

<b>Rubinstein v Cohen</b>
2020 NY Slip Op 30896(U)
March 26, 2020
Supreme Court, New York County
Docket Number: 805166/17
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

----- X Index No.: 805166/17

NANCY RUBINSTEIN,  
Plaintiff,

-against-

LARRY COHEN, M.D.,  
Defendant.

----- X

JOAN A. MADDEN, J.:

In this post-trial motion, plaintiff Nancy Rubinstein (“Ms. Rubinstein”) moves to set aside the verdict as to damages as against the weight of evidence, to increase the jury’s award for past pain and suffering from \$30,000 to \$250,000, and to award \$200,000 for future pain and suffering in the absence of any award for such damages.<sup>1</sup> In the alternative, plaintiff moves for a new trial on damages. Defendant, Larry Cohen, M.D. (“Dr. Cohen”) opposes the motion on the grounds that the circumstances of this case and Ms. Rubinstein’s injuries do not warrant the relief plaintiff seeks.

On January 25, 2015, Dr. Cohen performed what is commonly referred to as bunion surgery on Ms. Rubinstein’s left foot. Post operatively, Ms. Rubinstein continued under Dr. Cohen’s care until August 15, 2015. At trial, Ms. Rubinstein alleged that Dr. Cohen departed from accepted podiatric practice pre-operatively in taking non-weight bearing x-rays, and intra-operatively in the angle of the osteotomy cut, and by failing to plantar flex the head of the first metatarsal.

---

<sup>1</sup>While plaintiff does not specifically move to set aside the verdict, such request is implicit in her motion for additur.

The jury returned a verdict finding that Dr. Cohen departed from accepted podiatric practice with respect to the angle of the osteotomy cut and that such departure was a substantial factor in causing injury to Ms. Rubinstein. The jury also found that Dr. Cohen departed in taking non-weight bearing x-rays, but that this departure was not a cause of injury to Ms. Rubinstein. As to the alleged third departure, the jury found that Dr. Cohen did not fail to flex the first metatarsal head during surgery.

Ms. Rubinstein contended that as a result of the angle at which Dr. Cohen cut the bone, she sustained an excessively shortened first metatarsal causing her big toe to be elevated so that it did not touch the ground. After the surgery, Ms. Rubinstein complained of pain in her left foot, including in her heel, arch, and at the top of the foot, and from a lump which developed under her second and third metatarsal. Moreover, she testified that as a result of this pain, she developed pain in her right foot from favoring it. Ms. Rubinstein underwent six sessions of physical therapy and continued to treat with Dr. Cohen until her last visit on August 15, 2015.

During the time Ms. Rubinstein treated with Dr. Cohen, she consulted with a Dr. Katchis and, as a result of a referral by Dr. Cohen, with a Dr. Jeffrey Adler. While neither doctor testified at trial, their records were admitted into evidence.

Dr. Katchis' records reflect that when he saw Ms. Rubinstein on April 28, 2015, she complained of pain in her first metatarsal bone along her arch and along the lesser metatarsal, and later complained that chronic swelling limited her shoe wear.<sup>2</sup> Under a heading "Physical Exam," his notes reflect a one half centimeter elevation of her big toe with weight bearing, and that the lesser toes were straight and touched the ground. Dr. Katchis' notes indicate x-rays show

---

<sup>2</sup>The complaint of swelling is reflected in a telephone call on May 7, 2015.

the first metatarsal bone appears in “dorsi flexed position... [and that] [t]he lesser metatarsal are about 1 cm long relative to the head of the first metatarsal bone.” Dr. Katchis’s records reflect that he recommended revision surgery to the first metatarsal with a bone graft.

