

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

D25317
C/prt

_____AD3d_____

Argued - October 19, 2009

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2008-07017

DECISION & ORDER

Hyvia Sankar, etc., appellant, v Jamaica
Hospital Medical Center, et al., respondents.

(Index No. 28868/04)

Finz & Finz, P.C., Jericho, N.Y. (Jay L. Feigenbaum of counsel), for appellant.

Martin Clearwater & Bell LLP, New York, N.Y. (Arjay G. Yao and Kenneth R.
Larywon of counsel), for respondents.

In an action to recover damages for medical malpractice, the plaintiff appeals, on the ground of inadequacy, from a judgment of the Supreme Court, Queens County (Weiss, J.), entered June 9, 2008, which, upon a jury verdict awarding her the sums of only \$40,000 for past pain and suffering and \$140,000 for future pain and suffering, is in favor of her and against the defendants, Jamaica Hospital Medical Center and Linda Mae Belstein, in the principal sum of only \$20,000, reflecting the application of General Obligations Law § 15-108 to the settlement of her cause of action against another defendant for the sum of \$160,000.

ORDERED that the judgment is reversed, on the facts and in the exercise of discretion, with costs, and the matter is remitted to the Supreme Court, Queens County for a new trial on the issue of damages for future pain and suffering unless within 30 days after service upon the defendants of a copy of this decision and order, the defendants shall serve and file in the office of the Clerk of the Supreme Court, Queens County, a written stipulation consenting to increase the verdict as to damages for future pain and suffering to the principal sum of \$240,000, and to the entry of an amended judgment accordingly; in the event the defendants so stipulate, then the judgment, as so increased and amended, is affirmed insofar as appealed from, without costs or disbursements. The

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jury verdict insofar as it awarded the sum of \$40,000 for past pain and suffering is affirmed.

As a result of the defendants' negligence, the plaintiff, an infant, suffers from a mild form of Erb's palsy. The plaintiff's expert testified that the plaintiff's disability is a limited one, related to elevating her left arm above her head and moving her left arm away from her body. Specifically, she can only elevate her arm to between 160 and 170 degrees, instead of to a full 180 degrees. Nonetheless, this is a permanent injury she will have to live with for the rest of her life, which is expected to be another 70 years. While there is no difference in the length of her arms, and no atrophy in the left arm, the plaintiff has scapula winging, where her shoulder blade sticks out from her back when she moves her arms. According to the plaintiff's expert, the scapula winging condition is an indication of shoulder weakness that will pose difficulties for the plaintiff in numerous activities which require elevating her arm above her head.

Under the circumstances, the jury award of \$140,000 for future pain and suffering deviated materially from what would be reasonable compensation (*see* CPLR 5501[c]; *cf. Charles v Day*, 289 AD2d 190).

The plaintiff's remaining contentions are without merit.

DILLON, J.P., DICKERSON, BELEN and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court