To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

ANTONIO MOLINA, IV, as Administrator of the Estate of ANTONIO, III, Deceased and ANTONIO MOLINA ,IV, Individually,

Plaintiff,

-against-

JONATHAN Z. BERKOWITZ, JOSHUA M. TRUTT, RANDY A. GOLDBERG, YOU SUK CHOI HOANG M. LAI, CHRISTINE E. CAROSELLA, KATHLEEN K. BURAK, ROBERT N. BELKIN, ANDREW C. KUPERSMITH, CARDIOLOGY CONSULTANTS OF WESTCHESTER, P.C., MEDICAL RESEARCH ASSOCIATES, P.C., WESTCHESTER HEALTH CARE CORPORATION, WESTCHESTER COUNTY HEALTH CARE CORPORATION, and WESTCHESTER MEDICAL CENTER,

Defendants.

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Index No. 61298/2013

DECISION/ORDER

Motion Date: 4/18/18
Mot. Seq. 9 & 10

ECKER, J.

The following papers numbered 1 through 43 were read on the motions of defendants RANDY A. GOLDBERG and MEDICAL RESEARCH ASSOCIATES, P.C. [Mot. Seq. 9] ("Goldberg") and defendants WESTCHESTER HEALTH CARE CORPORATION and WESTCHESTER MEDICAL CENTER ("Westchester") [Mot. Seq. 10], made pursuant to CPLR 4404, 4545, 4546 and 5501, for an order setting aside the verdict in favor of ANTONIO MOLINA, IV, as Administrator of the Estate of ANTONIO, III, deceased and ANTONIO MOLINA ,IV, individually("plaintiff"),rendered by the jury against said defendants on January 10, 2018, and directing judgment in defendants' favor, or, in the alternative, ordering a new trial, or, in the alternative, granting defendants a new trial as to damages, or, in the alternative, granting defendants a hearing for the purposes of imposing collateral source and income tax reductions, and staying the proceeding pursuant to CPLR 2201:

PAPERS	NUMBERED
Notice of Motion [Mot. Seq. 9], Affirmation, Exhibits A-F	1-8
Affirmation in Opposition, Exhibits A-H	9-20
Affirmation in Reply	21
Notice of Motion [Mot. Seq. 10], Affirmation, Exhibits B (1-19)	22-42
Affirmation in Opposition, Exhibits A-H (same as above)	
Affirmation in Reply	43

Upon the foregoing papers, the court determines as follows:

Goldberg [Mot. Seq. 9] moves pursuant to CPLR 4404, 4545, 4546 and 5501 for an order: (I) granting judgment notwithstanding the verdict dismissing the complaint as against Goldberg, (ii) in the alternative, granting Goldberg a new trial on all issues, as the verdict was against the weight of the credible evidence, (iii) in the alternative, directing a new trial on the basis that the trial court's erroneous rulings during trial, including jury charge, were prejudicial to Goldberg and impacted the verdict such that they denied defendants' right to a fair trial, (iv) in the alternative, granting a new trial as to damages because the damages awarded deviated materially from what would be considered reasonable compensation, (v) in the alternative, should the court deny the above applications, granting Goldberg a hearing for the purposes of imposing collateral source reductions in accordance with CPLR 4545 and applying reductions for income taxes pursuant CPLR 4546, (vi) granting a stay of execution or entry of judgment pending the hearing and determination of this motion pursuant to CPLR 2201, and (vii) for such other and different relief as this court deems just and proper.

Westchester Heath moves [Mot. Seq. 10] for an order pursuant to CPLR 4404, 4545, 4546 and 5501: (1) setting aside the verdict as against it and directing a verdict in favor of Westchester Health or; (2)setting aside the verdict with respect to Westchester Health and ordering a new trial or; (3) should the court deny said relief, ordering a hearing with respect to collateral source set-offs pursuant to CPLR 4545 and applying reductions for income taxes pursuant to CPLR 4546; and (4) for such other and different relief as the court deems just and proper.

