

Llivicota v Rock

2022 NY Slip Op 31360(U)

April 20, 2022

Supreme Court, New York County

Docket Number: Index No. 805318/2019

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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INDEX NO. 805318/2019

JULIO LLIVICOTA,

Plaintiff,

- v -

**DECISION & ORDER AFTER
INQUEST**

DR. ALEXANDER ROCK, DR. ROBERT WINEGARDEN,
and ROBERT F. WINEGARDEN, D.D.S., P.C.,

Defendants.

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I. INTRODUCTION

This is an action to recover damages for dental malpractice. The plaintiff alleged that the defendants willfully and wantonly permitted unlicensed dentists and unlicensed assistants and technicians to diagnose and treat him. The plaintiff contended that, inter alia, the defendants negligently performed diagnostic procedures to determine the extent and nature of his dental problems, negligently prepared teeth for crowns and placed implants, failed to inform him of the risk and consequences of the prescribed treatment, and thereafter negligently abandoned him. By order dated September 9, 2021, the court, upon concluding that the plaintiff set forth sufficient proof of the facts underlying his cause of action to recover for negligence and lack of informed consent, granted the plaintiff's motion for leave to enter a default judgment against the defendants on the issue of liability, and set the matter down for an inquest on the issue of damages.

II. FINDINGS OF FACT

The facts underlying the issue of liability for dental malpractice are set forth in this court's September 9, 2021 order.

At the November 17, 2021 inquest on the issue of damages, the plaintiff testified on his own behalf and adduced the testimony of Herbert Rubin, a dentist having practiced for over 50 years in New York State. At the time of the inquest, the plaintiff was 47 years of age, and worked in construction as a helper to a roofer.

The court finds that the plaintiff credibly testified that he went to see the defendants due to damaged teeth, including a dental bridge that had fallen out. The court credits his testimony that the parties agreed on a price of \$6,000 for the necessary dental work, consisting of implants, a prosthesis, a bridge, and crowns, and that the plaintiff paid the agreed upon price in full. The court also credits his testimony that the defendants did not complete the necessary dental work and, in fact, when he returned to the defendants' office, it was closed. The plaintiff credibly testified that he was instructed to go to a New Jersey location and that, when he arrived, he was told that the staff at that location could complete the dental work for an additional \$2,000 to \$4,000. The court finds that the plaintiff credibly testified that he did not receive the additional treatment or any treatment since and, as a result, he has been without upper teeth for approximately five years. The plaintiff credibly testified that he does not eat well, he no longer goes out with his friends and family, and he cannot smile since he does not have teeth. The plaintiff also credibly testified that he has not fixed his teeth because he cannot afford to do so.

Dr. Rubin credibly testified that the plaintiff received some implants and abutments to allow for the placement of a bridge or teeth, but that he was unsure of the number of implants and abutments installed since there were no x-rays or other records available for his review. Dr. Rubin credibly testified that the abutments placed in the plaintiff's mouth were not covered over, and, if left as such, could subject the plaintiff to exposure to bacteria, plaque buildup, and deterioration of the bone. The court credits his testimony that, without teeth, the plaintiff is going to have difficulty talking and difficulty eating, although he might be able to "eat some mush but, not much else". Dr. Rubin credibly concludes that, to place implants on a patient without taking

a computerized axial tomography (CAT) scan is a departure from good and accepted standard of care. The court also credits his testimony that the defendants' failure to provide follow-up treatment and complete his dental work constituted a total abandonment of a patient, and a departure from good and accepted standard of care. In addition, Dr. Rubin credibly testified that the fair and reasonable cost of fixing the plaintiff's teeth, as it was supposed to be done, would cost between \$18,000 and \$20,000.

III. CONCLUSIONS OF LAW

A defaulting defendant admits all traversable allegations in the complaint, including the basic issue of liability (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 [1985]; *Cole-Hatchard v Eggers*, 132 AD3d 718, 720 [2d Dept 2015]; *Gonzalez v Wu*, 131 AD3d 1205, 1206 [2d Dept 2015]). The defaulting defendants are, however, "entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages" (*Minicozzi v Gerbino*, 301 AD2d 580, 581 [2d Dept 2003] [internal quotation marks omitted]; *see Rudra v Friedman*, 123 AD3d 1104, 1105 [2d Dept 2014]; *Toure v Harrison*, 6 AD3d 270, 272 [1st Dept 2004]). The defendants elected not to present such testimony or cross-examine witnesses at the inquest here, despite being provided with notice of the inquest.

This court already has determined that the plaintiff has a cause of action to recover for medical malpractice, inasmuch as a deviation or departure from accepted practice, and evidence that such departure was a proximate cause of the plaintiff's injury, constitute medical malpractice (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]).

