

LAWYERS WEEKLY USA

August 15, 2005

2005 LWUSA 46:

News Story

Laser Eye Surgery Verdict Nearly Doubles Previous Record Breaks New Ground With Damages For Pain And Suffering

By Natalie White

A New York jury awarded \$7.25 million recently to a former Wall Street investment banker who said his vision was permanently damaged after botched LASIK eye surgery.

The award was nearly twice the previous record in a laser eye surgery case - \$4 million in 2003 - and marked the first time a plaintiff has won substantial damages for pain and suffering in a LASIK case.

Mark Schiffer, 32, a graduate of Yale and the prestigious Wharton School of Finance, said the October 2000 surgery forced him to abandon his promising Wall Street career and settle instead for a job with his father's securities firm.

His attorney, Todd Krouner, said Schiffer was never a good candidate for the procedure and should have been screened out before surgery at TLC Laser Eye Center, one of the nation's largest LASIK eye surgery centers.

"We had terrific experts and a terrific case. This surgery never should have been done in the first place, because the shape of his corneas are a contra-indication for LASIK," said Krouner.

The jury found the doctor in the case 100 percent liable, ruling that TLC should not be held liable. The jury also found for the defendants on the issue of informed consent, deciding that the patient had been fully informed of the risks involved in LASIK surgery.

LASIK is an acronym for Laser-Assisted In Situ Keratomileusis, a type of refractive laser eye surgery to correct vision and reduce a person's dependency on glasses and contact lenses. Special lasers reshape corneal tissues, changing focusing power.

Evolving Litigation

In the previous record award, Steve Post of Arizona said he had to quit his job as an airline pilot because of failed LASIK eye surgery. Before that the record award in a LASIK case was \$1.7 million, awarded in 2002 to a Kentucky woman who required a corneal transplant after four failed LASIK surgeries.

The 2003 Arizona verdict broke new ground not only for the size of the award, but also because it was the first jury trial to focus on poor pre-operative screening of patients rather than surgical error or equipment problems.

The most recent case used the same argument, but was groundbreaking in its own right in that it was the first jury to give significant damages for pain and suffering. The verdict, awarded by a Manhattan Supreme Court jury, included \$4.5 million for lost wages and \$2.75 million for pain and suffering.

"I think this is going to sensitize the legal community and terrify the medical community," said Ken Keith, a New

York attorney who specializes in LASIK malpractice. "This case is significant because the jury recognized the significant pain and suffering that happens when LASIK goes bad."

Krouner said that there are about 4 million LASIK surgeries done each year, and he estimated that about 5 to 10 percent of those patients are not satisfied with their results.

Keith said that it is difficult to track the number of LASIK cases, but he believes that litigation is on the rise as more lawyers become familiar with the issues. He said the recent verdict including pain and suffering will also spur more attorneys to look closely at LASIK cases.

"This \$7 million verdict will make it economically appealing for lawyers to address this type of case," Keith said.

Sloppy Screening

Krouner compared the TLC Laser Eye Center to a fast food chain, saying patients are rushed through a "conveyor belt" of preoperative screenings and surgeries. He said Schiffer was the eleventh surgery of the day for Dr. Mark Speaker on Oct. 6, 2000.

Krouner said that neither the screeners nor Dr. Speaker saw the obvious warning signs that Schiffer's corneas made him a bad candidate for LASIK eye surgery because he had keratoconus, a degenerative eye condition.

"My client should have been screened out" by the referring optometrist, by the screener and by the surgeon, Krouner said.

He blamed the oversight in part on the screening process at TLC, which is handled by a person who is not directly responsible to the surgeon.

"This case isn't an indictment of LASIK as much as it is of co-managed care, where the responsibility for patients is divided up," said Krouner. "The notion of delegating the screening process to someone the surgeon doesn't even know or train or have direct responsibility for is the problem."

The defense, however, argued that the plaintiff did not suffer any pre-existing abnormality.

According to defense counsel Peter Kopff of New York, Schiffer suffered from "post LASIK ectasia," or thinning of the corneas - a complication that was not predictable. He noted that Speaker, medical director of TLC at the time, is one of the best-known LASIK surgeons in the region and has performed thousands of such surgeries.

The defense also contended that the plaintiff's injuries were exaggerated.

The plaintiff maintained that after the surgery, he suffered from distorted vision and had to undergo several eye surgeries, including a cornea transplant, to try to restore his sight. Krouner argued that his client's vision remains impaired and that he must live with the risks of the corneal transplant, which could be rejected or come unstitched.

He said Schiffer's vision is now "like trying to read a stop sign at night, in the rain, through a windshield."

In contrast, the defense contended that Schiffer has 95 percent of full vision in his left eye with the corneal transplant and that his right eye could be corrected to 20/20 vision. He noted that the plaintiff drives to and from work and at night.

Kopff also questioned the plaintiff's motivation for leaving his Wall Street job. He lamented that the defense was precluded from getting Mr. Schiffer's psychiatric records.

"I wonder if he told his psychiatrist that he was leaving investment banking because of his vision or because of the 20-hour days he had to work?" Kopff said.

The jury sided with Schiffer, awarding him \$500,000 for past lost earnings and \$4 million for future lost income, Krouner said.

Krouner said testimony from medical experts and an economist bolstered the plaintiff's case. He said eye experts showed jurors how Schiffer's sight had deteriorated and how the shape of his corneas should have alerted doctors not to operate. He said an economist presented a chart showing Schiffer's potential earnings.

The entire verdict, however, was assessed against Dr. Speaker, absolving TLC of any liability. Krouner said that the plaintiff intends to "vigorously pursue Dr. Speaker in collecting the judgment when it is entered."

Kopff said Dr. Speaker will appeal, in part on the grounds that an editorial from a 1999 edition of the Journal of Corneal and Refractive Surgery was allowed into evidence. He said the admission of medical literature as evidence is forbidden in New York.

"I cannot cross examine the [author] on whether his suggestions in the editorial constituted the standard of care for the average ophthalmologist," Knopff said.

Plaintiff's Attorneys: Todd J. Krouner of Law Offices of Todd J Krouner in Chappaqua, N.Y.

Defense Attorneys: Peter Kopff of Kopff, Nardelli & Dopf in New York; and Ralph Catalano of Catalano, Gallardo & Petropoulos in Jericho, N.Y.

The Case: *Schiffer v. Speaker*; July 27, 2005; Manhattan Supreme Court, New York; Judge Alice Schlesinger.

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