Plaintiff commenced this medical malpractice action claiming departures from accepted standards of medical care upon defendants' failure to properly treat the decedent over a two-day period in January 2008. Essentially, plaintiff alleged that the medical records and expert and non-expert testimony proved that, upon the decedent's presentation to Westchester Medical Center on January 4, 2008, defendants should have performed serial EKG's and cardiac enzyme testing and more promptly sought cardiology consults and catheterization prior to a heart attack on January 6, 2008, at which point he

underwent a catheterization and implant of a defibrillator. As a result of the heart attack, cardiac remodeling occurred and the decedent continued to suffer cardiac related illnesses. Plaintiff alleged that the decedent lived an additional three years and ten months at a significantly depleted and continually decreasing level of heart function as the result of the damage caused by the heart attack, ultimately was compelled to go on the list for a heart transplant, and to undergo the implant of a Left Ventricular Assist Devise ("VLVAD"), which led to his death in 2011 at Yale New Haven Medical Center ("Yale").

The case was tried before a jury over a period of several weeks. Thereupon the jury returned a liability verdict in favor of plaintiff against defendants finding that, among other things, Goldberg and Westchester Medical both departed from accepted standards of care for failing to order serial EKGs and cardiac enzyme testing. The jury also determined that Goldberg departed from accepted standards of care by failing to follow up on the order for a cardiology consult and in not reviewing the EKG taken upon admission. All of the departures were found to be casually related to the heart attack and to plaintiff's death.

The jury apportioned 40% liability against Goldberg and 60% against Westchester Medical and awarded $3.65 million in damages. The damage award comprised $1 million for pre-death terror, $1 million for pain and suffering, $600,000 in lost earnings, $350,000 for lost services, and $700,000 in lost parental guidance [Verdict Sheet NYSCEF No. 281]. The verdict sheet did not require the jury to designate a percentage division of the award between the decedent's two children.

At the outset, the Court notes that each defendant's post-trial moving and reply affirmations are, excluding exhibits, approximately 80 pages. Distilled to their essence, defendants' motions seek to re-litigate the trial, de novo, and the multiple evidentiary and charge rulings made by the Court. Nonetheless, upon due and deliberate consideration of the arguments advanced by defendants, and those made in opposition thereto by plaintiff, the Court denies all aspects of defendants' motions. Initially, upon ruling as such, the Court adheres to the plethora of evidentiary, jury charge and other rulings it made in connection with the underlying trial, and for the reasons set forth on the record.

Judgment Notwithstanding the Verdict and Verdict as Against the Weight of the Evidence.

The power to set aside a jury verdict and order a new trial is an inherent one which is codified in New York in CPLR 4404 (a) (*Nicastro v Park,* 113 AD2d 129 [2d Dept 1985]). "Initially, it must be reemphasized that whether a jury verdict is against the weight of the evidence is essentially a discretionary and factual determination which is to be distinguished from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence" (*Nicastro v Park, supra; Cohen v Hallmark Cards*, 45 NY2d 493, 498–499 [1978]). Although these two inquiries may appear somewhat related, they actually involve very different standards and may well lead to disparate results (*Nicastro v Park, supra; Cohen v Hallmark Cards*, *supra*).

Where the legal issue is the sufficiency of the evidence raised on a motion to set aside a verdict and direct judgment, the test is whether any valid line of reasoning and permissible inference could possibly lead rational jurors to the conclusion reached by the jury on the basis of the evidence presented at trial (*Cohen v Hallmark Cards, Inc., supra*). As for ordering a new trial because a verdict is contrary to the weight of the evidence, the standard is whether "the jury could not have reached the verdict on any fair interpretation of the evidence" (*Nicastro v Park, supra*). "Rationality, then, is the touchstone for legal sufficiency, while fair interpretation is the criterion for weight of the evidence"(*O'Boyle v Avis Rent-A-Car System, Inc.*, 78 AD2d 431[2d Dept 1981]).

