At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of June, 2015.

P R E S E N T:

HON. GLORIA M. DABIRI,
Justice.

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RAYMOND GASPARD AND BRIDGIT DENGEL GASPARD,

Plaintiffs,

- against -

Index No. 14612/09

JEFFREY S. ARONOFF, M.D., AND JEFFREY STEVEN ARONOFF, M.D., P.C.,

Defendants.

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The following papers numbered 1 to 7 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers Memoranda of Law, Trial Transcripts, EBT Transcripts	5-7

Upon the foregoing papers, defendants Jeffrey S. Aronoff, M.D. (Dr. Aronoff) and Jeffrey Steven Aronoff, M.D., P.C. seek an order: (a) pursuant to CPLR 4404 setting aside the verdict in plaintiffs' favor, vacating the jury awards and dismissing plaintiffs' complaint; or (b) failing dismissal, setting aside the verdict and ordering a new trial on liability and

damages; or (c) pursuant to CPLR 4545, setting this matter down for a collateral source hearing; and (d) for such other and further relief as the Court may deem just and proper.

Background and Procedural History

On July 30, 2008 plaintiff Raymond Gaspard, then 59 years of age, underwent his very first colonoscopy which was performed by Dr. Myron Goldberg. After the colonoscopy, Dr. Goldberg informed plaintiff that he had a polyp which was at risk for cancer, and referred him to Dr. Aronoff, a colorectal surgeon. Plaintiff and his wife Bridgit immediately went to Dr. Aronoff's office and a second colonoscopy was scheduled for the following day, July 31, 2008. Dr. Aronoff performed the colonoscopy on July 31, 2008 but did not remove the polyp at that point because he believed that it was too large to remove during the colonoscopy. Rather, he tattooed the area in the colon surrounding the polyp in anticipation of future surgery to remove it. Dr. Aronoff scheduled plaintiff for a CT scan, for August 5, 2008, in order to assess the possible spread of cancer related to the polyp. On August 5, 2008 Dr. Maklansky, a radiologist, performed the CT scan and found inflammatory changes in plaintiff's colon and air outside the colon. Dr. Aronoff testified that the extraluminal bubbles of air could be indicative of a perforation. The CT scan report also stated "possible diverticulitis" (p. 195).

Plaintiff testified that he went to work on Friday, August 1, 2008, but felt a little "out of sorts" (p. 84). He stated that he did not feel any abdominal pain over the weekend but some fatigue, diarrhea and was slightly feverish (p 85). On Monday he had slight abdominal

pain, still had diarrhea and felt fatigued (p. 88). Following the CT Scan on Tuesday, August 5, 2008, he went to work. Plaintiff testified that some time after 5:00 PM on Tuesday he received a voicemail from Dr. Aronoff's office requesting the name of his pharmacy so that a prescription could be called in (p. 88-89). On Wednesday morning, Plaintiff called Dr. Aronoff's office with the telephone number of his pharmacy, picked up the prescription that evening and then took one pill. Plaintiff testified that he had some pain prior and had not eaten solid food for several days. On Wednesday evening he ate his first full meal which consisted of salad and chicken (p. 92). Shortly after eating, he began to feel intense pain and at that point decided to call Dr. Aronoff (p. 93) who directed that he go directly to Lenox Hill Hospital's emergency department (p.94). It was at this point that plaintiff learned that there was a perforation to his colon and an infection, and was admitted (p. 95-96). On Thursday, he was treated with antibiotics. However, on Friday, August 8th, he was advised that the antibiotics were not working and that surgery was required (p.96). A large section of plaintiff's colon was removed and a colostomy bag inserted (p. 97). Plaintiff was unable to work for four to six weeks following the surgery and required the services of visiting nurses to assist him in using and cleaning the colostomy bag (p. 99). In mid-November, plaintiff underwent surgery to remove the colostomy bag (p. 101). Thereafter, in 2010, he underwent hernia repair surgery as a consequence of the prior surgeries (p. 104). He testified that he continues to experience jabs of pain in his abdomen and has bouts of incontinence.

