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Carrasquillo v City of New York
2009 NY Slip Op 52244(U)
Decided on October 5, 2009
Supreme Court, Kings County
Rivera, J.
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Decided on October 5, 2009

Supreme Court, Kings County

Erica Carrasquillo, an infant by her mother and natural guardian, Lisa Carrasquillo and Lisa Carrasquillo, individually, Plaintiffs,

against

The City of New York and The Parks and Recreation Department of the City of New York, Defendants.

13888/01

Plaintiffs:

John J. Nonnemacher, Esq.

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Defendants

Michael V. Ready, Esq.

Corporation Counsel of City of New York

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Francois A. Rivera, J.

On January 30, 2009, defendants jointly moved this court to dismiss the plaintiffs's complaint and/or to reduce the jury's verdict on both past and future pain and suffering as being excessive. By order dated February 27, 2009, this court found the verdict to be excessive and directed the plaintiffs to either accept the reduction of the verdict for past pain and suffering from \$500,000.00 to \$300,000.00 and for future pain and suffering from \$2,600,000.00 to \$900,000.00 or proceed to a new trial on damages within thirty days.

Plaintiffs move under motion sequence number nine, for an order pursuant to CPLR §2221(d) granting leave to reargue this court's aforementioned order dated [*2]February 27, 2009. Defendants oppose the motion.

By order of this court, dated June 26, 2009, the court granted plaintiff's portion of the motion seeking re-argument and reserved decision pending review of the original and instant motion papers.

BACKGROUND

This is an action to recovery monetary damages for personal injuries suffered by the infant plaintiff as the result of an accident that occurred on June 10, 2000 at Van Voorhies Park. At the time of the accident the infant plaintiff was ascending a seven foot steel ladder

which lead to the top of playground equipment. The infant plaintiff, then six years old, slipped on a wet rung causing her to fall and sustain a Type II supracondylar fracture of her left arm which required percutaneous pinning under general anesthesia. The infant plaintiff was left with a permanent disability in her dominant left arm.

Following a jury trial, the jury rendered a unanimous verdict finding the defendants liable and awarding the plaintiff \$500,000.00 for her past pain and suffering and \$2,600,000.00 for future pain and suffering.

MOTION PAPERS

Plaintiffs' motion consists of an attorney's affirmation and six exhibits labeled A through F. Exhibit A is a copy of defendants' original motion to set aside the verdict or reduce the awards to the plaintiff. Exhibit B is a copy of plaintiffs' prior cross motion for sanctions. Exhibit C is a copy of the court's February 27, 2009 order reducing plaintiffs' awards. Exhibit D is a copy of medical records. Exhibit E is a copy of the transcripts from Dr. Harrison's trial testimony. Exhibit F is of the transcripts from the plaintiffs' trial testimony.

Defendants oppose with an affirmation of counsel..

APPLICABLE STATUTES

CPLR §2221 [d] states, in pertinent part:

A motion for leave to reargue:

1. shall be identified specifically as such;
2. Shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.

CPLR §5501[c] states, in pertinent part:

In reviewing a money judgment in an action which an itemized verdict is required in which it is contended that the award is...inadequate and that a new trial should

have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is ... inadequate if it deviates materially from what would be reasonable compensation.

[*3]DISCUSSION

Plaintiffs' counsel contends that the case law previously submitted in opposition to defendants' motion to set aside the verdict was overlooked or misapprehended by the court. As such, plaintiffs sought re-argument of defendants' motion to set aside the verdict. "Motions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" (*Barnett v. Smith*, 64 AD3d 669, 670-671 [2nd Dept 2009] citing, *E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653 at 654 [2nd Dept. 2007]). In an exercise of discretion the court granted re-argument and reviewed the plaintiffs' submission and defendants' opposition papers.

With respect to damages, if a jury award deviates materially from what would be reasonable compensation (see CPLR §5501[c]), a trial court may order a new trial limited to the damages only (CPLR §4404[a]; see *Inya v Hyundai, Inc.*, 209 AD2d 1015 [4th Dept.]). The trial court uses the same material deviation standard as an Appellate Court in reviewing damage verdicts. It is not necessary for a moving party to prove to the court that the damage award shocks the conscience, either in terms of adequacy or inadequacy. The current standard of material deviation from reasonableness provides courts with more flexibility in the analysis of damage verdicts. Because personal injury awards, especially those for pain and suffering, are not subject to precise quantification, courts look to comparable cases to determine at what point an award deviates materially from what is considered reasonable compensation (*Po Yee So v Wing Tat Realty, Inc.*, 259 AD2d 373 [1st Dept 1999]). Although courts have reviewed awards in other cases involving similar injuries, any given award depends on a unique set of facts and circumstances (see *Miller v Weisel*, 15 AD3d 458 [2nd Dept 2005]). In *Hamilton v Rouse*, 46 AD3d 514, 515 [2007]).

The court notes that the infant plaintiff, although suffering a serious injury to her elbow, has a had good recovery, maintains a full range of motion in the effected elbow and

has performed well in physical education class. After reviewing the cases submitted by both the defendants and the plaintiffs to show comparable verdicts upheld by respective courts, the court is satisfied that its prior order of February 27, 2009, conditionally reducing the verdict awarded to the infant plaintiff was proper. The court neither overlooked nor misapprehended the facts or law nor mistakenly arrived at its earlier decision to reduce the verdict. The jury verdict did materially deviate from what would be a reasonable compensation.

The court has reviewed the trial evidence and the arguments and case law cited by the parties and after re-argument adheres to its prior determination. Plaintiff's motion to vacate the court's prior order dated February 27, 2009 is, therefore, denied.

Plaintiff may stipulate to the reduction of the jury's verdict or seek a new trial within thirty days of entry of this order.

The foregoing constitutes the decision and order of this court.

J.S.C.

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