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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
IA PART 24

Index No: 13511/96
Motion Date: 01/22/02
Cal No: 29

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PATSY MEROLA, As Administrator of
The Estate of WANDA MEROLA, ,

Plaintiff,

BY: SIMEON GOLAR, J.S.C.

DATED:

- against -

CATHOLIC MEDICAL CENTER OF BROOKLYN
d/b/a ST. JOHN'S HOSPITAL, et. al.,

Defendants.

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This medical malpractice action to recover damages for conscious pain and suffering and wrongful death was tried before me in April, 2001. On April 13, 2001, after the conclusion of the trial and while the jury was deliberating, plaintiff's trial counsel and defense counsel placed on the record a stipulation discontinuing the action as against the individual defendants, Drs. James and Lutwak. The parties also 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 and that, in the event of a plaintiff's verdict, the plaintiff would receive \$250,000, regardless of the amount of the verdict. Mr. Merola, the administrator of the estate of the decedent, 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. Subsequently, the jury returned a verdict in favor of plaintiff in the sum of \$16,000,000, as follows: \$3,000,000 for approximately fifteen hours of pre-death conscious pain and suffering, and \$13,000,000 for past and future pecuniary loss sustained by the distributees, the decedent's husband and children. Defendants then moved for an order approving the stipulation of settlement. The Court denied this motion by order dated September 19, 2001.

The defendant, Catholic Medical Center, moves herein, pursuant to CPLR 4404, for the Court to set aside the jury verdict and grant a new trial on damages or reduce the verdict based upon the following grounds:

1. The evidence was legally insufficient to support an award for pain and suffering;
2. The pain and suffering award deviates materially from what would be reasonable compensation;
3. The past and future pecuniary loss awards to decedent's spouse and distributees, in addition to being excessive, were (a) speculative, (b) tainted by reversible error, and (c) not based upon a fair interpretation of the evidence;

4. The jury mistakenly awarded pecuniary losses over the lives of the distributees rather than the life expectancy of the decedent;

5. The jury improperly heard testimony concerning letters written by decedent's son to the decedent after her death; and

6. The Court erred in submitting a verdict sheet to the jury that failed to differentiate among the various elements of pecuniary loss.

The defendant also moves, pursuant to CPLR 4545 and CPLR Article 50-A, for the Court to direct a hearing to determine (a) the deductions to be made for collateral source payments and (b) the structuring of the judgment.

While plaintiff's counsel concedes, for the purpose of this motion, that certain aspects of the damages verdict were excessive, he opposes defendant's assertion that the Court committed reversible error on the issue of damages.

The Court rejects defendant's contention that the evidence was legally insufficient to support an award for pain and suffering. Defendant argues that "plaintiff presented no proof, expert or otherwise, to enable the jury to distinguish between the pain and suffering associated with the underlying pulmonary embolism and pain resulting from the alleged failure to treat this condition." However, the record reflects that the malpractice consisted of the failure to immediately obtain arterial blood gases and to

administer heparin. Plaintiff's expert testified that heparin is an anti-coagulant that would have prevented the occurrence of another embolism and at the same time heparin would have acted as an "anti-platelet agent." The expert further testified that platelets release a series of substances that cause changes to occur that lead to lower oxygen in the blood, that the second embolism would not have occurred with the timely and proper administration of heparin and that the failure to administer heparin allowed the decedent to have low blood oxygenation, thereby causing decedent to suffer a shortness of breath.

CPLR 5501(c), though expressly applicable to New York appellate courts, also sets the standard for trial courts called upon to determine whether or not a verdict should be set aside as excessive or inadequate. (See, Shurgan v. Tedesco, 179 A.D.2d 805 (2d Dep't 1992); Giglio v. Pignataro, 54 A.D.2d 556 (2d Dep't 1976); Antunes v. The Nassau County Medical Center, N.Y.L.J. p.27 (Supreme Court, Nassau County, February 25, 2002).) With respect to both defendant's and plaintiff's assertion that the jury's \$3,000,000 award for pain and suffering was excessive, the applicable standard of review is whether the verdict "deviates materially from what would be reasonable compensation." (See, CPLR 5501(c).) This standard replaces the previous "shocks the conscience" standard and gives trial courts more latitude to tighten the range of jury awards so that the range of what is reasonable compensation in a given