Dr. Adler’s records reflect that on May 29, 2015, Ms. Rubinstein complained of worsening left foot pain and swelling, the pain originating in the first metatarsal phalangeal joint and traveling across her foot. Under “Physical Examination,” “Toes of the Left Foot,” the notes indicate that Ms. Rubenstein had “tendon contracture of the extensor hallucis longus,” and contracture of toes two to five.<sup>3</sup> Dr. Adler’s assessment includes “acquired hallux valgus,” and hammer toe. Under a second heading of “Assessment” which refers to x-rays,<sup>4</sup> his records indicate, to the extent relevant, “Osteoarthritic changes in ankle & Subtalar joints...dorsi-flexion of hallux, s/p 4 months post bunionectomy...1st met head not plantar flexed...plantar-flexed 2nd and 3<sup>rd</sup> met heads...[h]ammered 4<sup>th</sup> and 5<sup>th</sup> toes.” Under a third heading of “Assessment,” the records state “[h]ealed fracture at 1<sup>st</sup> metatarsal neck. No signs of bony changes that would elevate great toe. Hammer toes 4 & 5...”

Thereafter, in August, 2016, Ms. Rubinstein consulted with Dr. Matthew Roberts, an orthopedic and ankle surgeon whose records indicate that he diagnosed the problem with her elevated left big toe as a result of her shortened first metatarsal. Dr. Roberts recommended, and ultimately performed, surgery on November 11, 2016, to fracture, cut and shorten the second and third metatarsal, so that they would be more aligned with the first one. According to his records, after the surgery, Ms. Rubinstein initially felt some relief, however, as of May 15, 2017, she

---

<sup>3</sup>The records also reflect “with a hammer toe rigid fifth toe with semi rigid fourth toe.”

<sup>4</sup>The specific findings are from different x-rays with various views of plaintiff’s feet.

complained that the pain under her left big toe continued; it remained elevated, and Ms. Rubinstein experienced tenderness under her left sesamoid tibial bone with decreased range of motion. Based on these findings, Dr. Roberts concluded that Ms. Rubinstein had arthritis in her sesamoid bone, and as of December 17, 2017, the date of her last visit with him, Dr. Roberts' records indicate Ms. Rubinstein had developed a hammered second toe. Plaintiff contends Dr. Roberts' notes indicate that she might need surgery in the future with respect to the arthritis and hammer toe.

Plaintiff's expert, Dr. Robyn Joseph, a board certified podiatric surgeon, testified based on her review of medical records and on two examinations of Ms. Rubinstein she conducted on April 12, 2017 and April 15, 2019. Dr. Joseph testified that Ms. Rubinstein's left foot had arthritis of her first metatarsal phalangeal joint, and that her big toe did not fully touch the ground which resulted in difficulty with balancing and stability when barefoot. According to Dr. Joseph, on April 12, 2015, her examination of Ms. Rubinstein's left foot, indicated her big toe had limited range of motion on dorsi flexion (upward movement), specifically, 30 degrees, where normal measurement is 60 degrees; and a lack of plantar flexion (downward movement). Dr. Joseph testified, based on x-rays, that Ms. Rubinstein's first metatarsal was shorter than the second and third metatarsal and that the third and fourth toes curled under. Dr. Joseph further testified that while Ms. Rubinstein's elevation of, and range of motion in, her big toe had improved based on an examination of April 15, 2019, the big toe remained elevated and Ms. Rubinstein continued to complain of pain. According to Dr. Joseph, due to Ms. Rubinstein's loss of weight bearing capacity of her big toe, she is walking on the outside of her foot, which is causing her instability which is permanent. Dr. Joseph also opined that x-rays taken on April 15,

2019, showed the narrowing of the first phalangeal joint had increased, and that Ms. Rubinstein's arthritis and its effects are permanent, unless she has surgery to fuse the joint, which surgery, Dr. Joseph testified, would cause lack of movement in the joint. Trial Transcript (TT) at 358. In addition, Dr. Joseph was shown photographs introduced at trial of Ms. Rubinstein's feet taken by Dr. Edwin Wolf in December, 2018, at a medical examination of Ms. Rubinstein he conducted at defendant's request. Dr. Joseph testified the photographs show that Ms. Rubinstein's big toe is elevated, and her second, third and fourth toes are hammered. She also testified that certain the photos show Ms. Rubinstein was supinating on one side and pronating on her right foot, as, due to her elevated big toe on her left foot, she was not putting weight on it.

