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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of October 2009.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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GLORIA C. THOMAS, as Administratrix of the Estate of ARTHUR A. THOMAS, deceased and GLORIA C. THOMAS, individually,

Plaintiff,

- against -

Index No.: 35782/04

JOSHUA H. BURACK, M.D.,

Defendant(s).

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The following papers numbered 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed	1 -2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Memoranda of Law	4, 5, 6

In this action for medical malpractice and wrongful death, defendant Joshua H. Burack, M.D. seeks an order, pursuant to CPLR 4401, 4404 and 5501, setting aside a jury's liability verdict in favor of plaintiff and award of damages totaling $19,780,000.00

Dr. Burack alleges that (a) plaintiff failed to make a *prima facie* showing of medical malpractice [CPLR 4401]; (b) the liability verdict is against the weight of the evidence

[CPLR 4404]; c) a new liability trial is required in order to apportion fault against Downstate Hospital [CPLR 4404]; (d) the interest of justice requires a new trial [CPLR 4404]; (e) the awards for pain and suffering and loss of services are excessive and not supported by the evidence [CPLR 4401, 5501(c)]; and (f) the award for wrongful death, pecuniary loss, was not proven with reasonable certainty [CPLR 4404]

Plaintiff opposes the motion.

DISCUSSION

On April 7, 2003 plaintiff's decedent, Arthur Thomas, was admitted to Downstate Hospital for single bypass heart surgery and a mitral valve repair. Within a period of less than 24 hours, Dr. Burack performed three open heart surgical procedures on Mr. Thomas. At trial, plaintiff alleged negligence by Dr. Burack in connection with these surgeries, and Dr. Burack claimed that hospital staff was negligent in the monitoring and treatment of various infections and complications during Mr. Thomas' ensuing five-month hospitalization. Mr. Thomas died on September 12, 2004, without leaving the hospital.[1]

The jury determined that Dr. Burack departed from good and accepted medical practice in failing to inspect Mr. Thomas' lung for bleeding at the conclusion of the first surgery and in failing to properly test his staple line repair during the second surgery. The jury awarded $6 million for Mr. Thomas' conscious pain and suffering, $13 million to Mrs.

[1] Plaintiff has commenced an action against Downstate in the Court of Claims.

Thomas for the loss of Mr. Thomas' services and society prior to his death, and $780,000.00 in pecuniary damages on the wrongful death claim. The jury declined to make an award for wrongful death, loss of guidance, on behalf of Mr. Thomas' adult children.

In connection with his challenge to the liability verdict, Dr. Burack first argues that Dr. Molina, plaintiff's expert, was not qualified to opine as to the standard of care governing cardio-thoracic surgeons in New York State. This contention is without merit.

The prevailing standard of care governing the conduct of medical professionals, as articulated by the Court of Appeals in *Pike v. Honsinger*, 155 NY 201, 209 [1898], requires that a physician exercise "that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where [the doctor] practices, and which is ordinarily regarded by those conversant with the practices . . . as necessary to qualify [the doctor] to engage in the business of practicing medicine or surgery" (*id.*). Although malpractice jurisprudence has evolved to accommodate advances in medicine, the *Pike* standard continues to serve as the beginning point of any medical malpractice analysis (*Nestorowich v. Ricotta*, 97 NY2d 393, 398 [2002]). The Court of Appeals in *Toth v. Community Hospital at Glen Cove* (22 NY2d 255, 262-263 [1968]) recognized a two-tiered standard for measuring a doctor's conduct. There, the Court held that the community or locality test establishes a minimum standard, but that a physician also is required to utilize his or her best judgment and any special skill, knowledge or intelligence that the doctor possess (*id.; see* PJI 2:150). This second tier imposes a higher duty on doctors with