Judgment Notwithstanding the Verdict.

For a court to direct a verdict under CPLR 4404(a) as a matter of law, it must be shown that there was "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards, supra*; *Nicastro v Park, supra*). "The test is a harsh one because a finding that a jury verdict is not supported by sufficient evidence leads to a directed verdict terminating the action without resubmission of the case to a jury" (*Nicastro v Park, supra; see Licari v Elliott*, 57 NY2d 230 [1982]; *Bligen v New York City Transit Authority*, 2018 NY Slip. Op. 03432 [1st Dept 2018]; *Zambrana v Central Pathology Services, P.C.*, 51 Misc.3d 1223(A) [Sup. Ct. Richmond County 2016]). Reversal is required only if the court finds that the jury verdict was "utterly irrational"(*Killon v Parrotta*, 28 NY3d 101 [2016]).

Hence, on a motion for a directed verdict, the moving parties must demonstrate that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [individuals] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Bligen v New York City Transit Authority*, *supra*; *Hollingsworth v Mercy Medical Center*, 2018 NY Slip Op. 03340 [2d Dept 2018]; *Killon v Parrotta*, *supra*). "The party opposing the motion must be afforded the benefit of 'every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant'"(*Calafiore v Kiley*, 303 AD2d 816 [3d Dept 2003], *quoting Szczerbiak v Pilat,* 90 NY2d 553, 556 [1997]). "Notably, such a motion 'should be denied where different inferences may be drawn from undisputed facts, or where the facts in a case are in dispute, or where an issue depends upon the credibility of witnesses'"(*Calafiore v Kiley, supra quoting* 8A Carmody–Wait 2d, N.Y. Prac § 59:26). "This is a 'basic assessment of the jury verdict' and prohibits a holding of insufficiency 'in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon'" (*Mazella v Beals*, 27 NY3d 694 [2016], *quoting Cohen v Hallmark Cards, supra*).

Applying these principles to the facts of this case, the motion for a judgment notwithstanding the verdict is denied. In a medical malpractice action, such as here, plaintiff must show that the defendants deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury (*see Hollingsworth v Mercy*

Medical Center, supra; Mazella v Beals, supra). Based on the extensive evidence presented during the lengthy trial in this matter, the jury rationally could have concluded that defendants were negligent in, among other things, failing to perform serial EKG's and cardiac enzyme testing and failing to more promptly seek cardiology consults and catheterization prior to plaintiff's cardiac arrest on January 6, 2008 and that these departures were a proximate cause of plaintiff's injuries. Certainly, the jury's verdict was not "utterly irrational." As such, the motion for judgment not withstanding the verdict is denied.

Verdict as Against the Weight of the Evidence.

The criteria for setting aside a jury verdict as against the weight of the evidence pursuant to CPLR 4404(a), are necessarily less stringent, for such a determination results only in a new trial and does not deprive the parties of their right to ultimately have all disputed issues of fact resolved by a jury (*Killon v Parrotta, supra; Nicastro v Park, supra*). Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, therefore, but rather requires a discretionary balancing of many factors (*Messina v Staten Island University Hospital*, 121 AD3d 867 [2d Dept 2014]).

Hence, the standard for determining whether a jury verdict is contrary to the weight of the evidence is whether the evidence so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence (*Acosta v City of New York,* 153 AD3d 765 [2d Dept 2017]; *Stancati v Gunzburg*, 159 AD3d 1011 [2d Dept 2018]). Furthermore, "great deference is accorded to the fact-finding function of the jury regarding the credibility of witnesses, as the jury had the opportunity to see and hear the witnesses" (*Acosta v City of New York, supra*; *see McDonagh v Victoria's Secret, Inc.*, 9 AD3d 395, 396, [2d Dept 2004];.*Stancati v Gunzburg*, *supra*). Where, as here, conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and reject that of another expert (*see Hollingsworth v Mercy Medical Center, supra*; *Russo v Levat*, 143 AD3d 966, 968 [2d Dept 2016]; *Ferreira v Wyckoff Hgts. Med. Ctr.*, 81 AD3d 587 [2d Dept 2011]). A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (*Hollingsworth v Mercy Medical Center*, *supra*).

