

Lawsuit Involving Death of Six Year Old Boy Hit by Oxygen Tank While Undergoing MRI Test Settles on Verge of Trial for \$2,900,000

Posted on February 4, 2010 by [John Hochfelder](#)

We wrote about this tragic case last August, [here](#), and can now report that the **estate of Michael Colombini has settled** all of the claims arising out of his death in 2001. Bearing full responsibility, Westchester County Health Care Corp. (the formal name of Westchester Medical Center in Valhalla, New York) has agreed to pay **\$2,900,000**.



Michael Colombini had been undergoing a magnetic resonance imaging ("MRI") test at the hospital on July 26, 2001 when a hospital nurse brought an oxygen tank into the MRI room and, as it was made of ferrous metal, the **oxygen tank was propelled missile-like into the machine where it struck Michael's head as he lay sedated being tested for a brain tumor. He died two days later.**

It was a ferrous/metallic oxygen tank similar to this one that was brought into the MRI suite and was pulled towards the bore of the MRI magnet with deadly force:



Within days, the hospital assumed full responsibility and later offered \$1,000,000 to settle quietly. The offer was declined and extensive litigation ensued not only against the hospital but also against nine other defendants (including doctors, a nurse, technicians, the MRI suite administration company and the MRI manufacturer). Claims were made for wrongful death, pre-death conscious pain and suffering and punitive damages.

After **nine years of pre-trial discovery (such as depositions and document exchanges), motion practice (the defendants sought dismissal on technical grounds more than once) and an appeal**, the hospital increased its offer by nearly three-fold and the case is now over. A [court order approving the settlement was signed last week.](#)

The settlement is significant because it's a large recovery by New York law standards for the death of a child (the [New York State Trial Lawyers Association vigorously opposes as unfair the limiting laws in New York regarding damages allowed in child death cases](#)). And, to the extent that the settlement represents a recovery for Michael's pain and suffering, **\$2,900,000 appears to exceed the amounts sustained in appeals in all prior New York cases dealing with short periods of pre-death pain and suffering.**

So why did the hospital pay so much to settle? Three reasons:

1. looming punitive damage claims
2. the possibility of a significant emotional distress verdict in favor of Michael's father (who was at the scene) and
3. the tenacity and reputation of the Colombini family lawyers Tom Moore and Matthew Gaier

Punitive damages are very rarely awarded or sustained on appeal in a negligence or medical malpractice case. They are viable only when it's proven that a defendant engaged in conduct evincing an utter indifference or conscious disregard for the safety of others.

In this case, that claim was made against several defendants but as to the operator of the MRI suite – University Imaging Medical Corp. (“UIM”) – it looked like there was a good chance plaintiff would prevail.

UIM made a motion back in 2004 to have the punitive damages claim against it thrown out. The trial judge granted the motion and tossed the claim; however, on appeal in 2005 the [appellate court reinstated the punitive damage claim against UIM](#). Plaintiff was prepared to prove that UIM, which was responsible for MRI safety and training, had wantonly ignored safety practices in the MRI suite in allowing ferrous materials near the MRI magnet.

The punitive damage claim against UIM was a big, open item and **had the jury agreed UIM should be punished then the assessment would likely have been several million dollars** (it's nearly always many, many multiples of the actual or compensatory damages awarded).

Emotional distress claims are recognized in New York courts for people not physically injured in an accident when they were within the “zone of danger” and feared for their own safety. When he rushed into the MRI suite after the oxygen tank hit his son, Mr. Colombini testified that he was indeed in fear. The [appellate court, in its 2005 ruling in this case mentioned above, found that there was an issue of fact as to whether Mr. Colombini was in the zone of danger](#) and he was permitted, therefore, to present his emotional distress claim before a jury at trial.

[In a July 6, 2009 decision, though, the trial judge dismissed the emotional distress claim](#). The judge said that Mr. Colombini had not shown that the defendants owed him any duty of care and he had not shown he really feared for his own safety. This ruling was puzzling in that the judge reversed her own prior ruling in 2004 that allowed this claim to proceed. Plaintiff's counsel no doubt felt that had this case not settled then the father's emotional distress claim would have been reinstated on appeal and that a very substantial sum would have been awarded directly to the father for his emotional distress.

The law firm of [Kramer, Dillof, Livingston & Moore](#) is without question one of the top plaintiff's medical malpractice law firms in New York. In this case, partners **Thomas A. Moore** and **Matthew Gaier** superbly represented the Colombini family and reached the best result that anyone could have. “Tommy” Moore has become a legendary figure in the New York courts on behalf of malpractice victims. It is not an exaggeration to say that in this case, the defendants paid top dollar and then some because Mr. Moore was ready to try the case. That's not to say he's infallible, and he has critics and missteps (word is that this past June he advised a client to reject an \$8,000,000 settlement offer and then the jury verdict was for the defense) but it is to say that **the \$2,900,000 settlement in this case is probably more than would have been sustained on an appeal of a jury verdict in that amount or higher.**

I pause before I close this post with a thought and a prayer for Michael Colombini and his wonderful family. They are good people who've suffered tragedy beyond words. May Michael's soul be bound up in the bond of eternal life and may his family know no more sorrow.