Plaintiffs commenced this action for medical malpractice with the filing of a summons and complaint on June 12, 2009. Issue was joined by Dr. Aronoff on July 19, 2009. A trial was held before a jury on July 15, 16, 17, 22, 23 and 24, 2014. Following opening statements, plaintiff's lack of informed consent cause of action was dismissed without objection. At the conclusion of the evidence plaintiff withdrew his loss of earnings claim and Mrs. Gaspard withdrew her loss of services claim. On July 24, 2014, the jury reached a verdict in plaintiff's favor finding that Dr. Aronoff departed from good and accepted standards of medical/surgical care in not advising plaintiff of the signs and symptoms of a perforation following the colonoscopy, and that this departure was a proximate cause of injury to the plaintiff. The jury also found that Dr. Aronoff departed from the standard of care in not directing plaintiff to go directly to an emergency room on August 5, 2008, and that this departure was a proximate cause of injury to the plaintiff. The jury awarded $600,000 for past pain and suffering, $400,000 for future pain and suffering over 15.9 years, and $100,000 in past medical expenses.

CPLR 4404(a) provides that following the trial of an action the court upon the motion of a party may set aside a jury verdict 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 . . . where the verdict is contrary to the weight of the evidence." "To be entitled to judgment as a matter of law the defendant has the burden of showing that, upon viewing the evidence in the light most favorable to the plaintiff, the plaintiff has not made out a prima facie case"

(*Nichols v Stamer*, 49 AD3d 832, 833 [2008]; *see also Godlewska v Niznikiewicz*, 8 AD3d 430, 431 [2004]; *Lyons v McCauley*, 252 AD2d 516, 517 [1998]). A trial court should exercise its discretionary power to set aside a jury verdict only where the jury could not have reached the verdict on any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Thus, the question before the court on such a motion is whether "there is simply no valid line of reasoning and permissible inferences which could possibly [have] lead rational men [and women] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen*, 45 NY2d at 499; *see also Adamy v Ziriakus*, 92 NY2d 396, 400 [1998]; *Lolik*, 86 NY2d at 746). "In considering such a motion, the evidence must be construed in the light most favorable to the nonmoving party, and the motion should not be granted where the facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of the witnesses is in question" (*Cathey v Gartner*, 15 AD3d 435, 436 [2005]). Where the evidence presented at trial is adequate to provide a valid line of reasoning and permissible inferences to conclude that the plaintiff's injuries were caused by a defendant's medical malpractice, the verdict cannot be set aside (*see Cohen*, 45 NY2d at 499; *Leha v Yonkers Gen. Hosp.*, 22 AD3d 809, 811 [2005]; *Lopez v Bautista*, 287 AD2d 601, 602 [2001]).

"To prove a prima facie case of medical malpractice, a plaintiff must demonstrate that the defendant deviated or departed from accepted practice, and that such deviation or

departure was a proximate cause of the injury sustained" (*Perez v St. John's Episcopal Hosp. S. Shore*,19 AD3d 389, 390 [2005]; *see also Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 726 [2011]; *Keevan v Rifkin*, 41 AD3d 661, 662 [2007]; *Calabro v Hescheles*, 22 AD3d 622, 622 [2005]). "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause" (*Lyons v McCauley*, 252 AD2d 516, 517 [1998]; *see also Nichols*, 49 AD3d at 833). "An expert's opinion, which is not supported, and indeed is refuted by facts established in the record, has little probative value" (*Talon Air Servs. LLC v CMA Design Studio, P.C.*, 86 AD3d 511, 515 [2011]), and an expert witness may not reach his [or her] conclusion by assuming material facts not supported by evidence (*see Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Cillo v Resjefal Corp.*,16 AD3d 339, 340 [2005]). Where, however, there is simply a credibility battle between the parties' experts, issues of credibility are properly left to a jury for its resolution and the court must "'accord due deference to the jury's resolution of the experts' conflicting testimony based on its opportunity to observe and hear the witnesses and weigh their testimony'" (*Warnke v Warner-Lambert Co.*, 21 AD3d 654, 657 [2005], quoting *Abar v Freightliner Corp.*, 208 AD2d 999, 1001 [1994]).

Defendants argue that it was irrational for the jury to conclude that the plaintiff was not advised of the signs and symptoms of a perforation. Defendants contend that plaintiff's testimony that he did not receive post-colonoscopy instructions from either Dr. Goldberg or Dr. Aronoff is utterly incredible as a matter of law and note that Dr. Goldberg's chart actually

contained a copy of the post-colonoscopy instructions. They point out that the plaintiff testified that he did not read any of the forms given to him to sign.

