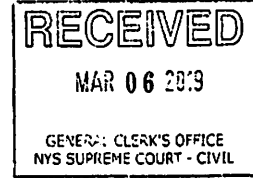


Jones v Rosenblum
2019 NY Slip Op 34126(U)
March 5, 2019
Supreme Court, New York County
Docket Number: 113987/2009
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART IAS MOTION 12EFM

_____X
SAMANTHA JONES,
Plaintiff,

INDEX NO. 113987/2009

- v -

MOTION DATE _____

HARVEY ROSENBLUM, MD AND ROSENBLUM
EYE CENTERS,
Defendants.

MOTION SEQ. NO. 006

DECISION AND ORDER

_____X
The following papers, numbered 1-3 were read on this application to set aside verdict

Notice of Motion/Exhibits	No(s)	<u>1</u>
Answering Affidavits - Exhibits	No(s)	<u>2</u>
Replying	No(s)	<u>3</u>

FILED
MAR 06 2019
NEW YORK COUNTY
COUNTY CLERK

HON. BARBARA JAFFE:

A jury trial was held before me in this matter from May 1 to May 15, 2018, when the jury returned a verdict of liability for medical malpractice and lack of informed consent against defendant Rosenblum, and awarded plaintiff \$600,000 for past pain and suffering and \$500,000 for future pain and suffering.

Defendant now moves pursuant to CPLR 4404(a) for an order setting aside the verdict and directing that judgment be entered in defendant's favor on the grounds that the evidence is insufficient as a matter of law, that the verdict is contrary to the weight of the evidence, and in the interest of justice, that plaintiff's comments and arguments prejudiced defendant's rights, and that the damages awarded are excessive. He also seeks remittitur. Plaintiff opposes.

I. SUFFICIENCY AND WEIGHT OF THE EVIDENCE

Pursuant to CPLR 4404(a), the court may set aside a verdict or judgment entered after

trial and “direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence . . .”

The determination that a verdict is not supported by legally sufficient evidence requires a finding that “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by [them] on the basis of the evidence presented at trial.” (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]; see also *Matter of New York City Asbestos Litig.*, 32 NY3d 1116, 1121 [2018] [Rivera, J., dissenting]; *Sow v Arias*, 21 AD3d 317 [1st Dept 2005], *lv denied* 5 NY3d 716). The court must afford the party opposing the motion every inference properly drawn from the facts presented, which must be considered in a light most favorable to the nonmovant. (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

The determination that a verdict is contrary to the weight of the evidence requires a finding that “the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence.” (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). As issues of credibility are for the jury, its verdict is entitled to deference. (*Aronov v Kanarek*, 166 AD3d 574, 575 [2d Dept 2018]). It is also within the jury’s province to determine the credibility of the parties’ experts; its resolution of conflicting expert testimony is likewise entitled to great weight. (*Id.*).

Liability for medical malpractice requires proof that the defendant “deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff’s injuries.” (*Daniele v Pain Mgmt. Ctr. of Long Isl.*, 168 AD3d 672 [2d Dept 2019], and cases cited therein). To establish proximate causation, expert testimony is necessary, in the form of “evidence from which a reasonable person might conclude that it was more probable

than not that the defendant's deviation was a substantial factor in causing the injury." (*Id.*). "[T]he plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased his injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his [or her] injury." (*Id.*).

A. Causation

1. Defendant's contentions

Dr. Renee Richards, a pediatric strabismus expert, whom plaintiff had consulted for eye muscle surgery, testified that she had discussed cataract surgery with plaintiff. Although the removal of plaintiff's cataract was unlikely to improve her macular vision, she allowed that plaintiff "could certainly stand to gain a great deal from improvement in her peripheral vision and her side vision in each direction and her vision and upgaze, and her vision in the lower field," all of which she characterized as "extremely" important. In April 2007, Richards referred plaintiff to defendant for cataract surgery. Defendant performed the surgery the following month.

Soon thereafter, defendant discovered that the intraocular lens he had inserted during the surgery had slipped out of position. Thus, on June 13, 2007, defendant replaced it with a new lens. Some days later, having observed that plaintiff's retina was detaching, defendant referred her to Dr. Mark Harooni, a retina specialist in his office, who reattached the retina on June 20, 2007. According to defendant's retina expert, Dr. Clifford Ratner, the surgery was successful and afforded no reason for "long-term pain, discomfort, need to guard against physical activity, or loss of peripheral vision," and that given the removal of plaintiff's vitreous, the risk of a future retinal detachment was "resolved." Post-operative testing by Dr. Robert Cykiert, defendant's

cornea expert, and Dr. Steven Odrich, defendant's glaucoma expert, revealed that plaintiff had peripheral vision. Silicone oil placed in plaintiff's eye by Harooni during the surgery he had performed was removed by plaintiff's treating ophthalmologist Dr. Michael Cooney on November 28, 2007.

