

**Rocha v 909 Third Co., L.P.**

2012 NY Slip Op 31200(U)

April 25, 2012

Supreme Court, New York County

Docket Number: 109752/2007

Judge: Joan A. Madden

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

PRESENT. **HON. JOAN A. MADDEN**

PART 11

Index Number : 109752/2007 **J.S.C.**

ROCHA, JORGE

vs  
909 THIRD COMPANY LP

Sequence Number : 007

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

| PAPERS NUMBERED |
|-----------------|
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|                 |
|                 |

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the annexed memorandum decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

MAY 07 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: April 25, 2012

*[Signature]*  
**HON. JOAN A. MADDEN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
JORGE ROCHA,

Plaintiff,

INDEX NO. 109752/07

-against-

909 THIRD COMPANY, L.P., SMC CONSTRUCTION  
CORP., and CITICORP NORTH AMERICA, INC.,

Defendants

-----X  
SMC CONSTRUCTION CORP.,

Third-party Plaintiff

-against-

HERMAN LEVIN DECORATING CO., INC.,  
d/b/a HELECO DECORATING COMPANY,  
and HELECO DECORATING COMPANY,

Third-party defendants.

-----X  
JOAN A. MADDEN, J.:

**FILED**

**MAY 07 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Jorge Rocha moves for an upward modification of the jury's verdict with respect to past and future pain and suffering on the grounds that the awards of \$50,000 and \$250,000, respectively, deviate materially from what would constitute reasonable compensation for his injuries.<sup>1</sup> In addition to these amounts, the jury also apportioned fault, finding that the plaintiff was 71% responsible and defendants 29% at fault. Defendants oppose the motion, arguing that the experts who testified on behalf of Mr. Rocha and defendants differed as to the nature, extent

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<sup>1</sup>In the notice of motion, plaintiff moves pursuant to CPLR 3215 for a default judgment. However, plaintiff's papers are clear that this is an error and that he is moving pursuant to CPLR 5501(c) for additur. Under these circumstances, where defendant does not object, I deem the motion made pursuant to CPLR 5501(c).

and permanency of Mr. Rocha's injury, and that the jury's verdict should not be disturbed as the weight to be accorded conflicting testimony of experts is peculiarly within the province of the jury.

In this action, the jury found defendants liable for violations of Labor Law § 241(6) with respect to the requirement that protective eye wear be provided to workers. The accident occurred on April 6, 2006. Mr. Rocha, who was not wearing goggles at the time, was injured when Peel Away, a lye-based caustic substance he was using splashed, getting into and burning his left eye. After the accident, Mr. Rocha was taken to the emergency room of New York Presbyterian Cornell Hospital where he was admitted to the hospital, given medication for the pain, and his left eye given extensive lavage in an attempt to wash out the eye. This treatment was continued and he remained in the hospital until he was discharged four days later. Although Mr. Rocha returned to work in July 2006, several months after the accident, he testified work was, and continues, to be difficult due to the injuries he sustained. He testified his injuries include loss of vision in his left eye, a dry eye condition which causes severe irritation and itching, sensitivity to light and a droopy lid. In addition, Mr. Rocha testified his eyes tire easily and he is self conscious and uncomfortable with his appearance due to the droopy lid condition.

At trial, the issues with respect to Mr. Rocha's injuries focused on the nature and extent of the damage to the cornea of Mr. Rocha's left eye. The medical evidence with respect to the anatomy and functioning of the eye pertinent to this motion, showed that the cornea is the clear front surface of the eye which provides the majority of the eye's refractive power. Light enters the eye through the cornea and is focused on the retina in the rear of the eye which transmits the image through the optic nerve to the brain. While the cornea consists of five layers, here, two

layers are implicated, the epithelium, or outer layer of cells, and the stoma, which is in the center of the cornea and makes up most of its thickness. As discussed below, the medical experts testified as to their opinions regarding the significance of the damage to these two layers and to Mr. Rocha's cornea.

