Burke v Carrion
2012 NY Slip Op 08678
Decided on December 19, 2012
Appellate Division, Second Department
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Decided on December 19, 2012

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
CHERYL E. CHAMBERS
SHERI S. ROMAN, JJ.

2011-01912
(Index Nos. 19658/01, 8363/03)

[*1]Judith Burke, etc., respondent,

v

Wesley . Carrion, etc., appellant, et al., defendant. (Action No. 1)

Judith Burke, etc., plaintiff,

v

Genevieve Ann Lankowicz, etc., et al., defendants. (Action No. 2)

Silverson, Pareres & Lombardi LLP (Michael A. Haskel and

Susan Haskel, Mineola, N.Y., of counsel), for appellant.
Duffy & Duffy, Uniondale, N.Y. (James N. LiCalzi of counsel), for respondent in Action No. 1 and plaintiff in Action No. 2.

DECISION & ORDER

In related actions, inter alia, to recover damages for medical malpractice, etc., which were joined for trial, Wesley V. Carrion, a defendant in Action No. 1, appeals from a judgment of the Supreme Court, Suffolk County (Costello, J.), entered February 4, 2011, which, upon, among other things, a jury verdict on the issue of liability finding him at fault for the injuries of the plaintiff's decedent, upon a jury verdict on the issue of damages finding that the plaintiff sustained damages in the sums of $500,000 for past pain and suffering, $1,000,000 for future pain and suffering, $250,000 for past loss of services, and $500,000 for future loss of services, and upon the denial of his motion, inter alia, pursuant to CPLR 4404(a) to set aside the jury verdict as contrary to the weight of the evidence and for a new trial, is in favor of the plaintiff and against him in the principal sum of $1,215,173.58.

ORDERED that the judgment is modified, on the facts and in the exercise of discretion, by deleting the provisions thereof awarding damages for past and future loss of services; as so modified, the judgment is affirmed, with costs to the appellant, and the matter is remitted to the Supreme Court, Suffolk County, for a new trial on the issue of damages for past and future loss of services only, 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, Suffolk County, a written stipulation consenting to reduce the award of damages for past loss of services to the principal sum of $15,000, and the award of damages for future loss of services to the principal sum of $5,000, and to the entry of an appropriate amended judgment accordingly; in the event that the plaintiff so stipulates, then the judgment, as so reduced and amended, is affirmed, without costs or disbursements.

The appellant contends that the Supreme Court should have recused itself based on [*2]certain comments it made during a prior unrelated trial in which the appellant was a named defendant. Absent a legal disqualification under Judiciary Law § 14, a court is the

sole arbiter of the need for recusal, and its decision is a matter of discretion and personal conscience (*see Irizarry v State of New York*, 56 AD3d 613, 614). Here, contrary to the appellant's contention, the comments cited do not demonstrate that the Supreme Court was biased and, thus, its refusal to recuse itself was not an improvident exercise of discretion (*see Matter of O'Donnell v Goldenberg*, 68 AD3d 1000). Morever, to the extent the appellant's contentions concerning the Supreme Court's alleged bias are not based on matter dehors the record, the appellant failed to demonstrate that the court exhibited bias toward him during the instant trial (*see Huerter v Astoria Fed. Sav. Bank*, 60 AD3d 815, 816).

The Supreme Court properly denied the appellant's motion to preclude the plaintiff's counsel from arguing in summation that the decedent wore diapers as a result of the appellant's malpractice, as there was sufficient evidence presented to establish causation (*see generally Razzaque v Krakow Taxi*, 238 AD2d 161, 162).

The appellant's challenges to the verdict sheet are without merit.

The awards of damages for past and future pain and suffering do not deviate materially from what would be reasonable compensation (*see DiGiacomo v Cabrini Med. Ctr.*, 21 AD3d 1052, 1054-1055; *Knight v Loubeau*, 309 AD2d 579, 580-581; *Stokes v New York Med. Group*, 304 AD2d 449). However, with respect to the awards of damages for past and future loss of services, although legally sufficient evidence and a fair interpretation of the evidence supports the jury's determination to award damages in that regard (*see Nicastro v Park*, 113 AD2d 129, 132-133), the damages are excessive to the extent indicated (*see Stanisich v New York City Tr. Auth.*, 73 AD3d 737, 738; *Wallace v Stonehenge Group, Ltd.*, 33 AD3d 789, 790; *Becker v Woods*, 24 AD3d 706, 707).

In light of our determination, the appellant's contention that the award of damages for future loss of services must be reduced in accordance with CPLR 5035 (repealed by L 2003, ch 86, § 3) is academic since, in the event the plaintiff stipulates to a reduction of the award of damages for future loss of services, the award is below the lump sum threshold of $250,000 (*see* former CPLR 5035; *see also Stinton v Robin's Wood, Inc.*, 45 AD3d 203, 210-211).

The appellant's remaining contentions are unpreserved for appellate review, as he either failed to object or did not object on the grounds now raised on appeal.

RIVERA, J.P., ANGIOLILLO, CHAMBERS and ROMAN, JJ., concur.

ENTER:

Aprilanne Agostino

Clerk of the Court

Return to Decision List