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

PRESENT: **JUSTICE DORIS LING-COHAN** PART 36

Justice

Johnson Devadas and Suramma Devadas,

- v -

Kevin Niksarli, M.D. and Newsight Laser Center, PLLC.

INDEX NO. 107637/07

MOTION DATE

MOTION SEQ. NO. 010

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for trial de novo

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision.

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

Dated: 7/9/10

JUSTICE DORIS LING-COHAN 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 : IAS PART 36

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JOHNSON DEVADAS and SARAMMA DEVADAS,

Plaintiffs,

- against -

KEVIN NIKSARLI, M.D. and NEWSIGHT LASER CENTER, PLLC,

Defendants.

---------- X

Index No. 107637/07

Motion Seq. No. 010

DORIS LING-COHAN, J.:

Defendants Kevin Niksarli, M.D. ("Niksarli") and Newsight Laser Center, PLLC, move for an order, pursuant to CPLR 4404(a), granting judgment notwithstanding the verdict in defendants' favor or granting defendants a new trial, in the interest of justice and on the grounds that the verdict is contrary to the weight of the evidence. In the alternative, if defendants' CPLR 4404 motion is not granted, defendants move to: (1) determine what judgment should be entered, if any, pursuant to CPLR 5031, for past and future pain and suffering, past and future loss of earnings and past and future loss of services; (2) determine, or set down for a hearing, the amount to reduce the award for past and future loss of earnings by the amount of personal income taxes, pursuant to CPLR 4546; (3) reduce plaintiffs' awards due to their excessiveness, in light of the extent of damages claimed and submitted at trial; (4) dismiss the derivative claim and vacate the awards as continuous treatment is not applicable; and (5) order plaintiffs' counsel to remove numerous press releases, articles, advertisements and disclosures from the internet, with regard to the verdict amount.[1]

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[1] The court notes that it had instructed counsel to cite page and line numbers when referencing the record in any post-trial motions made; however, defendants fail to adequately do so throughout their motion papers, which delayed the issuance of this decision. For example, the relevant facts section of the Affidavit in Support of the Motion contains many statements

Brief Statement of Facts

Plaintiffs commenced this action against defendants, for medical malpractice and lack of informed consent, following Johnson Devadas' LASIK eye surgery. Plaintiffs allege that defendants performed LASIK surgery on Johnson Devadas when said procedure was contraindicated. Further, plaintiffs allege that defendants conducted the surgery without obtaining proper consent from Johnson Devadas. Plaintiffs contend that, as a result, Johnson Devadas developed post-LASIK ecstasia and was subsequently diagnosed with keratoconus. Johnson Devadas asserts that his quality of vision has been significantly impaired and diminished by halos, blurred vision, double vision, glare and starbursts.

A jury trial was held before this Court, over a period of nine days. The jury reached a verdict in plaintiffs' favor, awarding Johnson Devadas damages of $100,000 for his past pain and suffering; $3,000,000 for his future pain and suffering; $60,000 for his past loss of earnings; $20,000 per year, for 37 years, with a growth rate of 5.5% annually, for his future loss of earnings; $20,000 for Saramma Devadas' past loss of her husband's services; and $100,000 for her future loss of her husband's services.

All other relevant facts will be discussed, as needed, throughout this decision.

Motion to Set Aside The Verdict

Defendants argue that the jury verdict in favor of plaintiffs should be set aside and either: (1) a verdict should be given in defendants' favor as the jury verdict is contrary to the weight of the evidence regarding the cause of action for lack of informed consent; (2) a new trial should be ordered because the verdict is contrary to the weight of the evidence regarding the existence and

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regarding testimony, without any citations to the trial transcript. The trial, which lasted over the course of 9 days, has a transcript over a foot in height and contains approximately 2,500 pages.

extent of plaintiffs' injuries; or (3) a new trial should be granted in the interest of justice due to the fact that defendants were prejudiced at trial by the wrongful admission of "manipulated" topographies, which were not disclosed prior to trial.

Pursuant to CPLR 4404(a), the Court has discretion to

> set aside a verdict or any judgment entered thereon 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 [or] in the interest of justice . . . .