Defendant maintains that there was insufficient evidence of any injury to plaintiff that was causally related to his treatment of plaintiff other than the lens replacement surgery, Harooni's retina reattachment surgery, and Cooney's removal of the silicone oil, and observes that no claim is made that he had negligently performed the cataract surgery. He otherwise asserts that plaintiff's denial of having been told before this trial that she had amblyopia is incredible.

In August 2009, plaintiff's retina detached again, this time due to a macular hole. It was repaired, and according to Ratner, the detachment was not causally related to the cataract surgery. Then, in March 2011, Cykiert diagnosed plaintiff with glaucoma. He testified, as did Odrich, that there was no causal connection between the cataract surgery and the glaucoma. Defendant characterizes as conclusory and unsupported the contrary testimony of plaintiff's expert, Dr. Richard Storm. Plaintiff's vision on September 7, 2012 was 20/400, whereas before the cataract surgery, she was counting fingers at two feet.

Defendant maintains that having called three experts with different specialties, who all testified that the macular hole and glaucoma were not related to defendant's treatment, whereas Storm's expert opinion included no consideration of plaintiff's improved peripheral vision and minimized the improvement of plaintiff's vision to 20/400 from counting fingers, the evidence weighs in favor of defendant. Defendant also observes that Storm had previously stated that if plaintiff had no vision in her left eye, then cataract surgery would be recommended given the

benefit of an improvement in vision, which, according to Cykiert and Odrich, would have continued to improve absent the glaucoma diagnosed on March 18, 2011.

Cooney testified that between 2007 and 2010, there was no evidence of glaucoma in plaintiff's right eye. He explained that glaucoma is diagnosed by optic nerve damage and that between those years, no such damage had been detected. Consequently, defendant contends that plaintiff's glaucoma could not have been caused by his 2007 surgery. Moreover, Cykiert testified, relying on plaintiff's records, that plaintiff's recent and partial loss of visual field resulted from the glaucoma.

By contrast, Storm testified that the macular hole and glaucoma were due to the cataract surgery, which testimony defendant discredits as contrived and contrary to his prior statement. Defendant observes that Storm had variously testified that plaintiff's retina was weak and that the retina surgery should have strengthened her retina and that plaintiff had a life-long issue with her retina. He thus maintains that Storm's conclusion that the subsequent detachment relates back to the cataract surgery, and that all of the other surgeries were necessitated by that first surgery, is fatally conclusory. Rather, according to Ratner, the 2007 detachment of the retina was caused by vitreous pulling on it, and as Harooni removed the vitreous in June 2007, the second detachment was caused, instead, by the macular hole. Thus, defendant interprets Storm's testimony about plaintiff's life-long issue as relating to her life-long myopia, and characterizes his testimony as to causation as simplistically based solely on the fact that the problems plaintiff subsequently had followed the cataract surgery.

2. Plaintiff's contentions

Plaintiff argues, relying on the expert testimony of Storm, Cooney, and Richards, that having been born with a congenital cataract, strabismus, and severe myopia, she had amblyopia,

which rendered the cataract surgery undertaken by defendant unnecessary and a departure from good and accepted medical practice as it could yield an acuity of only 20/400 in her right eye, which does not constitute meaningful, useful or functional vision. Rather, according to Storm, meaningful, useful and functional vision occurs at 20/70. Plaintiff alleges that Odrich had amended his narrative report by deleting a portion of a sentence that contradicted the defense after defense counsel had reviewed the first report.

Moreover, there is no dispute that before the cataract surgery, plaintiff had no retinal injury in her right eye, myopic degeneration, or glaucoma; her optic nerve was normal, and she had peripheral vision in that eye. And there is now no dispute that her claims relate to the unnecessary cataract surgery, subsequent tear in the posterior capsule of the cataract, tear in the superior section, vitrectomy, lens dislocation, procedure for its replacement, retinal detachment, another vitrectomy, removal of the silicone oil, and all of the pain and discomfort from those surgeries and procedures. Plaintiff disputes defendant's argument that her glaucoma, loss of peripheral vision, Cooney's surgery, and another retinal repair by a nonwitness are not related to his malpractice, relying on Storm's testimony to the contrary and her own testimony concerning her condition.

