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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey PART 40 D
Justice

CRAIG BROWN,

Plaintiff,

Index No.: 105230/02
MOTION SEQ. NO. 11
MOTION CAL. NO. _____

-V-

MARK G. SPEAKER, M.D., LASER AND CORNEAL SURGERY ASSOCIATES, P.C., TLC LASER EYE CENTER and WILLIAM TULLO, O.D.,

Defendants.

The following papers, 1 - 14, were read on this motion by plaintiff for an order, pursuant to CPLR § 4404, setting aside the jury's verdict

	Papers Numbered
Notice Of Motion - Affidavit	1-2
Answering Affidavit of Defendant Mark G. Speaker, M.D. and Laser and Corneal Surgery Associates P.C. - Exhibits	3-8
Answering Affidavit of Defendant TLC Eye Center - Exhibits	9-12
Answering Affidavit of Defendant William Tullo, O.D. - Exhibits	13
Replying Affidavit -	14

Cross-Motion: ❑ Yes ■ No

Plaintiff commenced the instant medical malpractice action against the defendants, alleging that as a result of their negligence in connection with a LASIK surgery, performed on January 21, 2000, he suffered extensive visual problems. It was alleged, specifically, that plaintiff's surgery was contraindicated because of his high level of myopia.[1] This action proceeded to trial on May 21, 2007, and concluded on June 7, 2007,with a jury verdict in favor of defendants. Plaintiff

[1] The evidence presented at trial showed that prior to the LASIK surgery the refraction in plaintiff's right eye was -16.75 diopters of myopia and -.75 diopters of astigmatism. Plaintiff's left eye refraction was -16.00 diopters of myopia and -1.25 diopters of astigmatism.

presently moves for an order, pursuant to CPLR § 4404, setting aside the jury's verdict. Plaintiff argues that the jury's verdict in the instant action should be set aside for the following reasons: (1) defendant TLC Eye Center's expert ophthalmologist made improper references to peer review articles and/or treatises during her direct examination; (2) defendants' improper use of periodicals to cross-examine plaintiff's expert ophthalmologist; (3) defendants' improper questioning of plaintiff's expert ophthalmologist, with respect to his website; and (4) defendants' improper comments and questions regarding Tiger Woods' LASIX surgery, a magazine article relating to defendant Dr. Speaker, and plaintiff's wealth.

Plaintiff first argues that the jury's verdict in the instant action should be set aside on the ground that Dr. Elizabeth Davis, defendant TLC Eye Center's expert ophthalmologist, made improper references to peer review articles and/or treatises during the course of her testimony. According to plaintiff, Dr. Davis, in her direct testimony, referred extensively to medical literature and claimed that such literature supported her opinion. Plaintiff contends that Dr. Davis' references to these peer review articles and/or treatises, during the course of her testimony, was hearsay and constituted improper "bolstering." The Court disagrees.

It is well settled that statements contained in scientific treatises and/or journal articles are considered hearsay, and that such statements may not be introduced into evidence for the truth of the facts asserted therein. *See* Prince Richardson On Evidence, §7-313,p. 478 [11th ed], citing *People v. Riccardi*, 285 NY 21 [1941]; *Gunnarson v. State*, 95 AD2d 797 [2d Dept. 1983]; *Rosario v. New York City Health and Hospital Corp.* , 87 AD2d 211 [1st Dept. 1982]. Therefore, the Court acknowledges that an expert may not testify about the *contents* of treatises and other publications that support his or her position. Notwithstanding, the facts and information contained in such publications, that are recognized as authoritative, are a proper basis for an expert's opinion, and an expert is not foreclosed from testifying that such publications were relied upon in forming the expert's opinion. *See People v. Sugden,* 35 NY2d 453 [1974]*; see also Hinlicky v. Dreyfuss*, 6 NY3d 636 [2006][clinical practice guidelines admissible for non-hearsay purpose of explaining the decision making process of the defendant physician].

At the outset, with respect to this argument, it is important to note that plaintiff's expert ophthalmologist, Dr. William Mathers, not only testified at trial that it was a departure to perform LASIK surgery on plaintiff because of his high level of myopia, but also testified that there was a lack of data with respect to the performance of LASIK surgery on patients with such a high level of myopia. Dr. Mathers testified, during his direct examination, that a patient's level of myopia may be so high, that the benefits of the surgery no longer outweigh the risk of the procedure (Trial transcript page 166, line 26 through page 167, line 15). According to Dr. Mathers, "up to about ten diopters, the community of people that does this agree that this works pretty well. . . . Between ten and twelve diopters, there are more problems . . . . As you get beyond twelve, thirteen, fourteen, it becomes increasingly problematic, and, basically, its not done." (Trial transcript page 167, line 22 through page 168, line 3). Dr. Mathers further stated that "certainly when you get to about fifteen, its really not done. In fact there isn't very much data on it that's published, because the little that was done, wasn't published and it doesn't work." (Trial transcript page 168, line 4 through line 7). Similarly on cross-examination Dr. Mathers testified that "the amount of data at 15 [diopters] is meager, at best. There is almost nothing there." (Trial transcript page 307, line 12 through line 13). When asked whether he "said there was a lack of data on treatments of high myopia," Dr. Mathers responded in the affirmative (Trial transcript page 308,

