

Westlaw

293 A.D.2d 459
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Supreme Court, Appellate Division, Second Department, New York.
 Jose E. RAMOS, etc., Respondent,
 v.
 Pragna B. SHAH, Appellant.
 April 1, 2002.

Patient's survivor brought medical malpractice action against medical care provider. The Supreme Court, Nassau County, Cozzens, J., upon jury verdict, entered judgment in favor of survivor in sum of \$900,000 for pain and suffering. On appeal, the Supreme Court, Appellate Division, held that award of damages for pain and suffering was excessive.

Reversed.

West Headnotes

[1] 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 \$900,000 to patient, for pain and suffering, in patient's medical malpractice action against care provider, was excessive; prior to his death, patient complained of suffering pain, allegedly from extreme dehydration, and although patient lapsed into a coma, he had some level of consciousness for several days. McKinney's CPLR 5501(c).

[2] Damages 115 ↪32

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k31 Physical Suffering and Inconvenience

115k32 k. In General. Most Cited

Cases

To recover damages for pain and suffering, an injured plaintiff must have some level of awareness.

[3] Death 117 ↪82

117 Death

117III Actions for Causing Death

117III(H) Damages or Compensation

117k80 Elements of Compensation

117k82 k. Suffering of Deceased. Most Cited Cases

In determining damages for conscious pain and suffering experienced in the interval between injury and death, when the interval is relatively short, the degree of consciousness, severity of pain, apprehension of impending death, along with duration, are all elements to be considered.

***377** Santangelo, Benvenuto & Slattery (Mauro Goldberg & Lilling, LLP, Great Neck, N.Y. [Caryn L. Lilling and Christopher Simone] of counsel), for appellant.

Philip J. Dinhofer, LLC, New York, N.Y., for respondent.

NANCY E. SMITH, J.P., CORNELIUS J. O'BRIEN, LEO F. MCGINITY and STEPHEN G. CRANE, JJ.

***459** In an action to recover damages for medical malpractice, the defendant appeals, as limited by her brief, from so much of a judgment of the Supreme Court, Nassau County (Cozzens, J.), entered December 1, 2000, as, upon a jury verdict, is in favor of the plaintiff and against her in the principal sum of \$900,000 for pain and suffering.

ORDERED that the judgment is reversed insofar as appealed from, on the facts and as a matter of dis-

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cretion, with costs, by deleting the provision thereof awarding damages for pain and suffering, and granting a new trial with respect thereto, unless within 30 days after service upon him of a copy of this decision and order, the plaintiff shall serve and file in the office of the clerk of the Supreme Court, Nassau County, a written stipulation consenting to reduce the verdict as to damages for pain and suffering from the principal sum of \$900,000 to the principal sum of \$450,000, and to the entry of an amended *460 judgment in his favor; in the event that the plaintiff so stipulates, then the judgment, as so reduced and amended, is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Nassau County, for the entry of an amended judgment accordingly.

[1] On March 19, 1992, the plaintiff's decedent, whom the defendant had treated for vomiting the day before, went to the defendant's office because his condition had worsened. The defendant referred the decedent to a hospital for emergency treatment for dehydration and shock. However, the decedent suffered cardiac arrest, lapsed into a coma, and died several days later.

[2][3] To recover damages for pain and suffering, an injured plaintiff must have some level of awareness (see *McDougald v. Garber*, 73 N.Y.2d 246, 255, 538 N.Y.S.2d 937, 536 N.E.2d 372). Moreover, "[i]n determining damages for conscious pain and suffering experienced in the interval between injury and death, when the interval is relatively short, the degree of consciousness, severity of pain, apprehension of impending death, along with duration, are all elements to be considered" (*Regan v. Long Is. R.R. Co.*, 128 A.D.2d 511, 512, 512 N.Y.S.2d 443). The opinion of the plaintiff's medical expert regarding the pain the decedent experienced from the dehydration, which was supported by the record (see generally *Erbstein v. Savasatit*, 274 A.D.2d 445, 711 N.Y.S.2d 458; *Samuel v. Aroneau*, 270 A.D.2d 474, 704 N.Y.S.2d 652), and the testimony of the decedent's father regarding his

complaints of pain, sufficiently demonstrated pain and suffering**378 resulting from the allegedly untreated dehydration (see *Sachs v. Nassau County*, 151 A.D.2d 558, 542 N.Y.S.2d 337; cf. *Richardson v. Lutheran Hosp. of Brooklyn*, 70 A.D.2d 933, 417 N.Y.S.2d 526). In addition, although the decedent lapsed into a coma, there was evidence that he had some level of consciousness for several days (see generally *Weldon v. Beal*, 272 A.D.2d 321, 322, 707 N.Y.S.2d 875; *Walsh v. Staten Is. Obstetrics & Gynecology Assocs.*, 193 A.D.2d 672, 673, 598 N.Y.S.2d 17).

However, we find that the damage award for pain and suffering was excessive to the extent indicated (see CPLR 5501[c]; *Kogan v. Dreifuss*, 174 A.D.2d 607, 571 N.Y.S.2d 314).

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