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

----------X

NANCY RUBINSTEIN,

Plaintiff,

-against-

LARRY COHEN,

Defendant.

----------X

Index No.: 805166/2017

AFFIRMATION IN OPPOSITION

COUNSELORS:

John G. Tomaszewski, Esq., an attorney duly admitted to practice law before the courts of this state, and being fully familiar with the facts and circumstances of the above entitled case having been trial attorney, duly affirms the following under the penalties of perjury:

1. I am the attorney for defendant, Larry Cohen (a doctor of podiatric medicine) in the above entitled case, which was the subject of a Jury Verdict on February 26, 2019.

2. That this opposition is submitted in response to plaintiff's order to show cause to set aside the jury's award of $30,000 for past pain and suffering only, and no award for future pain and suffering, and for a new trial on damages only, or, in the alternative, for the award to be amended to include the sum of $250,000 as to past pain and suffering and $200,000 as to future pain and suffering.

3. Presumably, plaintiff is seeking an order setting aside the verdict or, in the alternative, the court's directive that Dr. Cohen stipulate to the sought after modified, increased damage award.

4. Pursuant to CPLR §4404 (a) the court in its discretion may set aside a jury verdict and order a new trial where "...the verdict is contrary to the weight of the evidence, in the interest of justice..."

5. The applicable standard of review is whether a jury's monetary award for past and future pain and suffering deviates materially from what would be reasonable compensation. See, Donlon v. City of New York, 727 N.Y.S. 2d 94 (1st Dept. 2001). Where a damage award deviates materially from what would be reasonable compensation for comparable injuries, the court has the authority to order a new trial conditioned on the non-moving party stipulating to the additur or remittitur of the damages award. See, CPLR §5501 (c); Ortiz v. 975 LLC, N.Y.S.(1st Dept. 2010).

6. *Generally, however, the amount of damages awarded for personal injury is primarily a question for the jury, the judgment of which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony.* See Ortiz, supra; Vaval v. NYRAC, 31AD3d 438 (2006).

The Evidence As to Past Pain and Suffering/Injury Was Vague, Inconsistent and Inconclusive and the Verdict of $30,000 Should Stand

7. In her order to show cause for additur and, presumably, to set aside the jury's verdict of no future pain and suffering, plaintiff cites to several cases in which juries awarded considerable sums to plaintiffs in podiatric surgical malpractice cases. For the reasons set forth below it is respectfully submitted that the specific facts and circumstances of this case, as revealed in the trial testimony, do not support any judicial modification of the jury's award and verdict.

8. In Caprara v. Chrysler Corporation, 52 NY 2d 114, the Court of Appeals expounded upon the unique situation faced by the trial court in this instance:

"In no two cases are the quality and quantity of such damages identical. As has been pointed out by the pragmatists and theorists who have wrestled with the problem of how damages in such cases may justly be arrived at, evaluation does not lend itself to neat mathematical calculation" (id. at 127).

9. Despite testimony on direct examination by plaintiff that in the weeks and months after Dr. Cohen's surgery she experienced various symptoms and conditions, and eventually went on to undergo osteotomies to the left second and third toes, no testimony and opinions were proffered by her expert, Dr. Joseph, causally relating any of her alleged symptoms and injuries, or the need for further surgery, specifically to a departure on the part of Dr. Cohen. To reiterate, Dr. Joseph was never asked any questions to the effect: "do you have an opinion with a reasonable degree of podiatric surgery as to whether a departure from accepted podiatric standards on the part of Dr. Cohen (in this case the only departure proven was an improper osteotomy angle) was a competent producing cause or substantial factor in plaintiff's injury/condition?" It is respectfully submitted that a jury is not obligated to fill in the blanks, so to speak, left remaining by Dr. Joseph's incomplete and inadequate testimony. These injuries not causally related or adequately explain include right second metatarsal pain; left heel pain; outer part of foot pain; fourth and fifth toe pain; top of metatarsal pain; lump under second and third metatarsals and elevation of left big toe. Plaintiff also failed to offer to the jury an explanation of why she failed to consult any doctors for her alleged

complaints between the time of her final visit to Dr. Cohen in August, 2015 and her first visit to Dr. Roberts in July, 2016, a span of almost one year.

10. It would seem reasonable, therefore, for the jury to be unimpressed with the long list of claimed symptoms experienced by the plaintiff, not only because of her credibility issues as described more fully below, but also based on the inadequacy of Dr. Joseph's testimony in failing to provide a coherent and credible medical explanation of plaintiff's claimed injuries, and to attribute them to malpractice on the part of Dr. Cohen.

11. Notably, the suspect and questionable nature of plaintiff's alleged elevated left great toe, particularly to what extent, if any the condition existed or continues to exist, was vigorously contested by the defense. Indeed, despite being in possession of the report and x-rays of the defense examining podiatrist Dr. Wolf, which raised major questions and disputed the existence of an elevated left great toe, *Mrs. Rubinstein never stood before the jury and exhibited her left foot to permit the jurors to make up their own minds as to the legitimacy, or lack thereof, of her allegation of an elevated left great toe.*

12. It must be emphasized that scant evidence was brought forth by plaintiff during the trial that that she experienced any temporary or permanent, significant injury or continuing symptoms attributable to the left foot bunion surgery performed by Dr. Cohen. Indeed, many of the references to medical records set forth by plaintiff in the instant order to show cause, including the entirety of the contents of orthopedist Dr. Matthews chart, and Hospital for Special Surgery medical and physical therapy records, were never referred to, explained or read by any of plaintiff's witnesses during the evidentiary portion of the trial, and were only referred to by Mr. Karam during his

summation. It would not be unreasonable to surmise that an intuitive and perceptive jury would look askance at that omission in plaintiff's *prima facie* case, and give those records little or no weight in their decision.

13. The jury may have also focused on what became a major issue during the trial of plaintiff's credibility, in regard to her profoundly inconsistent testimony as to the circumstances surrounding her review and signing of the surgical consent forms contained in Dr. Cohen's medical chart.

14. The Court's Jury Charge correctly included the Falsus In Uno instruction:

PJI 1:22 Falsus in Uno

"If you find that any witness has willfully testified falsely as to any material fact, that is as to an important matter, the law permits you to discard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything..."

Specifically, on her direct examination by Mr. Karam, Mrs. Rubinstein testified that the surgical consent forms were presented to her by a nurse at the surgery center, across the street from Dr. Cohen's office just prior to the surgery, see plaintiff's direct testimony at page 24.

Mrs. Rubinstein went on to testify in response to Mr. Karam's questioning: "It (the consent form) was given to me right before surgery";

Q: did you read any part of the form when you signed it?

A: I don't think I did.

Q: is there a reason why you didn't read it?

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.