line 4through line 6; *see also* Trial transcript page 313, line 24 through page 314, line 5 [Dr. Mathers states "[h]ow much data is out there at 15? There are 9, 10, 11, 12, there's a lot of data. There's not much around 17, 16, 17, 18 diopters. There is not a lot of data."]).

Thereafter, during the examination of Dr. Davis, she testified that in her opinion it was not a departure to perform LASIK surgery on plaintiff based upon his level of myopia (Trial transcript page 1680, line 15 through page 1682, line 14). She stated that her opinion was based upon data in the literature, as well as the experience of Dr. Speaker and "our European colleagues." (Trial transcript page 1680, line 15 through page 1682, line 14). She testified that she disagreed with Dr. Mathers' testimony that there was not sufficient data available with respect to LASIK surgery on high myopia patients (Trial transcript page 1682, line 16 through line 22). According to Dr. Davis, there existed both published and unpublished data that supported good outcomes for patients with the level of myopia of that of plaintiff herein (Trial transcript page 1683, line 11 through line 24). Dr. Davis testified that she was aware of articles that supported her position (Trial transcript page 1684, line 5 through line 8), and that these articles appeared in authoritative journals (Trial transcript page 1684, line 9 through page 1685, line 24). Dr. Davis again stated that she was able to formulate her opinion that surgeons were having successful outcomes with high myopia patients based upon her review of this literature (Trial transcript page 1686, line 17 through page 1687, line 11). It is noted that defendants attempted to elicit testimony from Dr. Davis with respect to specific articles and published studies relating to high myopia patients, but such testimony was not permitted by the Court.[2] It is also important to note that Dr. Davis did not offer any testimony relating to any statements contained in these articles.

Based upon the foregoing, the Court finds that Dr. Davis' references to peer review articles and/or treatises during the course of her testimony was properly admitted, to the extent that such references were permitted by the Court, to demonstrate what she relied upon in forming her expert opinion in this case. Additionally, such testimony was proper in light of the fact that plaintiff's expert, Dr. Mathers expressly stated during his testimony that there exists little to no data relating to the performance of LASIK surgery on high myopia patients.

Plaintiff next argues that defendants improperly used periodicals to cross-examine plaintiff's expert ophthalmologist, Dr. William Mathers. It is plaintiff's contention that Dr. Mathers was confronted with passages from a publication of the American Academy of Ophthalmology on cross-examination even though he was not asked the proper questions to lay the foundation for the introduction of such publication. According to plaintiff, such cross-examination was improper because when Dr. Mathers was questioned with respect to the authoritativeness of this publication he stated that although such books "reflect the time they were written and the author's views . . . . they may not represent the standard that is in the community at the moment someone is actually reading the page." (Trial transcript page 299, line 20 through line 23).

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[2] The Court sustained plaintiff's objection to defense counsel for defendant TLC Laser Eye Center's question to Dr. Davis asking her to discuss a specific article (Trial transcript page 1684, line 26 through page 1685, line 6). Although Dr. Davis offered some testimony about specific studies published with respect to high myopia patients, such testimony was stricken from the record (Trial transcript page 1685, line 27 through page 1686, line 16).