Applying these principles to the evidence in the trial record, the jury's determination that defendants departed from good and accepted medical practice, and that such departures were a proximate cause of plaintiff's injuries, was supported by a fair interpretation of the evidence. It was within the province of the jury to determine the expert's credibility, and the jury was free to credit the testimony of the plaintiff's expert witnesses over that of the defendants' experts (*Hatzis v Buchbinder*, 112 AD3d 890, 891 [2d Dept 2013]; *Morales v Interfaith Med. Ctr.,* 71 AD3d 648 [2d Dept 2010]). Upon consideration of the facts, the court finds that the jury's liability and damage verdicts are rational, reasonable, and a fair interpretation of the evidence presented at trial. Importantly, the jury's verdict in favor of the plaintiff on the issue of liability in this case was supported by a fair interpretation of the evidence, and there exists a valid line of reasoning and

permissible inferences such as could lead rational persons to the challenged verdict. As such, the motion to set aside the verdict as contrary to the weight of the evidence is denied.

Evidentiary Rulings and Charge rulings.

As stated previously, the court adheres to the various evidentiary rulings made in connection with this trial, and for the respective reasons set forth on the record. "The Supreme Court has broad discretion in determining the materiality and relevance of proffered evidence"(*Aitcheson v Lowe,* 144 AD3d 848 [2d Dept 2016]; *Caplan v Tofel*, 58 AD3d 659, 659 [2d Dept 2009]). In any case, even if the court erred in this regard, reversal would be unwarranted, as there is no indication that the court's rulings prejudiced a substantial right of a party or that admission or denial of the relevant evidence had a substantial influence on the result of the trial (*see* CPLR 2002; *Aitcheson v Lowe*, *supra*; *Nestorowich v Ricotta,* 97 NY2d 393, 401 [2002]). Here, the court is not persuaded that the outcome of the trial would have changed had the relevant evidentiary rulings been different (*see White v Kyung Kim,* 29 AD3d 685 [2d Dept 2006]; *Sargente v Mobarakai,* 129 AD3d 818 [2d Dept 2015]; *Aitcheson v Lowe, supra*).

In addition, contrary to defendants' position, and for the reasons stated by the court at trial, the court adheres to its rulings with regards to the jury charge, including that the jury be charged concerning the liability of residents and pre-impact terror, but not be given the "error in judgment charge" (*Nestorowich v Ricotta*, *supra*; *see Markey v Eiseman*, 114 AD2d 887 [2d Dept 1985]). In any event, under the facts presented, any error committed in ruling on the relevant charges was not so prejudicial as to amount to reversible error (*see* CPLR 2002*; Nestorowich v Ricotta*, *supra*).

Motion to vacate damages awarded as excessive.

Next, those parts of the motions that seek to set aside the damages award are denied. In the verdict, damages were awarded in the amount of $3.65 million, including $1 million for pre-impact and fear of death terror, $1 million for pain and suffering, $600,000 lost earnings, $350,000 for lost services and $700,000 in lost parental guidance [Verdict Sheet NYSCEF No. 281].

Prima Facie Showing of Damages.

Contrary to defendants' argument, the court finds that plaintiff set forth a prima facie cause of action for damages. Evidence showed that the decedent's heart failure symptoms became worse and progressed as the result of the heart attack (myocardial infarction) that he sustained, which was caused by defendants' malpractice, and that, consequently, the decedent's life devolved into one that was dependant on his family and included living in constant fear of sudden death. In light of this showing, defendants' argument that plaintiff failed to set forth a prima facie case is rejected (*see generally Skelly-Hand v Lizardi*, 111 AD3d 1187 [3d Dept 2013); *Mihileas v State of New York*, 266 AD2d 866 [4th dept 1999]).