It is well-settled, however, that a jury verdict for the plaintiff "should only be set aside, based on the weight of the evidence, where the evidence so preponderates in favor of the defendant that it could not have been reached on any fair interpretation of the evidence" (*Yammoto v. Carled Cab Corp.*, 66 AD3d 603, 604 [1st Dep't 2009] [internal quotations omitted]). In determining whether to set aside the verdict, the court must engage in "a discretionary balancing of many factors" (*McDermott v. Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dep't 2004]). "[T]he court must cautiously balance the great deference to be accorded to the jury's conclusion . . . against the court's own obligation to assure that the verdict is fair" (*Id.* [internal quotations omitted]).

The discretionary nature of this inquiry does not imply that the court can freely reject any verdict that is unsatisfactory or with which it disagrees, as this would "unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty" (*Id.* [internal quotations omitted]). "In the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict" (*McDonald v. 450 West Side Partners, LLC*, 2010 NY Slip Op 01365, *1 [1st Dep't 2010], *citing Nicastro v. Park*, 113 AD2d 129, 133 [2d Dep't 1985]).

Moreover, if the verdict is set aside and an award of judgment entered in favor of the unsuccessful party, it would require the court to determine on its own the outcome of the case. Since this would deny the parties the opportunity to resubmit their cases to the jury, the burden on the party moving for such relief is very high (*Nicastro v. Park*, 113 AD2d 129, 132 [2d Dep't 1985]).

In the present case, defendants have failed to meet their burden to demonstrate that the verdict should be set aside and granted in their favor, or that a new trial should be ordered. With regard to liability on plaintiff Johnson Devadas' medical malpractice claim, there was sufficient evidence presented at trial that could lead the jury to conclude that defendants departed from the accepted standard of medical care. The jury's determination was not beyond "any fair interpretation of the evidence" (*McDermott*, 9 AD3d at 205).

Both parties presented expert testimony at trial. "The resolution of [conflicting testimony of expert witnesses] rests with the jury, and not the court" (*id.* at 207). Plaintiffs offered the testimony of Dr. Donzis to prove that defendant Niksarli departed from the accepted standard of care for refractive surgeons (*see* Trial Transcript 473:26-474:7). Dr. Donzis testified that Johnson Devadas' condition would never have progressed "but for the surgery" (*id.* at 617:3-8). Doctors Wing Chu and Peter Hersh testified on defendants' behalf. Dr. Chu testified that he conducted a medical examination of Johnson Devadas and tested his visual acuity, which was good (*see id.* at 1565:5-15; 1576:9-22). However, Dr. Chu admitted that he did not perform any tests to assess Johnson Devadas' quality of vision (*see id.* at 1621:18-1624:17), even though he complained of blurriness. Dr. Hersh also testified on behalf of defendants. Dr. Hersh testified that defendant Niksarli did not depart from the standard of care, as it appeared that Johnson

Devadas did not have forme fruste keratoconus. However, as to the measurement used in evaluating whether a patient has forme fruste keratoconus and, as a result, whether LASIK surgery is contraindicated for a candidate, Dr. Hersh testified that such measurement for the inferior-superior (I-S) calculation that he has found acceptable in the past, did not definitely match the measurement at issue in this case (*see id.* at 1783:17-24; 1824:23-1826:23).

Further, the court's inclusion of plaintiff Johnson Devadas' lack of informed consent claim, and the jury's subsequent determination that defendants' failure to give informed consent was a proximate cause of plaintiff Johnson Devadas' injuries, were neither inconsistent with, nor against the weight of the evidence. While defendants argue that the medical malpractice and informed consent causes of action are duplicative, this court has previously rejected this argument (*see id.* at 2183:2-2187:7). At the trial, this court ruled that:

> With regard to the [lack of informed consent] cause of action, plaintiff alleged that defendant failed to adequately explain or disclose the risks of the procedure and/or any alternatives to plaintiff and, as a result, plaintiff underwent a procedure that a reasonably prudent person would not, if given the proper disclosures. Moreover, during the course of the trial, there has been sufficient testimony on the issue of consent, in order for the jury to reach a determination on such issue.

(*Id.*).