As set forth above, statements contained in scientific treatises and/or journal articles are considered hearsay, and may not be introduced into evidence for the truth of the facts asserted therein. *See* Prince Richardson On Evidence, §7-313,p. 478 [11th ed.], citing *People v. Riccardi, supra*; *Gunnarson v. State, supra*; *Rosario v. New York City Health and Hospital Corp., supra*. Notwithstanding, such publications may be used on the cross-examination of an expert for the purpose of ascertaining the weight to be given to the testimony of the expert witness. *See Benson v. Behrman*, 248 AD2d 153 [1st Dept. 1998]; Hastings v. Chrysler Corp., 273 AD 292 [1st Dept. 1948] . In order to lay the foundation for the use of such material, the expert must first admit that such publication is authoritative. *See Lenzini v. Kessler*, 48 AD3d 220 [1st Dept. 2008], citing *Hinlicky v. Dreyfuss,* 6 NY3d 636 [2006]. Despite plaintiff's argument to the contrary, Dr. Mathers recognized this publication as authoritative before the Court permitted a cross-examination with respect to same. Dr. Mathers first acknowledged that the American Academy of Ophthalmology is the leading organization in the United States for the education of ophthalmologists (Trial transcript page 299, line 2 through line 5). Dr. Mathers was questioned specifically with respect to the authoritativeness of the section on Patient Selection, contained in a book entitled "Refractive Surgery."[3] (Trial transcript page 300, line 11 through line 18). Dr. Mathers expressly testified that such section "is authoritative by definition" and stated that the American Academy of Ophthalmology "is certainly a recognized authority by definition." (Trial transcript page 300, line 16 through line 20). Although Dr. Mathers previously stated that the views set forth in the publication "*may* not represent the standard that is in the community at the moment someone is actually reading the page," he expressly stated that such publication was "authoritative by definition." (Trial transcript page 300, line 16 through line 20). *See Lenzini v. Kessler, supra* [expert could not foreclose cross-examination with respect to a scientific text by using a "semantic trick"]; *Spiegel v. Levy*, 201 AD2d 378 [1st Dept. 1994][same]. The Court does not accept the argument that the term "authoritative by definition" does not amount to a concession on the part of Dr. Mathers that the publication at issue was authoritative.

Plaintiff similarly argues that Dr. Mathers was improperly cross-examined on a journal article entitled Laser In Situ Keratomileusis for High Myopia with the VISX Star Laser, written by Dr. Gary M. Kawesch and Dr. Guy M. Kezirian and published in the Journal of the American Academy of Ophthalmology, because he did not admit that such article was authoritative.[4] Notwithstanding such argument, Dr. Mathers expressly stated that the Journal of the American Academy of Ophthalmology was an authoritative journal (Trial transcript page 308, line 7 through page 309, line 4). Additionally, he conceded that to publish an article in such a peer reviewed journal, ophthalmologists review the scientific rigor of the articles and studies to determine the validity and usefulness for ophthalmologists (Trial transcript page 345, line 22 through page 346, line 2). Dr. Mathers also stated that such a publication "reflects the community's thinking." (Trial transcript page 346, line 15 through page 24). The Court acknowledges that Dr. Mathers testified that he

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[3] This publication contained data relating to patients with 15 diopters of myopia that were treated with LASIK surgery (Trial transcript page 301, line 13 through page 302, line 21).

[4] This article indicated that studies were performed with respect to high myopia patients and that data was in existence with respect to same (Trial transcript page 344, line 10 through line 22).

did not read the article at issue, however, he conceded that the journal in which it appears is authoritative, sufficiently laying a proper foundation for such cross-examination. *See Mark v. Colgate University*, 53 AD2d 884 [2d Dept. 1976]; *Hastings v. Chrysler Corp.*, 273 AD 292 [1st Dept. 1948].

Plaintiff also appears to argue that Dr. Mathers was improperly cross-examined with respect to a study presented at an annual meeting of the Academy of Ophthalmology (Trial transcript page 338, line 11 through page 340, line 15). However, the Court sustained plaintiff's objection to defense counsel's question relating to certain findings of this study, because Dr. Mathers never testified that the study presented at the annual meeting of the Academy of Ophthalmology was authoritative (Trial transcript page 340, line 10 through line 15). Accordingly, this Court does not find that defendants were permitted to use periodicals in an improper manner during the cross-examine of plaintiff's expert ophthalmologist.

It is further argued that defendants improperly questioned Dr. Mathers, with respect to information contained on his website[5] (Trial transcript page 354, line 24 through page 364, line 5). During Dr. Mathers' cross-examination he was asked several questions relating to the contents of the website, including being asked whether this site states that patients with minus 14 diopters may be treated with laser surgery, which Dr. Mathers answered in the affirmative (Trial transcript page 357, line 13 through line 20). According to plaintiff, defendants' line of questioning with respect to information contained on the website was improper and prejudicial because the site was run by "marketing people," and Dr. Mather was not responsible for the content. Plaintiff does not site any authority to support this proposition. It is clear that Dr. Mathers' website is a marketing tool used to advertise and provide information to the public relating to, *inter alia*, LASIK surgery. As such, the Court does not find it improper to question Dr. Mathers in connection with the website's content. Furthermore, such statements were clearly contradictory to Dr. Mathers testimony and should be heard by the jury to assess his credibility as a witness. Lastly, with respect to this issue, it is noted that at trial plaintiff did not object to the use of such information in connection with the cross-examination of Dr. Mathers.

