

Westlaw

806 N.Y.S.2d 839

24 A.D.3d 1233, 806 N.Y.S.2d 839, 2005 N.Y. Slip Op. 09867

(Cite as: 24 A.D.3d 1233, 806 N.Y.S.2d 839)

**H**

Supreme Court, Appellate Division, Fourth Department, New York.  
Joye MARACLE, Individually and as Administrator of the Estate of Michele  
Kohler, Deceased, and Melissa Kohler, Plaintiffs-Respondents-Appellants,  
v.  
Joseph CURCIO, Defendant-Appellant-Respondent. (Appeal No. 1.)

Dec. 22, 2005.

**Background:** Children brought suit against premises owner, seeking damages arising from injuries sustained by their mother when she fell down flight of stairs. The Supreme Court, Erie County, Frank A. Sedita, Jr., J., awarded plaintiffs \$1,029,287.53. Owner appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

- (1) mother had requisite level of awareness necessary for award of damages for conscious pain and suffering;
  - (2) award of \$125,000 for conscious pain and suffering was not inadequate;
  - (3) jury's failure to award damages for future pecuniary losses was not against weight of evidence; and
  - (4) child was not entitled to damages for past mental suffering, or emotional and psychological injury.
- Affirmed as modified.

#### West Headnotes

#### **[1] Damages ↪32**

115k32 Most Cited Cases

Although she was in vegetative state, woman who was injured in fall down stairs had requisite level of awareness necessary for award of damages for conscious pain and suffering.

#### **[2] Damages ↪127.15**

115k127.15 Most Cited Cases

Award of \$125,000 for conscious pain and suffering of woman who was in vegetative state after fall down flight of stairs was not inadequate; only pain medication prescribed for woman was acetaminophen, as needed, and she never communicated any indication of pain.

#### **[3] Damages ↪186**

115k186 Most Cited Cases

#### **[3] Damages ↪191**

115k191 Most Cited Cases

Jury's failure to award damages for future pecuniary losses to children of woman who was in vegetative state after fall down flight of stairs was not against weight of evidence.

**[4] Damages ↪ 57.29**

**115k57.29 Most Cited Cases**

Child of woman who fell down flight of stairs was not entitled to damages for past mental suffering, or emotional and psychological injury; at time of accident, child was not on stairway, and thus was not in zone of danger.

**\*\*840** Connors & Corcoran, LLP, Rochester (Eileen E. Buholtz of Counsel), for Defendant-Appellant-Respondent.

Connors & Vilardo, LLP, Buffalo (Vincent E. Doyle, III, of Counsel), for Plaintiffs-Respondents-Appellants.

PRESENT: PIGOTT, JR., P.J., GREEN, PINE, LAWTON, AND HAYES, JJ.

MEMORANDUM:

**\*1234** Plaintiffs commenced this action seeking damages arising from the injuries sustained by their mother (decedent) when she fell down a flight of stairs owned by defendant. Those injuries eventually resulted in decedent's death 40 months later. Plaintiffs alleged that decedent's fall was due to the allegedly hazardous condition of the stairway. Defendant appeals and plaintiffs cross-appeal from a judgment rendered upon a jury verdict that, inter alia, awarded decedent's estate \$125,000 for decedent's conscious pain and suffering, awarded plaintiffs the combined sum of \$170,000 for past pecuniary losses but no damages for future pecuniary losses, and awarded plaintiff Melissa Kohler \$500,000 for her claim for past mental suffering, emotional and psychological injury.

[1][2][3] Contrary to the contention of defendant, Supreme Court properly denied that part of his motion to dismiss the claim seeking damages for decedent's conscious pain and suffering. The evidence presented at trial established that decedent, although **\*\*841** in a vegetative state, had the requisite level of awareness necessary for such an award (see Weldon v. Beal, 272 A.D.2d 321, 322, 707 N.Y.S.2d 875; Walsh v. Staten Is. Obstetrics & Gynecology Assoc., 193 A.D.2d 672, 672-673, 598 N.Y.S.2d 17, *lv. denied* 82 N.Y.2d 845, 606 N.Y.S.2d 595, 627 N.E.2d 517; see generally Cummins v. County of Onondaga, 84 N.Y.2d 322, 324-325, 618 N.Y.S.2d 615, 642 N.E.2d 1071; McDougald v. Garber, 73 N.Y.2d 246, 255, 538 N.Y.S.2d 937, 536 N.E.2d 372). Contrary to plaintiffs' contention, the award of damages for conscious pain and suffering does not deviate materially from what would be reasonable compensation (see Walsh, 193 A.D.2d at 672-673, 598 N.Y.S.2d 17; see generally CPLR 5501 [c]). The only pain medication prescribed for decedent was Tylenol, as needed, and she never communicated any indication of pain. Contrary **\*1235** to plaintiffs' further contention, the jury's failure to award damages for future pecuniary losses is not against the weight of the evidence.

[4] We agree with defendant, however, that the court erred in denying that part of his motion to dismiss Melissa Kohler's claim for past mental suffering, emotional and psychological injury. At the time of the accident, Melissa Kohler was not on the stairway, i.e., she was "not in imminent danger of physical harm at the time of the accident," and thus was not in the zone of danger (Gonzalez v. New York City Hous. Auth., 181 A.D.2d 440, 440, 580 N.Y.S.2d 760; see Zea v. Kolb, 204 A.D.2d 1019, 1019-1020, 613 N.Y.S.2d 88, *lv. dismissed* 84 N.Y.2d 864, 618 N.Y.S.2d 9, 642 N.E.2d 328; see generally Bovsun v. Sanperi, 61 N.Y.2d 219, 230-231, 473 N.Y.S.2d 357, 461 N.E.2d 843). We therefore modify the judgment accordingly, and we remit the matter to Supreme Court to recalculate the interest and award to Melissa Kohler and the total amount of the judgment. In light of our determination, we need not address plaintiffs' contention that the jury's failure to award Melissa Kohler future

damages on that claim is against the weight of the evidence or defendant's contention that the court erred in applying General Obligations Law § 3-111 to the award on that claim. Defendant's contention that the court erred in its jury instruction is not preserved for our review, and in any event is without merit. We have considered defendant's remaining contentions and conclude that they are without merit.

**\*1234** It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously modified on the law by granting defendant's motion in part, setting aside the verdict in part and vacating the seventh decretal paragraph and the amounts awarded in the 10th and 11th decretal paragraphs and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings.

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