Plaintiff called as an expert witness, Dr. Munro Levitsky, a board certified ophthalmologist licensed to practice in New York, a graduate of Columbia University School of Physicians and Surgeons, and a clinical professor of ophthalmology at New York University. Dr. Levitsky testified that Mr. Rocha has no functional use of his left eye as he suffers from damage to his cornea resulting in a 90% loss of vision, a dry eye condition, ptosis or "droopy lid," and photophobia or sensitivity to light.

Dr. Levitsky examined Mr. Rocha's eyes on three occasions, April 7, 2008, July 20, 2009 and May 4, 2010, and based his opinion on various tests he performed during these examinations, and on the hospital and medical records of Dr. Lee, who treated Mr. Rocha at the hospital and thereafter, and Dr. Kelly, who was also one of Mr. Rocha's treating physicians. Dr. Levitsky explained that Peel Away, the substance which splashed into Mr. Rocha's eye, is a lye based alkaline, and can penetrate the cornea and cause more damage than an acid based substance. In Dr. Levitsky's opinion, the damage to Mr. Rocha's cornea was extremely painful and caused scarring and opacity in the central cornea. Moreover, Dr. Levitsky indicated that as the eye healed, blood vessels grew into the cornea, a process he referred to as neovascularization. Dr. Levitsky testified that the scarring, opacity and blood vessels caused Mr. Rocha's blurred vision which he described as permanent. Dr. Levitsky noted that the hospital records from New York

Presbyterian Cornell state that on admission Mr. Rocha had 2400<sup>2</sup> vision in his left eye and that the epithelium, was “significantly lost,” resulting in a diffuse haze over the cornea. Dr. Levitsky pointed to Dr. Lee’s finding on January 11, 2008 that Mr. Rocha had permanent corneal scarring with neovascularization, and Dr. Kelly’s March 11, 2010 record indicating a 20/200 vision and “anterior stromal opacity ” secondary to an old chemical injury.

Dr. Levitsky also testified that the hospital records show severe damage to the lining over the cornea, the conjunctiva, which was described as red and inflamed. According to Dr. Levitsky, during his examinations, the conjunctiva continued to be red and inflamed, that this caused a condition known as dry eye, and that this condition is permanent. As Dr. Levitsky explained, the condition is significant as it impacts on the composition of tears, which help to protect the cornea by keeping it moist. Tears have three components, mucous, which is produced by the conjunctiva, a watery substance secreted by the lacrimal glands, and an oily substance secreted by the meibomian glands which are located in the eyelid. The mucous and oily substance are important as they help prevent evaporation of tears, and here, Dr. Levitsky testified, the damage to Mr. Rocha’s conjunctiva affects the production of tears in his eye, leading to dry eye. The condition causes redness, a sensation of grittiness and burning, and can cause extreme discomfort and pain. Dr. Levitsky noted that in an attempt to alleviate the condition, in May 2006, Dr. Lee inserted punctal plugs in Mr. Rocha’s tear ducts, but the condition persisted. Dr. Levitsky opined that under these circumstances, over the long term, the damage to Mr. Rocha’s epithelium and conjunctiva, will cause the cornea to become dry with recurrent corneal abrasions exacerbating Mr. Rocha’s impaired vision.

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<sup>2</sup>Defendant’s expert testified that Mr. Rocha’s vision at the hospital was 2200.

As to ptosis or droopy lid, Dr. Levitsky testified, that this is a condition where the eyelid, which protects the eye and helps pump moisture over the cornea, droops. In Mr. Rocha's case, Dr. Levitsky found that out of an eleven millimeter opening between the upper and lower lids, there was an approximate three millimeter decrease in the opening in Mr. Rocha's left eye. Dr. Levitsky also testified that Mr. Rocha suffers from photophobia, or sensitivity to light, which he described as permanent. This condition causes chronic tearing when the eye is exposed to light. Dr. Levitsky pointed to Mr. Rocha's response in July 2009, during a slit lamp examination as an example of this reaction. Dr. Levitsky testified that Mr. Rocha's eye teared when a light was focused to shine into his eye, making the examination difficult.

Dr. Levitsky also testified that at various times since the accident, to treat symptoms related to dry eye and photophobia, Mr. Rocha was using different types of eye drops and artificial tears, wearing dark sunglasses and washing his eye two to three times daily with baby shampoo.

Tests with respect to Mr. Rocha's vision in his left eye, indicate that Drs. Lee and Kelly found Mr. Rocha's vision was 20/200. While in July 2009, Dr. Levitsky found Mr. Rocha's vision was correctable with lens to 20/70, he testified that this vision was intermittent, and that due to the nature of Mr. Rocha's injuries, that such vision could not be achieved on a regular basis, and therefore Mr. Rocha did not have functional 20/70 vision. Dr. Levitsky also testified that glasses would not correct Mr. Rocha's blurred vision. In May 2010, Dr. Levitsky found that Mr. Rocha was developing a cataract in his left eye. Dr. Levitsky attributed the cataract to Mr. Rocha's injuries, testifying that his opinion was based on Mr. Rocha's age, which he said was young to develop a cataract, the absence of a cataract in the right eye and the inflammation in his eye from the accident, which inflammation can make an eye more susceptible to cataract

formation. Dr. Levitsky, although noting that cataracts are caused by opacity in the lens of the eye and can cause blurred vision, testified that the cataract was mild, and that he was of the opinion that Mr. Rocha's loss of vision was due to damage to the cornea. However, Dr. Levitsky did state that in the future the cataract would exacerbate Mr. Rocha's loss of vision. Finally, as to possible corrective surgery, Dr. Levitsky was of the opinion that Mr. Rocha was not a candidate for a corneal transplant due to the damage to his cornea and the severe discomfit the procedure would involve. He also testified that Mr. Rocha was not at this time a candidate for cataract surgery as at its present stage it was mild, but that he may need future cataract surgery.

The defendant called Dr. Jay Fleischman, a board certified ophthalmologist licensed to practice in New York, a graduate of Columbia University School of Physicians and Surgeons, and a clinical associate professor of ophthalmology at the Albert Einstein College of Medicine Montefiore Hospital. Dr. Fleischman stated that he reviewed the records of the hospital and of the Drs. Lee and Kelly, and examined Mr. Rocha in April, 2009. In Dr. Fleischman's opinion, while Mr. Rocha suffered a chemical burn with peripheral corneal damage and early cataract formation, he had functional use of the eye. Dr. Fleischman testified that a caustic substance such as Peel Away can penetrate into the eye and cause serious damage, that Mr. Rocha had severe damage to his cornea and that his vision in his left eye when he was admitted to the hospital was 2200. However, in Dr. Fleischman's opinion, while Mr. Rocha has some scarring and opacity in the periphery of the cornea, he does not have scarring, opacity or neovascularization in the center of his cornea. Dr. Fleischman testified that scarring, opacity or neovascularization on the periphery of Mr. Rocha's cornea, would not cause blurred vision, as only the central part of the cornea is implicated in vision. Dr. Fleischman based his opinion as to

the location of the corneal damage on his retinal examination, during which he testified had a clear view of the retina; the slit lamp examination where he had a view of the retina with a microscope; and certain photographs in evidence showing a red reflex in Mr. Rocha's eye, which Dr. Fleischman testified would only be reflected if the cornea and lens were clear and the retina normal. Dr. Fleischman agreed that the hospital records and Dr. Lee's records show damage to the central part of the cornea, but testified that in his opinion the damage to the center of the cornea was not permanent. As to Dr. Lee's finding in her records that Mr. Rocha had loss of vision and permanent corneal scarring, Dr. Fleischman testified that he disagreed that the damage to the cornea caused any permanent loss of vision. He further testified that in his opinion, drawings of Mr. Rocha's eye in Dr. Lee's records show damage to the center of the cornea resolving, and the infiltration and haze in the center of the cornea retreating. When questioned about Dr. Kelly's finding of anterior stromal opacity in his March 11, 2010 record, which finding post-dated Dr. Fleischman's examination, Dr. Fleischman responded that Dr. Kelly did not relate the stromal opacity to loss of vision. Most significantly, Dr. Fleischman opined that while Mr. Rocha had blurred vision from the Peel Away, the damage to the central cornea healed and Mr. Rocha's blurred vision at present was attributable to the cataract which was developing in the eye. While he attributed the cataract to the damage to the eye from the accident, he described the cataract as "not significant" and "slight" and as a "20/40 cataract." Dr. Fleischman testified that while Mr. Rocha's vision tested at 20/200, based on the results of a pinhole examination,<sup>3</sup> he found his vision was correctable to 20/40. Dr. Fleischman explained

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<sup>3</sup>In this examination, a patient is asked to look through an opaque disc with one or more small holes in it. The purpose of the test is to focus light and to remove effects of refractive errors. Since the light passes through the center of the lens, defects in the shape of the lens or

the pinhole test focuses light so that refractory errors do not affect vision. While refractory errors can be cured by glasses, Dr. Fleischman responded to a number of questions on cross examination that glasses would not correct Mr. Rocha's vision. However, towards the end of redirect examination, he testified that his recommendation for treatment for Mr. Rocha included "a careful refraction" which might require fitting with a contact lens or glasses. Dr. Fleischman also testified that since the cataract was not significant, he would not recommend cataract surgery, but that Mr. Rocha might need such surgery in the future. Dr. Fleischman acknowledged that his opinion as to the severity and cause of Mr. Rocha's loss of vision and recommendations for treatment, which are discussed in more detail below, differed from the opinions of and treatment recommended by Mr. Rocha's treating physicians. Dr. Fleischman also acknowledged that the Worker's Compensation Board found that Mr. Rocha had 100% loss of vision and was blind in the eye.

As to Mr. Rocha's dry eye, while agreeing this can be a painful condition which can cause inflammation, and a burning and gritty sensation, Dr. Fleischman testified that in his opinion, dry eye was not a component of Mr. Rocha's injuries, and, if Mr. Rocha had dry eye, it was a mild condition which he could not say was permanent. As to Mr. Rocha's photophobia, in Dr. Fleischman's opinion, Mr. Rocha did not have severe photophobia, since Mr. Rocha would not have tolerated the slit lamp test he conducted. This test, as discussed above, involves keeping the eye open while a light is focused to shine into it. Dr. Fleischman testified that Mr. Rocha's

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errors of refraction, have no effect and an ophthalmologist can estimate the maximum improvement in a patient's vision which can be obtained by lenses. See Wilkopedia, The Free Encyclopededia, Pinhole Occluder at [http://en.wikipedia.org/wiki/Pinhole\\_occluder](http://en.wikipedia.org/wiki/Pinhole_occluder) [accessed March 29, 2012].

photophobia was due to a permanently dilated pupil caused by the accident and that this condition was permanent. He further testified that this condition could be treated with eye drops to constrict the pupil, surgery to make the pupil smaller and by wearing dark glasses.

Although the amount of damages to be awarded for personal injuries is primarily a question for the jury, an award may be set aside “as excessive or inadequate if it deviates materially from what would be reasonable compensation.” CPLR 5501(c), see Ortiz v. 975 LLC, 74AD3d 485 (1<sup>st</sup> Dept. 2010). Although CPLR 5501(c) dictates to the Appellate Division to overturn a verdict when it materially deviates from what is considered reasonable compensation, this standard has been held to apply to a trial court. Shurgan v. Tedesco, 179 AD2d 805, 806 (2d Dept. 1992). In determining whether an award deviates from what is reasonable compensation, courts look to comparable cases “bearing in mind that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification.” Reed v. City of New York, 304 AD2d 1 (1<sup>st</sup> Dept. 2003)(citations omitted). However, the amount of damages awarded or sustained in prior cases involving similar injuries is not binding on courts. See Senko v. Fonda, 53 AD2d 638, 639 (2d Dept. 1976). “Modification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible.” So v. Wing Tat Realty Co., 259 AD2d 373, 374 (1<sup>st</sup> Dept. 1999). Moreover, courts have recognized that the amount of damages to be awarded is a question of fact for the jury and a jury’s verdict should be given considerable deference. See Ortiz v. 975 LLC, supra. In evaluating an award for material deviation, if the evidence presents factual issues with respect to conflicting testimony of experts, the weight to be accorded such evidence is a matter peculiarly