Defendant argues that through the testimony of his examining podiatrist, Dr. Edwin Wolf, the defendant disputed the extent and existence of Ms. Rubinstein's elevated big left toe; that Dr. Wolf testified Ms. Rubinstein did not suffer any functional loss as a result of the surgery, that "the left foot looked in good position, sesamoid in a good position, great toe is straight, and the range of motion of the first metatarsal joint, no atrophy in musculature and things we spoke about this morning showed no functional loss." TT at 543. With respect to the range of motion of the left big toe joint, Dr. Wolf testified to 60 degrees of dorsi flexion and 5 degrees of plantar flexion, and while it was not the same plantar flexion of 10 degrees on the right, Dr. Wolf opined that the big toe "was able to purchase the ground when pushed down against the ground." TT at 508. Dr. Wolf also testified with respect to one of the photographs of Ms. Rubinstein's left foot that "the extensor tendon here lifting the toe up and we can see the toe off the ground." TT at 512. According to Dr. Wolf, the extensor tendon is "the tendon on the top of the foot, that lifts and goes up." TT at 511. Defendant points out that at trial, Ms. Rubinstein did not exhibit her

foot so that the jury could view it to evaluate the nature and extent of the alleged elevation.

Defendant also argues that Dr. Joseph was not asked if, and did not testify that, the bunion surgery performed by Dr. Cohen was a substantial contributing factor in causing pain to the fourth and fifth toes, to the left heel, to the outer part of Ms. Rubinstein's left foot; nor how it caused a lump under her second and third metatarsal nor how it caused elevation of her big toe. Moreover, defendant argues that with respect to her injuries, that Ms. Rubinstein's credibility was at issue, and that her credibility was undermined based on a change in her testimony on cross examination regarding the circumstances under which she signed the consent form in connection with the bunion surgery. In particular, defendant points to her direct testimony that the form was presented to her by a nurse at the surgery center shortly before the procedure (TT at 18, 24), and on cross examination she testified that Dr. Cohen presented her with the form in his office after discussing its contents with her. TT at 64-69.

With respect to Dr. Wolf's testimony, plaintiff contends, and defendant does not dispute, that Dr. Wolf testified that Ms. Rubinstein's big toe was elevated. Plaintiff further contends that Dr. Wolf testified that the elevation was due to extension Hallux tendon firing, but failed to explain the medical basis for this opinion. Plaintiff also argues that the photographs taken by Dr. Wolf and x-rays show that Ms. Rubinstein's left big toe is elevated.

### **C. ADDITUR**

Plaintiff's motion for additur or to order a new trial on damages is made pursuant to CPLR 4401(a), on the grounds that the awards are contrary to the weight of the evidence and inadequate. This motion is made with respect to the jury's award of \$30, 000 for Ms. Rubinstein's past pain and suffering, and the lack of an award for future pain and suffering.

The standard for review in determining whether an award should be set aside “as excessive or inadequate [is] if it deviates materially from what would be reasonable compensation.” CPLR 4404(a); see Ortiz v. 975 LLC, 74 AD3d 485 (1st Dept 2010); Plotkin v New York City Health and Hospitals Corp., 221 AD2d 425 (2d Dept 1995).

While “personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification,” courts look to comparable cases in deciding if an award deviates from fair and reasonable compensation. Reed v. City of New York, 304 AD2d 1, 6 (1st Dept), lv denied 100 NY2d 503 (2003); Halsey v New York City Transit Authority et al., 114 AD3d 726, 727 (1st Dept 2014). However, “[m]odification 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, Inc., 259 AD2d 373, 374 (1st Dept 1999).

At issue here, based upon the experts’ testimony and medical evidence, is whether the award for past pain and suffering, and the lack of one for future damages deviates materially from reasonable compensation. With respect to comparability, in her Memorandum of Law, plaintiff cites the following appellate cases.

In Murphy v A. Louis Shure, P.C., 156 AD2d 85 (1st Dept 1990), the 24 year old plaintiff underwent bunion surgery and the defendant removed an excessive amount of bone and cut the adductor tendon. Plaintiff underwent a second surgery where bone was cut from the distal and middle phalanx with an insertion of screws, so that the interphalangeal joint was fused. The decision does not indicate the allocation of the award of \$786,000 for past and future damages. Plaintiff’s expert testified that plaintiff would need future fusion surgery with a 50% chance of

success and total lack of motion in the foot, or, alternatively, the insertion of an artificial joint with life expectancy of 10 years. Without an allocation of damages as to past and future pain and suffering, this award offers minimal guidance for comparability as to past pain and suffering. Moreover, the injuries plaintiff sustained in that case, including the removal of excess bone, the cut to the abductor tendon, the second surgery resulting in the fusion of the joint with the insertion of screws, and the potential future damages, vastly differ and exceed the injuries the jury found Ms. Rubinstein sustained.