Plaintiff also argues that defendants made improper comments and asked improper questions regarding Tiger Woods' LASIX surgery, a magazine article relating to defendant Dr. Speaker, as well as plaintiff's wealth. With respect to the subject of Tiger Woods' LASIX surgery, plaintiff argues that Dr. Mathers was asked questions on cross-examination relating to the performance of LASIX surgery on Tiger Woods, in an attempt to imply that the performance of such surgery on the plaintiff was proper. After Dr. Mathers testified that he has never performed a LASIK procedure on anyone with 11 diopters of myopia, defense counsel asked Dr. Mathers if he was aware that Tiger Woods had LASIK surgery with 11.5 diopters of myopia. Dr. Mathers stated that he had no knowledge of Tiger Woods' level of myopia, and, as a result, plaintiff's counsel moved to strike those questions relating to Tiger Woods' surgery. The Court struck those questions relating to Tiger Woods' surgery from the record (Trial transcript page 389, line 24 through page 390, line 26). Plaintiff's attorney did not seek any curative instruction or move for a mistrial with respect to these questions, and cannot now seek to set aside the jury's verdict

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[5] The website at issue is that of the Casey Eye Institute, where Dr. Mathers had been practicing since February of 1999.

based upon same. In any event, prior to deliberating, the jury was instructed that testimony stricken from the record should be disregarded (*see* PJI 1:7, General Charges, Consider Only Competent Evidence [2d Edition 2008]), minimizing any prejudicial effect that such questioning *may* have had. Additionally, plaintiff argues that defendants asked improper questions of plaintiff's expert psychiatrist, Dr. Herbert Lessow, concerning a magazine article relating to defendant Dr. Speaker.[6] It is argued that the mention of such an article in the presence of the jury was extraneous, inflammatory and prejudicial. First, as the subject matter of this article was never discussed in front of the jury, the Court disagrees that the mere mention of the existence of a magazine article relating to defendant Dr. Speaker resulted in any prejudice to plaintiff (Trial transcript page 1270, line 25 through page 1271, line 6). Further, the Court, after a side bar discussion, sustained plaintiff's objection to this line of questioning relating to this article (Trial transcript page 1279, line 14 through line 22).

With respect to defendants' examination of plaintiff in connection with his "wealth," plaintiff argues that such questioning was improper as his earnings at the time he was suffering from vision problems, post surgery, were irrelevant because there was no claim for lost earnings. The Court disagrees. Not only did plaintiff fail to object to this line of questioning, the Court finds that defendants' cross examination of plaintiff with respect to his role as the president of a successful legal staffing company (Trial transcript page 1939, line 25 through page 1942, line 7), and his increasing compensation for his performance in that role, which was commensurate with the success of the company (Trial transcript page 1942, line 8 through page 1944, line 11), was relevant with respect to the injuries allegedly sustained as a result of the subject surgery. A plaintiff's ability to return to work and perform his work related duties without limitation after allegedly sustaining serious injury is relevant and should be considered by a jury in assessing a plaintiff's *pain and suffering*. *See Donlon v. City of New York*, 284 AD2d 13 [Appellate Division, First Department focuses on plaintiff's ability to perform his duties as a fireman in assessing whether a jury's award for future pain and suffering is supported by the record]. This is especially so in the instant action where in addition to his physical injuries, plaintiff presented much evidence, through both his own testimony and that of his expert psychiatrist, Dr. Herbert Lessow, relating to his mental suffering following the subject surgery. According to the evidence presented at trial, plaintiff was suffering from a major depressive disorder following his surgery (Trial transcript page 1241, line 2 through line 21), which, among other things, caused sadness, trouble sleeping, loss of appetite, loss of interest in most activities, suicidal thoughts and, most significant with respect to this issue, an inability to concentrate at work (Trial transcript page 1223, line 2 through page

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[6] Counsel for defendant Dr. Speaker asked Dr. Lessow if, during one of his examinations of plaintiff, plaintiff showed him a magazine article that appeared in New York magazine relating to Dr. Speaker (Trial transcript page 1270, line 25 through page 1271, line 6). Such question was asked by counsel for the purpose of (i) corroborating the testimony of Dr. Speaker in which he testified that Mr. Brown would have been provided with an informational packet during his first visit to his office, which included such article (Trial transcript page 2398, line 18 through page 2399, line 13); and (ii) refuting the testimony of plaintiff that he was never given any such informational material whatsoever by defendants (Trial transcript page 1753, line 24 through page 1274, line 12). The purpose of this inquiry was to demonstrate that plaintiff was well informed about the subject procedure prior to giving his consent for same.

1228, line 2). Accordingly, defendant's examination of plaintiff in connection with his success at the workplace following the subject surgery was proper.

Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion is denied.

Dated: 08/1/2008

J.S.C.

Check one: ■ FINAL DISPOSITION ❑ NON- FINAL DISPOSITION

Check if appropriate: ❑ DO NOT POST ❑ REFERENCE