Raefski v Hirsch
2020 NY Slip Op 30970(U)
April 16, 2020
Supreme Court, New York County
Docket Number: 805440/13
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

DARREN RAEFSKI, As Administrator Ad Prosequendum of the Estate of CHERYL RAEFSKI, Deceased, and DARREN RAEFSKI, Individually,

Index No.: 805440/13

Plaintiff,

-against-

CHRISTIAN HIRSCH, M.D., CHRISTIAN HIRSCH, M.D, P.C., JOSEPH RACCUIA, M.D. and HEPATOBILIARY & TUMOR SURGERY, P.C.,

JOAN A. MADDEN, J.:

Defendants Christian Hirsch, M.D. and Christian Hirsch, M.D., P.C. (together "defendants") move pursuant to CPLR 4404(a) for an order (a) setting aside the verdict in the interest of justice and ordering a new trial; or b) setting aside the verdict as contrary to the weight of the evidence and ordering a new trial; or c) amending defendants' Answer to assert set-off as an affirmative defense; or d) reducing the damages awards as excessive; and, (e) providing such other and further relief as this court deems proper and just. Plaintiffs, Darren Raefski, as Administrator Ad Prosequendum of the Estate of Cheryl Raefski, Deceased, and Darren Raefski, Individually, ("Darren Raefski") (together "plaintiffs") oppose the motion to set aside the verdict in the interest of justice and as against the weight of the evidence, and to reduce the award as excessive. Plaintiffs do not oppose the motion to amend the answer to assert a defense of set-off, and that part of the motion is granted, and that part which seeks to set aside the verdict in the interests of justice and against the weight of evidence, is denied, as defendants have not set forth any arguments upon which such relief can be granted. With respect to the motion for remittur, it is denied as to pain and suffering and granted with respect to the wrongful death damages to the

extent indicated below.

FACTS

In this medical malpractice action, plaintiffs claim, *inter alia*, that Dr. Hirsch departed from accepted standards of medical practice on December 5, 2011, in not removing a remnant of a polyp by colonoscopy, but rather in performing a laparoscopic procedure involving a partial resection of her colon. On December 5, 2011, Dr. Hirsch performed the procedure with co-defendant Dr. Joseph Raccuia; the laparoscopic procedure was converted to an open procedure, with an intraoperative colonoscopy; and the remnant removed. Plaintiffs allege at some point during the procedure, that Cheryl Raefski's bowel was perforated when an instrument using thermal heat touched the serosa, the outermost layer of the jejunum, or small bowel. Plaintiffs further allege that the perforation caused a leak of the contents of the bowel; that as a result of the leak, although Ms. Raefski underwent an additional three surgeries, she developed sepsis which led to her death 10 days later. Plaintiff's further allege that Dr. Hirsch departed from accepted medical practice in not ordering a CAT scan with contrast during her post-operative period, and that Dr. Hirsch failed to obtain Cheryl Raefski's informed consent.

Defendants allege that there was no perforation during the procedure, but that four days postoperatively, Cheryl Raefski developed a leak from a hole caused by a defect in the small bowel, which was surgically repaired in a second surgery. Notwithstanding the second surgery, Cheryl Raefski required a third surgery, and a day later died. She was, at the time, 43 years old, married to Darren Raefski and the mother of their three children. The jury found that Dr. Hirsch was liable, and awarded Darren Raefski $1,750,000 for loss of services, and each of their three children $3 million in damages.

MOTION TO SET ASIDE THE VERDICT

CPLR 4404(a) provides that "the court may set aside a verdict or any judgment entered thereon ... where the verdict is contrary to the weight of the evidence ...." The standard used in determining a motion to a set aside a verdict as against the weight of the evidence is whether the evidence so preponderated in favor of the moving party, that the verdict "could not have been reached on any fair interpretation of the evidence." Lolik v. Big V Supermarkets, Inc., 86 NY2d 744, 746 (1995), quoting Moffatt v. Moffatt, 86 AD2d 864 (2d Dept 1982), aff'd 62 NY2d 875 (1985) . To apply this standard, the court's analysis "involves what is in large part a discretionary balancing of many factors." Cohen v. Hallmark Cards, 45 NY2d 493, 499 (1978)(internal citation omitted).

At trial, plaintiff asserted, and the jury found, that Dr. Hirsch was liable under the theories detailed in the following interrogatories:

> 1. Did defendant Dr. Hirsch depart from accepted medical practice by not removing the remnant polyp in Cheryl Raefski by colonoscopy?
> 2. Did defendant Dr. Hirsch depart from accepted medical practice by performing a laparoscopic operative procedure on Cheryl Raefski on December 5th, 2011?
> 3. Did defendant Dr. Hirsch depart from accepted medical practice in the manner in which he performed the operative procedure of December 5th, 2011?
> 4. Did defendant Dr. Hirsch depart from accepted medical practice by not ordering a CT scan with oral contrast on December 6th, 2011, December 7th, 2011 or December 8th, 2011.
> 5. Did defendant Dr. Hirsch, before obtaining Cheryl Raeski's consent to the laparoscopic operative procedure to remove the polyp, provide appropriate information?[1]

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[1]With respect to this theory, a second interrogatory asked "[w]ould a reasonably prudent person in Cheryl Raefski's position

at the time consent was given, have decided not to undergo the laparascopic operative procedure to remove the remnant of polyp, if given appropriate information?" A third interrogatory asked [w]as the laparascopic operative procedure a substantial factor in causing injury and/or death to Cheryl Raefski?"

