

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NUMBER _____

SCOTT CZARNIAK and ADRIENNE
CZARNIAK,

Plaintiffs,

vs.

20/20 INSTITUTE, LLC and MATTHEW K.
CHANG, M.D.,

Defendants.

COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES

JURY TRIAL DEMANDED

1. Plaintiffs, SCOTT CZARNIAK and ADRIENNE CZARNIAK, by and through their attorneys, the Law Office of Todd J. Krouner and Cross & Bennett, L.L.C., hereby file this Complaint and Jury Demand against the defendants as follows:

INTRODUCTION

2. On May 8, 2009, Scott Czarniak presented at defendants, the 20/20 Institute, LLC (the “20/20 Institute”) for LASIK surgery, which was performed by Matthew K. Chang, M.D. (“Dr. Chang”) (herein after referred to as the “Subject Surgery”). Due to the blunder of Dr. Chang, or a LASIK technician employed by the 20/20 Institute and working under the direct supervision of Dr. Chang, the wrong numbers were entered into the surgical (or excimer) laser for Scott Czarniak’s left eye. As a result, Scott Czarniak developed severe visual disabilities, which cost him his job as a commercial banker in Avon, Colorado. As a result of Scott Czarniak’s unemployment, he also lost his home in Avon, Colorado, had to relocate his family and required corrective surgery in an effort

to restore his vision.

3. At the time of the Subject Surgery, Dr. Chang's surgical plan for Scott Czarniak's left eye was $-.50 = -3.25 \times 170$. However, the wrong numbers were entered into the excimer laser.

Either Dr. Chang, or his technician, negligently entered $-.50 = +3.25 \times 170$, into the excimer laser.

4. Defendants have made the following admissions:

a. on May 9, 2009, the day after his surgery, during his post-operative check-up, Scott Czarniak was told by an optometrist whose identity is presently unknown, at the 20/20 Institute, in sum or substance, that "the prescription was entered into the excimer laser backwards."

b. on May 9, 2009, Scott Czarniak was told by Christine Stone, the Director of the 20/20 Institute, in sum or substance, that "the 20/20 Institute would refund the full cost of the procedure."

c. on May 9, 2009, Dr. Chang called Scott Czarniak three times.

d. on or about May 16, 2009, during a post-operative visit, Scott Czarniak asked Mark Danzo, O.D., co-founder of the 20/20 Institute, how the wrong prescription could have been entered into the excimer laser. Dr. Danzo answered in sum or substance, "It will never happen again."

e. by letter dated May 12, 2009, Dr. Danzo, wrote to David Bernitsky, M.D.: "Mr. Czarniak was seen in our office for bilateral LASIK on May 8, 2009. The right eye was treated without incident. The left eye was to be treated with a surgical laser plan of $-.50 = -3.25 \times 170$. The patient incorrectly received the following treatment in the left eye: $-.50 = +3.25 \times 170$, of which he was been informed." Dr. Danzo's May 12,

2009 letter is annexed hereto as Exhibit A.

5. As a result of the Subject Surgery, Scott Czarniak developed blurriness and distorted vision in his left eye, at both distance and near. The axis of astigmatism¹ was flipped 90 degrees, thus doubling the pre-operative astigmatism. Among other things, this resulted in diminished visual acuity, loss of visual quality, and an overall loss of visual function in his left eye. Notwithstanding the expectation of 20/20 visual acuity after the Subject Surgery, Scott Czarniak's uncorrected acuity in his left eye was 20/100.

6. On September 25, 2009, Scott Czarniak had corrective surgery which was required on his left eye, as a result of defendants' carelessness.

7. As a result of defendants' negligence, Scott Czarniak and his family have suffered great emotional distress and economic loss. Consequently, as set forth below, plaintiffs seek damages against defendants for negligence, breach of informed consent, violation of the Colorado Consumer Protection Act, and Common Law Fraud and Misrepresentation.

PARTIES

8. Plaintiffs reside in Albuquerque, County of Bernalillo, New Mexico.

9. At all relevant times, the 20/20 Institute, was and is a corporation that was incorporated under, and existing pursuant to, the laws of the State of Colorado, with its principal place of business at 400 Inverness Parkway, Suite 100, Englewood, Colorado, and is doing business in the State of Colorado.

10. At all relevant times, defendant Dr. Chang was a physician licensed to practice medicine in the State of Colorado, holding himself out as a specialist in ophthalmology who

¹ Astigmatism is characterized by an irregular curvature of the cornea, which causes light entering the eye to refract in many directions, leading objects at a distance to appear blurry and wavy. <http://www.webmd.com/eye-health/astigmatism-eyes>

specializes in LASIK and LASEK surgeries, corneal transplants, cataracts, glaucoma, and other anterior segment disorders. He currently practices in the State of Colorado.

11. At all relevant times, defendant Dr. Chang was an employee, agent and/or owner of the 20/20 Institute. Whenever Dr. Chang provided any medical care or services whatsoever to, or on behalf of Scott Czarniak, Dr. Chang was doing so within the course and scope of his employment and/or agency for and on behalf of the 20/20 Institute.

JURISDICTION AND VENUE

12. The amount in controversy, exclusive of interest and costs, exceeds seventy-five thousand dollars (\$75,000).

13. Plaintiffs reside in New Mexico. Defendants are found in and transact business in this district, and the acts and omissions that form the basis of this Complaint occurred in this district. Jurisdiction and venue in this Court are therefore proper pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1391(a), respectively, based upon diversity of citizenship of the parties

FACTS

14. Scott Czarniak was, and remains, the husband of Adrienne Czarniak, and as such they duly reside together as husband and wife. Plaintiffs were married at all times material to this action. At the time of the Subject Surgery, plaintiffs resided in Avon, Colorado.

15. In 2009, Scott Czarniak sought to determine whether he was a suitable candidate for LASIK eye surgery. He was impressed and influenced by the fact that the 20/20 Institute claimed to treat professional hockey and football athletes. Indeed, it boasted that it was the official LASIK provider of the Colorado Avalanche and Indianapolis Colts.

16. In addition, the 20/20 Institute guaranteed its patients, including Scott Czarniak, that

they would achieve 20/20 vision. Under the terms of its guarantee, the 20/20 Institute promised its patients that they would achieve 20/20 visual acuity, without the use of corrective lenses, or the surgery would be free.

17. Furthermore, the 20/20 Institute offered a lifetime vision commitment, which provides for follow-up care to “ensure a lifetime of clear vision.”

18. The American Academy of Ophthalmology issued a policy statement, cautioning against overly aggressive advertising for LASIK procedures. “Physicians should avoid permanency claims unless they are able to substantiate the claims on the basis of their own surgical outcomes alone or in combination with current scientific evidence.”²

FIRST CLAIM FOR RELIEF
(Negligence)

19. Plaintiffs incorporate all allegations made in Paragraphs 1-18, above.

20. The negligent and careless acts and/or omissions of Dr. Chang, individually and/or through his real, apparent and/or ostensible agents, servants and/or employees, include but are not necessarily limited to:

- a. failing to adhere to his duty to care for plaintiff Scott Czarniak using the standard of care normally exercised by physicians generally under like conditions and similar surroundings;
- b. failing to render appropriate medical care and treatment to Scott Czarniak;
- c. negligently entering the wrong prescription into the excimer laser;
- d. failing to heed Scott Czarniak’s condition;
- e. departing from accepted standards in the procedures and treatment performed;

² <http://www.aao.org/about/policy/upload/Guidelines-for-Refractive-Surgery-Advertising-2008.pdf>

- f. failing to follow appropriate practice;
- g. failing to properly examine Scott Czarniak;
- h. failing to properly treat Scott Czarniak's eyes; and,
- i. failing to supervise the technicians and staff assisting with the Subject Surgery.

21. As a direct and proximate result of the negligence of Dr. Chang, Scott Czarniak experienced excruciating pain and suffering, suffered loss of vision, was otherwise grievously injured and damaged because of the complications of the Subject Surgery.

22. One or more of the foregoing breaches of the duty of reasonable care, by Dr. Chang, was a proximate cause of the injuries and damages sustained by plaintiffs.

23. The 20/20 Institute is vicariously liable under the laws of agency and *respondeat superior* for the acts and omissions of its agents, servants and/or employees who negligently treated and/or negligently cared for Scott Czarniak, while he was a patient of the 20/20 Institute. Any negligence of these agents, servants, and/or employees is imputed, by law, to the 20/20 Institute, under the principles of actual or apparent agency and/or *respondeat superior*.

24. The negligent and careless acts and/or omissions of the 20/20 Institute, through its real, apparent and/or ostensible agents, servants and/or employees, include but are not necessarily limited to the following:

- a. failing to train, supervise and manage Dr. Chang, and its technician(s).
- b. failing to promulgate and/or enforce surgical protocols to prevent the negligent acts complained of herein, and in particular, the failure to require cross-checking and/or the failure to competently assure that the data was entered into the excimer laser correctly.

25. One or more of the foregoing acts or omissions by the 20/20 Institute, was a proximate cause of the injuries and damages sustained by plaintiffs.

SECOND CLAIM FOR RELIEF
(Colorado Consumer Protection Act)

26. Plaintiffs incorporate herein all allegations made in Paragraphs 1-25, above.

27. As alleged herein, defendants engaged in deceptive trade practices prohibited by the Colorado Consumer Protection Act, C.R.S. § 6-1-101, et seq., including false and misleading advertisements as detailed herein.

28. As alleged herein, defendants engaged in deceptive trade practices prohibited by the Colorado Consumer Protection Act, C.R.S. § 6-1-105(1)(g), in that defendants advertised that their services are of a particular quality when defendants knew or should have known they are of another quality, including knowingly making false representations as to the benefits of the services they offer.

29. As alleged herein, defendants engaged in deceptive trade practices prohibited by the Colorado Consumer Protection Act, C.R.S. § 6-1-105(1)(i), in that defendants advertised their services, with the intent of not providing their services as advertised.

30. As alleged herein, defendants engaged in deceptive trade practices prohibited by the Colorado Consumer Protection Act, C.R.S. § 6-1-105(1)(c), in that defendants knowingly made false representations as to affiliation, connection, or association with or certification by another.

31. As alleged herein, defendants engaged in deceptive trade practices prohibited by the Colorado Consumer Protection Act, C.R.S. § 6-1-105(1)(u), including failing to disclose material information concerning services, which information was known at the time of an advertisement, if such failure to disclose such information was intended to induce the consumer to enter into a

transaction.

32. The following statements were false and misleading:

- a. Through their 20/20 guarantee, defendants expressly promised Scott Czarniak that he would obtain 20/20 uncorrected visual acuity, when in fact his post-LASIK visual acuity was 20/100;
- b. Through the name of the 20/20 Institute, defendants implicitly promised Scott Czarniak that he would obtain perfect vision from their LASIK surgery, when in fact he did not;
- c. Defendant's statements that it is the official LASIK provider of (i) the Colorado Avalanche; and (ii) the Indianapolis Colts. Upon information and belief, defendants are neither the official LASIK provider to either the Colorado Avalanche or the Indianapolis Colts. The basis of such information and belief is the absence of any testimonials from any professional athletes on either of the aforesaid sports teams on the 20/20 Institute's website;
- d. Defendants promised a "lifetime of clear vision;" and,
- e. Defendants failed to disclose the fact that they relied upon a large volume of LASIK procedures to increase revenues and decrease costs.

33. These deceptive trade practices occurred in the course of the defendants' business.

34. These deceptive trade practices significantly impacted the public as actual or potential consumers of the defendants' services.

35. Scott Czarniak was an actual user of defendants' services.

36. Scott Czarniak had notice of, and relied upon defendants' misrepresentations, and

suffered injuries and actual damages, as a direct result of the defendants' deceptive trade practices.

37. As a result, Scott Czarniak is entitled to all of the relief afforded by the Colorado Consumer Protection Act, C.R.S. § 6-1-101, et seq., including attorneys' fees and costs.

THIRD CLAIM FOR RELIEF
(Common Law Fraud and Misrepresentation)

38. Plaintiffs incorporate herein all allegations made in Paragraphs 1-37, above.

39. Defendants made misrepresentations of fact as detailed herein including the representation that LASIK would enable Scott Czarniak to have 20/20 vision, without the use of glasses or corrective prescription lenses of any kind.

40. The following misrepresentations were material to Scott Czarniak's decision to undergo LASIK surgery and were reasonably and justifiably relied upon by Scott Czarniak in making his decision to undergo the Subject Surgery:

- a. Through their 20/20 guarantee, defendants expressly promised Scott Czarniak that he would obtain 20/20 uncorrected visual acuity, when in fact his post-LASIK visual acuity was 20/100;
- b. Through the name of the 20/20 Institute, defendants implicitly promised Scott Czarniak that he would obtain perfect vision from their LASIK surgery, when in fact he did not;
- c. Defendant's statements that it is the official LASIK provider of (i) the Colorado Avalanche; and (ii) the Indianapolis Colts. Upon information and belief, defendants are neither the official LASIK provider to either the Colorado Avalanche or the Indianapolis Colts. The basis of such information and belief is the absence of any testimonials from any professional athletes on either of the

aforesaid sports teams on the 20/20 Institute's website;

d. Defendants promised a "lifetime of clear vision."

41. Scott Czarniak had notice of, and relied upon, defendants' misrepresentations, and suffered injuries and actual damages, as a direct result of defendants' fraudulent misrepresentations.

42. As a direct result of his reasonable and justifiable reliance upon the aforesaid misrepresentations of the defendants, Scott Czarniak suffered injuries and actual damages.

FOURTH CLAIM FOR RELIEF
(Loss of Consortium/Services)

43. Plaintiffs incorporate herein all allegations made in Paragraphs 1-42, above.

44. As a result of the foregoing occurrence, and resulting injuries to her husband as afore stated, Adrienne Czarniak has been and will be deprived of the services, society, support, companionship and consortium of her husband, Scott Czarniak.

CAUSATION AND DAMAGES

45. Plaintiffs incorporate all allegations made in Paragraphs 1-44, above.

46. As a direct and proximate result of the defendants' acts and omissions, plaintiffs have incurred, and will incur, the following general and special damages:

a. Economic loss, including without limitation, loss of past income, impairment of future earning capacity, and the short sale of the Czarniaks' Avon, Colorado residence;

b. Past and future pain and suffering, including emotional distress and loss of life's enjoyment;

c. Past and future medical and related eye care expenses;

d. Past and future loss of consortium/services;

e. All statutory damages, including but not limited to, treble damages, costs and

attorneys' fees

f. All such other monetary relief and compensatory damages as are permissible at common law and by statute and to which plaintiffs Scott Czarniak and Adrienne Czarniak are entitled.

WHEREFORE, plaintiffs pray for an award of damages to be fixed by the trier of fact in a reasonable amount. Additionally, plaintiffs ask for costs of this action, all pre-judgment and post-judgment interest as provided by law, trebling of damages, expert witness's and attorneys' fees where appropriate, and for all such other relief as the Court deems appropriate.

JURY TRIAL DEMANDED

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, plaintiffs hereby demand a trial by jury.

DATED this 22nd day of December, 2010

Respectfully submitted,

BY: /s/Todd Krouner
Todd J. Krouner (TK 0308)
Law Office of Todd J. Krouner
Co-Counsel for Plaintiffs
93 North Greeley Ave.
Chappaqua, New York 10514
Phone Number: 914-238-5800
Fax Number: 914-238-5820

BY: /s/Keith Cross
Keith Cross, #8934
Cross & Bennett, LLC
Co-Counsel for Plaintiffs
108 E. St. Vrain, Suite 20
Colorado Springs, CO
Phone Number: 719-633-1359
Fax Number: 719-633-5788

CERTIFICATION

Pursuant to C.R.S. § 13-20-602(3)(a), counsel certifies that:

- a. Counsel has consulted with a physician with expertise in the area of the alleged negligent conduct as set forth in this Complaint;
- b. The physician who has been consulted has reviewed all known facts relevant to the allegations of negligent conduct as alleged in this Complaint;
- c. Based upon review of such facts, the physician has concluded that the filing of the claims against the Defendants does not lack substantial justification within the meaning of C.R.S. § 13-17-102(4); and,

The aforementioned physician who has reviewed all known facts relevant to the allegations of negligent conduct as contained in plaintiffs' Complaint meets the requirements set forth in C.R.S. § 13-64-401.

DATED this 22nd day of December, 2010

Respectfully submitted,

BY: /s/ Todd Krouner
Todd J. Krouner (TK 0308)
Law Office of Todd J. Krouner
Co-Counsel for Plaintiffs
93 North Greeley Ave.
Chappaqua, New York 10514
Phone Number: 914-238-5800
Fax Number: 914-238-5820