knowledge or skills that might exceed local standards. The Court, in *Toth*, reasoned that "[t]here is no policy reason why a physician who knows or believes there are unnecessary dangers in the community [standard], should not be required to take whatever precautionary measure he [or she] deems appropriate . . . [as this] is nothing more than an application of the rule that a physician should at all times use his [or her] best judgment and care" (22 NY2d at 263). Thus, a medical specialist is held to a standard of care at least equal to that of similar specialists in the community, and expert testimony of a board certified specialist is appropriate to establish the superior knowledge and skill that such a specialist should possess (*Toth,* 22 NY2d at 262; *see also Spensieri v. Lasky*, 94 NY2d 231, 236 [1999] [defendant measured by the degree of knowledge and ability of the average Board Certified obstetrician/gynecologist practicing in New York State]; *Riley v. Wieman*, 137 AD2d 309, 315 [1988] [board certification denotes "superior knowledge, skill and intelligence" under a national standard]; *Prooth v. Wallsh*, 105 Misc 2d 653 [1980] [testimony of out-of-state cardiology expert as to national standards permissible]; *Hirschberg v. State of New York*, 91 Misc 2d 590, 598 [1977] [a state hospital operating under the State's uniform regulations is held to a statewide standard of care]; *see also Brune v. Belinkoff*, 354 Mass 102, 105 [1968] ["distinctions based on geography are no longer valid in view of modern developments in transportation, communication and medical education, all of which tend to promote a certain. degree of standardization within the profession"]).

Dr. Jose Ernesto Molina, a board certified cardiac surgeon and professor in heart surgery at the University of Minnesota, testified regarding his training in Central America, Germany and Minnesota, his more than 120 publications on the topic of cardio-thoracic surgery and related subjects, and his participation in approximately 6,000 such surgeries. Thus, Dr. Molina, by study, training, observation and experience was qualified to offer an opinion as to the relevant standard of care (*Adamy v. Ziriakus*, 92 NY2d 396, 401 [1998]; *Meiselman v. Crown Heights Hospital*, 285 NY 389, 398 [1941]; *Texter v. Middletown Dialysis Center, Inc.*, 22 AD3d 831 [2005]; *Erbstein v. Savasatit*, 274 AD2d 445 [2000]; *Payant v. Imobersteg*, 256 AD2d 702 [1998]; *Anderson v. Donis*, 150 AD2d 414 [1989]).

Moreover, the defendant's present challenge to the qualifications of Dr. Molina was not preserved for review by timely objection (*Koffler v. Biller*, 262 AD2d 150 [1999]; *Kwasny v. Feinberg*, 157 AD2d 396, 400 [1990]). In any event, the contention lacks merit as Dr. Molina possessed more than adequate qualifications to render an opinion and "any alleged lack of skill or expertise on his part was merely a factor to be considered by the jury" in weighing his testimony (*DeLucca v. Kameros*, 130 AD2d 705, 705-706 [1987], citing *Meiselman v. Crown Heights Hosp.*, 285 NY 389, 398 [1941]; *see also Julien v. Physician's Hospital*, 231 AD2d 678, 680 [1996]).

The defendant next argues that the plaintiff failed to establish, *prima facie*, that he departed from the accepted standard of care in the manner in which he inspected the decedent's lung for bleeding at the conclusion of the bypass surgery. This argument, also,

is rejected. Dr. Molina testified that it did not appear from the records that Dr. Burack inspected the apex area of the upper left lobe of the lung for bleeding or leakage of air at the conclusion of the bypass surgery, and that this constituted a departure from the accepted standards of care. According to Dr. Molina, the significance of doing such an inspection is that it would have provided Dr. Burack with the opportunity to address the bleeding or leakage, "as he did later," and would have avoided the need for a second or third surgery.

