



294 A.D.2d 898, 741 N.Y.S.2d 635, 164 Ed. Law Rep. 862, 2002 N.Y. Slip Op. 03606

(Cite as: 294 A.D.2d 898, 741 N.Y.S.2d 635)

Supreme Court, Appellate Division, Fourth Department, New York.

Aledia GIVENS, As Administratrix and Individually as Parent of Stephne Jamell Givens, Deceased, Plaintiff-Respondent,

v.

ROCHESTER CITY SCHOOL DISTRICT, Defendant-Appellant, et al., Defendants. (Appeal No. 1.)

May 3, 2002.

Parents of student killed in stabbing at school brought negligence action against school district. The Supreme Court, Monroe County, [Lunn, J.](#), entered judgment for one million dollars damage for pain and suffering upon a special jury verdict. School district appealed. The Supreme Court, Appellate Division held that judgment for one million dollars damages deviated materially from what would be reasonable compensation.

Modified and new trial on damages ordered.

West Headnotes

Death 117 99(2)

[117](#) Death

[117III](#) Actions for Causing Death

[117III\(H\)](#) Damages or Compensation

[117k94](#) Measure and Amount Awarded

[117k99](#) Excessive Damages

[117k99\(2\)](#) k. Suffering of Deceased. [Most Cited Cases](#)

In negligence action by parents of student killed in stabbing at school, judgment for one million dollars damages against school district deviated materially from what would be reasonable compensation for pain and suffering, and, thus, new trial on damages was appropriate, where child collapsed and lost consciousness within five minutes of being stabbed and died less than an hour later. [McKinney's CPLR 5501\(c\)](#).

\*\*636 Hiscock, Barclay, Saperston & Day, Rochester ([Patrick B. Naylor](#) Of Counsel), For Defendant-Appellant.

\*899 PRESENT: [PIGOTT, JR.](#), P. J., [HAYES](#), [WISNER](#), [SCUDDER](#), and [KEHOE](#), JJ.

\*898 MEMORANDUM:

Rochester City School District (RCSD) appeals from an amended judgment entered upon a special jury verdict awarding plaintiff \$1 million for the conscious pain and suffering of her daughter, who was stabbed to death by another student on school grounds. The jury apportioned fault between RCSD and the assailant, finding that plaintiff's decedent was not at fault.

We agree with RCSD that the award of \$1 million for conscious pain and suffering deviates materially from what would be reasonable compensation (see [CPLR 5501](#) [c]; [Rodd v. Luxfer USA Ltd.](#), 272 A.D.2d 535, 709 N.Y.S.2d 93; [Donofrio v. Montalbano](#), 240 A.D.2d 617, 659 N.Y.S.2d 484; [Glassman v. City of New York](#), 225 A.D.2d 658, 640 N.Y.S.2d 139; see also [DeLong v. County of Erie](#), 89 A.D.2d 376, 385, 455 N.Y.S.2d 887, *affd.* 60 N.Y.2d 296, 469 N.Y.S.2d 611, 457 N.E.2d 717; [Portaro v. Gerber](#), 217 A.D.2d 539, 541, 629 N.Y.S.2d 277). Within five minutes of being stabbed, plaintiff's decedent collapsed and lost consciousness. Less than one hour later, she was pronounced dead. In our view, an award of \$300,000 for decedent's conscious pain and suffering is the maximum amount the jury could have awarded as a matter of law. We modify the amended judgment, therefore, by vacating the award of damages for conscious pain and suffering, and we grant a new trial on damages for conscious pain and suffering only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for conscious pain and suffering to \$300,000, in which event the amended judgment is modified accordingly and as modified affirmed.

None of RCSD's remaining contentions is preserved for our review. RCSD contends that Supreme Court erred in failing to instruct the jury on implied assumption of risk. RCSD, however, did not request that instruction, join in a codefendant's request for that instruction, or object to the court's failure to give that instruction (see 4017, 4110-b, 5501 [a] [3] ). RCSD further contends that the verdict finding no contributory negligence on the part of plaintiff's decedent is against the weight of the evidence and that the court therefore erred in denying its motion to set aside the verdict (see 4404 [a] ). RCSD, however, did not move to set aside the verdict on that ground (see [Nitzke v. Loveland](#), 188 A.D.2d 1058, 1059, 592 N.Y.S.2d 165; [Nelson v. Times Sq. Stores Corp.](#), 110 A.D.2d 691, 487 N.Y.S.2d 814, *appeal dismissed* 67 N.Y.2d 645, 499 N.Y.S.2d 682, 490 N.E.2d 549). RCSD contends that the court erred in submitting the issue of constructive notice to the jury. RCSD, however, did not **\*\*637** move for a directed verdict on that issue (see 4401) or otherwise object to the submission of that issue to the jury (see 4017, 5501 [a] [3] ). Rather, RCSD sought a directed verdict dismissing the complaint on the ground that the assailant did not have a history of violence. That motion was properly denied by the court based on testimony that RCSD was warned of the impending fight shortly before it occurred. RCSD contends that it was entitled during deliberations to review the partially completed special verdict sheet before it was returned to the jury to be completed. RCSD, however, never made such a request or objected to the action taken by the court (see 4017, 5501 [a] [3] ).

It is hereby ORDERED that the amended judgment so appealed from be and the same hereby is unanimously modified on the law by vacating the award of damages for conscious pain and suffering and as modified the amended judgment is affirmed without costs, and a new trial is granted on damages for conscious pain and suffering only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for conscious pain and suffering to \$300,000 in which event the amended judgment is modified accordingly and as modified the amended judgment is affirmed without costs.

N.Y.A.D. 4 Dept.,2002.

Givens v. Rochester City School Dist.

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