The court further noted that the cases cited by defendants were not persuasive, as they were essentially a failure to diagnose and "plaintiffs did not undergo any procedure or operation as did plaintiff here" (*id.*). In explaining, this court stated: "The basis for plaintiff's lack of informed consent claim here is that plaintiff was not given the proper information prior to his surgery regarding the risks associated" (*id.*). Similarly, defendants' reliance on *Karlsons v.*

Guerinot, 57 AD2d 73 (4th Dep't 1977), in the within motion is misplaced. Here, there was sufficient evidence presented at trial that could cause a jury to reasonably conclude that Johnson Devadas' forme fruste keratoconus was diagnosable and that Niksarli failed to disclose the attendant risks of the proposed treatment and "the harm suffered arose from some affirmative violation of [Johnson Devadas'] physical integrity such as [a] surgical procedure[]", which is the basis for an actionable informed consent claim (*Karlsons*, 57 AD2d at 82).

Extensive testimony and rebuttal testimony was provided on the lack of informed consent claim (*see* Trial Transcript at 175-210; 388-391; 406). Plaintiff Johnson Devadas testified that on the day of the surgery, he was provided with an informed consent form, that defendant Niksarli addressed as a mere "legality" (*id.* at 183:8-11; 390:8-26). Johnson Devadas also testified that Valium was administered to him before he signed the informed consent form (*see id.* at 187:4-8). Dr. Donzis testified that the information conveyed by Niksarli to Johnson Devadas, prior to obtaining his consent, was inadequate and "did not fully satisfy the requirement" of informed consent because the patient was unaware of his "higher risk for developing complications" (*id.* at 581:5-23).

In addition, plaintiffs and defendants both called ink experts to testify on the handwritten portions of the medical records kept by Niksarli on his conversations with Johnson Devadas regarding informed consent. Plaintiffs called Dr. Albert Lyter, who testified that the ink on the handwritten note, which memorialized Niksarli's informed consent conversation with Johnson Devadas, was significantly older than the ink found on the previous page of the chart (*see id.* at 202:14-16; 259:17-261:7) and that the ink was "artificially aged" (*id.* at 261:10-15). Defendants' ink expert, Dr. Valery Aginsky, testified that these two pages in Johnson Devadas'

medical records were created at "approximately the same time" (*id.* at 1111:5-24; 1116:24-1117:1), but did not articulate and further define such statement (*see id.* at 1211:23-1214:26).

With regard to the existence and extent of plaintiffs' past and future physical injuries and economic damages, the jury's determination could also be reached by a fair interpretation of the evidence. Substantial expert and non-expert testimony was put forth regarding Johnson Devadas' reduced earnings, visual and physical impairments, and coping issues with these impairments, as well as Saramma Devadas' increased burden in household responsibilities (*see id.* at 210-223, 397-401, 404-05, 425-39, 1258-73 [testimony of Johnson Devadas]; 475-77 [testimony of Dr. Donzis]; 903-09, 926-51 [testimony of Dr. Gamboa]; 1489-90, 1524-36 [testimony of Saramma Devadas]). In particular, Johnson Devadas testified as to how his productivity at filling prescriptions decreased due to the injury and how he is unable to assist his wife in household responsibilities (*see id.* at 1269-1275; 1280-1289). Moreover, Dr. Gamboa testified on plaintiffs' behalf regarding economic loss and the impact that Johnson Devadas' visual problems would have on his future earning capacity (*see id.* at 900:24-912:22).

Defendants' counsel was allowed numerous opportunities to rebut testimony put forth by plaintiffs through cross-examination and use of his own medical experts, as well as defendant Niksarli's own non-expert testimony. Further, defendants chose not to call their own economics expert, to rebut Dr. Gamboa's findings, or offer any other evidence regarding Johnson Devadas' decrease in earning potential.

Viewed as a whole, the trial testimony could have led a reasonable jury to conclude that plaintiffs suffered both past and future physical and financial injuries for which they are entitled to recover damages. Moreover, the jury was entitled to credit or discredit any witness testimony

at trial, as "[j]uries are empowered to dissect the testimony of witnesses to accept what is credible and reject what is not" (*Hazel v. Nika*, 40 AD3d 430, 431 [1st Dep't 2007]). Furthermore, it is well-established that "[w]here the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Rodriguez v. New York City Transit Auth.*, 67 AD3d 511, 511 [1st Dep't 2009]), *citing Koopersmith v. General Motors Corp.*, 63 AD2d 1013 [2d Dep't 1978]). Defendants have not met their burden to set aside the verdict and enter judgment in their favor or order a new trial based on the weight of the evidence, as a valid line of reasoning did exist and the jury's finding in favor of plaintiffs was rational and supported by the evidence. Therefore, the branch of defendants' motion which seeks such relief is denied in light of the above.

Defendants also argue that the verdict should be set aside and a new trial granted on the basis that defendants were prejudiced by the court's wrongful admission of certain topographies. Defendants argue that the topographies should never have been admitted into evidence because they were not provided to defendants within a reasonable time period prior to trial, despite numerous discovery requests for such documents, pursuant to CPLR 3101(d), and, that the court erred in not requiring plaintiffs to show good cause for the late submission of such evidence. Defendants assert that, had the topographies been made available in a timely fashion and earlier than during the trial, defense counsel would have altered his opening statement and prepared more accordingly for cross-examination of plaintiffs' expert witness. Finally, defendants contend that plaintiffs' use of the additional topographies left the jury with the impression that they were the ones produced and evaluated by defendant Niksarli in his pre-operative diagnosis of plaintiff Johnson Devadas, even though Niksarli never had access to such topography at issue,

at the time of the diagnosis, and any evaluation he made regarding Johnson Devadas' candidacy for LASIK surgery was based on an entirely different topography.

Plaintiffs do not dispute that defendant Niksarli never used plaintiffs' additional topographies in his pre-operative diagnosis. Instead, plaintiffs maintain that this additional set of topographies was put together with the same numerical data as Niksarli's topographies and that the use of updated software did not manipulate any results. Furthermore, plaintiffs assert that the additional topographies merely demonstrate gradations in a varied color scheme, rather than only in shades of green as in Niksarli's original topographies, which assisted the jury in visualizing. Additionally, plaintiffs contend that any prejudice argument was already considered and addressed by the court during the trial.

CPLR 3101(d)(1)(i) provides that "upon request, each party shall identify each person to whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinions." In the present matter, the CPLR 3101(d)(1)(i) exchanges were sufficiently detailed so as to apprise defendants of the substance of each expert's opinions and expected testimony, and such exchanges are in accordance with the statute.

While defendants argue that plaintiffs never disclosed the additional topographies, this does not violate CPLR 3101(d)(1)(i), which only requires the exchange of the general "substance of the facts and opinions" (*Krygier*, 176 AD2d at 701 ["Fundamental factual information" or "facts and opinions" upon which an expert's opinions were based need not be provided, only the

"substance of those facts and opinions"]; *see also Weininger v. Hagedorn & Co.*, 203 AD2d 208, 209 [1st Dep't 1994] ["[A]ny additional disclosure of the subject matter thereof could lead to the divulgence of facts upon which his opinion is based, and therefore should not have been directed"]; *Nedell v. St. George's Golf & Country Club, Inc.*, 203 AD2d 121, 133 [1st Dep't 1994] [Plaintiff's response to defendant's demand for expert witness testimony disclosing in "reasonable detail" the substance of the anticipated testimony sufficiently complies with CPLR 3101(d)(1)(i)]). In addition, "the statute does not require 'particularity'" (*Einbeder v. Bodenheimer*, 2006 NY Slip Op 51264(U), *7 [NY County 2006] [internal citations omitted]). "Indeed, a party's request for facts and opinions on which another party's expert is expected to testify is improper" (*Id.*, *citing Krygier v. Airweld, Inc.*, 176 AD2d 700, 700-01 [2d Dep't 1991] [requesting party only entitled to substance of facts and opinions]).

Further, courts have held that preclusion for failure to comply with CPLR 3101(d) is improper, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party (*Gallo v. Linkow*, 255 AD2d 113, 117 [1st Dep't 1998]; *see also Shopsin v. Siben & Siben*, 289 AD2d 220, 221 [2d Dep't 1991]). This section makes clear that "the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph" (CPLR 3101[d][1][i]).

Here, defendants failed to demonstrate an intentional or willful failure to disclose by plaintiffs and have failed to demonstrate prejudice. With regard to defendants' prejudice argument, defendants had full opportunity to voir dire and cross-examine plaintiffs' expert, Dr. Donzis, at trial (*see* Trial Transcript at 520-537 [voir dire]; 642-674, 711-821 [cross-examination]; 866-880 [re-cross-examination]), as well as show the topographies to, and

prepare, defendants' experts (who testified approximately 8 days later), in addition to defendant Niksarli (who testified 9 days after his attorney's re-cross of Dr. Donzis). Additionally, during closing arguments, defense counsel had the opportunity to argue to the jury that plaintiffs' topographies should be discredited and not relied upon, based on his arguments here (*see id.* at 2270-2285).

Moreover, any concerns about prejudice were addressed by the court during the trial. The court permitted both parties to conduct a voir dire of Dr. Donzis regarding the software used to print the topographies (*see id.* at 513:14-543:19). Defendants could have called an expert witness during their case-in-chief to contradict and discredit the topographies and any alleged manipulations.[2] Nor did defendants ask for a continuance, in order to address any alleged prejudice.

Since defendants fail to adequately demonstrate that plaintiffs' delay was intentional or how defendants were prejudiced by any delay in the expert exchange (given defense counsel's opportunities to prepare and question the expert witnesses and defendant Niksarli on these topographies during the trial), defendants' request for a new trial based on the admission of the additional topographies as evidence is denied.

Lastly, defendants raise various other issues in their attempt to have the court set aside the verdict. First, defendants assert, as they did in their prior motion for summary judgment, that plaintiffs' claims are barred by the statute of limitations and that the continuous treatment doctrine should not apply to allow the within claims to fall within the accepted time frame. The

[2] The court will not consider the affidavit of Dr. Yaron Rabinowitz submitted by defendants in support of the within motion, as it is an improper submission in that it purports to deal with issues addressed at the trial but which were not put forth at that time and, thus, plaintiffs cannot cross-examine the statements made therein.

issue of whether Johnson Devadas' February 21, 2007 visit to Niksarli constituted continuous treatment was determined to be a question for the jury, in defendants' previous summary judgment motion (*see* Hon. Joan Carey's Order, dated April 20, 2009).

Second, with regard to defendants' position that the court erred in drafting the continuous treatment interrogatory on the Special Verdict Sheet (question number 1), again, this issue has been previously addressed by the court. The court's decision to adhere to the language set forth in the Pattern Jury Instruction for continuous treatment by including the words "injury or condition" (*see* PJI 2:149), was proper with regard to the case at hand. While defendants argue that such question should have referred to the last date of continuous treatment by defendant for plaintiff's elective procedure, i.e. the LASIK surgery, instead of using the words "injury or condition," such suggestion here is inappropriate since the elective procedure, the LASIK surgery, was the treatment Johnson Devadas received for nearsightedness, the condition for which he first sought defendant Niksarli's care.

Third, the court rejects defendants' argument that the expert testimony of Dr. Gamboa should not have been admitted. Any issues with regard to Dr. Gamboa's methodology was properly dealt with at the time of trial by defendants' ability to cross-examine Dr. Gamboa; defendants' ability to call their own vocational expert (which they chose not to); and defense counsel's ability to remind the jury during summation that an expert's opinion may be rejected and should be rejected in this instance. Once Dr. Gamboa took the stand to testify, the court also instructed the members of the jury that they could reject the expert's opinions, and, repeated such instruction in the final charge to the jury on the law.

Reduction of Damages

Defendants also move to reduce plaintiffs' awards for pain and suffering, loss of earnings, and loss of services or, in the alternative, to dismiss claims for any future damages as defendants assert the amounts awarded by the jury are excessive in light of the extent of the damages claimed and the evidence submitted at trial. Based on the trial testimony, defendants' motion to reduce plaintiffs' damages as excessive is denied.

Johnson Devadas testified at length concerning how his visual impairment negatively affects his ability to carry out household and professional responsibilities, how it causes him severe discomfort, and how he has had trouble coping with post-LASIK keratoconus (*see* Trial Transcript at 210-23, 397-401, 404-05, 425-39, 1258-75; 1280-89). Saramma Devadas also testified as to her husband's visual impairments and the additional duties she has had to take on because of them (*see id.* 1489-90, 1524-36).

The total amount awarded by the jury to plaintiffs (without taking into account the growth rate and discount rate to arrive at a present value of the award) is $4,020,000; when each component of the award is reviewed, no individual piece is extreme, in light of the testimony presented at trial.

