

Westlaw

292 A.D.2d 501

292 A.D.2d 501, 739 N.Y.S.2d 730, 2002 N.Y. Slip Op. 02358

(Cite as: 292 A.D.2d 501, 739 N.Y.S.2d 730)

H

*8 mos in hosp >
abdom. surgery*

Supreme Court, Appellate Division, Second Department, New York.
Marilyn JUMP, etc., Respondent,

\$ 1.3 P.S.

v.

Thomas FACELLE, etc., et al., Defendants, Janis Pastena, etc., et al., Appellants.

March 18, 2002.

Medical malpractice action was brought against physician and her professional corporation after patient died from complications secondary to abdominal infection following surgery. The Supreme Court, Rockland County, Sherwood, J., entered judgment upon a jury verdict finding that plaintiff had sustained damages of \$1,300,000 for past pain and suffering and \$250,000 for wrongful death, and defendants appealed. The Supreme Court, Appellate Division, held that: (1) award of \$1,300,000 for past pain and suffering was reasonable, and (2) award of \$250,000 for wrongful death was excessive.

Affirmed as modified.

West Headnotes

[1] Appeal and Error 30 ↪ 1004(3)

30 Appeal and Error

30XVI Review

30XVI(1) Questions of Fact, Verdicts, and Findings

30XVI(1)2 Verdicts

30k1004 Amount of Recovery

30k1004(3) k. Excessive Verdict. Most Cited Cases

In evaluating whether assessment of damages is excessive, Appellate Division must determine whether it deviates materially from what would be reasonable compensation. McKinney's CPLR 5501(c).

[2] 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

Award of \$1,300,000 for past pain and suffering in connection with complications from abdominal surgery experienced by

decendent before his death was reasonable in medical malpractice action; decendent was hospitalized for eight months prior to his death, suffered from persistent abdominal infection, underwent eight major surgeries, including insertion of permanent colostomy, and developed bedsore on his lower back that did not heal and eventually infected his spine. McKinney's CPLR 5501(c).

[3] Death 117 99(1)

117 Death

117III Actions for Causing Death

117III(H) Damages or Compensation

117k94 Measure and Amount Awarded

117k99 Excessive Damages

117k99(1) k. In General. Most Cited Cases

Award of \$250,000 for wrongful death was excessive to the extent it exceeded \$140,000, where only economic loss established with reasonable certainty was loss of decendent's pension, which equaled \$10,000 per year over decendent's 14-year life expectancy.

****730** Schiavetti, Corgan, Soscia, DiEdwards and Nicholson, LLP (Mauro Goldberg & Lilling, LLP [Katherine Herr Solomon and Caryn Lilling] of counsel), for appellants.
Goldsmith & Richman, New York, N.Y. (Howard S. Richman and Lee Goldsmith of counsel), for respondent.

A. GAIL PRUDENTI, P.J., NANCY E. SMITH, GLORIA GOLDSTEIN and LEO F. MCGINITY, JJ.

501** In an action to recover damages for medical malpractice, etc., the defendants Janis Pastena and Janis Pastena, P.C., appeal from so much of a judgment of the Supreme Court, Rockland County (Sherwood, J.), dated January 12, 2001, as, upon *731** a jury verdict finding that the plaintiff had sustained damages of \$1,300,000 for past pain and suffering and \$250,000 for wrongful death, and upon an order of the same court dated September 28, 2000, denying their motion to set aside the verdict on the ground that the amount of damages awarded was excessive, is in favor of the plaintiff and against them.

ORDERED that the notice of appeal from the order dated September 28, 2000, is deemed a premature notice of appeal from the judgment (*see, CPLR 5520(c)*); and it is further,

ORDERED that the judgment is modified, on the facts and as an exercise of discretion, by deleting the provision thereof awarding the plaintiff damages in the sum of \$250,000 for wrongful death and granting a new trial with respect thereto; as so modified, the judgment is affirmed insofar as appealed from, with costs payable to the appellants, unless within 30 days after service upon the plaintiff of a copy of this decision and order, the plaintiff 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 wrongful death from the sum of \$250,000 to the sum of \$140,000, and to the entry of an amended judgment accordingly; in the event the plaintiff so stipulates, then the judgment, as so reduced and amended, is affirmed insofar as appealed from, without costs or disbursements.

On July 18, 1991, the decendent, William Jump, was diagnosed with colorectal cancer by the defendant Dr. George Robert Cox. On August 8, 1991, he was admitted to the defendant Good Samaritan Hospital where he underwent a lower anterior resection

and anastomosis. The surgery, which involved removing *502 the cancerous tumor from Mr. Jump's colon and attaching the remaining healthy tissue of the colon to the remaining healthy tissue of the rectum, was performed by the defendants Drs. Thomas Facelle and Mandel Ganchrow, shareholders in the defendant Ramapo Valley Surgical Associates, P.C. According to Dr. Cox, before the surgery, Mr. Jump was in excellent health and had a life expectancy of approximately 14 years.

In the days following the surgery, Mr. Jump suffered from a fever, an elevated white blood cell count, and other symptoms related to infection and that are common following major abdominal surgery. However, on August 18, 1991, at approximately 8:00 P.M., Mr. Jump informed the nurse on duty that he felt something "pop" in his stomach, and a large amount of stool poured from the surgical incision. The nurse notified the defendant Dr. Janis Pastena, the on-call surgeon for Ramapo Valley Surgical Associates, who examined Mr. Jump at approximately 9:30 P.M. and determined that immediate surgery was not necessary.

Dr. Ganchrow examined Mr. Jump the next morning, and he determined that the anastomosis, or attachment between the colon and the rectum, had torn, and ordered surgery to repair the tear, insert a temporary colostomy, and position drains in the area of Jump's rectum to control infection. However, Jump's infection persisted. From the time of the initial surgery until his death, Jump remained hospitalized. He continued to suffer from abdominal infections, mental confusion, and hallucinations. In addition, he lost the ability to walk, and it was painful for him to sit upright in a chair. He underwent eight major surgeries in total, including the insertion of a permanent colostomy. He developed a bedsore on his lower back that did not heal, and had to be scraped and cleaned repeatedly, which eventually infected his spine. According to **732 to Mr. Jump's wife, the colostomy bag would sometimes open, and Mr. Jump's room always smelled like feces. On March 29, 1992, Mr. Jump passed away, not from cancer, but due to complications secondary to the abdominal infection. Mr. Jump received a pension of \$10,000 per year that he contributed to the household, which ceased at the time of his death.

At trial, the jury determined that Dr. Pastena committed medical malpractice in not operating on Mr. Jump immediately after she discovered fecal leakage on the night of August 18, 1991, and awarded the plaintiff damages in the amount of \$1,300,000 for past pain and suffering and \$250,000 for wrongful death. Dr. Pastena and her professional corporation appeal.

[1][2] In evaluating whether an assessment of damages is excessive, *503 this court must determine whether it deviates materially from what would be reasonable compensation (*see*, CPLR 5501[c]; *Olsen v. Burns*, 267 A.D.2d 366, 699 N.Y.S.2d 731). Considering the nature of the pain and suffering endured by the plaintiff's decedent for the eight months that he was hospitalized prior to his death, including the persistent abdominal infection, the numerous surgeries, the permanent colostomy, and the bedsore, the damages awarded for past pain and suffering were reasonable.

[3] However, we find that the \$250,000 award for wrongful death was excessive to the extent indicated. The only economic loss established with reasonable certainty was the loss of the decedent's pension, which equaled \$140,000 (\$10,000 per year x 14-year life expectancy).

N.Y.A.D. 2 Dept., 2002.

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