At trial, it was undisputed that in November, 2011, Cheryl Raefski had part of a large polyp removed from her intestine during a colonoscopy, which was performed by her gastroenterologist, Dr. Waxman. It was also undisputed that as the pathology report indicated the polyp was a "tubulovillous adenoma," there was a possibility it was cancerous; and that it should be removed. Dr. Waxman recommended that Cheryl Raefski see Dr. Hirsch or a Dr. Ligresti for evaluation.

With respect to the first interrogatory, at trial, plaintiffs' contentions were that Dr. Hirsch should have performed a colonoscopy to remove the remnant; if the pathology found it was benign there would be no need for a further procedure; if it was malignant, then further procedures could be done. Defendants' contentions were that a laparoscopic procedure for a partial resection of the colon with an anastomosis was within the standard of care, and Dr. Hirsch's decision to perform such a procedure was supported by his concern that the remnant was malignant, which concern was based on the type of adenoma, its size, and Cheryl Raefski's reported changes in gastrointestinal function and bowel habits. Defendants also contended that, although four centimeters of the six centimeter polyp had been removed, since colon cancer requires a "wider margin of resection," that this could not have been achieved through a colonoscopy. In support of their motion, defendants rely on the testimony of their expert, Dr. Persico, that it was not a departure not to have done a second colonoscopy, and, although it was an option for the removal of the polyp, it was not the definitive treatment, and, it was not the option chosen by the patient. Defendants also point to Dr. Persico's testimony that many of Cheryl Raefski's gastrointestinal symptoms, including poor appetite, bloating, bowel

changes, rectal bleeding and vomiting, are associated with many gastrointestinal conditions, including colon cancer; that since Cheryl Raefski had an upper endoscopy, many of these conditions could be excluded; that rectal bleeding is more common with colonic polyp malignancies; and that plaintiff's expert, Dr. Nizin, testified that a "tubulovillous adenoma" carries a 20% chance of being cancer.

In opposition, with respect to the first interrogatory, plaintiffs rely on the testimony of their expert, Dr. Nizin, that Dr. Hirsch departed from good and accepted medical practice in not performing a colonoscopy to remove the remnant of polyp; that when part of a polyp remains in the intestine and it is not known whether it is malignant, the standard of care requires that it be removed and analyzed; and then it can be determined what should be done. Trial Transcript (TT) at 1432.[2]

In support of the opinions by their respective experts, defendants and plaintiffs each point to two notes by Dr. Waxman, both dated November 14, 2011; an office note and a referral note. In his office note, Dr. Waxman wrote "I strongly suggested that she may have to have a lap colectomy done but that I would suggest that both Dr. Hirsch and Dr. Ligresti can do a surveillance colon [colonscopy] to try and remove the remnant of a polyp, but they may want to prep her for surgery at the same time." In his referral note to Dr. Hirsch, Dr. Waxman wrote "Huge T-V adenoma Polyp at 50 um – Please evaluate – still significant remnant left" and under

[2]The pages from the trial transcript are those cited in the submissions of plaintiffs and defendants.

remarks wrote "Colon/possible lap-colectomy. "[3]

Defendants contend that the notes support Dr. Hirsch's testimony that Dr. Waxman was suggesting two approaches, either a colonoscopy or a laparascopic colectomy, while plaintiffs contend that Dr. Hirsch testified that Dr. Waxman was saying to do a colonoscopy, try to remove it, but if it cannot be removed, she may have to have a lap colectomy done. TT at 295-296, 393. Plaintiffs argue the foregoing testimony of Dr. Hirsch as to the meaning of Dr. Waxman's note is bolstered by Dr. Hirsch's additional testimony that if the polyp were removed via colonoscopy, and pathology found that it was benign, then there would have been no need for a further procedure, and his deposition testimony that a "tubuvillous adenoma" has only a 25% likelihood of being cancer. TT at 339-40; 322. Neither defendants nor plaintiff's contentions are dispositive as to the interpretation and significance of the notes, and it was for the jury to evaluate this evidence in light of all the evidence in the case.

In connection with the first interrogatory, the expert testimony presented sharply conflicting opinions as to whether Dr. Hirsch departed from accepted medical practice in not performing a colonoscopy to remove the remnant. "[T]he weight to be accorded to conflicting expert testimony is a matter for the jury." Rojas v. Palese, 94 AD3d 557, 558 (1st Dept 2004)(citations omitted). Moreover, "[i]t is for the jury to determine the credibility of witnesses and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses....Where conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert." Siddiqua v. Anarella, 120 AD3d 793,794

[3]In the note, arrows appear where dashes are in the text of this decision.

(2nd Dept 2014)(internal citations omitted). Under these well settled legal principles, plaintiffs presented more that sufficient evidence to support the jury's finding of liability on this theory. Lolik v. Big V Supermarkets, Inc., 86 NY2d at 746.

As to the second interrogatory, defendants argue that the evidence at trial does not support the factual basis of Dr. Nizin's opinion that it was a departure from accepted medical practice for Dr. Hirsch to perform a laparascopic procedure on Cheryl Raeski. Specifically, defendants argue that Dr. Nizin testified that it was a departure because you do not know where the polyp is, and it becomes impossible to know where it is by this technique; while the evidence showed that the location of the remnant was known. Defendants point to Dr. Waxman's note that the polyp was at "50 cm" and Dr. Persico's testimony that polyps are described in terms of distance from the anal area. TT at 2252. Defendants also point to Dr. Hirsch's testimony that the polyp was described as being in the descending colon; he had a good idea where it was; there were indications on the outside of the colon; and Dr. Waxman, presumably by his note, told him where it was. Defendants also point to Dr. Persico's testimony that it was within the standard of care to perform a laparascopic procedure on Cheryl Raefski.