within the province of the jury. Norfleet v. City of New York Transit Authority, 124 AD2d 715 (2d Dept. 1986) lv. denied 69 NY2d 605 (1987).

Applying these standards to the case at bar, I conclude that the award of \$50,000 for past pain and suffering deviates materially from what is reasonable compensation. In reaching this conclusion, I reject defendant's argument that the determination of the issues in this motion, involves, exclusively, conflicting evidence of the experts. While Dr. Levitsy and Dr. Fleischman disagreed as to the extent and nature of the permanent damage to Mr. Rocha's eye, a significant portion of the evidence with respect to Mr. Rocha's past pain and suffering was undisputed. The evidence showed that Mr. Rocha suffered from a severe injury to his central cornea, resulting in a significant loss of its epithelium with opacity and scarring in the stroma. When admitted to the hospital, his vision tested at a minimum at 2200 and he remained in the hospital for four days. The injury resulted in blurred vision and was extremely painful. While he returned to work after approximately three months, his injuries, pain and impaired vision significantly impacted on his work and other daily activities. Approximately four and a half years elapsed from the date of the accident until trial. During this period, in addition to the damage to his cornea, the undisputed evidence showed that Mr. Rocha suffered from a dry eye condition which both experts agreed is painful, causes inflammation and a burning, gritty sensation. Moreover, due to his photophobia, he had chronic tearing and wore sunglasses when exposed to bright light. To alleviate these conditions, Dr. Lee inserted punctal plugs and Mr. Rocha used different types of eye drops and frequently washed his eye two to three times daily with baby shampoo. Moreover, he developed droopy lid, a disfiguring condition and a cataract which exacerbated his blurred vision.

In support of his motion, plaintiff submits the following cases: Torricelli v.

Pisacano, 9 AD3d 291 (1<sup>st</sup> Dept. 2004), (the jury's verdict for past pain and suffering was reduced to \$500,000 for a six year period, where plaintiff decedent suffered from deteriorated vision in his right eye resulting from a macular endema which had caused chronic inflammation for six months; decedent's vision deteriorated to 20/70 before a steroid injection and improved to 20/50 afterwards); Sanchez v. Project Adventure, Inc., 12 AD3d 208 (1<sup>st</sup> Dept. 2004) (upholding a \$3,000,000 award for pain and suffering for a fifteen year old boy blinded in one eye)<sup>4</sup>; Fresco v. 157 E. 72<sup>nd</sup> St. Condominium, 2 AD3d 36 (1<sup>st</sup> Dept. 2003) (reducing an award to \$1,000,000 for past pain and suffering where the plaintiff was injured while working without goggles when a nail flew into his eye); Fortune v. Newmark, 202 AD2d 197 (1<sup>st</sup> Dept. 1994) (a verdict in the reduced amount of \$2,261,136.00 was sustained where plaintiff suffered an eye injury from glass shards caused by workers above him removing glass window panes)<sup>5</sup>; Gonzalez v. Lovett Assoc., 252 AD2d 355 (1<sup>st</sup> Dept. 1998)(where the award was reduced to \$1,000,000 for past pain and suffering where plaintiff was blinded in one eye). In addition to these cases, awards in connection with eye injuries have been sustained in the following matters: Galawani v. 40 Sutton Place Condominium, 262 AD2d 55 (1<sup>st</sup> Dept. 1999)(a verdict of \$600,000 and \$330,000 for past and future pain and suffering was upheld where plaintiff who was not wearing goggles was injured when a grinder he was operating kicked back striking him in his eye); Davis v. Nassau Ophthalmic Services, P.C., 232 AD2d 358 (2d Dept. 1996)(the award was reduced to

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<sup>4</sup>Plaintiff states in a footnote that the amount of the verdict was not mentioned in the Appellate Division's decision, but does not indicate the source of this information nor does he distinguish the different awards for past and future pain and suffering..

<sup>5</sup>The decision does not breakdown the award nor does it state the nature of the injury, although plaintiff alleges the injury resulted in blindness in one eye.

\$400,000 where plaintiff suffered impaired binocular vision so that plaintiff became farsighted)<sup>6</sup>.

Notably, defendant fails to submit any cases for consideration. In reviewing the foregoing cases, I note that in Sanchez, Gonzalez and, according to plaintiff, in Fortune, plaintiffs were blinded in one eye. Here, Dr. Fleischman sharply disputed Dr. Levitsky's opinion that Mr. Rocha had a permanent functional loss of vision of 90 % in his left eye, and therefore, the awards in these cases cannot be said to be comparable to the case at bar. However, the \$500,000 award for past pain and suffering for six years in Toricelli is properly used for comparison, particularly, since, in that case, plaintiff's vision tested at 20/70 which improved to 20/50 after a steroid injection. Here, Mr. Rocha's vision tested at 20/200, which Dr. Levitsky testified with correction was intermittently 20/70, and Dr. Fleischman testified was correctable to 20/40. Moreover, the \$400,000 undifferentiated award for pain and suffering in Davis where plaintiff suffered from impairment to his binocular vision is relevant. Since, with respect to the award for past pain and suffering, the undisputed evidence at trial showed Mr. Rocha suffered severe pain from the injury to his cornea, including injury to the central cornea, the epithelium and stroma, blurred vision, dry eye, photophobia and ptoisis, I conclude the award for past pain and suffering deviates materially from what would constitute reasonable compensation, and grant the motion to the extent of ordering a new trial on damages unless defendant stipulates to increase the award for past pain and suffering to \$300,000. See Toricelli v. Pisacano, supra; Davis v. Nassau Ophthalmic Services, P.C., supra.

I reach a different conclusion as to the award for future pain and suffering. While both doctors agreed that as a result of the accident, Mr. Rocha suffers from some degree of impaired

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<sup>6</sup>The decision does not indicate a breakdown of the award.

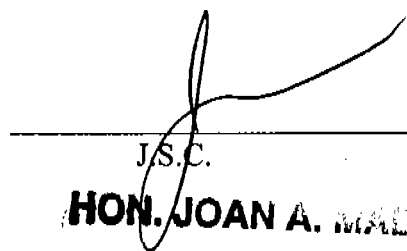
vision to the eye, sensitivity to light, a cataract and droopy eye lid, Dr. Levitsky and Dr. Fleischman disagreed as to whether Mr. Rocha suffers from permanent loss of functional vision of his eye and whether he suffers from a dry eye condition. Although Dr. Fleischman testified that Mr. Rocha's photophobia could be helped with eye drops, surgery, and sunglasses, at best, the evidence is unclear as to whether corrective measures may alleviate Mr. Rocha's impaired vision. Based on the conflicting testimony as to the nature and extent of any permanent impairment to Mr. Rocha's vision, it cannot be said that an award of \$250,000 for future pain and suffering materially deviated from what would be reasonable compensation. See Torricelli v. Pisacano, supra; Davis v. Nassau Ophthalmic Services, P.C., supra.

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent of ordering a new trial with respect to the award for past pain and suffering unless defendant within 20 days of service of a copy of this decision with notice of entry stipulates to increase the amount of the award for past pain and suffering to \$300,000; and it is further

ORDERED that the motion is denied with respect to the award for future pain and suffering.

Dated: April 25, 2012

  
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J.S.C.  
**HON. JOAN A. MADDEN**  
J.S.C.