In further support of this argument, defendants note Dr. Aronoff's testimony that in his 14 years of practice he has never had a colonoscopy patient who he did not inform of the risks of a perforation, instruct to call him if there was any problem, and provide a discharge instruction sheet to explaining what to do if certain things occurred. Defendants further point out that Dr. Goldberg, Dr. Aronoff and plaintiff's own expert, Dr. Weiner, all testified that in their many years of practice performing thousands of colonoscopies they have always told their patients about the risk of a perforation and what to do after the procedure.

Defendants also argue that the jury's reliance on the testimony of plaintiff's expert, Dr. Weiner, was misplaced in that he based his opinion upon plaintiff's testimony that he did not recall being informed about any signs and symptoms of a perforation, including fever and abdominal pain. Defendants note that Dr. Weiner admitted that he did not know what Dr. Aronoff actually said to plaintiff but concluded that had plaintiff received such instructions, that, as a competent adult, he would have acted upon them. Thus, defendants argue, Dr. Weiner's testimony was purely speculative, was not based upon a fair interpretation of the facts and, therefore, was insufficient to meet plaintiff's burden of proof.

In opposition, plaintiff contends that the jury made a credibility determination regarding whether Dr. Aronoff gave plaintiff the required instructions. Plaintiff argues that the jury was free to reject Dr. Aronoff's testimony and to credit plaintiff's testimony that he

never received post-colonoscopy instructions from Dr. Aronoff. Moreover, it is unrefuted that no record of written post-colonoscopy instructions by Dr. Aronoff was offered in evidence.

It is well-recognized that issues of credibility are primarily to be determined by the trier of fact who has the opportunity to view the witness, hear the testimony, and observe the witness' demeanor (*see Gerdik v Van Ess*, 5 AD3d 726, 727 [2004] [the conflicting testimony of the parties and their medical experts presented issues of credibility which were for the jury to resolve]; *Tornello v Gemini Enterprises, Inc.*, 299 AD2d 477 [2002] [determinations regarding the credibility of witnesses are for the fact-finders, who has an opportunity to see and hear the witnesses]; *Cirami v Taromina*, 243 AD2d 437 [1997][issues of credibility are primarily to be determined by the trier of fact who has the opportunity to view the witness]). When, as here, both plaintiff and defendant presented party eye witnesses and expert testimony in support of their positions, it is the province of the jury to determine the credibility of these witnesses (*see Siddiqua v Anarella*, 120 AD3d 793, 794 [2014]; *Barthelemy v Spivack*, 41 AD3d 398, 399 [2007]; *Flaherty v Fromberg*, 46 AD3d 743,746 [2007]). The jury, therefore, was well within its province to credit the testimony of the plaintiff and his medical expert.

Defendants also contend that the jury's findings that Dr. Aronoff departed from the standard of care in not directing that plaintiff on August 5, 2008 go directly to an emergency room and that this departure was a proximate cause of injury to the plaintiff, should be set

aside. In this regard the defendants claim that Dr. Aronoff made a choice between or among medically acceptable alternatives.

A doctor who uses his or her best judgment to choose between medically acceptable alternatives does not incur liability solely for a mere error in judgment (*Nestorowich v Ricotta*, 97 NY2d 393 [2002]; *Oelsner v State of New York*, 66 NY2d 636 [1985]. The "error in judgment" charge, which was given to the jury by the court, implies the exercise of some professional judgment in electing among medically acceptable alternatives (*Spadaccini v Dolan*, 63 AD2d 110, 116 [1978]). The "error in judgment" charge, as articulated in PJI 2:150, paragraph 5, states: "[a] doctor is not liable for an error in judgment if [the doctor] does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances" (PJI 2:150, P [5]). However, absent a showing that the "defendant physician considered and chose among . . . medically acceptable treatment alternatives" the error in judgment charge has been found inappropriate (*Martin v Lattimore Rd. Surgicenter, Inc.*, 281 AD2d 866 [2001]; *Nestorowich,* 97 NY2d at 399).