Plaintiffs rely on Dr. Nizin's opinion that it was a departure as:

> [Y]ou don't know where the polyp is, you don't see the wall very well because of the body, of her habitus, the amount of fat in her body, and you are trying to look at something through a camera. You can't touch it and you are trying to find a spot that isn't tattooed. So, it becomes impossible to know where this polyp is by that technique.

Plaintiffs also contend that although Dr. Hirsch testified he could see the splenic flexure, that is, the bend in the colon between the transverse and descending colon, he qualified this

testimony, saying "it wasn't easy," "it wasn't clear." TT at 395. Plaintiffs argue when this testimony is considered with Dr. Hirsch's testimony that if you cannot see the splenic flexure, you should not be manipulating or cauterizing in that area, and with Dr. Persico's testimony that if a surgeon cannot see, he can harm the patient, that this evidence inferentially supports Dr. Nizin's opinion. TT at 396-397, 2383.

Based on the conflicting opinions of the experts, and the evidence each relied upon in forming their opinions, it was for the jury to determine which opinions to accept. Thus, a fair interpretation of the evidence supports the jury's determination, and it cannot be said that the evidence so preponderated in favor of defendants that the jury's determination of liability as to this departure should be set aside.

With respect to the third interrogatory, plaintiffs allege three ways in which Dr. Hirsch departed in the manner in which he performed the surgery;[4] his use of thermal energy during the lapascopic portion of the procedure; the use of a Pfannenstiel or modified Pfanneniel incision; and the failure to properly inspect the small bowel at the end of the procedure.

As to the use of thermal energy during the laparascopic part of the procedure, plaintiffs contend that the use of thermal energy in the colon and the splenic flexure was a departure because Dr. Hirsch did not have an adequate view of the area. Plaintiffs contend that Dr. Hirsch was using cautery and LigaSure, which uses thermal energy, to try to free the splenic flexure, and

[4] Plaintiffs contend that Dr. Nizin testified to three separate departures, but at the request of Dr. Hirsch's counsel, the plaintiffs stipulated to combine all three of those departures into a single departure. TT at 3314-1).

point to Dr. Raccuia's deposition testimony, which was read to the jury, that "... we could not see the splenic flexure because of her obesity. So all the omentum was flopping and then mesentery. So where we had to go was not adequate with the laparoscope in terms of view." TT at 1351. Based on that testimony, Dr. Nizin opined that it was a departure from accepted medical practice by Dr. Hirsch to use thermal energy in the colon and the splenic flexure, as without a clear view "[y]ou can injure any of the surrounding structures, and in the splenic flexure there is the tail of the pancreas, there is the top of the kidney, there is a greater curvature of the stomach, there is the spleen, there are blood vessels, there are small intestine. There is a lot of things right in that one spot." TT at 1458-60, 1462-1463. Plaintiffs also point to Dr. Raccuia's testimony that Dr. Hirsch could not adequately see the splenic flexure when he was trying to take it down, and that he told Dr. Hirsch to convert to an open procedure, but that Dr. Hirsch continued for a time with the laparoscopy. TT at 1343, 1355-1360.

Defendants point to Dr. Hirsch's testimony that he could see the splenic flexure and had adequate visualization when he was cauterizing in that area; that he took down the splenic flexure himself; and that Dr. Raccuia only had a very minor role in this aspect of the procedure, which was limited to retraction of the abdominal wall. TT at 397, 419, 400, 401,403, 408, 410. Defendants argue that when this testimony is considered together, "a fair interpretation of this evidence is that Dr. Raccuia was not involved in using thermal energy on the splenic flexure and that although he may have had a limited view of the surgical field, Dr. Hirsch had adequate visualization at all times while using the thermal energy instruments." Based on a review of the above evidence, Dr. Hirsch's use of thermal energy was an issue for the jury to decide, and it cannot be said that the evidence as to this issue preponderated in favor of defendants.

The second way plaintiffs contend Dr. Hirsch departed in the manner in which he performed the surgery was the use of the Pfannenstiel incision for the open portion of the surgery, the use of which Dr. Nizin opined was a departure because it provided an inadequate view of the patient's anatomy. Defendants argue that Dr. Nizin's opinion was not supported by the evidence as it incorrectly presumed that the incision made by Dr. Hirsch did not extend past the bellybutton TT at 1492. Defendants contend D. Hirsch's testimony was that the type of Pfannenstiel incision he performed included an internal midline vertical incision, which he described as a "continuation" of his Pfannenstiel incision by cutting a midline incision underneath the skin through the fascia running vertically up the abdomen TT at 949, 950. Through the use of this type of incision, Dr. Hirsch testified he was able to obtain the exposure needed for the procedure.