Amount of Damages.

It is well settled that "[t]he amount of compensation to be awarded to an injured person is a question of fact to be resolved by the trier of fact and will only be disturbed when it deviates materially from what would be reasonable compensation" (*Simeon v Urrey,* 278 AD2d 624, 624 [3d Dept 2000]; *see* CPLR 5501; *Garrison v Lapine*, 72 AD3d 1441 [3d Dept 2010])."To successfully challenge a determination as to the amount of damages to be awarded, the record evidence must preponderate in favor of the moving party to such a degree that the verdict could not have been reached on any fair interpretation of the evidence [citations omitted]" (*Garrison v Lapine*, *supra, quoting Simeon v Urrey*, *supra*). Considerable deference is given to the jury's interpretation of the trial evidence as it relates to the determination of damages, and an award will be disturbed only when the verdict rendered could not have been reached on any fair interpretation of the evidence (*see Dishaw v Jones*, 296 AD2d 819 [3d Dept 2002]; *Simeon v Urrey, supra).*

Under CPLR 5501 (c), a court may overturn a jury's money verdict when it deviates materially from what would be reasonable compensation (*Santalucia v County of Broome*, 228 AD2d 895, 897 [3d Dept 1996]; *Stedman v Bouillon*, 234 AD2d 876 [3d Dept 1996]; *DeMarco v DeMarco,* 154 AD3d 1226 [3d Dept 2017]; *Duncan v Hillebrandt*, 239 AD2d 811 [3d Dept 1997]). Mindful that "the amount of damages to be awarded is primarily a question of fact and [that] considerable deference should be accorded to the interpretation of the evidence by the jury" (*Levine v East Ramapo Cent. School Dist.,* 192 AD2d 1025 [3d Dept 1993]), this "discretionary power is to be exercised sparingly" (*Santalucia v County of Broome*, *supra*; *Greblewski v Strong Health MCO, LLC.* , 2018 NY Slip Op. 03405 [3d Dept 2018]). An award will be disturbed only when the verdict rendered could not have been reached on any fair interpretation of the evidence (*see Dishaw v Jones,* 296 AD2d 819 [3d Dept 2002]; *Duncan v Hillebrandt*, *supra*).

Furthermore, the amount of an award for pain and suffering is a subjective determination that cannot be precisely quantified (*Ciuffo v Mowery Construction Inc.*, 107 AD3d 1195 [3d Dept 2013); *Acton v Nalley*, 38 AD3d 973 [3d Dept 2007]). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Quijano v American Transit Ins. Co.*, 155 AD3d 981 [2d Dept 2017]). "This analysis requires consideration of factors such as the nature and extent of the injuries, the degree of past, present and future pain and the permanency of the injury" (*Ciuffo v Mowery Construction Inc., supra; Garrison v Lapine*, 72 AD3d 1441, 1443 [3d Dept 2010]).

Pre-Impact terror and Fear of Impending death damages.

Applying these principles to the facts of this case, the court finds, contrary to defendants' claims, that the damages awarded for pre-impact terror and fear of impending death damages, do not deviate materially from what would be reasonable compensation

(*Simeon v Urrey*, *supra*). Pre-impact terror and fear of impending death is a sub-category of conscious pain and suffering and "[d]amages for pre-impact terror are designed to compensate the decedent's estate for the fear the decedent experienced during the interval between the moment the decedent appreciated the danger resulting in the decedent's death and the moment the decedent sustained a physical injury as a result of the danger (NY PJI 2:320, Comment, Caveat 3; *see McKenna v Reale,* 137 AD3d 1533, 1535 [3d Dept 2016]" (*Matter of 91st St. Crane Collapse Litigation*, 154 AD3d 139 [1st Dept 2017]). There must be some evidence that the decedent perceived the likelihood of grave injury or death before the death, and suffered emotional distress as a result (*Id.*; *see Keenan v Molloy*, 137 AD3d 868 [2d Dept 2016], *lv. denied,* 27 NY3d 908 [2016]; *see Donofrio v Montalbano*, 240 AD2d 617 [2d Dept 1997]).

Here, the record supports the jury's finding that the decedent endured significant pre-impact terror and fear of impending death. The testimony and records establish that during the three days in the hospital prior to the heart attack, the decedent was gasping for air, sweating, having trouble breathing, experiencing chest pain, suffering significant anxiety, expressing fear that he was dying and expressing feelings that his symptoms and complaints were being ignored at great risk to his health. Thereafter, the decedent suffered frequent, panic attacks, depression and anxiety and lived with declining health, and in fear of impending death for three years and 10 months before his death. During this time, the decedent made complaints to others of difficulty breathing and walking, discomfort and feelings that he was dying. In addition, the decedent underwent multiple hospitalizations and procedures, including eventually the implant of the LVAD to pump his blood, and was placed on the heart transplant list, all of which rationally generated fear of impending death. There was also evidence that the decedent was alert and conscious during his stroke, during which time he could not move his extremities and exhibited facial drooping and altered speech. As such, there was ample evidentiary support for the jury to reach its determination of damages on a fair interpretation of the evidence (*see Boston v Dunham*, 274 AD2d 708 [3d Dept 2000]; *Lang v Bouju*, 245 AD2d 1000 [3d Dept 1997]). Recognizing that damage awards for pain and suffering are inherently subjective and not subject to precise quantification or formulas (*see generally, Garrow v Rosettie Assoc., LLC*, 60 AD3d 1125 [3d Dept 2009]), the court finds that the jury awarded damages for pre-impact terror and fear of impending death were well within the range of reasonable compensation (*Matter of 91st St. Crane Collapse Litigation*, *supra*; *see generally, Doviak v Lowe's Home Ctrs., Inc.,* 63 AD3d 1348 [3d Dept 2009]).

Other pain and suffering damages.

As for the jury's determination of other pain and suffering damages, the record supports the award, especially in light of the decedent's experiences with, among other things, difficulty breathing, hemoptysis, severe chest pain, fatigue, swelling of limbs, sweating, physical discomfort and restricted movement from the LVAD, and difficulty enjoying daily activities and a regular diet. In addition, he experienced multiple hospitalizations and procedures, including eventually the implant of the LVAD to pump his blood, and the evidence shows that he suffered significant pain before, during and after

those procedures (*see Hyung Kee Lee v New York Hosp. Queens,* 118 AD3d 750 [2d Dept 2014]; *Louis v Kimmelman,* 8 AD3d 206 [1st Dept 2004]). Again, acknowledging that damage awards for pain and suffering are inherently subjective and not subject to precise quantification or formulas, the damages awarded were well within the range of reasonable compensation (*see Hyung Kee Lee v New York Hosp. Queens, supra; Louis v Kimmelman, supra; Coleman v New York City Transit Authority,* 134 AD3d 427 [1st Dept 2015]; *Garrison v Lapine*, *supra*; *Matter of 91st St. Crane Collapse Litigation*, *supra*).

Pecuniary Loss

"Pecuniary loss" is defined as the economic value of the decedent to each distributee at the time decedent died and includes loss of income and financial support, loss of household services, loss of parental guidance, as well as funeral expenses and medical expenses incidental to death (*Milczarski v Walaszek*, 108 AD3d 1190 [4th Dept 2013]). "Generally, because it is difficult to provide direct evidence of wrongful death damages, the calculation of pecuniary loss "is a matter resting squarely within the province of the jury" (*Milczarski v Walaszek*, *supra*, *quoting, Parilis v Feinstein*, 49 NY2d 984, 985 [1980]).

Lost Wages and Lost Services

The "pecuniary injuries" caused by a wage earner's death may be calculated, in part, from factors relevant to the decedent's earning potential, such as present and future earnings, potential for advancement and probability of means to support heirs, as well as factors pertaining to the decedent's age, character and condition, and the circumstances of the distributees (*Gonzalez v New York City Housing Authority*, 77 NY2d 663 [1991]; *Hyung Kee Lee v New York Hosp. Queens supra; Garrison v Lapine*, *supra*; *see McKenna v Reale,* 137 AD3d 1533 [3d Dept 2016]). As for a claim for lost services, 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" (*Hyung Kee Lee v New York Hosp. Queens, supra*, *quoting, Klos v New York City Tr. Auth.,* 240 AD2d 635 [2d Dept 1997]). Because it is difficult to establish pecuniary loss, calculation of pecuniary loss in a wrongful death case is a matter resting squarely within the province of the jury (*see Parilis v Feinstein,* 49 NY2d 984 [1980]; *see generally*, *Milczarski v Walaszek*, 108 AD3d 1190, 1190 [2013]).

Here, the lost earnings award and lost services awards are supported by the submitted documentation and the testimony of witnesses, including plaintiff's expert. With respect to the calculation of past and future loss of the decedent's financial support and household services for plaintiff, plaintiff adduced the testimony of the expert witness, and the defendants did not refute that testimony by presenting their own expert witness or otherwise (*see Nayberg v Nassau County*, 149 AD3d 761 [2d Dept 2017]). Plaintiff's evidence thereby established past and future loss of the decedent's financial support and household services with reasonable certainty, and the jury's award of damages in these categories did not deviate materially from what would be reasonable compensation (*see Vasquez v County of Nassau*, 91 AD3d 855 [2d Dept 2012]; *Calo v Perez,* 211 AD2d 607

[2d Dept 1995];*Nayberg v Nassau, supra*; *Hyung Kee Lee v New York Hosp. Queens supra*).

Loss of parental guidance

The documents submitted and testimony of the witnesses provided an adequate foundation for the jury's award of loss of parental guidance and assistance damages in this case."With respect to damages for loss of parental guidance, the statutory principle is that the damages should represent an amount which is fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought (see EPTL 5–4.3)" (*Zygmunt v Berkowitz*, 301 AD2d 593 [2d Dept 2003]). In determining such damages, "it has long been recognized that pecuniary advantage results as well from parental nurture and care, from physical, moral and intellectual training, and that the loss of those benefits may be considered within the calculation of 'pecuniary injury'"(*Id.*; *Kenavan v City of New York,* 120 AD2d 24 [2d Dept 1986], *affd.*,70 NY2d 558 [1987]). "The determination of pecuniary damages in a wrongful death action is peculiarly within the province of the jury" (*Facilla v New York City Health and Hospitals Corp.,* 221 AD2d 498 [2d Dept 1995]; *see Estvez v Tam*, 148 AD3d 779 [2d Dept 2017]). Here the testimony of the witnesses and the documentary evidence showed that loss of parental nurture and guidance was present and the jury award did not deviate materially from what would be reasonable compensation under the facts presented (*see Vasquez v County of Nassau*, *supra; Carlson v Porter,* 54 AD3d 1129 [4th Dept 2008], *Bryant v New York City Health & Hosps. Corp.,* 250 AD2d 797 [2d Dept 1998]; *see generally Zygmunt v Berkowitz*, *supra*).[1]

Of import, the "amount of damages to be awarded for personal injuries is primarily a question for the jury, and the jury's determination is entitled to great deference" *(Coker v Bakkal Foods, Inc.*, 52 AD3d 765 [2d Dept 2008]). Absent a deviation from what would be considered reasonable compensation, remittitur or a new trial on damages is unwarranted (*See* CPLR 5501[c]; see *Gorman v Mathew*, 151 AD3d 816 [2d Dept 2017]; *Walker v New York City Transit Authority*, 115 AD3d 941 [2d Dept 2014]).Upon consideration of the record here, therefore, the court declines to exercise its discretionary power in the favor of overturning or modifying the jury's verdict or awards . Such discretion, which is to be exercised sparingly, is not appropriately utilized here, especially upon given due consideration of the unique aspects of this case.

