

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 17, 2005

96815

WILLIAM F. BROOKING SR.,
Individually and as
Executor of the Estate
of THERESA A. BROOKING,
Appellant,

v

MEMORANDUM AND ORDER

JOSEPH M. POLITO et al.,
Respondents,
et al.,
Defendants.

Calendar Date: January 19, 2005

Before: Crew III, J.P., Peters, Rose and Lahtinen, JJ.

Kriss, Kriss, Brignola & Persing, Albany (Daniel J. Persing
of counsel), for appellant.

D'Agostino, Krackeler, Baynes & Maguire P.C., Menands (Mia
D. Van Auken of counsel), for Joseph M. Polito and others,
respondents.

Peters, J.

Appeal from an order of the Supreme Court (Benza, J.),
entered May 7, 2004 in Albany County, which granted a motion by
defendants Joseph M. Polito and Albany Gastroenterology
Consultants to dismiss the fourth cause of action.

In this medical malpractice action, plaintiff, on behalf of
decedent, seeks to recover both compensatory and punitive damages

against defendants Joseph M. Polito and Albany Gastroenterology Consultants (hereinafter collectively referred to as defendants) for their failure to, among other things, timely diagnose her cancerous condition; she died in February 2004 from metastatic pancreatic cancer. In this motion seeking partial dismissal of the complaint, defendants successfully obtained the dismissal of plaintiff's fourth cause of action against them seeking the imposition of punitive damages.

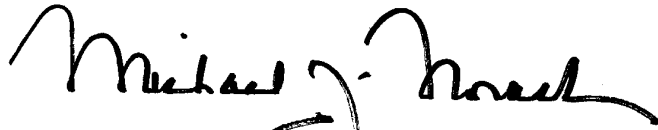
The order from which plaintiff appeals is affirmed. In a medical malpractice action, punitive damages are only recoverable where the conduct in question shows "a wrongful motive on the defendant's part, willful or intentional misdoing, or a reckless indifference equivalent to willful or intentional misdoing" (Frenya v Champlain Val. Physicians' Hosp. Med. Ctr., 133 AD2d 1000, 1000 [1987]; see McDougald v Garber, 73 NY2d 246, 254 [1989]; Washington v Community Health Plan, 220 AD2d 972, 973 [1995]; see also Rey v Park View Nursing Home, 262 AD2d 624, 627 [1999]; Luby v St. John's Episcopal Hosp., 220 AD2d 390, 390 [1995]; Spinosa v Weinstein, 168 AD2d 32, 42-43 [1991]; Ross v Community Gen. Hosp. of Sullivan County, 150 AD2d 838, 842 [1989]). While the conduct alleged against defendants is indeed significant, it is undisputed that since the commencement of care in November 2002, they performed various tests on decedent, which included blood tests, CAT scans, an MRI and ultrasound, analyzed those tests and recommended treatment accordingly. Even viewing plaintiff's allegations as true, none of them amounted to a "'conscious disregard of the rights of others'" (Washington v Community Health Plan, supra at 973, quoting Welch v Mr. Christmas, 57 NY2d 143, 150 [1982]) such that a "wrongful motive . . . willful or intentional misdoing, or a reckless indifference" (Frenya v Champlain Val. Physicians' Hosp. Med. Ctr., supra at 1000) could be discerned.

Accordingly, plaintiff's claim for punitive damages against defendants was properly stricken.

Crew III, J.P., Rose and Lahtinen, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:



Michael J. Novack
Clerk of the Court