Plaintiffs point to Dr. Raccuia's testimony with respect to a Pfannenstiel incision, that he told Dr. Hirsch it was inadequate, given Cheryl Raefski's large body habitus, which made it difficult to get from the lower pelvic area to the upper abdominal quantrant. TT at 1362-1363, 1366-1367. In connection with this testimony, defendants counter Dr. Raccuia testified he actually told Dr. Hirsch that he would prefer another incision; he felt the incision was ultimately adequate because Dr. Hirsch extended it, and he does not have experience in making incisions for laparoscopic colectomies. TT at 1369, 1362, 1369. As to Dr. Hirsch's testimony about the type of incision he made, plaintiffs point to his testimony that the record does not contain any notation that he made a midline incision in addition to the Pfannenstiel incision. TT at 548-549. Plaintiffs argue Dr. Nizin's opinions that the injury was to the serosa of the jejunum, the outermost layer of the small bowel, and "was caused by one of the thermal instruments used during that operation," establish that the injury occurred during the laparoscopic or open portion of the operative

procedure. TT at 1493. In support of this argument, plaintiffs contend Dr. Hirsch testified he believes the hole in the bowel was caused by inadvertent contact with serosa; Dr. Raccuia testified Cheryl Raefski had a burn injury from the operation; and Dr. Raccuia testified at his deposition that the perforation to the jejunum occurred during the surgery. TT at 596-598, 2564-2565, 2616. Based upon a review of the foregoing evidence, it is clear that the evidence on this issue did not preponderate in favor of the defendants, and that the issue as to whether Dr. Hirsch departed from accepted practice with respect to the incision was for the jury to decide.

Defendants argue the third way plaintiffs contend Dr. Hirsch departed, that is, his alleged failure to inspect the small bowel at the end of the surgery, is not supported by the evidence, as Dr Nizin failed to quantify the size of the injury. Plaintiffs point to Dr. Nizin's testimony that at the end of the procedure you are required to see if anything is injured, and when the serosa is burned, the burn will be visible, or you would see a white area where it was burned -- "the surface turns white." TT at 1497-1498. Plaintiffs further point to his testimony that "[t]here was nothing in the operative report that indicates the small bowel was examined at the end of the operation," [and Dr. Nizin's opinion that it was a departure from accepted medical practice to not inspect the small bowel at the end of the procedure.[5] TT at 1499-1500. In further support of Dr. Nizin's opinion,

[5]Dr. Nizin also testified that this departure was a substantial factor in causing injury to Cheryl Raefski. Dr. Nizin testified that if Dr. Hirsch had inspected the small bowel and found the burn, that a few sutures would have been put in, which would have prevented a hole in the wall of the small bowel and prevented the leak which caused Cheryl Raefski to become ill and develop sepsis. TT at 1501, 1505-1507.

plaintiffs point to Dr. Hirsch's testimony that anything significant you do should be in the chart; that he did not document an inspection of the small bowel in his operative report; and Dr. Raccuia's testimony that nobody inspected the small bowel while he was in the room. TT at 576, 559-560, 2572.

Defendants assert that this evidence is insufficient, as Dr. Raccuia testified he left the operating room after the colon was sewn back together and before Dr. Hirsch testified he inspected the small bowel. TT at 2752-2753. Defendants also argue that plaintiff's argument as to the lack of documentation and their reliance on Dr. Hirsch's trial testimony regarding documentation, ignores Dr. Hirsch's further testimony that running the bowel is one of the "routine things" which need not be documented. TT at 594. In connection with the burn to the serosa, defendants argue that Dr. Nizin's testimony in this regard fails as, although he testified that a burn to the serosa would be visible or identifiable during the procedure by an area where "the surface turns white," he fails to quantify this contention. TT at 1496. Significantly, defendants' submissions lack legal support for their argument regarding quantification. Defendants contend Dr. Hirsch testified that the injury was an extremely tiny injury from a cautery or ultrasonic device, which made it undetectable despite a thorough running and careful inspection of the small bowel; and that it was undetectable because it had not yet manifested or perforated. TT at 989-990, 993. The conflicting inferences to be drawn from the above evidence, clearly demonstrate that issues regarding the inspection of the small bowel were for the jury to decide.

As analyzed in the foregoing discussion regarding the third interrogatory, it cannot be said that the evidence as to any one of the three ways plaintiffs asserted Dr. Hirsch departed in the manner in which he performed the procedure, preponderated in favor of defendants so that the jury could not have reached its verdict by a fair preponderance of the evidence, and defendants motion with respect to this interrogatory is denied.

As to the fourth interrogatory, defendants argue the jury's finding that Dr. Hirsch is liable for not ordering a CT scan with oral contrast on December 6th, 7th or 8th is contrary to the weight of the trial evidence as Cheryl Raefski did not manifest, nor did Dr. Nizin testify to, any symptoms that warranted a CT scan with contrast before December 9th. Defendants argue that Dr. Nizin's opinion is based on conjecture and does not take into account what was known to the physicians in the three days following the first procedure. Defendants further argue that while Dr. Nizin referred to Cheryl Raefski's postoperative pain, he failed to state how pain alone would require a CT scan with contrast, particularly, as pain was consistent with sepsis from spillage in the OR with a KUB showing no free air TT at 1748. Defendants contend the evidence showed that Cheryl Raefski was improving postoperatively, which was inconsistent with a leak from a perforation during surgery, and the leak occurred on December 9th, when a "small defect" in the colon opened and spilled fecal contents into the abdominal cavity. Defendant's argue that this position is supported by the description in the pathology report from the second surgery as "an acute" situation, which, they assert means that it occurred within several hours of the surgery. Defendants also point to the following in support of this position; that the drains placed after the first surgery did not have any fecal content; Cheryl Raefski's white blood cell and lactate levels reduced to normal shortly after surgery; her abdomen was benign; she did not have a fever;

specialty consultations did not identify a perforation as a distinct possibility; references in the notes that the patient reported feeling better; and the reduction in her pain medications. Defendants also point to Dr. Brundage, the head of the ICU, as assessing Cheryl Raefski's course as "not consistent with a leak or perforation," and that none of the nine imaging studies Cheryl Raefski underwent after the surgery revealed any findings consistent with a bowel compromise or perforation. Defendants also argue Dr. Narasimham, their Intensive Care expert, testified that Cheryl Raefski did not have the significant symptom of a suspected bowel leak, which symptoms include a high lactate count, an elevated WBC, biliary material in the surgical drains, clinical exams, and lab results, and that Cheryl Raefski's symptoms were non specific until she had severe abdominal pain on December 9th. TT at 2851, 2859.