In Sokol v Lazar, 106 AD3d 512 (1<sup>st</sup> Dept 2013), the 58 year old plaintiff underwent a bunionectomy, and the jury awarded \$300,000 for past pain and suffering, and \$600,000 for future pain and suffering of 25.5 years, which award for future damages, was reduced by the First Department to \$450,000. As to plaintiff's injuries, in a decision denying defendant's motion to set aside the verdict, Skolol v Lazar, 2012 WL 2951191, the trial court pointed out that only plaintiff presented expert testimony, and pointed to plaintiff's testimony that before the surgery she was physically active, ran and was constantly at the gym, and afterwards, she was unable to run or walk long distances, at times she experienced acute pain in her foot or a lack of sensation in her toes injured foot, and that her footwear was now limited to sneakers. The nature of the injury is a factor considered in comparability, and the lack of any discussion in either decision regarding the nature of the injury to plaintiff's foot, impacts on a comparison regarding the adequacy of an award. Notwithstanding this consideration, similarities exist between the plaintiff in Sokol and Ms. Rubinstein's damages, to the extent the injury had on each plaintiff's ability to walk long distances and the need to wear sneakers. However, the applicability of the award for

past pain and suffering, is limited by the absence in the trial court and appellate decisions of a description of the nature of plaintiff's injury, or the nature of her past pain and suffering.

In Barthelmy v Spivack, 41 AD3d 398 (2d Dept 2007), the Second Department reinstated an award for past pain and suffering of \$200,000 and upheld the trial court's reduction of the award for future damages from \$300,000 to \$95,000. In that case, according to the Jury Verdict Reporter,<sup>5</sup> the 41 year old plaintiff underwent a bunionectomy, and during the surgery a metal burr broke off from an instrument, and a fragment fell into plaintiff's foot and was not removed. Plaintiff testified that due to the fragment she suffered persistent and excruciating pain and developed calluses under the balls of both feet. The pain was relieved when the fragment was removed in a second surgery two years later. However, plaintiff claimed after the second surgery, that she turned her left foot to the side while walking, and experienced pain under her left big toe when negotiating stairs, walking fast or is on her feet for any length of time, and stiffness in her left foot in the morning and evening. While the nature of the injury plaintiff in Barthelmy suffered are obviously different than Ms. Rubinstein's injuries, the nature of the pain both experienced is similar, so that the award for past damages provides some guidance.

In Siddiqua v Anarella, 120 AD3d 793 (2d Dept 2014), the Second Department affirmed the trial court's decision which ordered a new trial as to future damages unless plaintiff stipulated to reduce the award to \$450,000 and denied plaintiff's cross-motion for additur as to an award for past pain and suffering of \$73,923. In its decision, the trial court stated that with respect damages, for a five and a half year period, plaintiff's injuries consisted "of severe toe elevation, a partially successful surgery reducing the elevation by 50%, and a difficult recovery period from

---

<sup>5</sup>Plaintiff attached this report in Exhibit D to her moving papers.

said surgery and its limitations.” According to the Jury Verdict Reporter, the 35 year old plaintiff underwent a bunionectomy for a “tailor’s bunion” which is a bunion on the outside of the fifth toe. Plaintiff claimed that during the surgery the toe’s flexor tendon was torn, which resulted in upward deformity of her right toe. She had surgery for the elevation which included extension of the toe’s extensor’s tendon and a pinning of the toe, and which, as indicated above, was successful in partially reducing the elevation. After the surgery plaintiff testified she was unable to walk for two months, that her toe presses against her shoes, that her gait is altered and that she can only walk for short distances. While the injuries are similar to the extent both injuries involve the elevation of toes, Ms. Rubinstein’s injury is to her big toe, which has different impact than an injury to the fifth toe, and thus, the award for past pain damages offers minimal guidance.

