

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D18554  
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Argued - February 8, 2008

WILLIAM F. MASTRO, J.P.  
JOSEPH COVELLO  
RANDALL T. ENG  
ARIEL E. BELEN, JJ.

2007-03983

DECISION & ORDER

Barbara Scanzano, etc., appellant, v Stuart Horowitz,  
defendant, Roger Kersten, etc., et al. respondents.

(Index No. 18450/04)

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Duffy, Duffy & Burdo, Uniondale, N.Y. (Steven Sachs and James N. LiCalzi of  
counsel), for appellant.

In an action, inter alia, to recover damages for wrongful death, etc., the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Mahon, J.), entered March 30, 2007, as, upon reargument, in effect, vacated so much of an order of the same court entered November 9, 2006, as denied those branches of the motion of the defendants Roger Kersten, Roger Kersten D.O., P.C., and Long Island Cardiology and Internal Medicine which were pursuant to CPLR 3211(a)(5) to dismiss the cause of action to recover damages for wrongful death insofar as asserted against the defendants Roger Kersten and Roger Kersten D.O., P.C., in its entirety and to dismiss the cause of action to recover damages for wrongful death insofar as asserted against the defendant Long Island Cardiology and Internal Medicine in part and thereupon granted those branches of the motion.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and, upon reargument, so much of the order entered November 9, 2006, as denied those branches of the motion of the defendants Roger Kersten, Roger Kersten D.O., P.C., and Long Island Cardiology and Internal Medicine which were pursuant to CPLR 3211(a)(5) to dismiss the cause of action to recover damages for wrongful death insofar as asserted against them is adhered to.

March 25, 2008

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The Supreme Court incorrectly concluded that the cause of action to recover damages for wrongful death was time-barred insofar as asserted against the defendants Roger Kersten and Roger Kersten, D.O., P.C. (hereinafter collectively Dr. Kersten), and partially time-barred insofar as asserted against the defendant Long Island Cardiology and Internal Medicine (hereinafter LICIM). Pursuant to EPTL 5-4.1, a cause of action to recover damages for wrongful death may be maintained against persons “who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent’s death.” At the time of the decedent’s death, the decedent had a cause of action to recover damages for medical malpractice against Dr. Kersten and LICIM, which was Dr. Kersten’s employer (*see Hill v Saint Clare’s Hosp.*, 67 NY2d 72, 79), that was not time-barred (*see CPLR 214-a; Murphy v Jacoby*, 250 AD2d 826; *Suarez v Phelps Mem. Assn*, 130 AD2d 571; *Marlowe v E.I. DuPont deNemours & Co.*, 112 AD2d 769, 771). Furthermore, the plaintiff, who is the decedent’s widow and personal representative, asserted the cause of action against Dr. Kersten and LICIM within two years after the decedent’s death (*see EPTL 5-4.1[1]*). Accordingly, upon reargument, the Supreme Court should have adhered to the prior determination denying those branches of the motion of Dr. Kersten and LICIM which were to dismiss the cause of action to recover damages for wrongful death insofar as asserted against them.

MASTRO, J.P., COVELLO, ENG and BELEN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court