Plaintiffs point to Dr. Nizin's testimony that the symptoms Cheryl Raefski had on December 6th were due to a leak that occurred from the burn injury to the serosa, and that the leak continued through December 7th, 8th and 9th; the spiral chest CT scan ordered on December 6th to look for a pulmonary embolism would not show a leak; and that a CT scan with oral contrast was needed to show a leak. TT at 1507-1510. Dr. Nizin opined DR. Hirsch departed from accepted medical practice in not ordering a CT scan of the abdomen and pelvis with oral contrast on December 6th, 7thand 8th. TT at 510-11. Plaintiffs contend this opinion is supported by the testimony of defendants' Intensive Care Specialist, Dr. Narasimhan that the symptoms of a perforation include tachycardia, tachypnea, acidosis, diminished urinary output, sepsis, and abdominal pain, and that all of those symptoms are reflected in the hospital chart on December 6th

(see NYU Chart, pp. 0121, 0559). TT at 2974-2975.[6] Plaintiffs also point to Dr. Nizin's testimony that on December 9th when the CT scan with oral contrast was done, and the leak diagnosed, Cheryl Raefski was in septic shock with systemic organ involvement, and had the CT scan been done between December 6th and the 8th, the leak would have been diagnosed, the organ involvement would have been less, and Cheryl Raefski would have lived. TT at 1513, 1511. Plaintiffs argue this testimony refutes defendants' contention regarding the meaning of "acute" in the pathology report. Plaintiffs also point to Dr, Narasimhan testimony that a December 7th note in the chart indicates Cheryl Raefski was screaming in pain, and that this is not a picture of someone doing well. With respect to defendant's argument regarding Dr. Narasimhan's testimony that the absence of fecal contents in the abdominal drains before December 9th indicates there was no leak, plaintiffs point to her further testimony that the drains were placed in a location which would not have drained fecal matter. TT at 3104, 3107, 3053-54. With respect to defendants' assertion that Dr. Brundage assessed Cheryl Raefski's course as not consistent with a leak or perforation, plaintiffs contend that their review of the chart revealed no such entry, but did reveal the following note:

> Pt is a 43 yr. Old female with h/o HTN, HLD, asthma, and GERD who is POD #1 s/p lap converted to open L colon resection with persistent tachycardia, hypoxia, tachypnea, and decreased UOP. Differential diagnosis includes hypovolemia vs. sepsis vs. PE. Per primary team surgery was contaminated in addition to being difficult raising the possibility of septic picture yet time frame not

[6]With respect to Dr. Narasimhan testimony on direct that Cheryl Raefski's vital signs were good for post-op day one, on cross she testified that those vital signs were preoperative. TT at 2870-2871, 3090-3100.

consistent with leak.

Plaintiffs assert the note indicates Dr. Brundage found Cheryl Raefski's clinical picture consistent with sepsis from bowel contents, and indicates she was noting the surgical team found that the time frame was not consistent with an anastomotic leak. Plaintiffs also point to Dr. Narasimhan's testimony that if there is a suspicion of a leak, a CT scan with contrast should be done as soon as possible, as a patient might go from sepsis into septic shock, and death. TT at 2995-96, 2999. Thus, plaintiffs argue, Dr. Hirsch's argument that nine imaging studies were done is "misguided," as what was needed was a CT scan with contrast.

In considering the above evidence, while defendants and plaintiffs point to different evidence and argue different conclusions which should be drawn from the evidence, a fair interpretation of the evidence supports the jury's finding that Dr. Hirsch is liable for not doing a CT scan with oral contrast on December 6th, 7th or 8th, and defendants' motion as to the fourth interrogatory is denied.

As to the fifth interrogatory, the law requires:

> In order to recover for medical malpractice based upon lack of informed consent, a patient must establish that the physician failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in patient's circumstances having been so informed would not have undergone such procedure, and that lack of informed consent was the proximate cause of the injury (Public Health Law § 2805-d [1], [3]; *Bernard v Block*, 176 AD2d 843, 848; *Brandon v Karp*, *supra*, at 492-493).

Shkolnik v. Hosp. for Joint Diseases Orthopaedic Inst., 211 AD2d 347, 350 (1st Dept), appeal

denied 87 NY2d 895 (1995).

Moreover, "[e]xpert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff." Orphan v. Pilnik, 15 NY3d 907, 908 (2010).

Plaintiffs contend that sufficient evidence supports the jury's finding that Dr. Hirsch is liable under the cause of action for lack of informed consent based on the testimony of Dr. Nizin, as to the risks, benefits and alternatives to the operation which Dr. Hirsch needed to disclose to Cheryl Raefski; the lack of documentation in Dr. Hirsch's records regarding conversations of this nature with Cheryl Raefski, and Dr. Hirsch's testimony regarding the need to document significant events in the course of treatment. Plaintiffs point to Dr. Nizin's testimony that in order to satisfy the requirements for informed consent, Cheryl Raeski needed to be given the option of a colonoscopy; informed that colon surgery included risks of infections, injury, bleeding, medication reactions, stress leading to a heart attack or stroke, hernia and blood clots; and that complications from abdominal surgery are much greater than from colonoscopy. TT at 1445-1447. Plaintiffs argue the following is evidence from which the jury could have found that Dr. Hirsch did not provide the required information. Plaintiffs point out that although Dr. Hirsch's testified he had provided the required information to Cheryl Raefski, he did not write down any mention of such conversations in his office notes; that, as indicated above, he testified that anything significant, but not a minor event, should be put in the chart; and that informing a patient of the risks, benefits and alternatives is not a minor event. TT at 549-552, 576, 594. Plaintiffs also argue an inference could be drawn that Dr. Hirsch did not provide the required information based on his testimony that a colonoscopy was not an option to remove the remnant polyp in this case.

TT at 276-277, 558.[7]

With respect to this element, defendants contend Dr. Hirsch testified that he verbally provided the required information to Cheryl Raefski regarding the risks and benefits of, and alternatives to, the proposed procedure, after which she signed an informed consent form. TT at 553-554, 550, 1308. As to the lack of documentation, defendants point out that, although Dr. Hirsch "may" have testified in the past that something was "not done if it was not written, " he also testified that this did not apply to routine aspects of his medical practice, such as obtaining informed consent. TT at 594. As to Dr. Hirsch's testimony that colonoscopy was not an option to remove the remnant polyp in this case, defendants contend this was Dr. Hirsch's medical determination based on the location of the polyp and Cheryl Raefski's presentation, and that Dr. Hirsch testified he discussed alternatives including colonoscopy, laparoscopic resection, and open resection with Cheryl Raefski. TT at 296, 685-686, 909,916. Defendants argue this testimony shows that Dr. Hirsch spoke with Cheryl Raefski about alternatives to a laparascopic resection, including a colonoscopy, and, based on the entirety of Dr. Hirsch's testimony on this issue, there is no rational basis for the jury to have found Dr. Hirsch liable for failing to give proper informed consent.

In connection with the first element, the above discussion of the evidence and inferences

[7]In support of this argument, plaintiffs cite Bolin v. Goodman, 160 AD3d 1350, 1352 (4th Dept 2018), where the Appellate Division, found there was a rational basis for the jury's verdict that the defendant physician did not give proper advice, as his notes did not reflect any urgency for the decedent to go to the hospital.

to be drawn from such evidence, demonstrate that the record raises issues of fact, and that there was a sufficient basis for an inference that Dr. Hirsch did not provide the required information.

As to the second element, plaintiffs point to Dr. Nizin's testimony that it was a departure for Dr. Hirsch not to have removed the remnant of the polyp by colonoscopy, and if it was unsuccessful or if the polyp was malignant, then to have an operative procedure. TT at 1435, 1445-1446. Plaintiffs also point to Dr. Nizin's testimony that it was a departure for Dr. Hirsch to perform a laparoscopic procedure on Cheryl Raefski. TT at 14355, 1448-1449.[8] Plaintiffs argue this testimony supports the jury's finding that a reasonably prudent person would have decided not to undergo a laparoscopic operative procedure if given appropriate information. Plaintiffs also argue that Dr. Persico did not refute any of plaintiffs' claims as to lack of informed consent, and in particular as to this element.

Defendants argue neither Dr. Nizin's testimony that it was a departure to not have removed the remnant polyp by colonoscopy, nor his testimony that it was a departure to perform a laparoscopic procedure, are sufficient to support the jury's finding as to this element, as Dr. Nizin's opinions are inconsistent with the trial evidence. Defendants base this argument on Dr. Hirsch's testimony that he provided Cheryl Raefski with the risks, benefits and alternatives and that she chose to go forward with the surgery he proposed, and that she wanted the polyp removed. TT at 915. As to Dr. Persico's testimony, defendants point to his testimony as to his disagreement with the statement that a person would not choose to have part of her colon

[8]Plaintiffs also point to Dr. Nizin's testimony that "most people would not agree to surgery until they know their diagnosis in black and white." TT at 1447.

removed rather than have a repeat colonoscopy. TT at 2311.

From the above arguments and the evidence cited, it is clear that as to this issue, the parties differed as to the conclusions to be drawn. However, contrary to defendants' arguments, it cannot be said that there was no rational interpretation of the evidence to support the jury's finding.

As to the third element, plaintiffs argue Dr. Nizin's testimony established that the December 5th operative procedure was a substantial factor in causing Cheryl Raefski's injuries. TT at 1456, 1463-1464, 1482-1483.[9] In addition, plaintiffs point to the deposition testimony of Darren Raeski that Dr. Hirsch told her she had "a blockage, [h]e has to get it out -- the sooner the better, [and he] promised me I would be in and out within a couple of days" (1616). Plaintiffs allege this is evidence of causation, as it shows she was having the procedure based on what Dr. Hirsch told her. With respect to this evidence, defendants argue it does not establish liability as to lack of informed consent, but only that Cheryl Raefski was comfortable with Dr. Hirsch and wanted to proceed with the surgery. With the foregoing exception, defendants do not specifically address the evidence in regard to this element, and based upon the above cited evidence, there is a rational basis for jury's finding as to this element.

In accordance with the above analysis, as to each interrogatory regarding lack of informed consent, the evidence does not preponderate in favor of the defendants, and defendants' motion to set aside the verdict as against the weight of the evidence is denied.

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[9]Plaintiffs also point to TT at 1492-1495, 1499-1450,1505-1507.

