contrary. In my opinion, this minor issue focusses on whether her problem with high-heels derives from the (Accident-related) knee pain, or her (pre-Accident) ankle pain. I find that the Accident caused this change in the plaintiff's choice of footwear. Nothing else turns on this issue.

[20] The pre-existence of the plaintiff's depression is a more involved issue. The defence submits that there was evidence to establish that the plaintiff was diagnosed with depression in the period before the subject Accident. On that issue, there was some confusion among two of the collateral witnesses. The plaintiff's mother and husband knew that the plaintiff took anti-depressants after the birth of her second child. They could not recall whether that prescription continued until the Accident.

[21] However, the Pharmanet records were introduced in evidence. Those records show that the plaintiff took the prescription anti-depressant Sertraline in the period between 2016 and May 2017. The last purchase was 30 tablets (one month's supply) on May 4, 2017. There is no further prescription of anti-depressant medication until mid-2021.

[22] Given the plaintiff's history of significant depression, I infer that, when she is depressed, or tending in that direction, both she and her family physician are careful to treat her condition with antidepressant medications.

[23] On the basis of the Pharmanet records, I find that the plaintiff was not suffering from any pre-existing depression at the time of the Accident. However, I return to this evidence below in my discussion of the injuries suffered in the Accident.

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The Accident

[24] As noted, liability is admitted.

[25] The mechanism of the Accident was somewhat unusual. At the moment of impact, the plaintiff was caught standing between the passenger-side front door and the body of her vehicle.

[26] The plaintiff was dropping her daughter at elementary school. Her son was also in the vehicle. The children were in the back seat. The daughter's backpack was on the front passenger seat.

[27] There is a gravel area in front of the school used by parents for drop-off purposes. The plaintiff found a spot on the gravel and pulled up to the fence on a diagonal. Apparently, this is how the other parents park in that area.

[28] The plaintiff got her daughter (age 5) out of the back seat and had her wait at the front of the vehicle. The plaintiff then opened the front passenger door to get the child's backpack. She was standing between the door and the frame of the vehicle when she noticed movement out of the corner of her eye. She turned and saw the defendants' vehicle backing toward her. There was no time to move, although she yelled at the driver to stop. At the moment of impact, the plaintiff was facing away from her own vehicle and toward the back of the defendants' vehicle.

[29] The left-back bumper of the defendants' vehicle struck the front passenger door of the plaintiff's vehicle. The plaintiff, standing between the door and the frame of her vehicle was squished between the two hard objects. The main impact was on her knees. The bottom of the door panel on the plaintiff's vehicle was bent outward, indicating the force that was applied upon her knees.

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Credibility and Reliability

[30] As in all personal injury claims, credibility and reliability are in issue.

[31] The defendants do not argue that the plaintiff's testimony was not credible. In that sense, the defence does not submit that she is lying about her ongoing pain. Instead, the defence focusses on inconsistencies in the plaintiff's reports of pain and limitations over time. The defence submits that I should prefer the plaintiff's earlier statements and not the description offered during her testimony at trial.

[32] In particular, the defence notes that, at trial, the plaintiff described significant ongoing limitations in her home and work activities. However, the plaintiff's report to her family physician (Dr. Lam), as reported by Dr. Kei, was more positive. Dr. Kei's report states:

> According to the clinical records, Ms. Lacey followed up with Dr. Lam via the telephone on June 17, 2020 and reported that her knees were improving and she was able to bend and lift more. She reported that she was able to lift her 55 pound daughter up and was performing all regular duties at work except for lifting. She reported she was able to climb up to 5 flights of stairs. … She reported being able to kneel on soft surfaces but not on hard surfaces.

[33] In cross-examination, the plaintiff confirmed that all of the statements in that paragraph were correct.

[34] The defendants submit that those descriptions of the plaintiff's abilities, as of June 2020 (one year post-Accident), exceed the plaintiff's trial testimony describing her capacity. I discuss the opposing positions below.

Collateral Witnesses

[35] The plaintiff called three collateral witnesses. The defence called none.

[36] The plaintiff's husband, Chris Lacey, corroborated much of the plaintiff's testimony. He testified that the plaintiff's mood issues had a detrimental effect on the marriage. He described her becoming withdrawn from family activities. He also stated that after the Accident he was called upon to carry a much greater portion of the household duties, including cleaning and childcare. However, in cross-

examination he conceded that many of the parental and household duties are shared between himself and the plaintiff. The plaintiff does more of some chores, such as laundry. Mr. Lacey does more cooking.

[37] There was inconsistent evidence regarding the plaintiff's ability to do some tasks. For example, the plaintiff testified that she was sometimes required to do cleaning at her job with the Lark Group. She asks for assistance with heavier tasks. However, her husband indicated that she cannot do the cleaning or vacuuming at home. This inconsistency was not resolved. Based on all of the evidence, including the expert reports that I discuss below, I find that the plaintiff can vacuum and perform regular cleaning tasks.

