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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Justice

Index Number : 108854/2004

FILIPINAS, AURELINA

VS

ACTION AUTO LEASING FINANCE

Sequence Number : 002

VACATE

INDEX NO. 108854/04

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
MAY 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 8, 2007

MARTIN SHULMAN J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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AURELINA FILIPINAS as the Administratrix of the ESTATE OF SERGIO SOLANA and AURELINA FILIPINAS, Individually,

Plaintiffs,

-against-

ACTION AUTO LEASING, TOBIAS J. PONTE, SPANISH TRANSPORTATION SERVICE CORP. and AIRPORT SERVICE CORP.,

Defendants.

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Index No: 108854/04

Decision and Order

Hon. Martin Shulman:

Defendants, Action Auto Leasing, Tobias J. Ponte, Spanish Transportation Service Corp. and Airport Service Corp. (collectively "defendants"), move for an order vacating a jury verdict rendered on October 4, 2006 which awarded plaintiff Aurelina Filipinas, as Administratrix of the Estate of Sergio Solana ("decedent", "plaintiff" or "Solana"), $750,000 for decedent's past pain and suffering. Defendants contend this award is excessive and deviates materially from what would be reasonable compensation (CPLR 4404[a]).[1] Plaintiffs oppose defendants' motion.

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[1] After the verdict was rendered, defendants' counsel made the traditional motion to set aside the entire verdict as being against the weight of the evidence. While being mindful of defendants' rights to pursue appellate remedies, this court essentially refused to entertain any motion to set aside the jury verdict finding defendants liable for negligence in this wrongful death action. However, this court granted defendants leave to file this motion seeking remittitur and permitted the parties to stipulate to extend their time to present written arguments. *See*, *Brown v. Two Exchange Plaza Partners*, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1st Dept.,1989), *affd.*, 76 N.Y.2d 172, 556 N.Y.S.2d 991 (1990), citing "(CPLR 2004; *see*, Weinstein-Korn-Miller, NY Civ Prac para. 4405.05)." Parenthetically, while defendants reserved their right to appeal the verdict on liability, they do not challenge the jury award of $12,785 for funeral expenses.

Brief Factual Background and Circumstances of the Plaintiff's Fatal Accident

During the early afternoon of January 20, 2004, co-defendant Tobias Aponte, the driver of defendants' transportation van, was making a left turn from 42nd Street to 9th Avenue, when the van's left side mirror struck and severely injured decedent as he was walking across 9th Avenue. As was learned, decedent suffered a fracture of the left orbit, fracture of the right temporal bone, a subdural hematoma and subarachnoid hemorrhaging. An ambulance arrived at about 12:23 pm, stabilized plaintiff and transported him to St. Vincent's hospital.

At the hospital and prior to having a craniotomy to relieve pressure to the brain from internal bleeding, plaintiff was given Lidocaine (local anesthetic agent), Atomidate (short acting anesthetic agent), Atracurium (muscle relaxant) and succinylcholine (paralytic agent) as well as propofol (short acting anesthetic agent). Decedent was taken into surgery at 3:20 pm and indisputably never achieved any level of consciousness during the remaining four days of his life.

The jury award was intended to be reasonable compensation for plaintiff's cognitive awareness of his conscious pain and suffering during the time period between his impact/head injury and his death. Defendants' counsel contends the $750,000.00 jury verdict for plaintiff's pain and suffering from the time of impact until his death was excessive and unreasonable and plaintiffs' counsel disagrees.

Defendants' Motion for Remittitur

Defendants freely refer to the trial testimony of plaintiff's expert witness, Dr. Jon Glass, a board certified neurologist. Dr. Glass testified that a Glascow Coma Scale

Score[2] ("GCS") of 6-7 and below is the beginning of a comatose state and acknowledged that the ambulance call report recorded decedent's GCS of 6 at or about 12:35 pm and a GCS of 5 upon arrival at the emergency room at St. Vincent's Hospital at or about 12:50 pm. Defendants conceded that plaintiff may have experienced some conscious pain and suffering when injected with an IV stick sometime between those recorded times because plaintiff's GCS spiked to a 10. Dr. Glass further testified that a patient with a GCS of 6-7 would probably not feel any pain.

Defendants further point out that during Dr. Glass' direct examination, he opined that decedent may have experienced conscious pain and suffering until 3:21 pm, when he was taken into surgery. However, during his cross-examination, defendants argue, this expert witness, upon learning that Solana was given propofol as early as 1:15 pm, modified his opinion to the extent of conceding that decedent "experienced pain and suffering until at least 1:30 and possibly 3:20." (see September 28, 2006 trial transcript at p. 93 as Exhibit D to Motion).

Defendants rely heavily on the opinion of their expert, Dr. Aaron Rabin, also a board certified neurologist. Dr. Rabin's analysis of the varied GCS recordations led him

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[2] The Glascow Coma Scale is standard assessment for a suspected head injury. Usually, emergency medical technicians perform this test on an accident victim, which measures certain responses, *viz.*: 1) eye opening, 2) verbal responses, and 3) movement of extremities (arms and legs). The scores of these three tests are added up to determine the patient's condition as a whole. A total score of 3 to 8 suggests a traumatic brain injury, 9 to 12 suggests a moderate brain injury, and 13 to 15 suggests a mild head injury.

to opine that: (1) plaintiff's recorded motor function score of 4 at 12:50 pm indicates that any perceived reflexive activity (movement of extremities) was unconscious withdrawal movements and not a symptom of pain and suffering; (2) the absence of eye movement and verbal response suggest decedent suffered cortical damage rendering decedent incapable of feeling pain; (3) the administration of certain medications such as propofol at or about 1:00 pm rendered Solana totally sedated; and (4) the combination of these anesthetic agents and the severity of Solana's brain injury resulted in plaintiff never regaining consciousness after 1:00 pm. (See October 3, 2006 Trial Transcript at pp. 39-40 as Exhibit E to Motion).

Defendants essentially contend that the interval of time during which decedent may have experienced pain and suffering at some level was no more than thirty minutes after the time of impact. That being said, defendants argue that the verdict was clearly excessive and presumably designed to punish defendants. Defendants refer the court to five reported Second, Third and Fourth Department decisions and one Court of Claims decision issued during the last ten years (Exhibit F to Motion) which *inter alia* reduced substantial high six or seven figure awards within the $200,000 to $450,000 range. Defendants distinguish the facts of those cases with the case at bar principally grounded on the nature of respective decedent-plaintiffs' injuries which, unlike Solana, enabled them to actually experience conscious pain and suffering and the greater length of time during which each of those decedent-plaintiffs suffered (i.e., days and not a mere half-hour). Thus, defendants argue remittitur is clearly warranted.

Referencing to medical record notations, defendant Ponte's testimony and plaintiffs' expert's medical testimony, Solana's counsel counters as follows:

immediately after the impact, decedent was observed on the ground shaking and trying to get up, indicative of a high level of conscious pain and suffering (September 28, 2006 Trial Transcript at pp. 13-18 as Exhibit D to Motion); decedent's cranial fractures were extremely painful upon impact; in the ambulance, decedent was recorded as being combative and agitated when EMS technicians were attempting to place a face mask suggesting a "high level of consciousness with cognitive functioning and purposeful activity." (McMahon Opp. Aff. at ¶7); plaintiff sustained a subdural hematoma and subarachnoid hemorrhages and according to plaintiffs' expert, the latter is considered to be "the most painful type of head pain. . ." (September 28, 2006 Trial Transcript at pp. 41-42 as Exhibit D to Motion); medical record notations demonstrated that plaintiff physically manifested his awareness of pain as late as 1:44 pm (combativeness, agitation, etc.); short acting sedatives and paralyzing agents administered to effectuate intubation procedures would not have rendered plaintiff insentient prior to entering surgery at or about 3:20 pm; and except for a brief period when plaintiff was being intubated, the jury justifiably relied on the record evidence in finding that plaintiff suffered excruciating pain for approximately three hours (McMahon Opp. Aff. at ¶11).

To support the jury award of $750,000, plaintiffs' counsel discounts defendants' appellate authorities as not being controlling on the court and relies heavily on a 1998 First Department decision, *Ramos v. La Montana Moving & Storage, Inc.*, 247 A.D.2d 333, 669 N.Y.S.2d 529 (1st Dept., 1998). In *Ramos*, the initial jury award of $3 million went through vicissitudinous changes, *viz.*, the Appellate Division ultimately modified the lower court order (on a remittitur motion, reduced the pain and suffering award to $250,000) and increased the award to $900,000 for 15-30 minutes of conscious pain

and suffering. Counsel then argues that except for the location of the injuries between Solana and the decedent-plaintiff in *Ramos*, *supra*, the $900,000 award the Appellate Division found reasonable ten years prior to the verdict here surely justifies the $750,000 jury award for Solana's pain and suffering, which arguably was as excruciating and possibly lasted longer than the pain and suffering decedent-plaintiff experienced in *Ramos*, *supra.*

Discussion

When performing the requisite analysis as to the correctness of the verdict granting pain and suffering awards, the court must turn to CPLR §5501 (c) which states, in relevant part:

> . . . In reviewing a money judgment in an action in which an itemized verdict is required . . . in which it is contended that the award is excessive . . . and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive . . . if it deviates materially from what would be reasonable compensation.

Trial courts may also apply this material deviation standard in overturning jury awards but should exercise their discretion sparingly in doing so. *Shurgan v. Tedesco*, 179 A.D.2d 805, 578 N.Y.S.2d 658 (2nd Dept., 1992); *Prunty v. YMCA of Lockport, Inc.*, 206 A.D.2d 911, 616 N.Y.S.2d 117 (4th Dept., 1994); *see also*, *Donlon v. City of New York*, 284 A.D.2d 13, 727 N.Y.S.2d 94 (1st Dept., 2001) (implicitly approving the application of this standard at the trial level). As this court observed in *Kaczorowska v. 110 Wall Street LLC,* 9 Misc.3d 1110(A), 806 N.Y.S.2d 445 (Sup. Ct., N.Y. Co., 2005), "[f]or guidance, a trial court will typically turn to prior verdicts approved in similar cases,

but must undertake this review and analysis with caution not to rigidly adhere to precedents (because fact patterns and injuries in cases are never identical) and/or substitute the court's judgment for that of the jurors whose primary function is to assess damages. *Po Yee So v. Wing Tat Realty, Inc.*, 259 A.D.2d 373, 374, 687 N.Y.S.2d 99, 101 (1st Dept., 1999)."

However, while this court is mindful of the "deference typically accorded to the jury's interpretation of the factual evidence. . . the award for pain and suffering appears 'to deviate[ ] materially from what would be reasonable compensation'. . ." *McKay v. Ciani*, 288 A.D.2d 587, 589, 732 N.Y.S.2d 447, 451(3rd Dept., 2001). Both experts agree that the varied readings of decedent's GCS within the hour after impact upon the arrival of the emergency medical technicians and shortly thereafter at the hospital strongly suggested plaintiff was close to being comatose if not already in a coma. Unlike the decedent-plaintiff in *Ramos*, *supra*, who suffered severe crush injuries to the lower portion of his body after being struck and twice run over by a moving truck's rear wheels, Solana *inter alia* suffered cortical injuries which presumably dampened his ability to experience pain (*see* September 26, 2006 Trial Transcript at pp. 33-34 as Exhibit E to Motion). As further corroborated by certain hospital staff entries in the medical records in evidence and expert testimony, the sedatives, analgesic agents and paralytic agents administered to Solana to complete varied pre-surgical procedures either at 1:00 pm, the earliest, or 1:44 pm, the latest, collectively had the salutary effect of rendering decedent insentient, i.e., precluding decedent from having any awareness of pain from his life-threatening injuries. Stated differently, this court finds that while decedent suffered severe brain injuries, he was only minimally

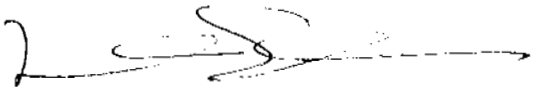
conscious for at least 30 minutes and possibly as long as an hour before being aggressively sedated prior to emergency surgery.

Moreover, there was no evidence that he experienced any pre-impact terror prior to being struck by the van's mirror, a factor the Appellate Division considered in modifying a judicially reduced jury award of $75,000 (from $1,074,000) to $250,000 for conscious pain and suffering for massive injuries including a severed thoracic artery and "evidence of consciousness for at least 15 minutes and possibly as long as an hour. . ." *Torelli v. City of New York*, 176 A.D.2d 119, 123-124, 574 N.Y.S.2d 5, 11 (1st Dept., 1991), *app. den.* 79 N.Y.2d 754, 581 N.Y.S.2d 282 (1992).

For the foregoing reasons, this court grants defendants' post-verdict motion for remittitur to set aside the jury verdict on damages for decedent's conscious pain and suffering and grants a new trial only on this damage issue unless, within ten days after service of a copy of this decision and order with notice of entry, plaintiffs execute a stipulation agreeing to decrease the jury's award for pain and suffering from $750,000 to $350,000.

Thereafter, the parties shall submit a proposed money judgment for signature consistent with this decision and order. This constitutes the decision and order of this court. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
May 8, 2007



HON. MARTIN SHULMAN, J.S.C.