There was testimony by Dr. Burack and Dr. Molina regarding "excessive" bleeding from the chest tube following completion of the bypass surgery. In addition, testimony was offered by Dr. Burack and Dr. Molina regarding bleeding from the apex of the lung, in the area of adhesions where the mammary artery was harvested, upon re-opening the decedent's chest cavity to perform the second surgery. In view of this evidence the jury was free to reject the testimony of Dr. Burack that he conducted an appropriate inspection for bleeding and leaking at the conclusion of the bypass surgery (*see Antoniato v. Long Island Jewish Medical Center*, 58 AD3d 652, 654 [2009] [plaintiff offered sufficient evidence from which it could reasonably be inferred that the defendant deviated from accepted medical practice by allowing the spinal needle to become contaminated and using it, which caused plaintiff's injuries], citing *Johnson v. Jamaica Hospital Medical Center*, 21 AD3d 881, 883 [2005] ["[i]n a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant"], and *Wong*

v. Tang, 2 AD3d 840 [2003] [it was not necessary for the plaintiff to eliminate every other possible cause; the plaintiff had to show that it was probable that some diminution in the chance of a cure had occurred]).

Dr. Burack argues that the exercise of his professional judgment in testing his staple repair, during the second surgery, was neither a departure or a proximate cause of injury to the decedent. Essentially, he contends that plaintiff's criticism of his testing of the staple line during the second surgery derives solely from the conclusion of her expert that because the staples failed, more stringent testing by him should have been undertaken.

At trial Dr. Burack explained that during the second surgery he excised defective tissue from the left upper lobe of the lung where there was excessive bleeding, cauterized the area and closed/connected the tissue with surgical staples. He then tested his repair by irrigating the area with fluid and inflating the lung by means of a ventilator in use during the surgery. However, plaintiff's expert, Dr. Molina, offered testimony that the level of pressure provided by a standard ventilator used during surgery would have been inadequate to test the viability of the stapled repair. Dr. Molina indicated that in the pleura, or lung tissue, staples pull through and, therefore, 30 centimeters of pressure was required to adequately test the repair. This was especially true in Mr. Thomas' case, Dr. Molina indicated, because of his "poor" lung tissue. Because the lung tissues were "bad" the metal staples tore through and Mr. Thomas continued to bleed, necessitating a third procedure. Dr. Molina testified that had the appropriate testing been conducted during the second surgery, the defect would have been

discovered and remedied by reinforcing the sutures with pericardium strips, a technique successfully employed during the third surgery. The jury, therefore, was free to conclude that, as testified to by plaintiff's expert, if the lung had been properly tested, the defect discovered and remedied during the second surgery, the third surgical repair would not have been necessary (*see Landau v. Rappaport*, 306 AD2d 446 [2003] ["issues regarding the credibility of expert witnesses are peculiarly within the province of the jury to determine"]).

In an action for personal injury a joint tortfeasor whose proportionate share of fault is 50 percent or less is liable for the plaintiff's non-economic loss to the extent of its proportionate share (CPLR 1601[1]; *Sommer v. Federal Signal Corp.* 79 NY2d 540, 554 [1992]). Dr. Burack maintains that he was entitled to have the jury apportion fault between him and the non-party Downstate Hospital.[2]

CPLR 1601[1] requires that the equitable shares of non-party joint tortfeasors be included in a determination of the relative culpability of the named defendant(s) unless the claimant is unable, with due diligence, to obtain jurisdiction over the non-party tortfeasor(s). The burden of demonstrating inability to obtain jurisdiction over the non-party is on the claimant. Upon such a showing, the equitable share of the non-party will not be considered. "One apparent purpose of this [provision] is to enhance plaintiff's recovery [only] when it is jurisdictionally impossible to join all of the tortfeasors in the New York action"

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[2]In his Answer of March 18, 2005 Dr. Burack asserts, as an affirmative defense, a claim for apportionment pursuant to CPLR Article 16.

At trial the Court denied the application for apportionment, citing *New York Telephone v. Nassau County*, 267 AD2d 629,634 [1999] and *Bay Ridge Air Rights v. State of New York*, 44 NY2d 49 [1978].

(Alexander, Practice Commentaries, Cons. Laws of NY, Book 7B, CPLR C1601:2).

CPLR 1601(1) does not address situations, such as here, where the alleged non-party tortfeasor is the State of New York which cannot be joined as a co-defendant in the Supreme Court (*see* Court of Claims Act §9). The prevailing view, however, is that apportionment against a state joint tortfeasor, subject to suit in the Court of Claims, is appropriate in a Supreme Court action (*see* Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C1601:3, citing *People ex rel. Swift v. Lace*, 204 NY 478, 487 [1912] [the Supreme Court had jurisdiction over cause of action, but no jurisdiction due to the State's immunity] and *Rezucha v. Garlock Mechanical Packing Co.*, 159 Misc 2d 855 [Sup. Ct. Broome Co., 1993]; *Allstate Ins. Co. v. State of New York*, 152 Misc 2d 869, 872-873 [1991]; *New York City Asbestos Litigation* (*ACandS, Inc.*), 194 Misc2d 214 [Sup. Ct., NY Co., 2002] ["[t]he jurisdictional provision of CPLR 1601 applies only when the plaintiff cannot obtain personal jurisdiction over the other tortfeasor, [that is], where a forum-based territorial connection is lacking"].

In addition, CPLR 1601(1) permits a state defendant, in the Court of Claims, the benefit of Article 16 apportionment against a non-state, joint tortfeasor by exempting the State from the rule which excludes a non-party's share when jurisdiction cannot be obtained over that non-party. In this case, the plaintiff has sued Downstate Hospital in the Court of Claims and the hospital in that action has raised as an affirmative defense the protection of

CPLR, Articles 15 and 16.[3] Thus, the state hospital may well seek apportionment against Dr. Burack in the pending Court of Claims action.

It is noted that "[w]hen two tort-feasors neither act in concert nor contribute concurrently to the same wrong, they are not joint tort-feasors; rather, their wrongs are independent and successive. Although the original wrongdoer is liable for all the proximate results of his [or her] own tortious act, including aggravation of injuries by a successive tort-feasor, the successive tort-feasor is liable only for the aggravation caused by his own conduct" (*Suria v. Shiffman*, 67 NY2d 87, 98 [1986]). However, "[i]n order for a defendant to be considered an independent and successive tortfeasor and therefore liable only for such [aggravated or] additional injury caused by [it] . . . there must be demonstrated two separate injuries. with the second injury not necessarily resulting from the first, and further, there must be demonstrated the capability of delimiting the injures caused by the successive tort-feasor" (*Ravo v Rogatnick*, 121 AD2d 705, 706 [1986], *affd* 70 NY2d 305 [1987]; *Suria v. Shiffman*, 67 NY2d at 98). Where, however, because of their nature the injuries are incapable of any reasonable or practical division the initial tortfeasor may claim contribution from other tortfeasors (*Ravo,* 70 NY2d at 310; CPLR 1401; *see Helmrich v. Eli Lilly & Co.*, 89 AD2d 441, 444 [1982]; *Innvar v. Schapira*, 166 AD2d 632 [1990] [successive treating physicians who failed to diagnose the decedent's heart condition jointly and severally liable for

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[3] See GLORIA C. THOMAS, *as Administratrix of the Estate of* ARTHUR A. THOMAS, *deceased and* GLORIA A. THOMAS, *individually, v.* THE STATE OF NEW YORK, *and* SUNY DOWNSTATE MEDICAL CENTER *a/k/a* UNIVERSITY HOSPITAL AT BROOKLYN, Claim No. 111211 (Marin, J.), Verified Answer of September 1, 2005, Tenth Affirmative Defense.

decedent's pain and suffering and wrongful death]), and the plaintiff maintains the right to collect the entire judgment award from any tortfeasor, despite the jury's apportionment of fault among them (*Ravo,* 70 NY2d at 313). The jury's apportionment of culpability merely defines the amount of contribution the defendants may claim from each other (*id.*).

In *Ravo*, (*supra*) the infant plaintiff suffered brain damage during birth allegedly due to the malpractice of the obstetrician charged with her ante partum care and delivery. The plaintiff also claimed that the defendant, a pediatrician, misdiagnosed and failed to properly treat her condition after birth. The pediatrician argued that as a successive tortfeasor he was only liable for any additional injury attributable to his conduct. However, as the brain damage which the infant sustained was indivisible and not susceptible to apportionment, the court affirmed the jury's finding of joint and several liability (*Ravo,* 70 NY2d at 313, *see also Lewis v. Yonkers General Hospital*, 174 AD2d 611, 612 [1991] [hospital which treated plaintiff for swelling of nose and under eye following tooth extraction jointly liable with dentist who performed tooth extraction]; *Helmrich v. Eli Lilly & Co.*, 89 AD2d 441, 444-445 [1982] [hospital treating patient for cancer caused by prenatal exposure to DES jointly liable with drug manufacturer of DES because injury could not be delimited]).

Here plaintiff's Bill of Particulars, which was served on Downstate Hospital prior to dismissal of her claims against Downstate in this action, alleges that the hospital caused the following injuries: "death; infections; sepsis; multiple surgeries; ulcers; emphysema; respiratory failure; tracheostomy; infected nephrostomy site; prolonged tracheal

intubation; chronic renal insufficiency; thrombocytopenia; multiple blood transfusions; disseminated intravascular coagulopathy; respiratory distress; pneumonia; prolonged mechanical ventilation; multiple decubitus ulcers; shock; acute renal failure; hemorrhage; severe pain; mental anguish; anxiety; loss of enjoyment of life; fear of impending death; cardiopulmonary arrest; fevers; anxiety; mental anguish; emotional distress and loss of enjoyment of live."

During the trial against Dr. Burack plaintiff maintained that the decedent's five month hospitalization and death resulted from the negligent surgeries performed by Dr. Burack Dr. Molina testified that the second operation was a substantial factor in the decedent's prolonged hospitalization due to lung damage. There was evidence presented that pneumonia was a complication resulting from the use of a ventilator required as a result of the surgically caused lung injury. Plaintiff's expert also opined that multiple blood transfusions during and following the surgeries exposed the decedent to the risk of infection. Dr. Holtzman opined that prolonged hospitalization and prolonged use of a respirator caused episodes of pneumonia, the need for a bronchoscopy, urinary obstruction requiring a tube to drain the kidneys, urinary tract infections, sepsis shock and ultimately death. Dr. Holtzman testified that the infection which resulted in sepsis, shock and death, were caused by three bacterial organisms which were most likely associated with hospital infections. Dr. Holtzman further testified that systemic inflammatory response syndrome, which induced respiratory distress, was associated with injuries to the lungs during the heart surgeries. Dr.

Burack treated the decedent in the cardio-thoracic intensive care unit September 6, 2004, at which time he was transferred to the medical intensive care unit. He died six days later on September 12, 2004. Thus, upon this record it cannot be said that damages for pain and suffering are divisible as between Dr. Burack and Downstate (*Ravo*, 70 NY2d at 313; *Helmrich*, 89 AD2d at 445), and the wrongful death claim is "an obviously single indivisible injury" (*Innvar v. Liviu Schapira, M.D., P.C.*, 166 AD2d 632, 633 [1990], citing *Wiseman v. 374 Realty Corp.*, 54 AD2d 199 122 [1976]). Accordingly, Dr. Burack was entitled to apportionment against Downstate in this action.

Where "two or more persons are subject to liability for damages for the same personal injury or wrongful death," CPLR 1401 permits one to seek contribution against another either in an separate action, by cross-claim, counterclaim or third party claim in a pending action (CPLR 1401). Where indemnification or contribution is sought against the State, the claim must be brought in the Court of Claims (*Bay Ridge Air Rights, Inc. v. State*, 44 NY2d 49, 54 [1978]). The appropriate statute of limitations in a claim for contribution against the State is six months from the time of payment of the judgment, which is when the right to contribution accrues (*Ruiz v. Griffin*, 50 AD3d 1007 [2008], *citing Bay Ridge Air Rights, Inc. v. State*, 44 NY2d at 54; *Berlin & Jones, Inc. v. State*, 85 Misc 2d 970 [1976]; *O'Sullivan v. State*, 83 Misc 2d 426, 436 [1975]; Court of Claims Act §10, subd. 4). Thus, Dr. Burack may seek contribution, for non-economic loss, from the state hospital in the Court of Claims and, as noted, the state has interposed a claim for Article 16 apportionment in the

pending Court of Claims action against it.