3. Defendant's reply

Apart from repeating many of his arguments, defendant alleges that Storm had admitted to the following: (1) that he had performed cataract surgery to remove congenital posterior polar cataracts in adults and that such surgeries are often performed (2) that he would have advised a patient to have the same surgery as plaintiff's "if the better seeing left eye vision had been lost"; (3) in 2017, he found central and peripheral vision in plaintiff's right eye, thereby disproving plaintiff's claim; (4) "high" myopia is a risk factor for retinal detachment and for the glaucoma

that plaintiff developed years later; (5) the doctor who operated on plaintiff for her macular hole in 2009 believed that the two years when as a child, plaintiff's left eye was patched, indicated that she could recover more vision; (6) defendant discussed with plaintiff the risk of the surgery and the amblyopia; and (7) cataract surgery can result in known complications.

B. Informed consent

1. Defendant's contentions

Plaintiff first saw defendant on May 10, 2007, when he examined her, conducted several tests, and discussed cataract surgery with her. According to defendant, he had informed plaintiff that although cataract surgery would yield an improvement of only 20/400 in her central vision, her peripheral vision would improve. He also testified, and noted in her chart on which he relied absent a present recollection, that he had informed her of the risks, benefits, and alternatives, and specifically of the risk of a retinal detachment. He knew about her cataract, amblyopia, severe myopia, and anisometropia. Plaintiff signed a consent form on the day of her surgery, indicating that "[t]his procedure, it's [sic] nature and purpose, risks, benefits, and alternatives have been fully explained to me by my physician, and he/she has answered all relevant questions to my satisfaction."

Defendant also contends that plaintiff had been aware of her amblyopia, relying on Richards's testimony that plaintiff knew of it, having been treated for it with the patching of her eye when she was a child and as Richards had operated on her in the 1990s due to it.

2. Plaintiff's contentions

Plaintiff observes that as defendant acknowledged having no independent recollection of having informed her of the risks and benefits of, or alternatives to, the surgery, the jury was warranted in crediting plaintiff's testimony to the contrary. Having failed to provide plaintiff

with appropriate information about the purposes and advantages of the surgery, the reasonably foreseeable risks to plaintiff's health which the surgery may entail, and the impact of her amblyopia, defendant failed to obtain her informed consent to the surgery. She also observes that in telling her that her central vision would improve, defendant misled and misrepresented to her the benefits and risks. Moreover, Richards testified that the surgery would never result in meaningful central, or macular, vision given her amblyopia that followed from her long-standing cataract.

3. Defendant's reply

Beyond reiterating that he had in fact advised plaintiff of the risks of the surgery, defendant argues that defendant testified that it was his custom and practice to advise patients of the risks, benefits and alternatives.

C. Analysis

At this trial, the jury was presented with opposing evidence as to whether defendant had deviated from the applicable standard of ophthalmologic care in undertaking to perform the cataract surgery and whether he had imparted to plaintiff information sufficient to render her consent to the surgery informed. The unimpeached evidence established that plaintiff's amblyopia, which developed as a result of her early cataract, and the good vision in her left eye, rendered the cataract surgery unnecessary.

That Storm had performed cataract surgery to remove congenital posterior polar cataracts in adults, that such surgeries are often performed, and that he would have recommended the surgery "if the better seeing left eye vision had been lost" do not constitute admissions as they fail to account for plaintiff's good vision in her left eye. Other aspects of Storm's testimony do not impact on the key finding that the cataract surgery was unnecessary. That cataract surgery

may result in known complications, under the circumstances here, does not relieve defendant of the surgeries that were in fact the result of his cataract surgery notwithstanding his lack of negligence in performing it.

As the resolution of the credibility of these witnesses, expert and otherwise, is “peculiarly” within the jury’s province, and as defendant offers an insufficient reason for finding that the testimony offered by Storm or by plaintiff was irrational or incapable of crediting or that no valid line of reasoning and permissible inferences could have possibly led the jurors to the conclusion they reached based on the trial evidence, and after affording plaintiff every inference properly drawn from the facts and considered in a light most favorable to her, the evidence is sufficient as a matter of law. (*See Rose v Conte*, 107 AD3d 481, 483-484 [1st Dept 2013] [acknowledging that battle of experts poses quintessential jury question]).

