Vatalaro v County of Suffolk
2016 NY Slip Op 30496(U)
March 4, 2016
Supreme Court, Suffolk County
Docket Number: 12002/2008
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER INDEX NO. 12002/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

TERESA VATALARO, as the Administratrix of the Estate of JENNA ALLYSE VATALARO, deceased, and TERESA VATALARO, individually,

Plaintiffs,

-against-

THE COUNTY OF SUFFOLK, SUFFOLK BUS CORP., and WILLIAM R. DORTCH,

Defendants.

ORIG. RETURN DATE: MAY 1, 2014
FINAL SUBMISSION DATE: OCTOBER 29, 2015
MTN. SEQ. #: 006
MOTION: MOT D

ORIG. RETURN DATE: JUNE 12, 2014
FINAL SUBMISSION DATE: OCTOBER 29, 2015
MTN. SEQ. #: 008
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 12 read on this motion TO SET ASIDE JURY VERDICT AND CROSS-MOTION FOR AN ADDITUR TO AWARD. Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation and supporting papers 6, 7; Notice of Cross-motion and supporting papers 8-10; Affirmation in Opposition and supporting papers 11, 12; it is,

ORDERED that this motion (seq. #006) by defendants THE COUNTY OF SUFFOLK, SUFFOLK BUS CORP. and WILLIAM R. DORTCH (collectively "defendants") for an Order, pursuant to CPLR 4404, setting aside the verdict and ordering a new trial on the issue of damages as the jury's verdict was contrary to the weight of the evidence; or, in the alternative, an Order of remittitur as the jury's verdict was excessive and in the interest of justice, is hereby **GRANTED** to the extent set forth herein; and it is further

ORDERED that this cross-motion (seq. #008) by plaintiffs TERESA VATALARO, as the Administratrix of the Estate of JENNA ALLYSE VATALARO, deceased, and TERESA VATALARO, individually (collectively "plaintiffs") for an Order, pursuant to CPLR 4404, issuing an additur to the award for pecuniary loss, is hereby **DENIED** in light of the Court's ruling on defendants' motion-in-chief.

Defendants have filed a motion, pursuant to CPLR 4404, to set aside the verdict and to order a new trial on the issue of damages as the jury's verdict was allegedly contrary to the weight of the evidence. In the alternative, defendants seek an Order of remittitur arguing that the jury's verdict was excessive under the circumstances. The decision in this matter has been held in abeyance pending the resolution of a similar motion made by defendants, pursuant to CPLR 4404, to set aside the prior jury verdict in favor of plaintiffs on the issue of liability. By Order dated October 6, 2015 (Mayer, J.), defendants' motion to set aside the verdict on the issue of liability was denied.

The damages portion of this action was tried before the undersigned resulting in a jury award on February 19, 2014, as follows:

Conscious pain and suffering	$1,250,000.
Pre-impact terror	$250,000.
Past economic loss	$10,710.[1]
Future economic loss	$159,290.

Before granting a motion pursuant to CPLR 4404 (a) to set aside a verdict and for judgment as a mater of law, the trial court must conclude that there is "simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see Firmes v Chase Manhattan Auto. Fin.. Corp.*, 50 AD3d 18, 29 [2d Dept 2008].

[1] This figure was arrived at by stipulation of the parties prior to submission of the case to the jury.

In *Nicastro v Park*, 113 AD2d 129, 133-134 (2d Dept 1985), the Second Department held:

> Fact finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and "unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty" [citations omitted] . . . the challenge is directed squarely at the accuracy of the jury's fact finding and must be viewed in that light.

Moreover, "[i]t is well settled that the amount of damages to be awarded for personal injuries is primarily a question of fact for the jury" (*Rodriguez v City of New York*, 191 AD2d 420, 420 [2d Dept 1993]). Further, the appellate court in *Turuseta v Wyassup-Laurel Glen Corp.*, 91 AD3d 632, 634-635 (2d Dept 2012) held:

> The standard for reviewing the inadequacy or excessiveness of a jury award is whether it "deviates materially from what would be reasonable compensation" (CPLR 5501 [c]). Since the inherently subjective nature of noneconomic awards cannot produce mathematically precise results, the "reasonableness" of compensation must be measured against the relevant precedent of comparable cases (*see Donlon v City of New York*, 284 AD2d 13, 15-16, 727 NYS2d 94 [1st Dept 2001]).