Here, the testimony revealed that the plaintiff was sent by Dr. Aronoff for a CT scan on August 5, 2000. Dr. Maklansky, the radiologist who performed the scan, informed Dr. Aronoff that it revealed inflammation five centimeters from the polyp and possible diverticulitis. Dr. Aronoff testified that he called the plaintiff and assessed what was going on with him clinically, and determined that the inflammation that was present was not

antibiotics Dr. Aronoff prescribed. Dr. Aronoff testified that he prescribed both Cipro and Flagyl. However, the plaintiff testified that he was prescribed, only, Cipro. Dr. Aronoff was unable to explain why there was no prescription for Flagyl and stated that there was no record of this in plaintiff's chart because he had spoken to him at night when he was not in his office. Thus, the jury was free to find credible the plaintiff's testimony that he never spoke with Dr. Aronoff on August 5th and to reject Dr. Aronoff's testimony that he spoke with the plaintiff on the evening of August 5th and assessed his condition.

A plaintiff's evidence of a proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance for a better outcome or increased the 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 [the] injury" *(Alcea v Ligouri*, 54 AD3d 784, 786 [2008] [internal quotation marks omitted]; *see Flaherty v Fromberg*, 46 AD3d 743, 745 [2007]; *Jump v Facelle*, 275 AD2d 345, 346, [2000]). Here, the evidence presented at trial was sufficient to allow the jury to reasonably infer that plaintiff would have had a better outcome if Dr. Aronoff had examined him or referred him to the hospital's emergency department on August 5, 2008. Accordingly, the jury's finding on this issue will not be disturbed.

The defendants contend that Dr. Weiner was not qualified to testify regarding the standard of care required of colorectal surgeons. They maintain that Dr. Weiner, a

gastroenterologist, should not have been permitted to testify as to whether Dr. Aronoff, a colorectal surgeon, departed from the good and accepted standard of care by not sending plaintiff to an emergency room on August 5, 2008.

However, it has long been held that "[a] physician need not be a specialist in a particular field in order to be considered a medical expert" (*Humphrey v Jewish Hosp. & Medical Center*, 172 AD2d 494 [1991]; *see Fuller v Preis*, 35 NY2d 425, 431 [1974]; *Joswick v Lenox Hill Hosp.*, 161 AD2d 352 [1990]; *Kletnieks v Brookhaven Mem. Assn.*, 53 AD2d 169 [1976]; Fisch, New York Evidence, § 428, at 277; Richardson, Evidence § 368 [Prince, 10th ed]). "[I]n order to testify regarding accepted practices in that field ... the witness ... should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" (*Postlethwaite v United Health Servs. Hosps.*, 5 AD3d 892, 895 [2004] [citations and internal quotation marks omitted]). In addition "a foundation must be laid tending to support the reliability of the opinion rendered" (*Mustello v Berg*, 44 AD3d 1018, 1019 [2007]; *see Behar v Coren*, 21 AD3d 1045, 1046-1047 [2005]). Here, Dr. Weiner , a gastroenterologist, laid the proper foundation for his opinion that Dr. Aronoff departed from the good and accepted standard of care in his treatment of plaintiff in, both, failing to advise the plaintiff of the signs and symptoms of complications following a colonoscopy and in not examining the plaintiff following the CT scan findings. Dr. Weiner testified regarding his own experience in performing colonoscopies and in advising patients of post colonoscopy complications, and established his qualifications to

render these opinions (*see also Borawski v Huang*, 34 AD3d 409, 410 [2006]; *Moon Ok Kwon v Martin*, 19 AD3d 664, 664 [2005]).

The defendants also argue that the jury's awards for pain and suffering were not supported by the evidence and deviate materially from what would constitute reasonable compensation. It is well settled that the amount awarded for personal injuries is primarily a question for the jury (*see Crockett v Long Beach Med. Ctr.*, 15 AD3d 606, 606-607 [2005]; *Day v Hospital for Joint Diseases Orthopaedic Inst.*, 11 AD3d 505, 506 [2004]) whose determination is entitled to great deference (*Fryer v Maimonides Med. Ctr.*, 31 AD3d 604, 605 [2006];*see Crockett* 15 AD3d at 606-607; *Day*, 11 AD3d at 506).