jurisdiction will be more predictable and uniformly applied to similarly situated litigants. (See, Antunes, *supra* citing Consorti v. Armstrong World Industries, Inc., 72 F.3d 1003, 1009 (2d Cir. 1995), *vacated on other grounds*, 518 U.S. 1031 and Weigl v. Quincy Specialities, Co., 2001 N.Y. Slip Op. 21502, 735 N.Y.S.2d 729 (Supreme Court, New York County, 2001).) Accordingly, the accepted methodology for determining whether or not a given verdict deviates materially from what is reasonable compensation is for the trial court to review awards approved by appellate courts in comparable cases. (See, Karney v. Arnot-Ogden Memorial Hospital, 251 A.D.2d 780 (3d Dep't 1998), *app. dsmsd.*, 92 N.Y.2d 942 (1998); Antunes, *supra*.)

The Court has reviewed awards in several Appellate Division, Second Department, decisions in cases similar to this one and concludes that the jury's award of \$3,000,000 for decedent's pain and suffering deviates from what would be reasonable compensation under the circumstances. The Appellate Division has approved pain and suffering awards ranging from a low of \$200,000 to a high of \$1,200,000 (reduced from \$4,000,000). (See, Johnson v. Queens-Long Island Medical Group, P.C., 272 A.D.2d 524 (2d Dep't 2000); Olson v. Burns, 267 A.D.2d 366 (2d Dep't 1999); Garcia v. New York City Health and Hospitals Corp., 230 A.D.2d 766 (2d Dep't 1996); Patricia Birkbeck, as Executrix of the Estate of Donald W. Birkbeck, deceased, and Patricia Birkbeck, individually, v. Central Brooklyn Medical Group, P.C., et. al., 2001 N.Y. Slip Op. 40133U; 2001 N.Y.

Misc. LEXIS 368 (Supreme Ct. Kings Cty., 2001).)

In Johnson, the Appellate Division reduced a \$4,000,000 pain and suffering award to \$1,200,000 to the estate of a fifteen-year-old girl for a failure to diagnose lupus, and for fifty days of pain and suffering.

In Olson, the Appellate Division reduced a \$1,146,000 award to plaintiff to \$700,000. Plaintiff was a fifty-six-year-old woman who experienced eight months of pre-death pain and suffering resulting from a failure to diagnose lung cancer.

In Garcia, the Appellate Division affirmed a \$200,000 verdict for the decedent's pre-death conscious pain and suffering. Decedent, within minutes of being improperly intubated, suffered brain damage and fell into a coma where he remained for several days until being pronounced brain-dead.

In Birkbeck, a \$1,000,000 award was reduced to \$750,000 by the trial court for decedent's pain and suffering resulting from a failure to diagnose lung cancer. The trial court relied upon the above Second Department case law and considered the decedent's age, the nature of his ailment and a four-month period of distress in reducing the award.

Considering the evidence in this case that Mrs. Merola experienced approximately fifteen hours of pain and suffering, and the results of comparable case analysis, while giving due deference to the jury's determination, the Court finds that the award for pain

and suffering deviates materially from what would be reasonable compensation.

The jury also awarded damages for past and future pecuniary loss as follows: \$4,000,000 to Mr. Merola, \$1,000,000 for past and \$3,000,000 for future loss of household services; \$5,000,000 to Michael Merola, \$1,000,000 for past and \$4,000,000 for future loss of parental guidance; \$4,000,000 to Christine Merola, \$1,000,000 for past and \$3,000,000 for future loss of parental guidance.

The Court, having reviewed awards in several Appellate Division decisions in cases similar to this one, concludes that the jury's award of \$13,000,000 for the distributees' past and future pecuniary losses deviates from what would be reasonable compensation under the circumstances.

With respect to the award to decedent's spouse for past and future pecuniary loss, "the standard by which to measure the value of past and future loss of household services, is the cost of replacing the decedent's services." (See, Mono v. Peter Pan Bus Lines Inc., 13 F.Supp. 2d 471 (S.D.N.Y. 1998) citing Klos v. NYCTA, 240 A.D.2d 635 (2d Dep't 1997).) The only evidence offered by plaintiff to support his demand for pecuniary loss was his testimony that the decedent "cooked, cleaned, did the laundry and took care of the children." Since decedent was not employed and was not providing financial support to her family at the time of her death, the only element of pecuniary loss available for recovery to

decedent's spouse is loss of household services. Plaintiff failed to offer any expert testimony establishing the value of decedent's cooking, cleaning, laundry and child care services.

In Bryant v. New York City Health and Hospitals Corporation, 93 N.Y.2d 592 (1999), which involved a wrongful death action stemming from treatment rendered during and after a cesarean section and birth of a daughter, the lower court reduced a verdict for future loss of household services from \$ 900,000 to \$ 450,000.

In Mono, the District Court reduced a jury award of \$378,000 for past and future loss of household services to \$301,000 based upon *plaintiff's economist's expert testimony*. The decedent's husband testified that he now performs the chores that his wife performed in the past. These chores included shopping, cleaning and laundry and required *fourteen hours per week to complete*.

In Klos, the Appellate Division reduced a \$380,000 award for past and future loss of household services to \$100,000 in a case involving the death of a thirty-eight-year-old construction worker.

In Garcia, the Appellate Division reduced the jury award for decedent's husband's pecuniary loss from \$1,200,000 to \$800,000. Decedent was a forty-two-year-old housewife who, while not employed outside of the home, performed household chores for her husband. The Court notes that Exhibit 3 to plaintiff's opposition includes a copy of the Table of Contents of the Record on Appeal in the Garcia case which lists as a witness Anna Dutka, Ph.D. Defendant's reply

references the fact that the expert is a well-known forensic economist.

Considering the evidence in this case, and while giving due deference to the jury's determination, the Court finds that the award for decedent's husband's past and future pecuniary loss deviates materially from what would be reasonable compensation. Absent expert testimony establishing the value of these household services, it is very difficult to ascribe a monetary value to them even though society does place a value on such services.

With respect to the awards to decedent's distributees for past and future pecuniary loss, "the factors to be considered by the jury include the age, character, earning capacity, health, intelligence, and life expectancy of the decedent, as well as the degree of dependency of the distributees upon the decedent and the probable benefits they would have received but for the untimely death." (See, Mary McKee v. Texasgulf, 849 F.2d 46 (1988).)

In Garcia, the Appellate Division reduced jury awards to decedent's son and daughter for loss of maternal care from \$1,000,000 and \$1,200,000 to \$850,000 and \$750,000 respectively. The facts of Garcia are strikingly similar to the facts of the case at bar in that decedents were both housewives in their forties who left behind two children.

The Court finds that the evidence was sufficient to support an award for pecuniary loss to decedent's distributees. The record

reflects close mother-daughter and mother-son relationships. However, the Court notes that the jury apparently used the life expectancies of the distributees rather than the life expectancy of the decedent to compute future pecuniary loss. Clearly, this item of damages, which relates to the lost nurture, care and guidance of decedent, cannot logically extend beyond the life expectancy of the decedent.

The defendant also contends that the Court improperly admitted testimony concerning letters written by decedent's son to the decedent after her death and that the Court erred in submitting to the jury a verdict sheet that failed to differentiate among the various elements of pecuniary loss. The Court finds that no error was committed.

In view of the foregoing, defendant's motion to set aside the verdict and grant a new trial on the issue of damages is granted unless within thirty days after service upon the plaintiff of a copy of this order, together with notice of entry, the plaintiff PATSY MEROLA shall serve and file in the office of the Clerk of this Court a written stipulation consenting to reduce the verdict in plaintiff's favor from the sum of \$16,000,000 to \$2,100,000: \$350,000 for pain and suffering; \$250,000 for past and future pecuniary loss (loss of household services) to decedent's spouse; \$100,000 for past pecuniary loss and \$500,000 for future pecuniary loss to Christine Merola for loss of parental guidance; \$150,000 for

past pecuniary loss and \$750,000 for future pecuniary loss to Michael Merola for loss of parental guidance.

If a written stipulation consenting to reduce the verdict in plaintiff's favor is served and filed as directed above, the parties are directed to contact chambers to schedule post-trial hearings pursuant to CPLR 4545 and 50-A.

The foregoing constitutes the order of the Court.

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SIMEON GOLAR, J.S.C.