In the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict.

Applying the foregoing standard to the facts of this case, it is incumbent upon this Court to determine whether the jury's verdict was fairly and reasonably supported by the evidence. The fact that conclusions different from those fairly reached by the jury may be drawn does not automatically warrant setting aside the verdict or reducing the awards, because the credibility of witnesses, the truthfulness and accuracy of their testimony, and the weight

accorded to this are all issues for the jury, the trier of fact, and not the Court (*see Saldana v Guzman*, 34 Misc 3d 1233[A] [Sup Ct, Nassau County 2012]).

Based on the foregoing, the Court concludes as a matter of law that while the jury's damages verdict should not be set aside, the jury's awards for pain and suffering and pre-impact terror deviate materially from what would be considered reasonable compensation. The motion on this basis is therefore **GRANTED** to the extent set forth herein.

CONSCIOUS PAIN AND SUFFERING

To recover damages for pain and suffering, an injured plaintiff must have some level of awareness (*see McDougald v Garber*, 73 NY2d 246 [1989]). Furthermore, "[i]n determining damages for conscious pain and suffering experienced in the interval between injury and death, when the interval is relatively short, the degree of consciousness, severity of pain, apprehension of impending death, along with duration, are all elements to be considered" (*Regan v. Long Is. R.R. Co.*, 128 AD2d 511, 512 [2d Dept 1987]). However, "[m]ere conjecture, surmise or speculation is not enough to sustain a claim for [pain and suffering] damages" (*Fiederlein v New York City Health & Hosps. Corp.*, 56 NY2d 573, 574 [1982]). "Without legally sufficient proof of consciousness following an accident, a claim for conscious pain and suffering must be dismissed" (*see Cummins v County of Onondaga*, 84 NY2d 322, 325 [1994]; (*see Blunt v Zinni*, 32 AD2d 882 [4th Dept 1969], *affd* 27 NY2d 521 [1970]). In order to recover for post-accident pain and suffering, a plaintiff must demonstrate some level of cognitive awareness (*see Mueller v Elderwood Health Care at Oakwood*, 31 Misc 3d 1210[A] [Sup Ct, Erie County 2011]).

In this case, the first issue in question concerns the plaintiffs' decedent's post-impact awareness of her circumstances as evidenced by the observations of: (1) civilians; (2) law enforcement; and (3) emergency medical witnesses. The severe impact imposed certain instantaneous traumatic consequences upon the decedent's physical condition seriously and substantially affecting her ability to communicate her awareness of her physical pain. The police officer who testified was physically inside the vehicle with the decedent and stated unequivocally that she was unresponsive, demonstrated no movement, and made no sounds of any kind. All of the witnesses who testified were

consistent in their observation that there was no physical movement of the head, limbs or body. Two civilian witnesses who responded to the scene, a mother and daughter who were neighbors of the decedent, were the only two to describe eye movement under closed eyelids and some movement of the lips. The daughter described hearing some sort of sound; however, she was alone in that observation. She testified that she heard moaning and further described what she heard as very faint sounds and no words. The daughter also described an increase of the movement of the eyes under closed lids when she spoke the decedent's name.

The timeline from the occurrence of the accident to the point where there were no discernable vital signs of the decedent was uncontroverted in the record. The accident occurred between 4:00 p.m. and 4:01 p.m., and there was no pulse at 4:26 p.m. The record demonstrates that the decedent's vital signs deteriorated during this time period. There were documented respiration and pulse rate entries made by the emergency medical personnel. There were further recorded observations entered in the record for the Glasgow Coma Scale. The only positive sign by any emergency responder was a notation of a sound characterized during the EMT's testimony at trial as "gurgling."

The existence of a pulse and respiration rate is not evidence of awareness – there may be capacity for awareness, but the burden of proof is on the plaintiffs to prove that the plaintiffs' decedent was aware at some level of her pain. The record demonstrates the possibility of capacity to be aware by deducing that if a person is still breathing even at an agonal rate that the capacity to perceive pain exists. Whether it was actually perceived is unknown. As the decedent suffered severe and massive injuries, any period of consciousness was limited in duration.

