SHORT FORM ORDER

INDEX NO. 05-07803
CALENDAR NO. 07-00354-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-30-07
ADJ. DATE 7-31-07
Mot. Seq. # 001 MG;CASEDISP

JEANNIE H. MONGER, as adminstratix to the goods, credits and chattels which were of RASHAWN CHARLES WILLIAMS, deceased, and JEANNIE H. MONGER, Individually, Plaintiff, – against – SCHOOLMAN TRANSPORTATION SYSTEMS, and SALVATORE P. MILAZZO, Defendants.	SIBEN & SIBEN Attorneys for Plaintiff 90 East Main Street Bay Shore, NY 11706 JEFFREY SAMEL & PARTNERS Attorneys for Defendants 150 Broadway, 20th Floor New York, NY 10038

Upon the following papers numbered 1 to 36 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 31; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 32 - 34; Replying Affidavits and supporting papers 35 - 36; Other ___: (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted.

On March 20, 2004, at approximately 7:55 p.m., a bus owned by defendant Schoolman Transportation Systems, Inc. and driven by defendant Salvatore Milazzo struck 16-year-old Rashawn Williams (the decedent) as he was attempting to walk across Peconic Avenue in the Town of Riverhead. At the site of the accident, Peconic Avenue is a two-lane road that runs north and south, with a center turning lane separating opposing traffic, and there is no crosswalk or traffic control device. Designed to resemble a trolley, the bus that struck the decedent carries

up to 28 passengers, and had been hired the day of the accident to transport party guests to and from various sites in Nassau county. It is undisputed that the decedent was struck by the front of the bus as he was walking in a westerly direction across the northbound land of Peconic Avenue. It also is undisputed that defendant Milazzo did not know he had struck someone until, after hearing a noise, he pulled the bus over and saw the decedent lying motionless in the street.

Hospital records submitted by defendants show that the decedent was brought by ambulance to the emergency department of Central Suffolk Hospital at approximately 8:10 p.m. The records indicate that the decedent suffered a severe head injury, and that he was in cardiac and respiratory arrest when he arrived at the hospital. Sadly, resuscitative efforts by emergency room doctors and staff were unsuccessful, and Rashawn Williams was pronounced dead approximately one hour after the accident. A report prepared by the Suffolk County Medical Examiner concludes that the cause of death was blunt impact head trauma.

In February 2005, the decedent's mother, plaintiff Jeannie Monger, was given limited letters of administration authorizing her to commence a wrongful death action. The following month, plaintiff filed the instant action seeking damages for wrongful death, conscious pain and suffering, and pre-impact terror. Defendants now move for summary judgment dismissing the claims against them, arguing that the decedent's actions were the sole cause of the subject accident. Defendants further assert that the decedent's distributees suffered no pecuniary injuries, and that there is no evidence that the decedent was conscious at any time after he was struck by the bus. The Court notes that on May 11, 2004, the decedent's biological father, Charles Williams, in consideration of a settlement payment of $15,000, executed a general release discharging any claims against defendants arising out of the subject accident. Plaintiff opposes the motion, arguing that triable issues of fact exist as to whether defendant Milazzo was negligent in failing to avoid the accident, whether the decedent experienced any pain after the impact, and whether the decedent's distributees sustained any pecuniary losses as a result of his death.

On March 26, 2006, plaintiff testified at a pretrial deposition that she and Charles Williams lived together with their children at Mr. William's mother's house until the decedent was three years old, at which time she moved out of the residence. She testified that she had no contact with the decedent from the time he was three years old until approximately one month before his death. When questioned about her relationship with the decedent, plaintiff testified that after she and Charles Williams ran into each other at a health center in 2004, she made efforts to develop a relationship with the decedent by calling him on the telephone and arranging a face-to-face meeting. She testified that while the decedent spoke with her on the phone, he was angry and rejected her when they met in person. Plaintiff was unable to answer questions about the basic details of the decedent's life, such as where he was living at the time of his death, what schools he had attended in the past, and what grade he was in at the time of his death. Finally, plaintiff testified that she neither gave money to nor received money from her son during the 13-year period of time from when she left him in the care of Charles Williams's family to his

death in May 2004, and that she did not incur any expenses in connection with the funeral.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering proof in admissible form sufficient to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing summary judgment to present evidence establishing the existence of a material question of fact requiring a trial (***Alvarez v Prospect Hosp.***, *supra*, at 324, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The opposing party must meet this burden by producing evidentiary proof in admissible form, or by demonstrating a reasonable excuse for failing to meet the requirement of tender in admissible form (*see*, ***Zuckerman v City of New York***, *supra*; *see*, ***W.W.W. Assocs. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]). "It is incumbent upon a [party] who opposes a motion for summary judgment to assemble, lay bare and reveal [her] proofs, in order to show that the matters set up in [the complaint] are real and are capable of being established upon a trial" (***Di Sabato v Soffes***, 9 AD2d 297, 301, 193 NYS2d 184 [1st Dept 1959]).

Damages for wrongful death are limited to "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought" (EPTL 5-4.3 [a]; ***Johnson v Manhattan & Bronx Surface Tr. Operating Auth.***, 71 NY2d 198, 203, 524 NYS2d 415 [1988]; ***Estate of Pesante v Mundell***, 37 AD3d 1173, 1175, 829 NYS2d 390 [4th Dept 2007]; ***Altmajer v Morley***, 274 AD2d 364, 365, 710 NYS2d 616 [2d Dept 2000]). Pecuniary damages include the loss of future support, assistance, and inheritance, as well as medical and funeral expenses incidental to the death (***Parilis v Feinstein***, 49 NY2d 984, 985, 429 NYS2d 165 [1980]; ***Sand v Chapin***, 238 AD2d 862, 863, 656 NYS2d 700 [3d Dept 1997]). Pursuant to EPTL 5-4.1 and 5-4.4, a wrongful death action may be maintained for the benefit of the decedent's distributees, in this case the decedent's parents (*see*, EPTL 4-1.1 [a][4]).

To establish a right to recovery in a wrongful death action, a distributee must show that he or she had a reasonable expectation of support from the decedent and, therefore, suffered a pecuniary loss as a result of the death (*see*, ***Parilis v Feinstein***, *supra*; ***Hanson v Erie County***, 120 AD2d 135, 507 NYS2d 778 [4th Dept 1986]; *cf.*, ***Estate of Pesante v Mundell***, *supra*; ***Public Adm's of Kings County v U.S. Fleet Leasing of N.Y.***, 159 AD2d 331, 552 NYS2d 608 [1st Dept 1990]). "In determining whether an estate beneficiary may reasonably expect to sustain pecuniary loss as a result of the decedent's death and, therefore, has a cognizable claim for compensation, it is, of course, relevant whether the decedent would have been legally obligated to support the beneficiary and, if not, whether the beneficiary would have volunteered to do so" (***Public Adm'r of Kings County v U.S. Fleet Leasing of N.Y.***, *supra*, at 1175, 552 NYS2d 608). And in cases claiming the wrongful death of a child, factors considered by the trier

of fact when making an award for pecuniary damages include the age, health and life expectancy of the decedent; the decedent's future earning potential and likelihood of means to support parents if in they are in need; and the relationship that existed between the decedent and the persons claiming pecuniary loss (*see*, ***Estate of Pesante v Mundell***, *supra*; ***Krueger v Wilde***, 204 AD2d 988, 614 NYS2d 88 [4th Dept 1994] ***Moyer v State of New York***, 175 AD2d 607, 572 NYS2d 262 [4th Dept 1991]; ***Franchell v Sims***, 73 AD2d 1, 424 NYS2d 959 [4th Dept 1980]; *see also*, ***Johnson v Manhattan & Bronx Surface Tr. Operating Auth.***, *supra*; ***Greenspan v East Nassau Med. Group***, 204 AD2d 273, 611 NYS2d 580 [2d Dept 1994]).

