



57 A.D.3d 475

57 A.D.3d 475

(Cite as: 57 A.D.3d 475, 870 N.Y.S.2d 56)

Gersten v. Boos
57 A.D.3d 475, 870 N.Y.S.2d 56
NY,2008.

57 A.D.3d 475870 N.Y.S.2d 56, 2008 WL 5102251, 2008 N.Y. Slip Op. 09555

Brian Gersten et al., Respondents
v
Duane K. Boos et al., Appellants, et al., Defendants.
Supreme Court, Appellate Division, Second Department, New York

December 2, 2008

CITE TITLE AS: Gersten v Boos

***476 HEADNOTE**

Negligence
Proximate Cause

In wrongful death action, complaint should have been dismissed against county-decedent was struck by vehicle driven by defendant as she crossed county roadway; despite claim that presence of pedestrian ramp approved by County and absence of marked crosswalk or pedestrian crossing signs contributed to accident, there was no evidence that decedent utilized ramp to cross roadway-there was no evidence from which rational juror could have found that conduct of County was proximate cause of accident.

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel), for appellant Duane K. Boos.
Saretsky Katz Dranoff & Glass, LLP, New York, N.Y. (Howard R. Cohen and Alan Katz of counsel), for appellant County of Rockland.

Lynch Law Firm, P.C., Suffern, N.Y. (James Lynch of counsel), for respondents.

In an action, inter alia, to recover damages for wrongful death, (1) the defendant Duane K. Boos appeals, and the defendant County of Rockland separately appeals from a judgment of the Supreme Court, Rockland County (Garvey, J.), dated June 28, 2007, which, upon a jury verdict on the issue of liability finding the defendant County of Rockland 65% at fault in the happening of the accident and the defendant Duane K. Boos 35% at fault, and upon a jury verdict on the issue of damages finding that the plaintiffs sustained damages in the principal sums of \$1,000,000 for pain and suffering and \$14,700 for funeral expenses, is in favor of the plaintiffs and against them, and (2) the defendant Duane K. Boos appeals from so much of an order of the same court dated September 29, 2007, as denied his motion pursuant to [CPLR 4404](#) (a) to set aside the jury verdict on the issue of damages or reduce the verdict as to damages for pain and suffering, and for a new trial, and the County of Rockland separately appeals from so much of the same order as denied its separate motion pursuant to [CPLR 4404](#) (a) to set aside the jury verdicts and to dismiss the complaint insofar as asserted against it, or

to reduce the verdict as to damages for pain and suffering, or for a new trial.

Ordered that the order is reversed insofar as appealed from by the County of Rockland, on the law, without costs or disbursements, that branch of the County's motion which was to dismiss **2 the complaint insofar as asserted against it is granted, and the motion is otherwise denied as academic; and it is further,

Ordered that the appeal by Duane K. Boos from the order is dismissed as academic, without costs or disbursements, in light of our determination on the appeal from the judgment; and it is further,

Ordered that the judgment is modified, on the law, the facts, and in the exercise of discretion, by (1) deleting the provisions thereof awarding damages against the County of Rockland, (2) adding a provision thereto dismissing the complaint against the County of Rockland, and (3) deleting the provision thereof awarding damages in the principal sum of \$1,000,000 for pain and suffering against Duane K. Boos; as so modified, the judgment is affirmed, and a new trial is granted against Duane K. Boos on the issue of damages for pain and suffering only unless within 30 days after service upon the plaintiffs of a copy of this decision and order, the plaintiffs shall serve and file in the office of the Clerk of the Supreme Court, Rockland County, a written stipulation consenting to reduce the verdict as to damages for pain and suffering from the principal sum of \$1,000,000 to the principal sum of \$350,000, and to the entry of an appropriate amended judgment against Duane K. Boos accordingly; in the event that the plaintiffs so stipulate, then the judgment, as so modified, reduced, and amended, is affirmed, without costs or disbursements.

The decedent was struck by a vehicle driven by the defendant Duane K. Boos traveling northbound on North Middletown Road in Orangetown, New York as she crossed the county roadway. Mr. Boos did not see the decedent in the roadway, and he did not stop after the collision. There were no other witnesses to the occurrence. Despite the plaintiffs' claim that the presence of a mid-block pedestrian ramp approved by the defendant County of Rockland and the absence of a corresponding marked crosswalk or pedestrian crossing signs at that location contributed to the accident, there was no evidence adduced at trial that the decedent utilized the pedestrian ramp to cross the roadway. Accordingly, the Supreme Court should have granted that branch of the County's motion which was to dismiss the complaint insofar as asserted against it, as there was no evidence from which a rational juror could have found that the conduct of the County was a proximate cause of the accident (*see Mirand v City of New York*, 84 NY2d 44, 51 [1994]; *Bernstein v City of New York*, 69 NY2d 1020 [1987]; *Cohen v Hallmark Cards*, 45 NY2d 493 [1978]).

The plaintiffs met their burden of proving that the decedent was conscious for at least some period of time following the accident, and thus an award of damages for pain and suffering was justified (*see Cummins v County of Onondaga*, 84 NY2d 322, 324 [1994]). However, the amount of damages awarded by the jury deviated materially from what would otherwise be reasonable compensation to the extent indicated herein (*see CPLR 5501* [c]; *Rodd v Luxfer USA*, 272 AD2d 535, 536 [2000]; *Donofrio v Montalbano*, 240 AD2d 617 [1997]; *Portaro v Gerber*, 217 AD2d 539 [1995]).

The parties' remaining contentions either are without merit or need not be reached in light of our determination. Santucci, J.P., Dillon, Dickerson and Chambers, JJ., concur. *478

Copr. (c) 2009, Secretary of State, State of New York

NY,2008.

Gersten v Boos

57 A.D.3d 475

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.