Dr. Barry Sloane, plaintiffs' expert, is a primary care osteopath who offered medical opinions on the subject of the decedent's injuries and whether those injuries caused pain, and whether the trauma impaired her ability to be aware of pain. Dr. Sloane stated that a person who appeared to be unconscious can still feel pain. He explained his understanding of the different aspects of neurological brain function, as well as the nature of and differences between the voluntary and involuntary nervous systems. It was Dr. Sloane's testimony that the sharp, dicing injuries, as well as the general diffuse impact injuries, would have been painful to the decedent. Given the severity of the impact, the plaintiffs' expert testified that even in the absence of an internal autopsy it was his belief

that there was internal hemorrhaging within the head and body. The existence of both a heart rate and respirations made clear that nerve pathways were open and the decedent was capable of experiencing pain. The expert agreed that the decedent's condition deteriorated quickly, and that by 1611 hours, and no later than 1620 hours, she was no longer capable of experiencing pain.

Upon cross-examination, the plaintiff's expert conceded that the decedent never responded to painful stimulus as attempted by emergency medical personnel, and at all times was unresponsive.

The defendants' expert, Stuart Dawson, M.D., performed the external post-mortem examination. Without a full autopsy, the defendants' expert conceded that the full extent of the internal injuries suffered could not be definitively determined. Dr. Dawson testified that given the findings of his examination, it was his experience that under such circumstances decedents such as this suffered severe cranio-cervical disruptions. In the absence of an internal examination and full autopsy, he was unable to determine the level of brain stem or spinal cord disruption.

It was Dr. Dawson's opinion that the emergency responder reports indicated complete unconsciousness from the start with no sign of any kind of awareness. It was his further opinion that this state was achieved instantaneously with impact. Moreover, it was Dr. Dawson's opinion that the decedent was completely insensitive to any sort of feeling of pain and unable to hear anything. He testified that she was completely unconscious and deep in a coma from the second of the impact, and that was never relieved because she passed away. Dr. Dawson also testified that any eye movement under closed lids and lip trembling or movement was involuntary and does not indicate any level of consciousness. Dr. Dawson concluded that the decedent had no awareness of pain or suffering in the slightest from the moment of the impact until her death.

To the extent that this jury award exceeds that which may be considered fair compensation, it may be reduced and recent cases by the Appellate Division, Fourth Department support defendants' argument (*see Kolbert v Maplewood Healthcare Ctr., Inc.*, 21 AD3d 1301, 1302 [4th Dept 2005] [$1.5 million award for deceased nursing home resident reduced to $500,000]; *Estate of Angelica Pesante v Mundell*, 37 AD3d 1173 [4th Dept 2007] [$500,000 award for a 13-year-old who died from internal injuries on the same day the injuries were suffered was reduced to $350,000]; *Givens v Rochester City Sch. Dist.*, 294

AD2d 898 [4th Dept 2002] [award of $1 million for conscious pain and suffering for a student who was stabbed to death by another student on school grounds was reduced to $300,000]).

Additionally, other New York cases with somewhat similar facts support a modification and reduction of the jury's award here (*see Rodd v Luxfer USA Ltd.*, 272 AD2d 535 [2d Dept 2000] [$1 million verdict reduced to $300,000 where decedent suffered no more than thirty minutes after sustaining a chest wound due to an explosion]; *Glassman v City of New York*, 225 AD2d 658 [2d Dept 1996] [$1.4 million award reduced to $500,000 where decedent suffered massive injuries but was only minimally conscious before death after being struck by a car]; *Torelli v City of New York*, 176 AD2d 119 [1st Dept 1991] [court awarded $250,000 where decedent suffered between fifteen minutes and one hour from horrendous injuries after a car collision]; *Hackert v First Alert, Inc.*, 2006 US Dist LEXIS 56138 [ND NY 2006], *affd* 271 Fed Appx 31 [2d Cir 2008] [$3 million award for conscious pain and suffering reduced to $1 million for decedents who experienced between three and six minutes of pain and suffering before succumbing to heat, smoke and fire]). Notably, in *Walker v New York City Transit Auth.*, 130 AD2d 442 (1st Dept 1987), a case analogous to the instant matter, the First Department affirmed the reduction by the trial court of a $1 million award for conscious pain and suffering to $600,000 where the decedent suffered very briefly and his level of consciousness was unknown after he was struck by a train.