A jury's award is excessive if it "deviates materially from what would be reasonable compensation" (CPLR 5501 [c]; *see also Ditingo v Dreyfuss*, 27 AD3d 1024,1026 [2006]; *Jump*, 292 AD2d at 502-503 [2002]; *Simmons v East Nassau Med. Group*, 260 AD2d 463, 465 [1999]). Since pain and suffering awards are not subject to precise quantification, the court, in determining whether a particular award is excessive, must review other analogous cases involving similar and comparable injuries, bearing in mind that any given award depends on a unique set of facts and circumstances (*see Nolan v Union Coll. Trust of Schenectady, NY*, 51 AD3d 1253,1256 [2008]; *Acton v Nally*, 38 AD3d 973, 976 [2007]; *Deyo v Laidlaw Tr.*, 285 AD2d 853, 854 [2001]). "[F]actors to be considered in evaluating such awards include the nature, extent and permanency of the injuries, the extent of past, present and future pain and the long-term effects of the injury" (*Nolan*, 51 AD3d at 1256).

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The testimony presented at trial by the plaintiff and his wife revealed that plaintiff was in extreme pain from August 6th through August 8th. He remained hospitalized for one week following the surgery to remove his sigmoid colon and insert a colostomy bag. The colostomy bag remained in place for four months and required visiting nurse care during the first month. Testimony was given regarding plaintiff's gaping wounds and the need for a second surgery to reverse the colostomy, which resulted in a two week hospitalization due to various complications. Plaintiff was unable to work for several months and thereafter, only for a reduced number of hours. In addition, he developed a hernia which resulted in an additional surgery. Plaintiff testified that he suffers from incontinence, abdominal pain and has been unable to resume his prior level of activity.

Accordingly, the jury's determination to award $600,000 for past pain and suffering and $400,000 for future pain and suffering should be afforded deference as it does not deviate materially from reasonable compensation for plaintiff's injuries (*see Jump*, 292 AD2d at 503 [2002][$1.3 million for past pain and suffering for the eight month period that the decedent suffered following surgery related to removing cancerous portion of colon which resulted in a tear and the insertion of a colostomy bag, abdominal pain and infections]; *see Butterfield v Caputo*, 108 AD3d 1162 [2013] [jury awarded $1.8 million for 30 years of pain and suffering for negligent laproscopic surgery with no follow up surgeries]; *Beverly H. v Jewish Hospital & Medical Center*, 135 AD2d 497, 498 [1987] [recto vaginal fistula from an episiotomy resulting in four surgeries, including the insertion and removal of a colostomy bag.

The jury awarded plaintiff $1.0 million for past pain and suffering and $500,000 for future pain and suffering, reduced by the trial court to $ 600,000 for pain and suffering up to the time of trial and $ 100,000 for future pain and suffering]).

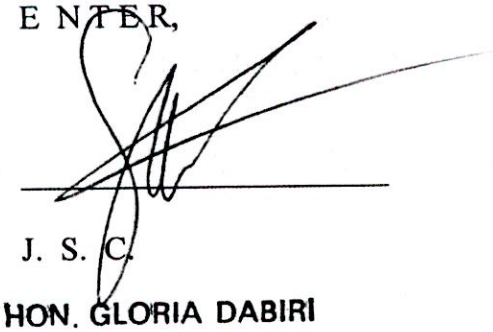
Defendants also seek to vacate the jury's award of $100,000 for past medical expenses arguing that plaintiff failed to offer any medical testimony establishing that the medical bills were reasonably related to the alleged deficiencies in treatment and that the bills are not properly included as damages because plaintiffs did not notify defendants in their 2009 Bill of Particulars of their intent to recover this amount. Alternatively, defendants argue that a collateral source hearing should be held because Blue Cross/Blue Shield covered all of plaintiff's medical expenses. In opposition, the plaintiff contends that he claimed $600,000 for medical expenses in his Bill of Particulars, of which $100,000 was proven at trial. In reply, defendants note that plaintiff does not dispute that his bills were paid by Blue Cross/Blue Shield and thus a collateral source hearing is warranted.

CPLR 4545 (a) provides in relevant part that "[a]ny collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict." Accordingly, a hearing shall be held before a judicial hearing officer to determine the amount, if any, of the collateral source deduction to be made from the jury's award for medical expenses (*see Turuseta v Wyassup-Laurel Glen Co.*, 91 AD3d 635 [2012]; *Firmes v Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 36 [2008]).

The court has considered the defendants' remaining contentions and finds them to be without merit.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. GLORIA DABIRI