

55 A.D.2d 587, 389 N.Y.S.2d 615
(Cite as: 55 A.D.2d 587, 389 N.Y.S.2d 615)

FIND Request: 55 A.D.2d 587

Supreme Court, Appellate Division, First Department, New York.
Delores CLANCY, as Administratrix of the Estate of Michael John Clancy, Deceased, et al., Plaintiff-Respondent,
v.
The PORT OF NEW YORK AUTHORITY et al., Defendants-Appellants.

Dec. 28, 1976.

Action was brought for wrongful death of construction worker who was killed when he fell 25 stories down elevator shaft during building construction. Judgment was entered for the plaintiff by the Supreme Court, New York County, Hilda G. Schwartz, J., and appeal was taken by defendants. The Supreme Court, Appellate Division, held that photographs of scene were properly excluded because of lack of adequate foundation, that while claim for punitive damages should not have gone to the jury in absence of adequate foundation therefor error was harmless since no award was made, but that that portion of verdict based on conscious pain and suffering would be stricken since decedent's life did not last for even the smallest interval of time after impact.

Judgment modified, and, as modified, affirmed.

West Headnotes

[1] Evidence 157 ⚡ 380

157 Evidence

157X Documentary Evidence

157X(D) Production, Authentication, and Effect

157k369 Preliminary Evidence for Authentication

157k380 k. Photographs and Other Pictures; Sound Records and Pictures. Most Cited Cases (Formerly 157k379)

Trial court properly excluded photographs of

scene of accident offered by defendants in wrongful death action where the foundation with respect to whether photographs were fair and accurate representations of scene of accident at the time of the occurrence was incomplete.

[2] Labor and Employment 231H ⚡ 2881

231H Labor and Employment

231HXVII Employer's Liability to Employees

231HXVII(B) Working Conditions and Methods of Performing Work

231Hk2881 k. Weight and Sufficiency of Evidence. Most Cited Cases

(Formerly 148Ak206.1, 148Ak206 Employers' Liability, 255k278(12), 255k276(11) Master and Servant)

Evidence in action for wrongful death of deceased construction worker, who fell 25 stories down an improperly safeguarded elevator shaft during construction, showed that decedent necessarily traversed the path through construction in course of access to and departure from his work and that he was therefore at the scene of employment at time of accident subject to provisions of Labor Law. Labor Law § 241-a.

[3] Appeal and Error 30 ⚡ 1062.1

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)17 Submission of Issues or Questions to Jury

30k1062.1 k. In General. Most Cited Cases

While claim for punitive damages should not have gone to jury in wrongful death action since there was no adequate foundation therefor, error was harmless because there was no award.

[4] Appeal and Error 30 ⚡ 1151(2)

30 Appeal and Error

30XVII Determination and Disposition of Cause

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30XVII(C) Modification

30k1151 Modification as to Amount of Recovery

30k1151(2) k. Reducing Amount of Recovery. Most Cited Cases

Appellate Division struck that portion of verdict in wrongful death action based on conscious pain and suffering of decedent who fell to his death 25 stories down an improperly safeguarded elevator shaft during construction, since it could not be successfully maintained that his life lasted for even the smallest interval of time before the tremendous impact resulting from fall.

****615** A. N. Seiff, New York City, for plaintiff-respondent.

T. R. Newman, New York City, for defendants-appellants.

***588** Before MARKEWICH, J.P., and MURPHY, BIRNS, CAPOZZOLI and NUNEZ, JJ.

****616** MEMORANDUM DECISION.

***587** [1][2][3][4] Judgment, Supreme Court, New York County, entered January 8, 1976, unanimously modified, on the law, to strike therefrom that portion based on the decedent's claimed conscious pain and suffering, and otherwise affirmed, without costs and without disbursements. The tragic death of plaintiff-respondent's decedent resulted, according to unassailable circumstantial evidence, from a fall of 25 stories down an improperly safeguarded elevator shaft during construction of the World Trade Center. We find that the path through the construction was necessarily one requiring traversal by the decedent in the course of access to and departure from his work and was therefore at the scene of employment, subject to the transgressed provisions of section 241-a of the Labor Law. There was no error in exclusion of photos of the scene offered by defendants; the foundation in respect of their being fair and accurate representations of the scene at the time of the tragic occurrence was incomplete. The award of damages for wrongful death is not considered excessive. While the trial was not free of errors, they were harmless in their effect; the claim for punitive damage should not have gone to the jury, there having been no adequate foundation therefor, but there was no award on this score; and we strike that portion of the verdict based

on conscious pain and suffering because it cannot be successfully maintained that decedent's life lasted for even the smallest interval of time after the tremendous impact resulting from his fall. One other error, the inclusion of more Labor Law statutes than applicable in the court's charge was speedily corrected before verdict by additional instructions. All in all, we hold, the trial was eminently fair and the result in accord with justice.

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