[38] The plaintiff's mother, Karen McCorkindale, testified. She acknowledged that the plaintiff had suffered significant periods of depression before the subject Accident. However, her daughter always had the capacity to push through and cope with her problems. She testified that before the Accident, her daughter was healthy and functional. She felt that her daughter had lost her "coping" abilities as a result of the Accident.

[39] The plaintiff's co-worker Cameron MacKenzie provided helpful evidence. As noted above, the plaintiff started her employment at Lark Construction a few months before the Accident. Mr. MacKenzie has worked at the company for 12 years. He works in the cost-estimating department. He became friendly with the plaintiff and would see her almost daily because she was at reception. He confirmed her evidence that her role at reception involved more than just greeting and answering phones. She was responsible for the general appearance of the reception area, as well as courier duties and some event planning.

[40] Mr. MacKenzie first became aware of the Accident when he saw the plaintiff walking gingerly in the halls. She told him about the Accident. He said that, thereafter, he noticed the plaintiff's slow gait recur on a number of occasions.

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[41] Mr. McKenzie noted that the plaintiff was well-liked by the other employees, both before and after the Accident. He noted that she was always friendly, and he described her personality as “bubbly”. He testified that members of his group were impressed with the plaintiff and they gave some thought to hiring her away from her reception job. However, nothing came from that idea. Mr. McKenzie was shocked when the company decided to lay off the plaintiff in 2022.

[42] I found all of the collateral witnesses to be credible.

Injuries and Their Progression

[43] Because of the nature of the Accident, the only physical injury was to the plaintiff’s knees. In addition, the plaintiff claims that, over time, her injuries led to a decline in her mood. I discuss each of these conditions separately.

Knee Injury

[44] Immediately after the Accident, the plaintiff fell to the ground where she remained until the ambulance arrived. Her children were taken away by friends. She testified that she could not feel her feet during this period. She was taken to Surrey Memorial Hospital where she was treated in the Emergency Department and released the same day. Her husband attended at the Accident scene, and then to the hospital.

[45] The plaintiff was diagnosed with bruising and swelling of both knees, including a bone bruise to the right knee. There was no evidence of any structural damage to the knees. There is, however, a dispute over the diagnosis of her knee injuries.

[46] The plaintiff was bedridden for the first week or so. She gradually became more mobile. At first, she used a walker to move around.

[47] The claim for income loss (past) is agreed at $2,188.05. Documents from the plaintiff’s employer indicate that she was off work from June 12 to July 14, 2018. She returned to work on modified duties.

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[48] In the period from the Accident until the end of October 2020 (51 months), the plaintiff attended 83 treatment sessions divided between physiotherapists, massage therapists, a chiropractor, and active rehabilitation sessions. The majority of the appointments were with a physiotherapist (approximately weekly). The defence does not suggest that the treatments were unnecessary or exaggerated. Further, the defence does not argue that there was a failure to mitigate.

[49] According to the plaintiff, her knee pain continues to bother her and limit her activities both at home and at work. She says that her ability to do household tasks has been limited. The plaintiff also says that she continues to be limited in her activities and work capacity by knee pain. I review the medical evidence on that issue below.

[50] The defence notes that she has been employed in two different full-time positions without any formal accommodations since the Accident. As noted above, the defence points to the plaintiff’s earlier statements to Dr. Lam regarding her minor limitations in June 2020.

[51] Based on the lay evidence, I accept that the plaintiff continues to have ongoing pain in her knees. However, I do not accept that her knee pain limits her in the manner she described in her testimony. In that respect, I accept, as true, her prior statements about being able to lift her 55-pound child and climb five flights of stairs. I find those statements to be an accurate description of her functioning in 2020. There is no evidence to suggest her condition worsened thereafter.

Psychological Issues

[52] I note, at the outset of this discussion, that there was no evidence from an expert in psychological or psychiatric issues.

[53] The plaintiff suffered a period of depression starting in mid-2019. She asserts that her mood issues were related to the injuries she suffered in the Accident. She says that the continuing physical limitations (due to knee pain) caused her mood to

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slowly decline. In addition, her husband testified that she became withdrawn after the Accident. She was less involved in the family's activities.

[54] As noted above, the plaintiff's family physician prescribed anti-depressant medication commencing in mid-2019, one year after the Accident. She remains on that medication as of the trial date. The dosage has been increased over time (and never decreased).

[55] The defendants do not dispute that the plaintiff suffered depression beginning in mid-2019. However, they do not accept the plaintiff's allegation of a causal link to the Accident. With respect to the evidence that the plaintiff became "withdrawn", they note the evidence of her co-worker who testified that the plaintiff was always friendly and that she was well-liked within the Lark Group. That witness used the word "bubbly" to describe her personality. The defence submits that his evidence was inconsistent with the plaintiff being "withdrawn".

[56] It is evident that there is an inconsistency between the plaintiff's presentation at home versus work. In my discussion below, I do not mean to suggest that a person with depression could not "put on a mask" in certain situations. However, on the evidence in this case, there is no expert opinion regarding the plaintiff's psychological problems. The lack of any expert opinion regarding the plaintiff's depression leads to three gaps in the evidence.

[57] The first gap arises from the lack of an opinion regarding causation. Although the plaintiff blames the Accident and her injuries for the onset of her depression, there is no medical opinion to support that position. On this issue, I give no weight to the plaintiff's own opinion about the cause of her depression. The plaintiff had two prior bouts of significant depression. The first bout followed high school. She blames that period of depression on bullying that she received prior to her graduation. I have no evidence to use as a foundation to determine whether her opinion is correct. The second major bout was in 2016-2017 following the birth of her second child. The plaintiff refers to that period as postpartum depression. She may well be correct. I have no information about the cause.

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[58] The plaintiff had a third bout of depression commencing in mid-2019, approximately one year after the Accident. She had returned to work less than five weeks after the Accident. She was working on a full-time basis for almost a year before she sought anti-depressant medications from her family doctor. As noted above, I infer that she seeks doctor’s assistance as soon as she feels depressed.

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[59] Given the multiple factors involved in a person’s life and psychological makeup, in the absence of expert evidence, it would be difficult for any judge to find a causal link between one single incident and an episode of depression.

[60] The second issue relates to the plaintiff’s inconsistent presentation. Both the plaintiff and her husband testified that she became “withdrawn” after the Accident. To the extent that the plaintiff suggests that the outward manifestation of her depression was the fact that she was “withdrawn” I am left with no explanation as to the inconsistency between her presentation at work (“bubbly”) and at home (“withdrawn”). It is possible that a psychiatrist could explain that inconsistency. I do not have that evidence. It follows that I have no evidentiary basis to determine the reason for her inconsistent presentation. Although the plaintiff and her husband point to difficulties in their marriage, I have no reference point to assess whether those difficulties were caused by the Accident as opposed to the normal exigencies of life.

[61] The third issue relates to the severity of the plaintiff’s depression. She says that she her family doctor has increased her dosage of anti-depressant medication. She testified that she is near the maximum. However, I have no evidence to assist me in determining whether that statement (which clearly requires some expertise) is correct.

[62] Based upon the evidence presented at trial, I am unable to find that “but for” the Accident, the plaintiff would not have suffered the period of depression that began in mid-2019.

[63] On the basis of the evidence, I find that the plaintiff’s mood issues were not caused by the Accident.

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Expert Evidence

[64] There were two experts called to provide evidence in the trial:

a) For the plaintiff, Dr. Kei, a specialist in physical medicine and rehabilitation testified about his report dated October 20, 2022.

b) For the defendants, Dr. Rickards, an orthopedic surgeon, testified about his report (also) dated October 20, 2022.

[65] It will be evident from the dates of these reports that neither doctor saw the plaintiff in the first four years after the Accident.

[66] I find both doctors to be good witnesses. As discussed below, they agreed on some points but arrived at different diagnoses in respect of the underlying cause of the plaintiff's ongoing symptoms.

[67] Dr. Kei diagnosed the plaintiff with a crush injury to both knees. There was evidence (on MRI) of an "osseous contusion" (bone bruise) on the right knee, along with injuries to the soft tissues of that right knee (including an area called Hoffa's fat pad). An MRI of the left knee showed soft tissue injuries. Both of those diagnoses were based upon MRI scans performed on July 2, 2018 (three weeks post-Accident).

[68] Dr. Kei opined that the soft-tissue injuries had long-since resolved but the plaintiff is left with diffuse neuropathic pain in both knees. He testified that there is nothing structurally wrong with the knees. His opinion is that the plaintiff is left with chronic pain.

[69] The instruction letter to Dr. Kei asked whether there was a real and substantial possibility of a future income loss arising from the plaintiff's injuries. Dr. Kei's report provided the following answer (at line 310):

> In my opinion, Ms. Lacey was only able to apply for jobs that did not have a significant physical tasks (sic) such as lifting. While this may have resulted in a reduced income, she tells me that she is starting an administrative position that will earn her more income than her previous job.

[70] This is Dr. Kei's only opinion regarding the future loss of opportunity to earn income. In cross-examination, Dr. Kei confirmed that his opinion was "looking backward in time". In other words, the opinion he provided only considered the events that occurred prior to his examination on October 3, 2022.

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[71] The defendants submit that there is no evidence to form the foundation of a claim for any future loss of capacity to earn income.

[72] Unfortunately for the defence, their expert, Dr. Rickards, did provide such an evidentiary foundation.

[73] Dr. Rickards saw the plaintiff on October 14, 2022. He agreed with Dr. Kei that the plaintiff suffered soft-tissue injuries to both knees and a bone-bruise to her right knee. However, diverging from Dr. Kei, Dr. Rickards concluded that the most probable diagnosis for the plaintiff's ongoing pain and limitation is "Medial Patellar Plica Syndrome" in both knees.

[74] Dr. Rickards describe plica syndrome as a constellation of symptoms occurring secondary to injury or overuse. He says that the synovial plica are normal structures found in many knees. Under normal circumstances the plica are not associated with any pain. However, with the right combination of events, overuse or injury, the plica can become painful.

