

--- N.Y.S.2d ----, 2010 WL 4541860
(N.Y.A.D. 4 Dept.), 2010 N.Y. Slip Op. 08223

**This opinion is uncorrected and subject to revision
before publication in the printed Official Reports.**

RICHARD WINIARSKI AND CATHLEEN
WINIARSKI, PLAINTIFFS-RESPONDENTS,

v.

LINDA HARRIS, M.D., UNIVERSITY AT BUFFALO
SURGEONS, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS. (APPEAL NO. 2.)

OPINION

1239 CA 10-00490
Supreme Court, Appellate Division,
Fourth Department, New York
Decided on November 12, 2010

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE,
AND GORSKI, JJ.

Appeal from a judgment of the Supreme Court, Erie County
(Frank A. Sedita, Jr., J.), entered January 26, 2010 in a
medical malpractice action. The judgment awarded plaintiffs
money damages upon a jury verdict.

APPEARANCES OF COUNSEL

BROWN & TARANTINO, LLC, BUFFALO (ANN
M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-
APPELLANTS.

STAMM, REYNOLDS & STAMM, WILLIAMSVILLE
(GREGORY STAMM OF COUNSEL), FOR PLAINTIFFS-
RESPONDENTS.

It is hereby ORDERED that the judgment so appealed from
is unanimously modified on the law by granting the post-trial
motion of defendants Linda Harris, M.D. and University at
Buffalo Surgeons, Inc. in part and setting aside the award
of damages for past and future pain and suffering and as
modified the judgment is affirmed without costs, and a new
trial is granted on damages for past and future pain and
suffering only unless those defendants, within 30 days of
service of a copy of the order of this Court with notice
of entry, stipulate to increase the award of damages for
past pain and suffering to \$162,000 and for future pain
and suffering to \$400,000, in which event the judgment

is modified accordingly and as modified the judgment is
affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking
damages for injuries sustained by Richard Winiarski
(plaintiff) during surgery due to the medical malpractice of
his surgeon, Linda Harris, M.D. (defendant). We reject the
contention of defendants-appellants (hereafter, defendants)
that Supreme Court erred in denying their post-trial motion to
set aside the jury verdict on the ground that plaintiffs failed to
establish a prima facie case of medical malpractice. In order
to establish their entitlement to that relief, defendants had to
establish that the evidence was legally insufficient, i.e., "that
there [was] simply no valid line of reasoning and permissible
inferences which could possibly lead rational [persons] to the
conclusion reached by the jury on the basis of the evidence
presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493,
499; *see Stewart v Olean Med. Group, P.C.*, 17 AD3d 1094,
1095). Here, there is a valid line of reasoning supporting
the jury's verdict that defendant deviated from the applicable
standard of care in her performance of plaintiff's surgery, and
that such *2 deviation was a proximate cause of plaintiff's
injuries (*see generally Johnson v Jamaica Hosp. Med. Ctr.*, 21
AD3d 881, 882-883). Contrary to the alternative contention
of defendants in support of their post-trial motion, the verdict
was not against the weight of the evidence, i.e., it did not
so preponderate in defendants' favor such that the jury could
not have found for plaintiffs on any fair interpretation of
the evidence (*see generally Lolik v Big V Supermarkets*, 86
NY2d 744, 746; *Stewart*, 17 AD3d at 1095-1096). Indeed,
"[t]his trial was a prototypical battle of the experts, and the
jury's acceptance of [plaintiffs'] case was a rational and fair
interpretation of the evidence" (*Lillis v D'Souza*, 174 AD2d
976, 977, *lv denied* 78 NY2d 858).

We agree with the contention of defendants in their post-
trial motion that Supreme Court erred in permitting plaintiffs'
counsel to attempt to impeach defendant by reading into
the record a passage from an unidentified medical treatise
during plaintiffs' direct examination of defendant. "Although
opinion in a publication which an expert deems authoritative
may be used to impeach an expert on cross-examination . . . ,
the introduction of such testimony on direct examination
constitutes impermissible hearsay" (*Lipschitz v Stein*, 10
AD3d 634, 635). Further, even considering that, as an adverse
party, the direct examination of defendant by plaintiffs'
counsel could and, in fact did, "assume the nature of cross-
examination" (*Jordan v Parrinello*, 144 AD2d 540, 541), here
defendant never accepted the medical treatise as authoritative
(*see Labate v Plotkin*, 195 AD2d 444, 445). Nevertheless, we
cannot conclude that such an isolated error warrants reversal

under the circumstances of this case (*cf. id.*; *see generally Messina v Renison*, 21 AD2d 803). Although we also agree with defendants that plaintiffs' counsel erred on summation in referring to testimony that had been stricken from the record, we note that defendants did not object (*see Stewart*, 17 AD3d at 1096-1097). In any event, that error, as well as the other alleged errors in the summation of plaintiffs' counsel "to the extent that they are preserved, are not so flagrant or excessive that a new trial is warranted" (*Dombrowski v Moore*, 299 AD2d 949, 951).

Contrary to the further alternative contention of defendants in their post-trial motion, the court properly determined that the jury's award for past pain and suffering of \$12,000 and for future pain and suffering of \$40,000 deviated materially from what would be reasonable compensation for plaintiff's injuries (*see CPLR 5501 [c]*; *Garrow v Rosettie Assoc., LLC*, 60 AD3d 1125, 1125-1126). Plaintiff, who is right-handed, suffered from scapular winging and a permanent limitation of his right shoulder and arm as a result of defendant's malpractice. As plaintiffs correctly concede, however, the court erred in unconditionally increasing the jury verdict inasmuch as "[t]he proper procedure when a

damages award is inadequate is to order a new trial on damages unless [a] defendant stipulates to the increased amount" (*Rajeev Sindhvani, M.D., PLLC v Coe Bus. Serv., Inc.*, 52 AD3d 674, 677; *see Feathers v Walter S. Kozdranski, Inc.*, 129 AD2d 975). Further, although we conclude that the increased award of \$162,000 for past pain and suffering does not "deviate [] materially from what would be reasonable compensation" (CPLR 5501 [c]), we conclude that an award of \$400,000 for plaintiff's future pain and suffering, rather than the sum of \$540,000 as determined by the court, is the highest amount a jury could have awarded plaintiffs (*see generally Garrow*, 60 AD3d at 1125-1126).

We have reviewed defendants' remaining contentions and conclude that they are without merit.

Entered: November 12, 2010

Patricia L. Morgan

Clerk of the Court

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