Next, with respect to the jury's damages award, Dr. Burack argues that the awards in the amount of $6 million for pain and suffering and $13 million for loss of services deviate materially from what would be reasonable compensation (CPLR 5501[c]), and that the jury's $780,000.00 award for wrongful death was not proven with reasonable certainty [CPLR 4404].

The decedent underwent three open heart surgeries within a period of less than twenty-four hours. Evidence was offered that the defendant's malpractice necessitated the second and third surgeries. Hospital records record a pain level of "10" following the second operation. Even when sedated Mr. Thomas was "restless" and "agitated" and required wrist restraints. During his ensuing five-month hospitalization, Mr. Thomas experienced multiple blood transfusions, six episodes of pneumonia, a partial lung collapse, requiring a bronchoscopy, intestinal bleeding, urinary tract infections, decubitus ulcers, sepsis and hearing loss. He underwent surgery for his bed sores. Antibiotics administered to Mr. Thomas for infection rendered him comatose at times. As a result of the use of respiratory tubes, he was unable to speak at times and communicated with his wife in writing. In several of his notes he expressed that he was in pain and discomfort, and in fear of dying.

The decedent was 68 years old and had been married to plaintiff for 40 years. Mr. Thomas retired from his job as a mail handler shortly before his hospitalization. The trial evidence disclosed that the couple had a close relationship, traveled regularly, took walks

together, attended movies and enjoyed dancing. Mr. Thomas cooked and baked, and each year prepared Thanksgiving dinner for the couples' seventy or more guests. The Thomas' had three adult children and grandchildren who they spent time with. Mrs. Thomas testified that while her husband had a "male problem," "there [was] a whole lot of other ways to have fun and we did have fun. That's why while he was in the hospital, he still had fun with me."

The amount of damages to be awarded to the plaintiff for conscious pain and suffering and loss of services is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Courtney v. Port Authority of New York and New Jersey*, 45 AD3d 801, 802 [2007]). Here, the jury's award for conscious pain and suffering deviates materially from what is reasonable compensation to the extent that it exceeds $1.2 million (*see Jump v. Facelle*, 292 AD2d 501 [2d Dept., 2002] [$1.3 million award for pain and suffering sustained, with 8-month hospitalization, abdominal infection, mental confusion and hallucinations, pain when sitting upright, inability to walk, 8 major surgeries, including insertion of permanent colostomy, and bedsores leading to spine infection prior to death]; *Brenowitz v. North Shore Univ. Hosp.*, 10 Misc 3d 1076(A) [Sup. Ct., Richmond Co., 2006] [$1.5 million for pain and suffering reduced to $1 million where the patient died due to malpractice during bladder prostate surgery; five-month hospitalization for undiagnosed cancer resulting in ongoing infection, nausea and vomiting prior to death]; *Kastick v. U-Haul Co. of Western Michigan*, 292 AD2d 797 [4th Dept., 2002] [verdict increased to $350,000.00

for past pain and suffering where plaintiff's 66-year-old decedent sustained multiple fractures of the ribs, legs and hips, became respirator dependant due to pulmonary contusion and died after a five-month hospitalization]; *Sullivan v. Locastro*, 178 AD2d 523 [2d Dept., 1991] [award reduced from $2.5 million to $1.5 million for pain and suffering where after being struck by vehicle the plaintiff's decedent suffered brain damage, aphasia and seizures, was in constant extreme pain due to permanent muscle contraction and died of grand mal seizure after 3 years and 9 months of hospitalizations and therapy]).

Upon this record, the jury's award for loss of services deviates materially from what is reasonable compensation to the extent that it exceeds $200,000.00 (*see Parris v. Shared Equities, Co.*, 281 AD2d 174 [1st Dept., 2001] [wife awarded $200,000.00 in past and $100,000.00 in future loss of services where 59 year old husband suffered second and third degree burns to his legs and feet, was hospitalized for 28 days and underwent excruciatingly painful debridement and skin grafting resulting in permanent scarring]; *Matsur v. New York City Transit Authority*, ___ AD3d ___, 2009 WL 3383986 [2nd Dept., 2009] [$200,000.00 for past and future loss of services where husband suffered a subdural hematoma, cerebral concussion and herniated disc of cervical spine]; *Louis v. Kimmelman*, 8 AD3d 206 [1st Dept., 2004] [$200,000.00 in loss of services when spouse sustained brain damage resulting in severe neurological deficits, including deafness in one ear, headaches, vertigo, imbalance and fatigue]; *Meyers v. City of New York*, 230 AD2d 691 [1st Dept., 1996] [$150,000.00 for loss of consortium where wife suffered "blow out fracture of right orbit"]; *Courtney v. Port*

Authority of New York and New Jersey, 45 AD3d 801 [2nd Dept., 2007] [$100,000.00 for loss of services where husband suffered torn gastrocnemius muscle, compartment syndrome, several surgeries, 25 percent loss of calf muscle and severe nerve damage, infection, scarring and a drop foot]; *Hernandez v. Melro Co.* 229 AD2d 565 [2nd Dept., 1996] [$100,000.00 for loss of services where husband fell into elevator shaft sustaining severe injuries including commuted fracture of upper humerus and 50 percent loss of nose, confined to bed and hospital for significant periods and had clinical depression]; *Wallace v. Stonehenge Group, Ltd*, 33 AD3d 789 [2d Dept., 2006] [$100,000.00 for loss of services where spouse had comminuted, intra-articular distal tibia pilon fracture, multiple lengthy hospitalizations, four surgeries, extreme pain, edema, infection and complications due to non-union of bone, broken fixator screws, arthritis, and destruction of ankle cartilage]; *Lieberman v. Maimonides Medical Center*, 278 AD2d 203 [2nd Dept., 2000] [$90,000.00 for past and $180,000.00 for future loss of services where spouse suffered perforation, and severe infection during an ERCP procedure, requiring removal of his gallbladder, an ileostomy, and several surgeries and hospitalizations over the next few years]; *Vertsberger v. City of New York*, 34 AD3d 453 [2nd Dept., 2006] [$85,000.00 for loss of services as a result of comminuted fracture to husband's elbow resulting in surgeries, open reduction, internal fixation with pins and screws, permanent loss of motion in arm and continuous pain]; *Singh v. Gladys Towncars, Inc.*, 42 AD3d 313 [1st Dept., 2007] [$50,000.00 for past and $50,000.00 for future loss of services where husband suffered fractured tibia and fibula with nerve damage, requiring

internal fixation, open reduction surgery with hardware and five weeks hospitalization, and fractures of facial bones]).

Finally, Dr. Burack argues that the jury's award of $780,000.00 in wrongful death pecuniary loss was not proven with reasonable certainty. Specifically, he maintains, there was no evidence offered of loss of earnings, loss of guidance, loss of inheritance or loss of household services.

"For a court to conclude that a jury verdict is not supported by legally sufficient evidence, there must be no valid line of reasoning and permissible inference which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial [*see Cohen v. Hallmark Cards*, 45 NY2d 493, 499 . . . ; *Nicastro v. Park*, 113 AD2d 129, 132 . . .]" (*Courtney v. Port Authority of New York and New Jersey*, 45 AD3d 801, 802 [2007]; *Roman v. Brooklyn Navy Yard Development Corp.*, 63 AD3d 1136 [2009]; CPLR 4404(a)). In this case there was sufficient evidence to support a finding of pecuniary loss.

"[T]he essence of the cause of action for wrongful death in this state is that the [survivors'] reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent's death" (*Gonzalez v. New York City Housing Authority*, 77 NY2d 663, 667 [1991], citing *Loetsch v. New York City Omnibus Corp.*, 291 NY 308, 310-311 [1943]) "[T]he amount of recovery is measured by the '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)]. 'Such damages are limited to loss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death' (*Parilis v. Feinstein*, 49 NY2d 984, 985 . . .). A determination of what is 'fair and just compensation' is complex and requires consideration of a variety of factors including the decedent's age, sex, relationship to the person seeking recovery, earning capacity, life expectancy, health and intelligence, and the number and circumstances of [his] distributees (*see Nussbaum v. Gibstein*, 138 AD2d 193, 210, revd on other grounds 73 NY2d 912 . . .)" (*Brown v. Horn*, 179 AD2d 1073, 1074 [4th Dept., 1992]; *see also Nuthmacher v. Dunlop Tire Corp.*, 309 AD2d 1175, 1176 [2003] [*the four elements of pecuniary loss in a wrongful death claim are (1) decedent's loss of earnings; (2) loss of decedent's services to each survivor; (3) loss of parental guidance by decedent; (4) loss of possibility of inheritance from decedent*]).

In *Parilis v. Feinstein* (*supra*) the Court of Appeals instructed that "in any wrongful death action, especially one involving a child of tender years, the absence of dollars and cents proof of pecuniary loss does not relegate the distributees to recovery of nominal damages only (*citations omitted*). Rather, since it is often impossible to furnish direct evidence of pecuniary injury, calculation of pecuniary loss is a matter resting squarely within the province of the jury" (49 NY2d at 985). In *Parilis,* proof as to the age, character and condition of the decedent and the circumstances of his distributees was found to be a sufficient basis upon which to premise the jury's award of pecuniary damages.

Here, plaintiff offered evidence as to loss of services and loss of parental guidance, and the jury rendered an award only as to loss of services.

As previously noted, the decedent, a 68-year-old retiree suffered from polycythemia vera, congestive heart failure, kidney stones and high blood pressure prior to his admission to Downstate Hospital. Mrs. Thomas testified that her husband, who was from the Carribean, did all of the baking and all of the West Indian cooking for the family. Each Saturday he would make the West Indian "bakes," and on Thanksgivings he prepared the meal for 70 to 80 guests. He cooked when he came home from work, which was after midnight. Family birthdays, therefore, were celebrated at 2 A.M. (*see DeLong v. County of Erie*, 60 NY2d 296 [1983]; *Gonzalez v. New York City Housing Authority*, 77 NY2d 663 [1991]). The decedent's age, health, life expectancy, relationship to his wife and family and disposition to serve them were all proper considerations for the jury (*see Kraus v. Ford Motor Co.*, 55 AD2d 851 [1976]; *see also Parilis v. Feinstein*, 49 NY2d 984, 984 [1980]). Thus, while the plaintiff presented sufficient evidence to establish her claim, the evidence offered by the plaintiff does not support the jury's award for pecuniary damages to the extent that it exceeds $75,000.00 (*see Merola v. Catholic Medical Center of Brooklyn & Queens, Inc.*, 24 AD3d 629, 631 [2005]; *see also Gonzalez v. New York City Housing*, 77 NY2d 663 [1991]; *Koster v. Greenberg*, 120 AD2d 644 [1986]; *Korman v. Public Service Truck Renting, Inc.*, 116 AD2d 631 [1986]). Accordingly, it is

ORDERED, that the motion is granted to the extent that a new trial as to damages

is granted for the decedent's conscious pain and suffering, plaintiff's past loss of services and society, and wrongful death pecuniary damages for loss of services, unless within 30 days after service upon the plaintiff of a copy of this decision and order, with notice of entry, the plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Kings County, a written stipulation consenting to reduce the verdict as to damages for the decedent's conscious pain and suffering from the principal sum of $6 million to the principal sum of $1.2 million, to reduce the verdict as to damages for the plaintiff's past loss of services and society from the principal sum of $13 million to the principal sum of $200,000.00, and to reduce the verdict as to damages for wrongful death pecuniary damages for loss of services from the principal sum of $780,000.00, to the principal sum of $75,000.00; and it is further

ORDERED, that the motion is otherwise denied.

SO ORDERED,

J.S.C.
HON. GLORIA DABIRI