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[1] Moreover, the failure to allocate the wrongful death damages amongst the children was not an error, and, in any event, does not bar recovery here (*Carter v New York City Health and Hospital Corp.,* 47 AD3d 661 [2d Dept 2008]). Nor have defendants provided the court with any binding or convincing legal authority to support defendants' argument that Alexander Molina is precluded from recovery for pecuniary loss because he was born after the malpractice was committed and, accordingly, the argument was rejected (*see* EPTL 5-4.1 et seq), and remains the court's ruling.

CPLR 4545 (collateral source) and CPLR 4546 (income tax) Hearings.

In addition, defendants' motion for a CPLR 4545 hearing to determine the amounts by which the awards for economic loss should be reduced to account for Workers' Compensation benefits, for which there is a lien that most be satisfied from the awards, is denied. Defendants have failed to provide any evidence proving that plaintiff was awarded duplicative recovery (*McKnight v New York City Transit Authority,* 150 AD3d 840 [2d Dept 2017]).

Furthermore, defendants failed to set forth any legal basis for finding that a hearing with regards to an income tax offset is warranted. First, defendants' reliance on CPLR 4546 is misplaced as the issue of the impact of income taxes on a lost earnings award in a wrongful death action based on medical malpractice is governed by EPTL 5-4.3, not CPLR 4546. In contemplation of that statute, the income tax impact question was presented to the jury in the charge, and defendants present no basis for disturbing the jury's conclusions regarding the matter [Trial Transcript p. 2690; see PJI 2:151B Comment].

Conclusion

The court, having read the cases cited by plaintiff and defendants, finds there is no justification to vacate the verdict, direct verdict, order a new trial as to liability or to modify or strike the damages award. Further, the court declines to exercise its discretion under CPLR 2201and the request for a stay is denied *(see McCarthy v Kettigan*, 2018 NY Slip Op. 28093 [Sup. Ct. New York County 2018]). Defendants' motions are therefore denied in their entirety. Accordingly, it is hereby

ORDERED that the motion of defendants RANDY A. GOLDBERG and MEDICAL RESEARCH ASSOCIATES, P.C. made pursuant to CPLR 4404(a), 4545, 4546, and 5501 for an order setting aside the verdict in favor of ANTONIO MOLINA, IV, as Administrator of the Estate of ANTONIO, III, deceased and ANTONIO MOLINA ,IV, individually rendered by the jury against said defendant on January 10, 2018, and, upon so doing, directing a verdict or ordering a new trial, or, in the alternative, granting defendant a hearing for the purposes of taking collateral source and income tax reductions and granting a stay of this matter is denied in its entirety; and it is further;

ORDERED that the motion of defendants WESTCHESTER HEALTH CARE CORPORATION and WESTCHESTER MEDICAL CENTER [Mot. Seq. 10] made pursuant to CPLR 4404(a), 4545, 4546 and 5501 for an order setting aside the verdict in favor of ANTONIO MOLINA, IV, as Administrator of the Estate of ANTONIO, III, deceased and ANTONIO MOLINA ,IV, individually rendered by the jury against said defendants on January 10, 2018, and, upon so doing, directing a verdict or ordering a new trial, or, in the alternative, granting defendant a hearing for the purposes of taking collateral source and income tax reductions is denied in its entirety.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
June 5, 2018

ENTER

HON. LAWRENCE H. ECKER, J.S.C.

Appearances:
Silberstein Awad & Miklos
Attorneys for Plaintiffs
Via NYSCEF

Wilson, Elser, Moskowitz, Edelman & Dicker LLP.
Attorneys for Defendants Randy A. Goldberg and
Medical Research Associates, PC
Via NYSCEF

Vigorito, Barker, Porter, & Patterson, LLP.
Attorneys for Defendants Westchester Heath Care Corporation, Westchester County
Heathcare Corp., Westchester Medical Center and
Hoang M. Lai
Via NYSCEF