With regard to Johnson Devadas' award of $100,000 for past pain and suffering and $3,000,000 for his future pain and suffering, the damages awarded to him by the jury are not excessive or unsupported by the evidence. While Johnson Devadas has not suffered full vision loss, testimony and evidence at trial indicated that the quality of his vision is significantly impaired. Johnson Devadas testified that he suffers from double vision, blurriness, starbursts, glare, poor nighttime vision, photosensitivity, and chronic dry eyes (*see* Trial Transcript 424:26-

425:22, 430:17-19). He also testified that his eyes are constantly irritated (*see id.* at 1278:12-14); he cannot focus his eyes on anything for very long (*see id.* at 1278:13-21); he often gets headaches due to his visual impairment (*see id.* at 425:15); and he has trouble wearing his contact lenses (*see id.* at 430:12-25). Moreover, he testified how his vision problems have affected his confidence, his family relationships, his family duties, and his professional duties (*see, e.g., id.* at 1269:5-1275:13; 1276:6-1294:19; 1531:19-1532:16). The $3,000,000 awarded for future pain and suffering was awarded by the jury to compensate plaintiff Johnson Devadas over a time period of 45 years, which on a yearly basis equates to approximately $66,000. Viewed as such, the amount is not deemed excessive to compensate plaintiff, in light of his testimony as to how the incident has affected, and will affect, his quality of life, on a daily basis.

The case cited by plaintiffs, *Schiffer v. Speaker*, 2005 WL 2398129 [New York County 2005], supports the amount awarded in this action. In *Schiffer*, the plaintiff underwent LASIK surgery in both eyes to correct a retinal irregularity (*see id.*). After the surgery, the plaintiff began to experience blurred vision, especially in his left eye, and it was determined that he was suffering ectasia in his left eye, which required replacement of his left cornea (*see id.*). Plaintiff was awarded a total of $7.25 million: $750,000 for past pain and suffering; $2,000,000 over 10 years for future pain and suffering; $500,00 for past lost earnings; and $4,000,000 over 7 years for future lost earnings (*see* February 16, 2006 Judgment, 2006 WL 2601641 [New York County 2006]).[3] Although there are some differences between the facts in *Schiffer* and the facts herein, mainly, that the *Schiffer* plaintiff underwent replacement of his left cornea, such case is

[3] The court notes that, after the jury returned the above verdict, a settlement was reached between the parties for $2.3 million (*see* February 16, 2006 Judgment, *Schiffer v. Speaker*, 2006 WL 2601641 [New York County, 2006]). While the parties did agree to reduce the amount, it is important to note that a jury had reached a verdict far greater than the one reached here.

illustrative of the fact that even greater damages, than those at issue here, have been previously awarded by a jury. Not only were those damages awarded approximately 3 years prior to the trial in this case, but the award for past pain and suffering was hundreds of thousands of dollars more and the award for future pain and suffering amounted to $200,000 per year in the *Schiffer* case (as compared to $66,000 per year herein). Therefore, the within case is not the first occasion of a jury awarding a plaintiff a large amount, after suffering from ectasia as the result of LASIK surgery.

Further, with regard to his lost earnings, plaintiff Johnson Devadas was awarded $60,000 for past loss of earnings and $20,000 per year (for 37 years) for future loss of earnings. Plaintiffs presented the expert testimony of an economist, Dr. Gamboa, who defendants had ample opportunity to cross-examine and rebut. Based on a fair interpretation of the evidence provided at trial regarding plaintiff Johnson Devadas' reduced earning capabilities and costs associated with additional staffing at his pharmacy, as well as defendants' lack of a rebuttal expert and in light of the opportunities to cross-examine Dr. Gamboa, the verdict for loss of earnings was not against the weight of the evidence and, thus, defendants' request for a reduction in the loss of earnings award is denied.

The jury award for Saramma Devadas' past loss of services in the amount of $20,000 and future loss of services in the amount of $100,000 is also not deemed excessive by this court. There was adequate evidence presented at the trial for the jury to make its determination of an award to Saramma Devadas. At the trial, she testified as to how her husband's injury has affected their marriage and family life, including the additional responsibilities she has had to shoulder (*see id.* at 1525:2-1532:16).

Thus, based on the trial testimony, defendants' motion to reduce damages as excessive, is denied.

Determination of Judgment

CPLR 5031 provides the basis for determining judgment to be entered in a medical malpractice action. As such, the below calculations are subject to the provisions set forth in CPLR 5031.

