

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - November 3, 2008

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
FRED T. SANTUCCI
EDWARD D. CARNI, JJ.

2007-07411
2008-09974

DECISION & ORDER

Maria Monroy, respondent, v Ioannis Glavas, et al.,
defendants, Henry Futterman, appellant.

(Index No. 23751/03)

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, N.Y. (Richard E. Lerner of counsel), for appellant.

Simonson Hess & Leibowitz, P.C., New York, N.Y. (Edward S. Goodman of counsel), for respondent.

In an action to recover damages for medical malpractice, the defendant Henry Futterman appeals from (1) a judgment of the Supreme Court, Queens County (O'Donoghue, J.), entered June 20, 2007, and (2) an amended judgment of the same court entered October 31, 2008, which, upon a jury verdict on the issue of liability finding him 100% at fault in the happening of the accident, and a jury verdict on the issue of damages finding that the plaintiff sustained damages in the principal sums of \$800,000 for past pain and suffering and \$1,600,000 for future pain and suffering, and upon the denial of his motions pursuant to CPLR 4401 for judgment as a matter of law for failure to establish a prima facie case and pursuant to CPLR 4404(a) to set aside the jury verdict as against the weight of the evidence and for a new trial, is in favor of the plaintiff and against him.

ORDERED that the appeal from the judgment is dismissed, as the judgment was superseded by the amended judgment; and it is further,

ORDERED that the amended judgment is reversed, on the facts and in the exercise

December 9, 2008

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of discretion, with one bill of costs, and a new trial is granted on the issue of damages only, unless, within 30 days after service upon the plaintiff of a copy of this decision and order, she shall serve and file in the office of the Clerk of the Supreme Court, Queens County, a written stipulation consenting to reduce the damages for past pain and suffering from the principal sum of \$800,000 to the principal sum of \$400,000, and the damages for future pain and suffering from the principal sum of \$1,600,000 to the principal sum of \$800,000, and to the entry of an amended judgment accordingly; in the event that the plaintiff so stipulates, then the amended judgment, as so reduced and amended, is affirmed, without costs or disbursements.

To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove that the appellant deviated from accepted practice, and that such deviation proximately caused her injuries (*see Lovett v Interfaith Med. Ctr.*, 52 AD3d 578, 579). Here, the evidence was legally sufficient to support the jury's finding that the appellant deviated from accepted medical practice in various respects, and that such deviations proximately caused the plaintiff's injuries (*id.*).

Moreover, the jury's findings were based on a fair interpretation of the evidence, and thus were not against the weight of the evidence (*see Nicaastro v Park*, 113 AD2d 129, 134-135). Where, as here, both parties present expert testimony in support of their positions, it is the province of the jury to determine the experts' credibility (*see Lovett v Interfaith Med. Ctr.*, 52 AD3d at 580).

However, the jury's awards for past and future pain and suffering deviated materially from what would be reasonable compensation to the extent indicated herein (*see Sam v Zelman*, 271 AD2d 429).

SKELOS, J.P., LIFSON, SANTUCCI and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court