In view of the evidence regarding plaintiff’s injuries, and an analysis of the awards in the above cases, I conclude that the award of \$30,000 for past pain and suffering deviates materially from what would be reasonable compensation. It is undisputed that as a result of Dr. Cohen’s surgery, Ms. Rubinstein’s first metatarsal was shortened which caused elevation of her big toe, limited range of motion, and that after six therapy sessions, approximately 18 months after Dr. Cohen’s surgery, she eventually underwent surgery where her second and third metatarsal were fractured and shortened. During the period prior to the second surgery, Ms. Rubinstein experienced pain in her left foot, including in her first metatarsal joint, heel, arch and at the top of her foot, and under her second and third metatarsal, chronic swelling, and pain in her right foot. and underwent six physical therapy sessions. After the second surgery her left toe was still elevated, although not to the same degree as before the surgery, and the second and third metatarsal were still longer than the first one.

With respect to her condition after the second surgery, Ms. Rubinstein's testimony is relevant to past pain and suffering for, at a minimum, a reasonable period of time after the second surgery. In this connection, Ms. Rubinstein testified that after the second surgery she experienced pain under her big toe, and tenderness under the area of her foot identified as her left sesamoid bone, and that her elevated big toe and pain affected her ability to walk long distances and engage in the physical activities in which she participated prior to Dr. Cohen's surgery. Based on foregoing, I conclude that the award of \$30,000 is inadequate and that \$200,000 is reasonable compensation for Ms. Rubinstein's past pain and suffering. Thus, plaintiff's motion to set aside the verdict is granted to the extent of ordering a new trial as to past pain and suffering unless defendant stipulates to increase the award to this amount. Barthelmy v Spivack, 41 AD3d at 399; Sokol v Lazar, 106 AD3d at 513.

With respect to the lack of an award for future pain and suffering, the standard for setting set aside verdict as against the weight of evidence involves "a determination ...[as to] whether the evidence so preponderate[d] in favor of the [plaintiff] 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)(internal citations and quotations omitted). Here, the expert testimony presented sharply conflicting opinions as to the nature of the injuries Ms. Rubinstein sustained as a result of Dr. Cohen's negligence and as to the permanency of such injuries. "It is for the jury to determine the credibility of witnesses and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses....Where conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert." Siddiqua v Anarella, 120 AD3d at 794 (internal citations omitted).

As to permanency, as discussed above, plaintiff's expert testified that Ms. Rubinstein's left foot had arthritis which was permanent unless she has surgery to fuse her joint, that her big toe had limited range of motion, and that she experienced difficulty with balancing and stability when barefoot. Defendant's expert, Dr. Wolf testified Ms. Rubinstein did not suffer any functional loss as a result of the surgery, that her left foot and sesamoid bone was in good position, that the loss of range of motion of the big toe was minimal. Moreover, with respect to arthritis, the evidence relating to this condition does not warrant setting aside the verdict as to permanency, based on Dr. Wolf's testimony regarding functionality and the evidence in Dr. Adler's chart that four months after Dr. Cohen's surgery, Ms. Rubinstein had osteoarthritic changes in other parts of her foot, specifically her ankle. Based upon the conflicting expert testimony regarding permanency, it cannot be said that the evidence so preponderated in favor of the plaintiff, that the lack of an award for future damages should be set aside.

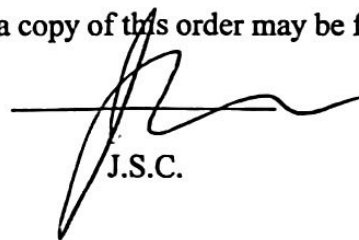
Accordingly, it is

ORDERED that the motion to set aside the verdict is granted with respect to the award of past pain and suffering, unless defendant stipulates to an award of \$200,000 instead of \$30,000 for past pain and suffering within 90 days of service of a copy of this order with notice of entry, which 90 days is subject to extension in light of the COVID-19 emergency; and it is further

ORDERED that the motion to set aside the verdict with regard to future pain and suffering is denied; and it is further

ORDERED that pursuant to CPLR 2103(e) a copy of this order may be filed and served.

DATED: March 26, 2020

  
J.S.C.