Defendants move to set aside the verdict and for a new trial with respect to damages, on the grounds that the jury's awards to plaintiffs were excessive. While the amount of damages to be awarded for personal injuries is primarily a question for the jury, and a jury's verdict should be given considerable deference, an award may be set aside "as excessive or inadequate if it deviates materially from what would be reasonable compensation." CPLR 5501© see Ortiz v. 975 LLC, 74 AD3d 485, 486 (1st Dept 2010). While "personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification," courts look to comparable cases in deciding if an award deviates from fair and reasonable compensation. Reed v. City of New York, 304 AD2d 1, 6 (1st Dept), lv denied 100 NY2d 503 (2003). However, "[m]odification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible." So v. Wing Tat Realty, Inc, 259 AD2d 373, 374 (1st Dept 1999).

Defendants contend that the of $2,250,000 for Cheryl Raefski's pain and suffering is excessive. Plaintiffs argue the award is reasonable compensation, and point to evidence in the NYU hospital chart that during the 10 day period from the first surgery to her death, Cheryl Raeski underwent three additional operations; was intubated after the second operation; complained of pain of seven to ten out of ten; Dr. Nizin's description of her pain as "excruciating;"[10] the dosage increase and change in her pain medication; and that she developed

[10]Plaintiffs contend that Dr. Nizin's testimony describes Cheryl Raefski's pain from peritonitis, an infection in the lining of the abdomen, as frequently so painful on movement, that a

sepsis and lapsed into septic shock. Specifically, plaintiffs point to entries in the chart on December 6th, of pain of nine out of ten and the change in her pain medication from morphine to Dilaudid; on December 7th, pain of five, seven and eight out of ten while on Dilaudid, and a note that she was going down in her chair/bed, suffering friction and continued to be confused, "screaming" in pain; on December 8th, pain of ten out of ten, abdominal pain at rest and screaming at movement; on December 9th, pain of seven out of ten and decreased respiratory effort due to pain; and on December 10th, the change in her medication to Fentanyl. Plaintiffs also point to entries on December 9th, that Cheryl Raefski was sedated and given "IV Tylenol" for breakthrough pain, and although sedated, she was able to follow commands and was arousable to stimuli, including those that were painful, was irritable and confused, and continued to be intubated and on a mechanical respirator. On December 11th, as a result of contractions, spasticity or agitation, she was sliding down in her bed/chair. On December 12th, Cheryl Raeski underwent her third operation and on the 13th, she underwent her fourth operation, and died on the morning of December 15th. Plaintiffs argue that the numerous entries in the chart up until December 13th describing Cheryl Raefski as "agitated, alert, conversant and responsive to painful stimuli, together with the three unplanned surgeries, intubation and breathing through a ventilator,

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patient tries not to move at all. TT at 1554. In this connection, plaintiffs point to Dr. Raccuia's testimony that Cheryl Raefski had pockets of infected fluid throughout her abdomen, that her abdominal wall was necrotic, her intestines inflamed, and that pain from sepsis can be agonizing. TT at 2663-2664, 2613.

demonstrate the duration and intensity of her pain and suffering.

Further evidence of Cheryl Raefski's mental and emotional condition during her hospitilization, plaintiffs argue is demonstrated by the fact that Cheryl Raefski had the last rites administered on December 7th, and by Darren Rafski's testimony that on December 12th, when a tear rolled down her cheek as he spoke with her about her promise to be home by Christmas. TT at 2050. Plaintiffs also point to his testimony that his wife told him "they hurt me real bad;" she flinched with pain whenever she was touched, even with the movement of a blanket; she was bloated; her face swelled up as if she had been punched; on December 9th after the second surgery he observed a "vacuum " being used to suction "green-, brown -yellow stuff" out of her from a tube down her throat; and on December 10th, he observed that her fingertips and toes were turning black and ointment was being applied. TT at 2037, 2045, 2042, 2043, 2047-2048, 2049.

Defendants argue that while Cheryl Raefski experienced postoperative pain, three surgical procedures and sepsis during her 10 days of hospitalization, the award of $2,500,000 is unwarranted and excessive, and, in support, in their moving papers, cite two cases; Arbutina v. Bahuleyan, 159 AD2d 973 (4th Dept1990) and Beckom v. United States, 584 FSupp1471 (ND NY 1984). In Arbutina, a case involving a failure to diagnose rectal cancer, the Fourth Department upheld an award of $265,000 for what was described as 47 days of pain and suffering, and in Beckom, a case involving a failure to diagnose breast cancer, the Federal Court awarded of $800,000 for approximately six and a half years of pain and suffering.

In opposition, plaintiffs cite two decisions, Lee v. New York Hosp. Queens, 118 AD3d 750 (2nd Dept 2014), and In re 91 St Street Crane Collapse Litigation, 154 AD3d 139 (1st Dept 2017). In Lee, defendant was found liable for a failure to perform gall bladder surgery for three

days on the 60 year-old decedent, where he was not given anything to eat or drink for three days in preparation for surgery, which was repeatedly rescheduled for the following day, and, on the fourth day, as he was being intubated for the surgery, he suffered cardiac arrest and died. The Second Department upheld the trial court's reduction of an award $5,000,000 to $3,750,000, basing the award on decedent's three and a half days of pain and suffering, during which decedent was denied food and drink by mouth and experienced intermittent, sharp gallbladder pain, and experienced, on the day of his death, bouts of agitation, a sense of impending death, respiratory distress, fever and chills. The Court cites, as an additional basis for the award, the testimony of plaintiff's expert anesthesiologist that, except for the first two to three minutes, the decedent was fully conscious during intubation due to inadequate sedation, and that he must have gagged with a tube down his throat, and been in conscious distress. Defendants argue Lee is not applicable as the nature of the pain and suffering of decedent in Lee, differs from that which Cheryl Raefski experienced, contending the Second Department's decision "was substantially based on the conscious distress associated with this inadequate sedation." This argument is unavailing. The decision in Lee, clearly upholds the award on the basis of the pain, as discussed above, which decedent experienced over three and a half days, as well as the testimony of the anesthesiologist, regarding intubation.[11]

[11]The Court stated that "decedent's conscious pain and suffering was established by the above testimony [of the anesthesiologist], together with the testimony of the plaintiffs' expert in the area of surgery, and the testimony of one of the decedent's treating physicians, and an employee of the defendant." Lee v. New York Hosp. Queens, 118 AD3d at 753.