Pursuant to CPLR 5031(b), it is undisputed that the jury's award of $100,000 for past pain and suffering shall be paid in a lump sum. As to the jury's award of $3,000,000 over 45 years for Johnson Devadas' future pain and suffering, CPLR 5031(c) applies, which states that an award in excess of $500,000 for future pain and suffering must be paid in a lump sum of the greater of $500,000 or 35% of such damages, and the remainder is to be paid in equal installments for a period determined by the jury or 8 years, whichever is less, which shall be increased by adding 4 percent to the previous year's payment and applying a discount rate. The discount rate to be used to determine the present value for periods up to 20 years shall equal the rate in effect for the 10-year United States Treasury Bond on the date of the verdict (*see* CPLR 5031[e]). Therefore, it is undisputed that $1,050,000 shall be paid as a lump sum, and the remainder paid over 8 years, with a growth rate of 4% and a discount rate of 3.98%.

The jury awarded Johnson Devadas $60,000 for past loss of earnings, which is to be paid in a lump sum, pursuant to CPLR 5031(b). However, CPLR 4546 requires that the award for past loss of earnings be reduced for income taxes. CPLR 4546 allows for evidence to be supplied to the court "to establish the federal, state and local personal income taxes which the plaintiff would have been obligated by law to pay" and for the reduction of "any award for loss

of earnings or impairment of earning ability by the amount of federal, state and local personal income taxes which the court finds, with reasonable certainty, that the plaintiff would have been obligated by law to pay" (CPLR 4546[1] and [3]). As defendants have proposed a 25% reduction to which plaintiffs do not object, plaintiff Johnson Devadas is entitled to $45,000, for past loss of earnings.

As to future loss of earnings, the jury awarded Johnson Devadas $20,000 per year, for a period of 37 years, at a growth rate of 5.5%. Pursuant to CPLR 5031(d), the stream of payments is determined by applying the growth rate to the annual amount for the period of years, all of which were determined by the jury, and then applying a discount rate as set out in CPLR 5031(e). To determine the discount rate when the period of years exceeds 20 years, the average, *on an annual basis*, of the United States Treasury Bond rate on the date of the verdict for the first 20 years and 2 percentage points above the United States Treasury Bond rate at the date of the verdict for the years after 20 years, shall be taken (*see* CPLR 5031[e]). The amount is also subject to reduction for personal income taxes, as provided in CPLR 4546. As plaintiffs have provided that Johnson Devadas' tax rate in 2005 was 25%, and accounting for 6.85% New York state tax rate, the amount shall be reduced by 31.85%.[4] 35% of the present value is paid in a lump sum, pursuant to CPLR 5031(d) and the remainder over time in the form of an annuity, in accordance with the provisions set forth in CPLR 5031(g).

Lastly, as for the jury's award of $20,000 for Saramma Devadas' past loss of services and $100,000 for her future loss of services, those sums shall be paid in a lump sum, pursuant to CPLR 5031(b).

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[4] Defendants fail to adequately establish how they got to a rate of 35%.

Internet Material

Finally, Defendant has requested that the court order Plaintiff's counsel to remove from the internet various press releases, articles, advertisements and disclosures regarding the jury verdict and award. The Court denies this part of the motion as moot, now that a decision on the post-trial motion has been rendered and the jury award sustained. While defendants' counsel has cited to the Model Rules of Professional Responsibility, no case law has been supplied in support of defendants' position, wherein a judge has issued the relief requested by defendants.

As to the alleged false advertisements, defendants' attorney states that:

> "[Mr. Krouner, plaintiffs' attorney,] does this in order to extract a settlement from the defendant's before post-trial motions are heard or an appeal is taken. In addition, this type of publicity prejudice the defendant's opportunity for a fair trial should the court determine or as a result of the post-trial motions the case be retried."

Neil H. Ekblom Affirmation ¶ 49. Defendants' counsel's concerns are not an issue, now that defendants' motion to set aside the verdict was denied and the jury verdict upheld.

Accordingly, it is

ORDERED that defendants' motion is granted solely to the extent that plaintiffs are directed to settle judgment on notice pursuant to 22 NYCRR 202.48, returnable to Room 119A, 60 Centre Street, in accordance with the attached judgment form, with appropriate modifications; and it is further

ORDERED that the balance of defendants' motion is denied; and it is further

ORDERED that, within 30 days of entry of this order/decision, plaintiffs shall serve a copy of this order/decision with notice of entry, upon defendants.

Date: 7/9/10

Hon. Doris Ling-Cohan, J.S.C.

J:\Jury Trials\Devadas.Kiksarli\Devadas, POST TRIAL - to set aside verdict, denied - damages sustained - FINAL.wpd