Based upon the foregoing and under the circumstances presented herein, the Court finds that the amount of damages awarded by the jury for conscious pain and suffering deviated materially from what would otherwise be reasonable compensation (*see Donofrio v Montalbano*, 240 AD2d 617 [2d Dept 1997]; *Portaro v Gerber*, 217 AD2d 539 [2d Dept 1995]). Accordingly, this matter is remitted for a new trial on the issue of damages for pain and suffering unless, within thirty (30) days after service upon plaintiffs of a copy of this Order, plaintiffs file with the Clerk of this Court a written stipulation consenting to the reduction of the verdict as to damages for pain and suffering from the principal sum of $1.25 million to the principal sum of $400,000, and to entry of a judgment in accordance therewith.

PRE-IMPACT TERROR

Whether the decedent suffered any pre-impact terror is a question of fact for a jury. In order to be compensable, it must be shown by a preponderance of the evidence that the decedent had some knowledge or other basis for anticipating the impending disaster; otherwise, no basis exists for a finding of fright or mental anguish (*see Anderson v Rowe*, 73 AD2d 1030 [4th Dept 1980]; *Shatkin v McDonnell Douglas Corporation*, 727 F2d 202 [2d Cir 1984]). Eyewitness testimony to the decedent's pain and suffering is not essential to recovery, but at least some circumstantial evidence must be adduced from which it can reasonably be inferred that the decedent underwent some suffering before the impact (*see e.g. Solomon v Warren*, 540 F2d 777 [5th Cir 1976], *cert dismissed sub nom. Warren v Serody*, 434 US 801 [1977]).

Recovery has been permitted for pre-impact terror experienced by decedents prior to their death, even if only for a short period of time, and even only lasting a few seconds (*see Lang v Bouju*, 245 AD2d 1000 [3d Dept 1997]). In *Lang*, the decedent was driving a motorcycle and came into contact, head on, with a truck stopped in decedent's lane of traffic. The Third Department found that it was appropriate for the plaintiff to recover for pre-impact terror due to the likelihood that the decedent, upon seeing the truck and applying his brakes, was "aware of the likelihood – and ultimately the certainty – of a serious collision, during the approximately five seconds preceding impact" (*Lang*, 245 AD2d at 1001). Likewise, in *Donofrio*, *supra*, the decedent was a passenger in a car driven by the defendant which struck a tree. The plaintiffs were permitted to recover for the very brief period of time the decedent could have experienced pre-impact terror as he observed the vehicle in which he was a passenger move at a speed of 70-75 miles per hour towards the tree.

Here, the duration within which the decedent could have experienced any pre-impact terror was limited to only several seconds, which warrants, at best, a minimal award (*see Shu-Tao Lin v McDonnell Douglas Corp.*, 742 F2d 45 [2d Cir 1984]; *cf. Shatkin*, 727 F2d 202). Accordingly, this matter is remitted for a new trial on the issue of damages for pre-impact terror unless, within thirty (30) days after service upon plaintiffs of a copy of this Order, plaintiffs file with the Clerk of this Court a written stipulation consenting to the reduction of the verdict as to damages for pre-impact terror from the principal sum of $250,000 to the principal sum of $50,000, and to entry of a judgment in accordance therewith.

FUTURE ECONOMIC LOSS

In fashioning a wrongful death award in accordance with the statute, a court may consider evidence of the "reasonable expectancy" of financial support, gifts and inheritance that would have inured to those on whose behalf the claim was filed had the decedent lived (*see Loetsch v New York City Omnibus Corp.*, 291 NY 308 [1943]). Factors traditionally considered by the courts include "the age, health and life expectancy of the decedent at the time of the injury; the decedent's future earning capacity and potential for career advancement; and the number, age and health of the decedent's distributees" (*Johnson v Manhattan & Bronx Surface Tr. Operating Auth.*, 71 NY2d 198, 203-204 [1988]; *see* EPTL 5-4.3; PJI 2:320). The value of the decedent's past and future lost earnings may be measured by his or her gross income at the time of death (*Johnson*, 71 NY2d at 204).

Under the circumstances presented, the Court finds that the record supports and the jury appropriately awarded future economic loss in the amount of $159,290.

The foregoing constitutes the decision and Order of the Court.

Dated: March 4, 2016

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION