

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

D21524  
O/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - November 18, 2008

ROBERT A. SPOLZINO, J.P.  
EDWARD D. CARNI  
RANDALL T. ENG  
JOHN M. LEVENTHAL, JJ.

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2007-02298

DECISION & ORDER

Gareth Robinson, et al., respondents-appellants,  
v Fred D. Way III, et al., appellants-respondents,  
et al., defendant.

(Index No. 31413/04)

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Kecia J. Weaver, Brooklyn, N.Y. (Bernard M. Alter and Stephen V. Barbaro of  
counsel), for appellants-respondents.

Gregory Antollino, New York, N.Y., for respondents-appellants.

In an action to recover damages for legal malpractice, the defendants Fred D. Way III and Law Offices of Fred D. Way appeal, as limited by their brief, from a judgment of the Supreme Court, Kings County (Saitta, J.), dated February 26, 2007, which upon a jury verdict, and upon an order of the same court dated February 7, 2007, denying that branch of their motion pursuant to CPLR 4404(a) which was to set aside so much of the jury verdict as was in favor of the plaintiffs and against them awarding compensatory damages in the principal sum of \$29,100 and for judgment as a matter of law on the ground that the plaintiffs failed to establish a prima facie case of legal malpractice, or in the alternative, for a new trial on the ground that the verdict was against the weight of the evidence, and granting that branch of their motion pursuant to CPLR 4404(a) which was to set aside so much of the jury verdict as was in favor of the plaintiffs and against them awarding punitive damages in the principal sum of \$100,000, is in favor of the plaintiffs and against them in the principal sum of \$29,100, and the plaintiffs cross-appeal from the same judgment on the ground of inadequacy.

ORDERED that the judgment is affirmed, without costs or disbursements.

December 23, 2008

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The defendants Fred D. Way III and Law Offices of Fred D. Way (hereinafter together the defendants) contend that the Supreme Court erred in denying that branch of their motion which was to set aside so much of the jury verdict as was in favor of the plaintiffs and against them awarding compensatory damages in the principal sum of \$29,100 and for judgment as a matter of law on the ground that the plaintiffs failed to establish a prima facie case of legal malpractice, or in the alternative, for a new trial on the ground that the verdict was against the weight of the evidence. We disagree.

A court may grant a defendant's motion to set aside a verdict on the ground that the plaintiff failed to establish a prima facie case only if there is "no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence at trial" (*Zelaya v Breger*, 43 AD3d 437, 438). Contrary to the defendants' contention, the jury could have rationally concluded, under the circumstances presented in this case, that Fred D. Way III "failed to exercise the ordinary reasonable skill and knowledge commonly possessed" by an attorney in various respects, and that his breach of that duty proximately caused the plaintiffs to sustain actual and ascertainable damages (*Carrasco v Pena & Kahn*, 48 AD3d 395, 396; see *Baccash v Sayegh*, 53 AD3d 636, 639). Further, the jury verdict was not against the weight of the evidence as it was supported by a fair interpretation of the evidence (see *Adelman v Attonito*, 304 AD2d 507).

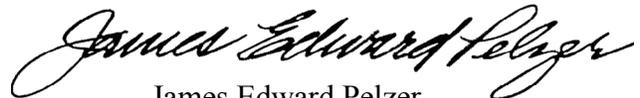
However, the court properly granted that branch of the defendants' motion which was to set aside so much of the jury verdict as was in favor of the plaintiffs and against them awarding punitive damages since the plaintiffs failed to present evidence demonstrating that the defendants' "conduct was so outrageous as to evince a high degree of moral turpitude . . . showing such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Zarin v Reid & Priest*, 184 AD2d 385, 388).

The plaintiffs' remaining contention is without merit.

The defendants' remaining contention is not properly before us as it is raised for the first time on appeal (see *Albanese v Village of Freeport*, 52 AD3d 550, 551).

SPOLZINO, J.P., CARNI, ENG and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court