Clearly, the decedent in this action had no legal obligation to provide financial support to his parents. The issue, then, is whether there is any evidence in the record indicating that he voluntarily would have done so. The evidence submitted in support of the motion, particularly plaintiff's own deposition testimony, shows that plaintiff broke off her relationship with the decedent when he was only three years old, and that she did have any contact with him until approximately one month before his death. It indicates that plaintiff made contact with the decedent only after a fortuitous meeting with Charles Williams, and that the decedent rejected her apparent attempt at reconciliation during their only face-to-face meeting in 13 years. It also indicates that plaintiff took no financial responsibility for the decedent after she left the home, and that she did not contribute towards any of the expenses attendant with his death.

The evidence in the record further indicates that while the decedent maintained a relationship with his father, he was raised by a paternal aunt from the time he was three years old. Although plaintiff argues that Charles Williams "had expectations that his son would contribute to him and his household currently and in the further once he obtained proper employment," there is no evidence before the court supporting this allegation. In fact, there is absolutely no evidence in the papers regarding the nature of the relationship between the decedent and his father. Furthermore, Charles Williams executed a release in May 2004 discharging the defendants from liability. There also is no proof regarding the decedent's assets or future earning capacity. Accordingly, absent evidence indicating that plaintiff had a reasonable expectation the decedent would some day provide her with support, the application for summary judgment dismissing the cause of action for wrongful death is granted.

As to the remaining causes of action, a cause of action for conscious pain and suffering is separate and distinct from a cause of action for wrongful death (*see*, EPTL 5-4.3, 11-3.2; ***Lancaster v 46 NYL Partners***, 228 AD2d 133, 651 NYS2d 440 [1st Dept 1996]; ***Dunefsky v Montefiore Hosp. Med. Ctr.***, 162 AD2d 300, 556 NYS2d 645 [1st Dept 1990]; ***McDaniel v Clarkstown Cent. School Dist. No. 1***, 110 AD2d 349, 494 NYS2d 885 [2d Dept 1985], *appeal dismissed* 67 NY2d 918, 501 NYS2d 1027 [1986]; *see also*, ***Holmes v City of New York***, 269 AD 95, 54 NYS2d 289 [2d Dept 1945]). A plaintiff asserting a claim for conscious pain and suffering must establish, as a threshold matter, that the decedent was conscious for a period of time after the subject accident (***Cummins v County of Onondaga***, 84 NY2d 322, 324, 618 NYS2d 615 [1994]; *see*, ***Fiederlein v New York City Health & Hosps. Corp.***, 56 NY2d 573, 450

NYS2d 181 [1982]; ***Phiri v Joseph***, 32 AD3d 922, 822 NYS2d 573 [2d Dept 2006]; ***Williams v City of New York***, 169 AD2d 713, 564 NYS2d 464 [2d Dept 1991]). Similarly, a decedent's representative may recover damages for pre-impact terror if there is evidence that the decedent was aware of his or her impending death (*see*, ***Phiri v Joseph***, *supra* ; ***Martin v Reedy***, 194 AD2d 255, 606 NYS2d 455 [3d Dept 1994]; ***Anderson v Rowe***, 73 AD2d 1030, 425 NYS2d 180 [4th Dept 1980]). Here, the limited letters of administration issued by the Suffolk County Surrogate do not authorize plaintiff to bring a survival action to recover damages for the decedent's pain and suffering or pre-impact terror (*cf.*, ***Monson v Israeli***, 35 AD3d 680, 828 NYS2d 424 [2d Dept 2006]). Defendants' application for summary judgment dismissing the claims for conscious pain and suffering and pre-impact terror, therefore, is granted.

Dated: OCT 10 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION