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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIMEON GOLAR IA PART 24  
Justice

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PATSY MEROLA, etc.           :   Index
                             :   Number 13511 1996
                             :
                             :   Motion
      - against -           :   Date June 12, 2001
                             :
CATHOLIC MEDICAL CENTER OF  :   Motion
BROOKLYN AND QUEENS, INC., :   Cal. Number 23
et al.                       :
-----X
  
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The following papers numbered 1 through 14 read on this motion by defendants for an order pursuant to CPLR 2104 and 3217, and EPTL § 5-4.6 (1) approving a settlement and discontinuing this action with prejudice; (2) directing plaintiff to deliver to counsel a duly executed general release and hold-harmless agreement within 10 days after the service of a copy of the order to be entered herein together with notice of entry; and (3) directing defendants to pay the sum of \$25,000.00 to counsel for plaintiff within 21 days after the delivery of the release. Plaintiff cross-moves in opposition, and seeks an order (1) disapproving the settlement (2) directing the entry of the judgment in accordance with the jury's verdict and (3) appointing a guardian ad litem for the infant, Michael Merola.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits(A-B).....	1 - 4
Notice of Cross Motion-Affidavits-Exhibits(1-3).	5 - 10
Reply Affidavits .....	11 - 12
Reply Affidavits .....	13 - 14

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

This is an action to recover damages for wrongful death resulting from medical malpractice. The decedent, Wanda Merola, was born on November 21, 1951 and died on January 12, 1996. She was survived by her husband, Patsy Merola, born on October 18, 1948, and their two children, Kristy Ann Merola and Michael Merola, who were 15 and 14 years old, respectively, at the time of their mother's death. Michael Merola was born with congenital myotonic

dystrophy and, as a result, is physically and mentally disabled. Limited Letters of Administration were issued to Patsy Merola on May 31, 1996, and on June 20, 1996, the within wrongful death action was commenced by Mr. Merola as Administrator of the Estate of Wanda Merola. The trial before a jury of the action was commenced on March 28, 2000, and continued through April 13, 2000.

At trial, the jury heard testimony that in the early evening hours of January 11, 1996, the decedent was taken to the emergency room of St. John's Medical Center complaining of shortness of breath and chest pain. She was initially seen by the triage nurse, then by emergency room physicians. The decedent was found to have very poor oxygen saturation, and during the next several hours various tests were performed and medications and oxygen administered. At some time in the early hours of January 12, 1996, decedent died. Plaintiff alleged that defendants failed to properly diagnose and treat the decedent for a pulmonary embolism, which caused her death.

On April 13, 2000, after the conclusion of the trial and while the jury was deliberating, plaintiff's trial counsel and defense counsel placed on the record, without obtaining the prior approval of the court, a stipulation which provided that, in the event of a defendants' verdict plaintiff would receive \$90,000.00 and that, in the event of a plaintiff's verdict, the plaintiff would receive \$250,000.00, regardless of the amount of the verdict. Mr. Merola did not personally participate in this stipulation, and the court did not participate in negotiating or approving the purported settlement before it was entered into the record, nor thereafter in writing, as required by statute for it to have been valid and binding (see, EPTL §5-4.6[a][1]); nor did it approve it at the time it was placed on the record. It should be noted in this regard that the court did not have any prior notice or request that such a stipulation would be entered into the record. At the conclusion of the trial and after deliberations, the jury found in favor of the plaintiff and awarded damages in the amount of \$16,000,000, allocated between decedent's claim for pain and suffering, and the pecuniary losses suffered by the decedent's distributees. Following the trial of the action and the plaintiffs' verdict, plaintiff engaged new counsel to seek to set aside the prior stipulation of settlement.

Defendants' motion for an order approving the stipulation of settlement of April 13, 2000, directing the plaintiff to deliver an executed general release and hold-harmless agreement, and directing plaintiff to accept payment of his counsel fees in the sum of \$25,000.00, is denied in its entirety. Section 5-4.6(a) of the EPTL provides that only "an administrator appointed under 5-4.1 or a personal representative to the court in which an action for wrongful act, neglect or default causing the death of a decedent is pending..." may make an application to compromise or settle the action. The defendants in a wrongful death action have no legal

interest in whether the settlement is in the best interest of the estate, and therefore do not have standing to seek the court's approval of the settlement. (See, Matter of DeLong, 89 AD2d 368.)

Plaintiff's cross motion for an order disapproving and vacating the April 13, 2000 settlement is granted. It is the right and responsibility of this court to evaluate and determine the fairness and reasonableness of the settlement, including the amount to be paid, the manner in which the payment obligation is fulfilled and the parties' arrangements for payment of costs and attorneys' fees; and the court's written approval constitutes "conclusive evidence of the adequacy of the compromise in any proceeding in the surrogate's court for the final settlement of the account of [the] administrator or personal representative." (EPTL § 5-4.6[b]; see also, Pollicina v Misericordia Hospital Medical Center, 82 NY2d 332.) In view of the Limited Letters of Administration, as well as the provisions of section 5-4.6 of the EPTL, the parties could not lawfully enter into a binding settlement without the court's approval. The issue of plaintiff's counsel's apparent authority and the extent of that authority therefore is irrelevant.

The court finds that, as the parties' settlement provided solely for a lump sum payment without allocating between the cause of action for the decedent's conscious pain and suffering and that for wrongful death, and the court's prior written approval as to the proposed settlement not having been obtained by the parties' counsel, the purported settlement is invalid. Moreover, in this court's judgment, in view of the jury's verdict, the purported settlement would appear to inadequately compensate decedent's distributees. The court also notes that while the settlement failed to provide for the payment of costs and attorneys' fees, defendants now assert that they will pay plaintiff the sum of \$25,000.00 for his attorneys' fees. This sum, however, was not part of the April 13, 2000 agreement, and it is unclear as to whether it is separate and apart from the \$250,000.00, or whether it bears any relationship to the plaintiff's actual legal costs. In view of all of the foregoing, the proposed settlement is not in the best interests of the distributees of the decedent's estate and is not in accordance with the law. Accordingly, the court declines to approve the settlement and orders it vacated.

Plaintiff's request to appoint a guardian ad litem for Michael Merola is denied. The within action was brought by Patsy Merola as the Administrator of the Estate of Wanda Merola, on behalf of the distributees of the Estate, including Michael Merola. This action is now concluded as the action has been tried, and a jury verdict has been rendered. Therefore, there is no need for the court to appoint a guardian ad litem at this time. Plaintiff may renew his request in the Surrogate's Court, in order to protect the rights of Michael Merola in the distribution of the jury's award.

Pursuant to the "so ordered" stipulation dated June 7, 2000, the parties are directed to file post-verdict motions within 60 days of the date of this order, or to submit their proposed judgments in accordance with Article 50-B of the CPLR.

Dated:

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J.S.C.