

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

D24558
W/prt

_____AD3d_____

Argued - September 18, 2009

WILLIAM F. MASTRO, J.P.
RUTH C. BALKIN
THOMAS A. DICKERSON
PLUMMER E. LOTT, JJ.

2008-03313

DECISION & ORDER

Susan Perez, etc., respondent, v St. Vincents
Hospital and Medical Center of New York,
et al., appellants.

(Index No. 21968/01)

Costello, Shea & Gaffney, LLP, New York, N.Y. (Frederick N. Gaffney, Michael J. Morris, and Stephen J. Levy of counsel), for appellants.

Nathan L. Dembin & Associates, P.C., New York, N.Y. (Ellen S. Davis and Brian J. Isaac of counsel), for respondent.

In an action, inter alia, to recover damages for medical malpractice and wrongful death, the defendants appeal from an amended judgment of the Supreme Court, Kings County (Bunyan, J.), entered November 6, 2008, which, upon a jury verdict on the issue of liability in favor of the plaintiff and upon a separate jury verdict on the issue of damages awarding the plaintiff the sums of \$1,500,000 for the decedent's conscious pain and suffering, and \$600,000 for the pecuniary loss sustained by the distributees of the estate (\$200,000 each as to Susan Perez, Anastacio Perez, Jr., and Edistrudy Perez), and upon the denial of their motion pursuant to CPLR 4404(a) to set aside the verdict on the issue of liability and for judgment as a matter of law or, in the alternative, to set aside the verdict on the issue of liability as contrary to the weight of the evidence and for a new trial, is in favor of the plaintiff and against the defendants in the principal sums of \$1,500,000 for the decedent's conscious pain and suffering and \$600,000 for the pecuniary loss sustained by the

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distributees of the estate (\$200,000 each as to Susan Perez, Anastacio Perez, Jr., and Edistrudy Perez).

ORDERED that on the Court's own motion, the defendants' notice of appeal from a judgment of the same court entered March 12, 2008, is deemed a premature notice of appeal from the amended judgment entered November 6, 2008 (*see* CPLR 5520[c]); and it is further,

ORDERED that the amended judgment is modified, on the law, on the facts, and in the exercise of discretion, (1) by deleting the provision thereof in favor of the plaintiff and against the defendants in the principal sum of \$200,000 for the pecuniary loss sustained by the distributee Anastacio Perez, Jr., (2) by deleting the provision thereof in favor of the plaintiff and against the defendants in the principal sum of \$200,000 for pecuniary loss sustained by the distributee Susan Perez, and (3) by deleting the provision thereof in favor of the plaintiff and against the defendants in the principal sum of \$1,500,000 for the decedent's conscious pain and suffering; as so modified, the amended judgment is affirmed, with costs to the appellants, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the issue of damages for the decedent's conscious pain and suffering only, and for the entry of a second amended judgment thereafter, 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, Kings County, a written stipulation consenting to reduce the verdict as to damages for conscious pain and suffering from the principal sum of \$1,500,000 to the principal sum of \$800,000, and to the entry of an appropriate second amended judgment accordingly; in the event that the plaintiff so stipulates, then the amended judgment, as so modified, reduced, and further amended, is affirmed, without costs or disbursements.

“Before granting a motion pursuant to CPLR 4404(a) to set aside a verdict and for judgment as a matter of law, the trial court must conclude that there is ‘simply 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’ ” (*Roman v Brooklyn Navy Yard Dev. Corp.*, 63 AD3d 1136, 1136-1137, quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499). Here, contrary to the defendants' contention, there is a rational view of the trial evidence that supports the jury's verdict on the issue of liability. Moreover, the jury's findings on the issue of liability were based upon a fair interpretation of the evidence and, thus, were not contrary the weight of the evidence (*see Nicastro v Park*, 113 AD2d 129, 134-135).

However, the award for the decedent's conscious pain and suffering in the principal sum of \$1,500,000 deviates materially from what would be reasonable compensation to the extent indicated herein (*see* CPLR 5501[c]; *Ramos v Shah*, 293 AD2d 459, 460). Moreover, the portion of the wrongful death award that was made on behalf of the decedent's adult son, Anastacio Perez, Jr., and adult daughter, Susan Perez, in the amounts of \$200,000 each, must be vacated because there was no evidence as to any pecuniary injury to those children caused by the decedent's death (*see Loehner v Simons*, 239 AD2d 468, 469).

The remaining award for individual pecuniary loss does not deviate materially from what would be reasonable compensation (*see Ramos v La Montana Moving & Stor.*, 247 AD2d 333,

334; *Korman v Public Serv. Truck Renting*, 116 AD2d 631, 632).

The defendants' remaining contentions either are unpreserved for appellate review, are without merit, or involve trial determinations that were not sufficiently prejudicial to warrant a different outcome.

MASTRO, J.P., BALKIN, DICKERSON and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court