[75] Dr. Rickards testified that the recommended treatment protocol for plica syndrome would include:

a) an exercise regime focussing on building muscle in specific areas;

b) anti-inflammatory medications;

c) cortisone injections; and

d) as a last resort, arthroscopic (surgical) evaluation with possible extraction of the offending plica.

[76] Despite this treatment protocol, Dr. Rickards testified that, because of the amount of time that has elapsed since the Accident, the plaintiff is unlikely to achieve any gains without surgery. However, he testified that with surgery:

a) she is very likely to have significant recovery;

b) the risks involved with the surgery are very low;

c) the surgery itself, being arthroscopic, would entail 3–4 incisions around the knee; and

d) if surgery is undertaken (on each knee), she would be off work for two months followed by ten months of limited, but gradually increasing, function.

[77] In the conflict between the two opinions, the plaintiff submits that I should accept Dr. Rickards, but places caveats on his prognosis. I discuss those caveats below under the heading “Loss of Capacity to Earn Income”. Similarly, the defence does not suggest that I should prefer Dr. Kei’s opinion over Dr. Rickards.

[78] I note that, if this was a regular case, and if the plaintiff’s expert, Dr. Kei, had provided better (by which I mean, more dire) evidence, then I expect that the plaintiff would have argued that I should accept Dr. Kei’s evidence because Dr. Rickards is semi-retired and ceased conducting surgery some years ago. His continuing work is primarily in the area of litigation support. However, that is not the plaintiff’s submission in this case.

[79] As a final piece to this evidentiary puzzle, I note that the plaintiff saw Dr. Schweigel, an orthopedic surgeon, for a specialist consultation. He advised that there was nothing that could be done for her ongoing pain. Dr. Schweigel was a treating specialist. His consultation letter was not tendered as expert evidence. However, the defence concedes that in order for the court to accept Dr. Rickards’ opinion, I must find that both Dr. Kei and Dr. Schweigel missed the plica syndrome diagnosis.

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[80] As a result, I am presented with the somewhat paradoxical situation wherein both parties put forward Dr. Rickards' opinion as being more probable. However, in context:

a) Dr. Kei, for the plaintiff, provides a guarded, but relatively benign, prognosis. He believes that the plaintiff's knee pain will continue, but he does not provide any evidence or opinion tying that pain to any future loss.

b) Dr. Rickards' provides evidence of a surgical path toward a more optimistic outcome for the plaintiff. However, that path would require two surgeries with significant periods of incapacity and rehabilitation.

[81] Before leaving this issue, I note the defence submission that points to evidence of the plaintiff having subsequent falls upon her knees. The defendants posit the theory that those falls could account for some percentage of the plaintiff's ongoing pain. The trouble with that submission is that it exists in an evidentiary void. Dr. Rickards did not opine about it. I reject the defence submission on the later injuries.

[82] On the evidence, and based upon the submissions of counsel, I prefer Dr. Rickards' opinion regarding diagnosis. I find that Dr. Rickards' opinion regarding diagnosis and prognosis is more probably correct. His prognosis does, however, come with some amount of uncertainty. Further, I consider Dr. Kei's opinion to be helpful in respect of ongoing limitations. As noted, he did not voice any concern over future employability.

[83] It follows from my assessment of the entirety of the evidence that:

a) the plaintiff suffers from bilateral plica syndrome. Surgery is available to substantially improve her symptoms;

b) the plaintiff's testimony at trial, and her reports of limitations to Drs. Kei and Rickards regarding the limitations caused by her knee pain, were more negative than her prior statements to her family doctor;

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c) I find that her prior statements are a more accurate description of her functional abilities and limitations; and

d) although the plaintiff suffers from ongoing depression, that condition is not causally linked to the Accident.

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<u>Non-Pecuniary Damages</u>

[84] The plaintiff submits that the appropriate award for non-pecuniary damages is in the range of $160,000. The plaintiff relies upon:

a) *Lee v. MacLean*, 2022 BCSC 312 ($130,000)

b) *Cook v. Symons,* 2014 BCSC 1781 ($140,000)

c) *Lanthier v. Ritchey,* 2019 BCSC 2022 ($120,000)

d) *Henbury v. Egilson,* 2019 BCSC 215 ($100,000)

[85] I note that the plaintiff's submission is based upon the position that both the plaintiff's knee injury and depression were caused by the Accident. The decisions in *Lee, Cook*, and *Henbury* all involve plaintiffs who suffered compensable psychological problems. I have not accepted that position. As a result, I find that those cases are less persuasive.

[86] In response, the defence submits that a range of $60,000–$65,000 is appropriate. The defendants rely on the following decisions (while also recognizing that the awards must be adjusted based upon their age):

a) *Hartman v. Dias,* 2006 BCSC 478 ($30,000)

b) *Russell v. Parks,* 2012 BCSC 1128 ($45,000)

c) *Gray v. Ellis,* 2006 BCSC 1808 ($50,000)

d) *Hillman v. Esaryk,* 2014 BCSC 170 ($40,000)

[87] Of these cases, I note that:

a) *Hartman* involved a knee crush injury, but the plaintiff resumed her normal activities "after a few weeks". The residual pain was an "annoying discomfort" and the prognosis was "favourable".

b) *Russell* involved a man in his 50s who suffered a knee injury, but his functional limitations and his recovery were complicated by other medical conditions. In essence, the effect on his lifestyle was not significant.

c) In *Gray*, although the plaintiff suffered a fractured patella requiring surgery, she had substantial recovery within six months. After the six-month mark, she had occasional weather-related aches, but no real limitation on her lifestyle.

d) *Hillman* involved a plaintiff who suffered knee pain and underwent arthroscopic surgery. He had a period of recovery, but by the time of trial his symptoms were minor and he was able to undertake long-distance running and snowboarding. That is a higher level of function than Ms. Lacey enjoys.

[88] In short, although the defence cases involve discreet knee injuries, I find that they all involve plaintiffs who realized better outcomes that Ms. Lacey. I do not find them instructive in respect of the assessment of her non-pecuniary damages.

[89] Although not submitted by either party, I note the decision of Justice Lyster in *Morgan v. Ziggiotti*, 2021 BCSC 106, wherein the plaintiff's non-pecuniary damages were assessed at $120,000. In that case, the primary injury was to the plaintiff's knee. Coincidentally in *Morgan*:

a) The plaintiff alleged that he suffered depression as a result of the subject accident, but that claim was rejected on the evidence.

b) Dr. Rickards (the defence expert in that case) opined that the plaintiff suffered from plica syndrome and there was a similar dispute regarding

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> the diagnosis of the knee injury. The plaintiff's expert disagreed with Dr. Rickards. In *Morgan*, the plaintiff's expert gave a prognosis that was less optimistic than Dr. Rickards'. Justice Lyster sided with the plaintiff's expert.

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[90] Although Dr. Rickards' opinion was not accepted in *Morgan*, in my opinion, for the diagnosis of the injury matters less than the symptoms and functional limitation when assessing non-pecuniary damages. I find Justice Lyster's decision in *Morgan* provides guidance in my assessment.

[91] In my opinion the injuries suffered by the plaintiff in *Morgan* were more severe than those suffered by Ms. Lacy. Further, his prognosis, as determined by Justice Lyster, was less optimistic. Mr. Morgan was a construction worker. The consensus of opinion was that he would not be able to continue in that field and he would have to retrain. His injuries were so severe that an award of $520,000 was made for Future Loss of Earning Capacity. Further, Justice Lyster (at para. 94) addressed the plaintiff's loss of housekeeping capacity by making an increased award of non-pecuniary damages.

[92] As set out above, I have found that the plaintiff continues to have ongoing pain in her knees. However, those symptoms do not have a significant effect on her lifestyle or her ability to work in her current occupation.

[93] Having considered all of the evidence, the submissions of counsel, and the analogous decisions, I find that the appropriate award for non-pecuniary damages is $90,000.

<u>Loss of Capacity to Earn Income</u>

[94] The plaintiff seeks damages for a diminished capacity to earn income. She submits that an award of $144,000 would be appropriate. She arrives at that figure by employing both the "earnings" and the "capital asset" approach.

[95] The defence submits that the evidence does not support any award for loss of capacity to earn income. In the alternative, they submit that the award should be nominal.

[96] Both sides agree that the proper approach to this issue is described in the quartet of cases: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; *Lo v. Vos*, 2021 BCCA 421; and *Steinlauf v. Deol*, 2022 BCCA 96.

a) On the evidence, is there a potential future event that could lead to a loss of earning capacity?

b) If yes, is there a real and substantial possibility that the future event will cause a pecuniary loss to the plaintiff?

c) What is the value of that possible future pecuniary loss? This requires an assessment of the relative likelihood of the possibility occurring. This assessment can be approached on the basis of the plaintiff's "earnings" or "capital asset".

[97] I address each question in order. Further I note that I am addressing these questions on the basis of the existing state of the plaintiff's health. However, I return to address the prospect that the plaintiff will undergo arthroscopic surgery on her knees and the effect such surgery would have upon any claim under this head of damage.

On the evidence, is there a potential future event that could lead to a loss of earning capacity?

[98] The plaintiff's counsel submits that there is a strong prospect of a future event. He notes the following evidence:

a) Before the Accident, she was not limited by any physical problems.

b) She is now restricted by her knee pain in her ability to: lift heavy items, walk longer distances and walk on uneven ground.

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c) She has a history of losing jobs due to events beyond her control such as her departure from the Lark Group;

d) She has not yet achieved a "career trajectory" upon which she can rely. In that respect, she is different from a teacher in his or her 50s who is unlikely to either lose, or change, jobs.

e) She has gained experience working in the positions as receptionist and administrative support. However, those positions:

  i. are often combined with physical requirements;

  ii. are usually considered to be entry-level positions. The plaintiff submits that she is at risk because it is easy to find replacement workers.

[99] Hence, based upon past experience, the plaintiff says there is a good chance that she will lose jobs in the future. Her employment will be at the "entry level" and she will be subject to layoffs during periods where her employer reorganizes. Hence, she will probably be forced to apply for jobs in the future. She will see jobs that she is not capable of performing because of her knee injuries.

[100] In response, the defendants submit the plaintiff has demonstrated that:

a) she enjoys working in the capacity of receptionist and administrative assistant;

b) she has performed that work for more than four years since the Accident and despite her knee pain. There is no evidence that she has struggled with the work apart from her testimony that she seeks assistance with heavy items;

c) although she lost her job at the Lark Group in 2022, she managed to find new employment at Ocean Park Mechanical at a rate of pay that was slightly higher;

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d) the plaintiff has not exhibited an intention to seek promotion or change occupations;

e) hence, it is unlikely that she will opt to make a change in her career path toward heavier employment.

[101] The defendants submit that the plaintiff has been steadily employed. Further, the defence submits that, because her employment is considered “entry level” if she loses her current position, she will be able to replace it with a similar one. In effect, this is the “other side of the coin” from the plaintiff’s submission. Although entry level positions can be filled easily, they are often available.

[102] The defendants also submit that both medical opinions (Dr. Kei and Dr. Rickards) agree that the plaintiff is capable of either carrying out her current occupation (receptionist) without significant difficulties or is capable of working in another sedentary position.

[103] The defendants further submit that if the plaintiff feels restricted by her knee condition, then she has the option to pursue the surgery recommended by Dr. Rickards. That surgery has a high success rate.

[104] As discussed above, I have found that the plaintiff’s prior statements about her functional capacity are more accurate than her testimony at trial. She reported to Dr. Lam that she was able to lift her 55-pound daughter and was performing all regular duties at work except for lifting. She was able to climb up to five flights of stairs.

[105] On the first question, whether there is a potential future event which could lead to a loss of capacity to earn income, I accept a portion of the plaintiff’s submission. In short:

a) the plaintiff’s work history is peppered with layoffs and firings that were not of her choosing;

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b) she works in an area (reception) that is subject to reorganization and involuntary termination. The evidence of the Lark Group was that they consolidated two reception areas into one. That made the plaintiff redundant;

c) on that basis, I find that there is a potential future event (a layoff from her current employment) which could lead to a loss of capacity to earn income.

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[106] However, I find that the defence submissions, outlined above, are applicable to the second and third issues.

Is there a real and substantial possibility of the future event causing a pecuniary loss?

[107] Of course, if the plaintiff is laid off in future, that job-loss will not be caused by the accident. The question is whether there is a real and substantial possibility of the plaintiff suffering a pecuniary loss in the period following such a lay-off. The further questions is whether that subsequent loss would be caused by the plaintiff being unable to obtain a replacement job due to her current physical limitations.

[108] The plaintiff submits that the range of jobs that she is capable of pursuing will be limited. She will not be able to pursue any job that requires significant lifting. On that basis, the plaintiff submits that there may be times in the future when she will be applying for jobs and she will be restricted in the types of jobs to which she can apply. Hence, her future earning capacity has been limited.

[109] The defence submits:

a) While the plaintiff's employment history has not evinced a "career track", it is clear that she has chosen to work in the receptionist field.

b) She has demonstrated the ability to work in the receptionist field. All of the expert evidence indicates that she is capable of performing that work.

c) There is no evidence to suggest that she would consider moving to a heavier or more laborious form of employment. She gave no evidence of a plan to pursue career advancement.

d) As noted above, the plaintiff's current employment is considered "entry level". The plaintiff's own testimony established that finding replacement employment after a lay-off was relatively easy.

e) If the plaintiff should choose, she could undertake the surgery recommended by Dr. Rickards and her loss would be limited.

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[110] On the facts of this case, the answer to the second question requires some amount of crystal ball gazing. In my opinion:

a) It is probable that the plaintiff will lose a job in future for a reason outside of her control. In other words, it is unlikely that she will retire from her current employment.

b) If a layoff occurs, she will look for replacement work. Like any person who has been laid-off, she will probably look for work in the areas wherein she is qualified. She will be an attractive candidate to employers who seek a new hire with relevant experience. In this regard, the plaintiff is not equivalent to plaintiffs in their teens or early 20s who have not formed a career path. The plaintiff will probably remain in sedentary, clerical positions for the remainder of her working career.

c) However, it is possible (not probable) that one or more of those potential future employers will offer a position that requires some lifting or physical activity that the plaintiff cannot undertake.

d) Thus, it is possible that the plaintiff will not have the capacity to pursue one or more job opportunities between now and her expected retirement.

e) Having said that, it is unlikely that the inability to pursue a particular job opportunity will lead to a period of sustained unemployment. As noted above, there will always be a supply of "entry level" positions available.

[111] Hence, to the extent that the plaintiff may suffer a pecuniary loss in the future:

a) Although the prospect meets the "reasonable possibility" hurdle, I view that prospect as being relatively slim.

b) The pecuniary loss would be measured either by:

i. the additional period of unemployment before the plaintiff found a job that she was capable of performing; or

ii. the difference between the salaries at the two jobs (i.e. the job that the plaintiff could not pursue, versus the replacement job that the plaintiff does obtain).

What is the value of that possible future pecuniary loss?

[112] The final question to be addressed is the value of the possible future loss. This inquiry requires an assessment of the relative likelihood of the possibility occurring. This assessment can be approached on the basis of the plaintiff's "earnings" or "capital asset".

[113] The plaintiff submits that her loss can be measured on either the "capital asset" approach or the "earnings approach".

[114] On the capital asset approach, the plaintiff submits that she is:

a) less capable overall of earning income from all types of employment;

b) less marketable or attractive as an employee;

c) unable to take advantage of all job opportunities;

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d) less valuable to herself as a person capable of earning income in a competitive labour environment.

[115] Turning to the earnings approach, the plaintiff projects that, based upon her current employment at Ocean Mechanical, her remaining career earnings are in the range of $961,459. Plaintiff's counsel submits that her earning capacity has been reduced by 15%. Thus, using an earnings-based approach, her future loss of capacity is in the range of $142,218.

[116] In my opinion, the capital asset approach has some application to the plaintiff's situation, but it is not the preferable approach. The plaintiff has demonstrated that she chooses to work as a receptionist. She is capable of working in that type of job as evidenced by her work history since the Accident. With that said, I accept that there is a possibility that the plaintiff will be considered less attractive to a future employer.

[117] In my further opinion, the earnings approach is more suitable for the plaintiff's circumstances. However, I do not accept the plaintiff's formulation of the theoretical basis for the assessment. In my opinion a blunt assessment of a percentage of disability is divorced from the reality of the plaintiff's life. In that respect, as outlined above:

a) Since the Accident, the plaintiff's entire income loss consists of the first five weeks after the Accident. Thereafter she has suffered no income loss.

b) If the plaintiff decides to pursue surgery, then the evidence of Dr. Rickards (which I have accepted) indicates she will probably have no restrictions. However, she may have some income loss during the recovery from those two surgeries (approximately 4 months). She would also have a period when she was limited in her ability to perform full duties.

c) Any potential loss in the future (absent surgery) will consist of either:

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i. the additional period of unemployment before the plaintiff finds a job that she was capable of performing; or

ii. the difference between the salaries at the two jobs (*i.e.*, the one the plaintiff could not pursue versus the replacement job that the plaintiff does obtain).

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[118] Hence, the plaintiff has not sustained a percentage loss in her overall earning capacity. Instead, there are potential future events that may cause a pecuniary loss. Those potential events, at worst, would cause either short-term loss (additional time to find a replacement job), or limited value loss (the difference in wage between “receptionist job requiring lifting” and “receptionist job not requiring lifting”). In either scenario, the pecuniary loss is both: a possibility and, of limited value. Further, the plaintiff could avoid the potential for a future loss (and reduce her pain symptoms) by choosing to undertake the arthroscopic surgery.

[119] Based upon that analysis, I assess the loss of capacity at $20,000. I arrive at that figure from three separate angles, all using her current yearly salary of $48,000:

a) First, by an estimate of the income the plaintiff would lose if she chooses to undergo the two knee surgeries. She would lose approximately two months’ work after each surgery, followed by a period of limited duties.

b) The second scenario presumes that the plaintiff does not pursue surgery. During the period between the trial and her retirement, after any (potential) layoff, the plaintiff may suffer from longer periods of unemployment because of her inability to accept or pursue certain jobs in her field. It may take her longer to find a replacement job. The figure of $20,000 represents five separate layoffs where her unemployment is extended by an additional month.

c) The third scenario is more speculative. There is no evidence on the amount of salary that the hypothetical “receptionist job requiring lifting” versus the same type of job without the physical requirement. I project

(admittedly speculation) that the job with physical requirements may pay slightly more than the other.

[120] Applying those three possible future outcomes, I find that an award of $20,000 is appropriate for loss of future earning capacity.

Future Care Costs

[121] The plaintiff seeks an award of $5,000 for future care. The defence position is that the plaintiff attended physiotherapy until October 2020 and has not pursued any further treatment.

[122] The plaintiff’s claim is calculated on the basis of a future period of active rehabilitation and physiotherapy (30 sessions each).

[123] I noted above that Dr. Rickards’ report describes the protocol for treatment of plica syndrome. That protocol includes a structured exercise program. However, the plaintiff is far past the time that such a program would provide benefit.

[124] According to Dr. Rickards, the only step that would relieve the plaintiff’s current symptoms would be arthroscopic surgery. The plaintiff would need physiotherapy following that surgery.

[125] I am left in a situation where the plaintiff may, or may not, pursue the future surgery. If she does not pursue the surgery, then there is no medical need, nor benefit, from further treatment.

[126] I note that in her final submissions (relating to loss of capacity), the plaintiff submitted that there was only a 50% chance that she would pursue the surgery recommended by Dr. Rickards. I note that this was counsel’s submission, and not the evidence of the plaintiff (who was not asked about her intentions).

[127] In my opinion it would not be fair to the plaintiff to award zero for future care. She may undertake the surgery and be left paying the cost of the subsequent

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treatment. Conversely, it would not be fair to the defendant to award an amount for future care that the plaintiff does not need to (or intend to) pursue.

[128] Given those parameters, I award the amount of $2,500, representing half of the plaintiff's claim under this head of damage. That amount is for physiotherapy following any knee surgery the plaintiff may pursue.

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Housekeeping Capacity

[129] The plaintiff seeks an award of $31,600 for the loss of her housekeeping capacity, both past and future:

a) She ascribes $10,400 of that amount to the first year after the Accident.

b) The future element relates to the expected recovery time if the plaintiff undergoes both knee surgeries. She claims the equivalent of 10 hours per week at $20 per hour for a period of two years.

[130] The defence position is that the evidence does not establish an inability to perform the housekeeping duties, only increased pain when they are performed. On that basis the plaintiff submits that the appropriate step would be to compensate the plaintiff with a larger non-pecuniary award. The defence notes that the plaintiff did not retain or pay anyone to do the housekeeping. To the extent it was necessary, the plaintiff's husband and parents carried the additional load.

[131] A claim for loss of housekeeping capacity can either be made as a separate, pecuniary award, or as an element of the plaintiff's non-pecuniary damages. The rational for the latter award is that the plaintiff may undertake the housekeeping duties, but suffer increased pain as a result. As set out in *Kim v. Lin*, 2018 BCCA 77:

> [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court

> said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
>
> [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

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[132] In *Riley v. Ritsco*, 2018 BCCA 366, the Court of Appeal further clarified the distinction:

> [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.

[133] A further explanatory nuance was added by the Court of Appeal in *McKee v. Hicks*, 2023 BCCA 109. In that case the trial judge found that the plaintiff would have difficulty performing heavier household tasks in the future, but made no pecuniary award to compensate for that loss. The Court of Appeal upheld the trial decision on that issue:

> [110] Especially in light of this Court's unanimous decision in *Riley*, I do not read *Kim* as suggesting that there is a discretion to award pecuniary damages in cases where the plaintiff remains capable of performing all household tasks but encounters some frustration or difficulty in doing them. Such cases are cases where the damages are non-pecuniary in nature.
>
> [111] *Riley* was such a case. The Court acknowledged that the plaintiff's difficulties had to be considered in assessing the amount of non-pecuniary damages but rejected the idea that a segregated non-pecuniary award was necessary. It also suggested that segregated non-pecuniary awards should not be made absent special circumstances.
>
> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are

> typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.
>
> [Emphasis in original.]

[134] In this trial, the evidence was clear that the plaintiff's ability to assist with parenting and household duties was very limited during period immediately after the Accident. The plaintiff's husband was required to take on much of that burden. In my opinion, his efforts were undertaken because the plaintiff was incapable of doing the work.

[135] As noted the plaintiff's formulation of the claim (her math) is based upon 10 hours of work per week for one year at $20 per hour. I do not accept that the plaintiff was incapable of performing all of the normal housekeeping duties for the entire year. As noted above, the plaintiff returned to working on a full-time basis after five weeks. There was evidence that she was cleaning the boardroom space at work for the Lark Group, but not vacuuming at home. That evidence causes me concern. I am at a loss to understand how a person could be capable of performing housekeeping tasks in one place but not the other.

[136] With those concerns in mind, I award the amount of $2,500 for the past loss of housekeeping capacity. That amount is focussed on Mr. Lacey's efforts in the first six months after the Accident.

[137] Turning to the future, I do not accept the underpinning of the plaintiff's formulation of the future loss claim. The plaintiff submits that if she undergoes two surgeries, she will not be able to conduct her housekeeping duties for two years. That formulation does not accord with Dr. Rickards' evidence. He testified that she would be incapacitated (disabled) for two months after each surgery. She would then be able to return to work with increasing duties over the next ten months.

[138] On that basis, if the plaintiff undergoes the two surgeries (50% chance), she will be unable to perform housekeeping duties for a total of four months. Thereafter she would be working. Her ability to perform housekeeping would be limited immediately after the surgery, but would increase as the year went on.

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[139] On that basis, given the chance that the plaintiff will not undergo surgery, and the anticipated recovery period is she does, I award the amount of $5,000 for future loss of housekeeping capacity.

[140] Hence, in total under this head of damage, I award $7,500.

Special Damages

[141] The plaintiff presents a claim for special damages of $4,773.55.

[142] The defence does not dispute that amount.

Summary and Conclusion

[143] In summary, I find the defendants liable for the Accident and the injuries suffered by the plaintiff. I award the following amounts:

a)	Non-Pecuniary Damages:	$90,000.00
b)	Past Income Loss (Agreed):	$2,877.05
c)	Future Loss of Capacity to Earn Income:	$20,000.00
d)	Future Cost of Care:	$2,500.00
e)	Future Loss of Housekeeping Capacity:	$7,500.00
f)	Special Damages (Agreed):	$4,773.60
	Total:	$127,650.65

[144] Barring any offers of which I am not aware, the plaintiff is entitled to her costs.

"A. Ross J."

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