"The 'reasonableness' of compensation must be measured against relevant precedent of comparable cases" (*Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]; *see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 275 [1st Dept 2007]; *Reed v City of New York*, 304 AD2d 1, 7

[1st Dept 2003]; *Halsey v New York City Tr. Auth.*, 114 AD3d 726, 727 [2d Dept 2014]). “Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation” (*Miller v Weisel*, 15 AD3d 458, 459 [2d Dept 2005]; see *Garcia v CPS 1 Realty, L.P.*, 164 AD3d at 659 [2d Dept 2018]; *Vainer v DiSalvo*, 107 AD3d 697, 698-699 [2d Dept 2013]; *Reed v City of New York*, 304 AD2d at 7). What constitutes “reasonable compensation” must be assessed with due regard to the “circumstances presented” (*Luna v New York City Tr. Auth.*, 116 AD3d 438, 438 [1st Dept 2014]).

The court concludes that the plaintiff is entitled to an award of \$60,000 for past pain and suffering (see *Altman-Fider v Gershon*, 2002 NY Slip Op 30122[U], *5 [Sup Ct, NY County 2002] [holding that an award of \$40,000 for past pain and suffering was consistent with several other tooth injury cases]; *Classen v Ashkinazy*, 258 AD2d 863, 865 [3d Dept 1999][affirming past pain and suffering award of \$40,000 to plaintiff with failed lower dental implant]; *Teller v Anzano*, 263 AD2d 647, 650 [3d Dept 1999] [modifying judgment to allow \$35,000 past pain and suffering award in personal injury action involving damage to two front teeth]; *Kushner v Mollin*, 181 AD2d 866, 867 [2d Dept 1992] [affirming \$40,000 for past pain and suffering where plaintiff lost six upper teeth]). The court notes that these representative cases were decided between 20 and 30 years ago, so that a reasonable award in 2022 would take inflation and other economic factors into account.

The court also concludes that the plaintiff is entitled to an award of \$6,000 for his past expenses, and \$20,000 for his future expenses in accordance with the testimony adduced by the plaintiff and his expert, Dr. Rubin.

New York does not recognize an independent cause of action for punitive damages; however, a demand or request for punitive damages is viable when attached to a substantive cause of action (see *Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 80 [2d Dept 2007]).

While a demand for punitive damages is often raised in terms of conduct that is intentional,

malicious, and done in bad faith, conduct warranting an award of punitive damages “need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness” (*id.* at 80-81; see *Home Ins. Co. v Am. Home Prods. Corp.*, 75 NY2d 196, 204 [1990]). Moreover, punitive damages are proper where there is sufficient evidence of reprehensible conduct evincing a gross indifference to patient care (see *Brown v LaFontaine-Rish Med. Assoc.*, 33 AD3d 470, 471 [1st Dept 2006]; *Graham v Columbia Presbyt. Med. Ctr.*, 185 AD2d 753, 754 [1st Dept 1992]).

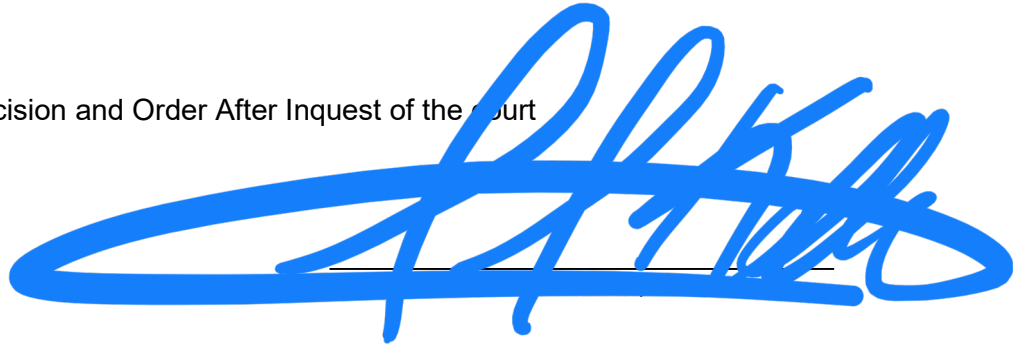
The court concludes that the defendants’ behavior and the practices that they engaged in are sufficient to warrant an award of punitive damages. Such an award is appropriate to deter future reprehensible conduct by the defendants and others similarly situated (see *Garber v Lynn*, 79 AD3d 401, 403 [1st Dept 2010]; *Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 81 [2d Dept 2007]). As such the court concludes that the plaintiff is entitled to an award of punitive damages in the amount of \$60,000.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, Julio Llivicota, 460 52nd Street, Apartment Three Floor, Brooklyn, New York 11220, and against the defendants Dr. Alexander Rock, 5 Commack Road, Commack, New York 11725, Dr. Robert Winegarden, 401 East 34th Street, New York, New York 10016, and Robert F. Winegarden, D.D.S., P.C, 57 West 57th Street, Suite 610, New York, New York 10019, jointly and severally, in the sum of \$146,000.

This constitutes the Decision and Order After Inquest of the court



4/20/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE