

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - STP

WANDA RIVERA and STEVEN RIVERA, Administrators
of the Estate of NICO RIVERA, Deceased, and WANDA
RIVERA and STEVEN RIVERA, Individually,

Plaintiffs,

- against -

Index No. 26799/04

DEBRA GREENSTEIN, M.D., et al.,

Defendants.

HON. HOWARD R. SILVER:

After a trial held before me from November 25, 2008 to December 9, 2008 the jury found that defendants Debra Greenstein, M.D. and Pediatric Associates of New York City P.C. deviated or departed from good and accepted practice by (1) failing to order a CK-MB test; (2) failing to order an EKG; (3) failing to order serum troponin testing; (4) failing to refer Nico for a cardiac evaluation and (5) failing to hospitalize Nico or bring him into her office on January 24, 2004, and such departures were a substantial factor in causing Nico's death.

The jury assessed Nico's pain and suffering from the date of the malpractice to January 28, 2004 to be \$3,000,000.00.

The action against defendant John Wells, M.D. was settled prior to trial for \$150,000.00.

After verdict, defendants moved for judgment notwithstanding the verdict, or alternatively setting aside the jury verdict as being against the weight of all the credible evidence and directing a new trial or in the alternative, reduce the jury's verdict as excessive and deviating materially from what would be reasonable compensation.

Through extended adjournments, final submission was received March 30, 2009.

This action was commenced on behalf of Wanda Rivera and Steven Rivera, individually, and as administrators of the estate of Nico Rivera for defendants failure to properly treat and for the wrongful death of their son Nico.

After reviewing the briefs submitted and reviewing the testimony in this case, that portion of the motion seeking judgment for the defendant notwithstanding the verdict, is denied.

Likewise, that portion of the motion seeking the setting aside of the jury verdict as being against the weight of all the credible evidence is denied. In determining whether to set aside a jury verdict as being against the weight of the evidence, the standard to be applied is whether the jury could have reached its decision on any "fair interpretation of the evidence". (Nicastro v. Park, 113 A.D. 2d 129; Frances G. v. Vincent G., 145 A.D. 2d 599.)

As to liability, the jury saw and heard the witnesses and were able to assess the veracity of such testimony, The Court will not substitute its judgment for that of the jury unless there was a complete absence of probative evidence to support the verdict or that the evidence was so strong and overwhelming that reasonable and fair minded persons in the exercise of impartial judgment could not render such a verdict. The Court finds there is ample proof in the record to support a finding of liability.

That leaves the issue of damages and whether the jury's assessment of damages was excessive. The measure of damages for pain and suffering is a complex factual determination and the jury's verdict with respect to those damages will not be disturbed unless it is clearly excessive (Teneza v. Milligan, 47 A.D. 2d 773). The test to be applied is whether the amount awarded is reasonable or does it deviate from reasonable compensation.

It is the Court's opinion that this is a classic case of a runaway jury and that the \$3,000,000.00 verdict rendered was excessive. Based upon the proof, medical and other, it is evident that the jury did not follow the Court's instruction not to be guided by sympathy when determining an amount which would fairly and justly compensate plaintiffs for conscious pain and suffering from the date of the malpractice to Nico's death on January 28, 2004.

The Court determines that reasonable compensation for this tragedy to be \$300,000.00 - total. The plaintiff having settled with Dr. John Wells for \$150,000.00 the judgment against Dr. Greenstein is reduced to \$150,000.00.

Accordingly, defendants motion to set the verdict aside for excessiveness is granted and a new trial ordered on the issue of damaged only, unless plaintiffs, within 30 days after service upon them, serves and files in the Office of the Clerk of this Court, a written stipulation consenting to the net amount of the verdict in favor of the plaintiffs against Dr. Greenstein in the reduced sum of \$150,000.00 and to entry of judgment in favor of plaintiffs against Dr. Greenstein in that amount.

Dated:

APR 16 2009



J.S.C.