For essentially the same reasons, the evidence was not shown to have so preponderated in favor of defendant that the verdict could not have been reached on any fair interpretation of the evidence. As jurors are instructed at the trial’s outset, they may not consider the number of witnesses called by a party or the length of time a party takes in presenting her case. They are also told that even if a witness’ testimony may not be credible as to certain issues, they may accept that part of testimony that they found credible and reject any part found incredible.

II. MOTION FOR NEW TRIAL BASED ON TRIAL ERRORS

Defendant asserts that the prejudicial comments and questions of plaintiff’s counsel, along with a trial error, cumulatively deprived him of a fair trial, given the overwhelming evidence that the cataract surgery was appropriate, and that plaintiff’s informed consent had been duly obtained.

A. Change in theory of basis for lack of informed consent

1. Defendant's contentions

Before trial, plaintiff's theory underlying her cause of action for lack of informed consent was that defendant had failed to tell her that her vision would not improve, whereas during the trial and absent any prior disclosure, she changed her theory to one based on defendant's failure to inform her that she had amblyopia. He complains that counsel altered the order in which he called witnesses so that plaintiff's witnesses were called after defendant had finished testifying, and asserts that he was prejudiced as his experts were not prepared to address his alleged failure to inform plaintiff about her amblyopia.

2. Plaintiff's contentions

Plaintiff argues, in effect, that her amblyopia need not have been specified pre-trial, as it was the reason why the surgery was unnecessary.

3. Analysis

Defendant offers no authority for the proposition that denying his objection to plaintiff's failure, pre-trial, to specify amblyopia as a basis for claiming a lack of informed consent constitutes error. Although he claims to have been deprived of an opportunity to address it, he does not specify what evidence his experts would have or could have offered on the subject, nor did he object to the order in which witnesses were called to testify.

B. Missing records

1. Defendant's contentions

Defendant asserts that the numerous references to Richards's records as missing constituted unfair and prejudicial conduct. He alleges that he had located Richards's original records before trial and had provided them to plaintiff who then sought a two-week adjournment

of the trial based thereon. Plaintiff's counsel nonetheless gave the jury the false impression that the records were missing at the time of trial and intentionally secreted.

2. Plaintiff's contentions

Counsel alleges that Richards's records were handed to him on the first day of jury selection and that defendant had admitted at trial that they were missing. When given a brief opportunity to review them before trial, counsel noticed Richards's notation that she had referred plaintiff to defendant "to consider cataract extraction" in contrast to defendant's position that Richards had referred plaintiff to him for the surgery. Moreover, Richards testified that she had spoken with defendant concerning the "whereabouts" of her records three weeks before trial as the records were in his custody. Given the foregoing, plaintiff argues that the records had in fact been missing and that his remarks were based on evidence in the case.

3. Defendant's reply

Defendant alleges that plaintiff did not seek Richards's records until the eve of trial.

4. Analysis

Having sought the records on the eve of trial, plaintiff's characterization of the records as missing exceeds the bounds of proper advocacy.

C. References to defendant's financial motive in performing the cataract surgery

1. Defendant's contentions

Plaintiff's counsel questioned defendant about how much money he earns from performing cataract surgery and then commented about it on summation, notwithstanding his lack of a good-faith or factual basis for it. In doing so, defendant argues, plaintiff insinuated that he was motivated by greed, whereas defendant testified that he had accepted whatever insurance was used regardless of what he had billed, that he had waived plaintiff's co-payments, and that

his billing records reflect that he had been paid \$927.59 for the first surgery and \$841.71 for the second. As defendant wore a yarmulke during trial and none of the jurors was Jewish, moreover, defendant contends that plaintiff's conduct in this regard was "inflammatory."

Defendant also maintains that plaintiff "purposely" confused the jury with the definitions and use of diagnostic codes versus procedure codes and gave the erroneous impression that he was financially motivated to bill for the surgery using the wrong diagnostic code.

2. Plaintiff's contentions

As the surgery was unnecessary, plaintiff argues that it is reasonably inferred that financial concerns motivated it, which inference becomes more reasonable in light of the evidence concerning defendant's improper use of the procedure codes. According to plaintiff, defendant thereby sought to avoid having to obtain preauthorization for the surgery. It was also established at trial that defendant had misrepresented plaintiff's diagnosis in his surgery records as he never indicated that she had a "congenital cataract," and that he signed a document seeking insurance coverage for the surgery due to plaintiff's inability to drive because of glare.

Moreover, defendant testified that he charged \$5,000 for cataract surgery and that he could perform as many as 15 surgeries daily, yielding \$75,000 a day in addition to the daily facility fee for the 15 surgeries, or \$30,000. Thus, plaintiff asserts that defendant earns \$100,000 for a day of surgeries.

3. Defendant's reply

Defendant relies on the insurer's explanation of benefits to prove that he earned \$1,569.30 for both the cataract surgery and the surgery to replace the lens. He also derides plaintiff's assertions concerning what he could earn on a surgical day, observing that his partial ownership of a surgery center does not result in his personal receipt of all that is billed.

4. Analysis

As plaintiff's position is that the surgery was unnecessary, the issue of defendant's motivation was relevant. However, given defendant's evidence of the amount he earned from performing plaintiff's surgery, counsel's questioning about the money defendant ordinarily earned for a surgery or for a day of surgeries was irrelevant and prejudicial.

However, plaintiff's strategy in asking defendant about the insurance codes was not improper as evidence that defendant had used an inaccurate code that would not require preauthorization for the surgery could be used to argue that defendant was wary that the surgery would not be authorized by the insurance company which would reflect a consciousness that the surgery may have been unnecessary. That plaintiff may have deliberately sought to confuse the jury on this score is of minimal import as defense counsel met each and every question raised and comment made.

D. Improper charge on susceptibility

1. Defendant's contentions

In accepting plaintiff's argument that her myopic right eye rendered her more susceptible to retinal detachment than someone with a normal right eye, and then instructing the jury as to her susceptibility, defendant maintains that the jury was improperly given the impression that higher damages were warranted. He also claims that the charge is "not applicable" in a medical malpractice case where "the very reason the defendant is operating is to remove the patient's myopic condition by changing the lens in her eye."

2. Plaintiff's contentions

Given testimony given by defendant, Cykiert, and Cooney that those with myopic atrophy are more susceptible to a retinal change and detachment, and as plaintiff's myopia

predisposed her to greater injury from the surgery than someone without it, plaintiff argues that the jury was properly instructed on susceptibility.

3. Defendant's reply

Defendant reiterates that a jury instruction on susceptibility is not given in malpractice cases.

4. Analysis

Evidence that plaintiff's myopia rendered her susceptible to retinal detachment was admitted without either an objection or a request for a limiting instruction, and defendant offers no authority for the proposition that such an instruction is not pertinent to medical malpractice cases. It is commonly known, however, that cataract surgery is commonly performed on people without myopia. To that extent, plaintiff's myopia rendered her susceptible to risks that those without myopia are not rendered. Consequently, the susceptibility instruction was appropriately given.

E. Cumulative effect

As indicated (*supra*, III.B.4., C.4.), plaintiff's counsel improperly prejudiced defendant's case in two instances: accusing defendant of having delay the production of Richards's records and eliciting of irrelevant evidence of fees defendant ordinarily earned for cataract surgery and for a day of such surgeries. Whether such conduct warrants a new trial, however, depends on the strength of the evidence supporting plaintiff's case.

The evidence established that plaintiff's amblyopia, which developed as a result of her early cataract, and the good vision in her left eye, rendered the cataract surgery unnecessary. That evidence was unimpeached (*supra*, I.C.) and defendant does not demonstrate that absent the misconduct of plaintiff's counsel, the verdict would have been in his favor.

III. MOTION FOR REMITTITUR

A. Governing law

Pursuant to CPLR 5501(c), the court may review a money judgment to determine whether it is excessive or inadequate and whether a new trial should be granted absent a stipulation otherwise. The standard to be applied is whether the award “deviates materially from what would be reasonable compensation.” (Siegel, NY Prac § 407 [6th ed] [2017]).

While the amount of damages awarded for a personal injury is generally and primarily a jury question, and it “is entitled to great deference based upon [the court’s] evaluation of the evidence, including conflicting expert testimony” (*Ortiz v 975 LLC*, 74 AD3d 485 [1st Dept 2010]), reasonable compensation may be deducted “in light of awards approved in similar cases, the type of injury, the level and duration of pain suffered by plaintiff, the surgical procedure and physical therapy she underwent, her age and activity level, and the long-term effects and limitations on her life” (*Saft v Consolidated Edison Co. of NY, Inc.*, 124 AD3d 410 [1st Dept 2015]; *Pinto v Gormally*, 109 AD3d 425, 427 [1st Dept 2013], *lv denied*, 22 NY3d 862 [2014]).

Nonetheless, the reviewing court must “bear[] 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 [1st Dept 2003], *lv denied* 100 NY2d 503). Some cases, moreover, have little or no precedential analog. (*See e.g. Launders v Steinberg*, 39 AD3d 57, 59 [1st Dept 2007], *aff’d as mod* 9 NY3d 930).

B. Defendant’s contentions

Although defendant concedes that his undertaking to perform the cataract surgery resulted not only in that surgery, but also in the lens replacement surgery, Harooni’s surgery to

repair the retina, and Cooney's surgery to remove the silicone oil that Harooni had placed in plaintiff's eye (*supra*, I.A.1., at 4), he maintains that as those surgeries followed his non-negligently performed cataract surgery, and as the need to perform the subsequent surgeries is a potential risk of cataract surgery, \$600,000 in past pain and suffering is excessive.

Defendant also contends that absent plaintiff's claims that he was "greedy" and could pay a large verdict, the jury would have: (1) credited Odrich's and Cykiert's testimony that she would have had more peripheral vision had it not been for her glaucoma, (2) would not have awarded her damages based on her glaucoma, subsequent retinal detachment, and risk of future retinal detachment, and (3) would have discredited Storm's testimony that she had lost peripheral vision due to the cataract surgery based on his relatively belated examination of her in 2017.

Moreover, as plaintiff testified that she both drives and works, and given the evidence that (1) she has excellent vision in her left eye, (2) that while the vision in her right eye is compromised by glaucoma, it is "under control" and was in any event, not caused by the cataract surgery, (3) that she incredibly alleges an ability to feel the scleral buckle notwithstanding Ratner's testimony that the absence of nerve endings would eliminate any sensation from it, and (4) that her claim to have gained 100 pounds as a result of the surgeries and condition of her eye is unverified, the verdict is excessive for those reasons as well.

C. Plaintiff's contentions

Plaintiff observes that the injuries incurred by the cataract surgery, namely, the four surgeries immediately following the cataract surgery, the two subsequent surgeries to reattach her retina and to address her macular hole, plus her having suffered from two detached retinas, glaucoma, optic nerve damage, a fixed right eye pupil and bulging right eye, and the loss of peripheral vision warrant the award for past pain and suffering. She maintains that the award for

future pain and suffering is warranted by her lifetime obligation to administer eye drops for glaucoma and the sedentary lifestyle entailed in avoiding the risk of another detachment. She does not dispute that she drives and works, has excellent vision in her left eye, her glaucoma is under control, and that her claim that she gained 100 pounds as a result of the surgeries and condition of her eye is unverified.

Plaintiff cites cases that she contends supports the damages awarded and observes that “what was excessive 10 years ago may not be excessive today” and that defendant cites no recent cases.

C. Defendant’s reply

Defendant argues that plaintiff’s theory of her case is that she received no benefit from the surgery. Thus, her damages arise solely from the four ensuing surgeries.

D. Analysis

The conceded consequences of defendant’s having undertaken to perform the cataract surgery and the failure to have obtained plaintiff’s informed consent thereto are the surgery itself, the three surgeries that followed soon thereafter, and a great deal of pain and discomfort per plaintiff’s testimony. However, the evidence that the glaucoma, second detached retina, macular hole, and the surgeries they entailed were caused by the cataract surgery, namely, Storm’s testimony of causation based solely on their having occurred subsequent to the cataract surgery, does not demonstrate that those conditions constitute damages flowing from the cataract surgery. Thus, the award of \$600,000 for past pain and suffering is excessive, although the case law cited by defendant is too remote to be persuasive.

As the consequences of the unnecessary cataract surgery do not include a significant loss of vision, and given plaintiff’s ability to drive and work, the totality of her claimed future pain

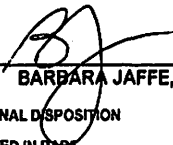
and suffering warrant a reduction of the \$500,000 award. The case law cited by plaintiff is significantly distinguishable as involving total loss of vision and other injuries.

IV. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that defendant's motion to set aside the verdict and for remittitur is granted to the extent of remanding the matter for a new trial on damages only unless plaintiff, within 30 days of service on her of a copy of this order with notice of entry, stipulates to reduce the award for past pain and suffering from \$600,000 to \$350,000, and for future pain and suffering from \$500,000 to \$100,000, and to entry of a judgment in accordance therewith.

3/5/2019
DATE


BARBARA JAFFE, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

FILED
MAR 06 2019
NEW YORK COUNTY
COUNTY CLERK