As to the Crane litigation, plaintiffs argue the decision, finding awards for pain and suffering for a crane operator and construction worker killed in connection with the collapse of a crane, provides guidance as to reasonable compensation, where pain and suffering is for a short time period. Awards of $8,000,000 for the pain and suffering of the crane operator who died nine minutes after the crash, and $24,000,000 for the worker on the ground who died four hours after the crash, were reduced by the First Department, respectively, to $5,500,000 and $7,500,000. Defendants argue, in their reply, in addition to citing again to Arbutina v. Bahuleyan, two cases which they contend are factually similar to the circumstances here; Jump v. Facelle, 292 AD2d 501 (2d Dept), lv denied 98 NY2d 612 (2002) and Hoehmann v. Siebkin, 38 AD3d 839 (2nd Dept. 2007). In Jump, the Second Department held that an award of $1. 3 million was not excessive in a medical malpractice case where defendants failed to timely operate after discovery of a fecal leak; decedent was hospitalized for eight months after the initial surgery until his death, during which time he underwent eight surgeries, the insertion of a permanent colostomy, lost his ability to walk, developed bed sores which needed scraping, and suffered from mental confusion and hallucinations. In Hoehman, the Second Department reduced an award of $750,000 to $525,000 for 10 days of pain and suffering where decedent was hospitalized and developed pancolitis, an inflammation of the colon, and megacolon, a massive distension of the colon which led to systemic toxicity organ failure, and his death.

In analyzing whether an award is reasonable compensation, as discussed above, courts look to awards in comparable cases; however, such awards are not binding, given the unique nature of pain and suffering in individual cases. Courts, in giving deference to jury awards, have considered that the jury had an opportunity to hear testimony first hand and concluded that the

award at issue was appropriate, Ford v. A.O. Smith Water Products, 173 AD3d 602 (1st Dept 2019). Considering the forgoing factors, I conclude that the jury's award of $2,250,000 for Cheryl Raefski's pain and suffering is reasonable compensation. In reaching this conclusion, I find the award of $3,750,000 in Lee v. New York Hosp. Queens supra, offers guidance. In this regard, I have considered, *inter alia,* that Cheryl Raefski, experienced intense pain over 10 days, while the decedent in Lee experienced pain over three and a half days, both were intubated, although the pain the decedent in Lee suffered in this regard differs, as he suffered additional pain from lack of sedation during intubation, and both were, at times, agitated and confused. In addition, I have also considered that Cheryl Raefski underwent an additional three operations, was on a respirator, and was administered last rights. This evidence, as described above, is reflected in the hospital chart and medical testimony, and the testimony of Darren Raefski. I have also considered plaintiffs' arguments regarding the First Department's reasoning in determining the amount of reasonable compensation for past pain and suffering in 91 St Street Crane Collapse Litigation, supra. As to the decisions defendants cite, while of some guidance, I note that Arbutina v. Bahuleyan, supra, was decided 30 years ago; and while injuries to the colon were at issue in Jump v. Facelle, supra and Hoehmann v Siebkin, supra, they were decided respectively, 18 and 13 years ago, and I find these decisions do not warrant a different conclusion.

As to the wrongful death awards to Darren Raefski, and the Raefski's three children:

> recovery may be had for "fair and just compensation for the pecuniary injuries resulting from [a] decedent's death to the persons for whose benefit the action is brought" (EPTL 5-4.3 [a]; see EPTL 5-4.1). "[T]he essence of the cause of action for wrongful death in this [s]tate is that the plaintiff's reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent's death" (Gonzalez v New York City

> Hous. Auth., 77 NY2d 663, 668 [1991]). Thus, a plaintiff may recover for " '[l]oss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death' " (id., quoting Parilis v Feinstein, 49 NY2d 984, 985 [1980]; see EPTL 5-4.3 [a]). Because it is difficult to establish pecuniary loss, damages in a wrongful death case should typically be for a jury to calculate (see Milczarski v Walaszek, 108 AD3d 1190, 1190 [2013]).

McKenna v. Reale, 137 AD3d 1533, 1536 (3rd Dept 2016).

Defendants allege the awards of $1,750,000 to Darren Raefski and $3 million to each of the children should be reduced, as they are in excess of other awards upheld by the Courts and are not supported by the evidence. In support of the awards, plaintiffs point to the testimony of Darren Raefski and the three children.

With respect to Darren Raefski, the jury awarded $750,000 for approximately six and a half years of past, and $1 million for 10 years of future loss of services. According to Darren Raefski's testimony, he and Cheryl met in high school in 1991-1992 when each played soccer for their school teams, and they married in 1995. TT at 1996. While Cheryl worked during the first years of their marriage, supervising over 300 employees at Comcast, she left in 2001 for the birth of their first child, a daughter. Darren further testified that Cheryl provided him with support he needed as a police officer, took care of their three children, and did all of the household chores, including vacuuming, shopping, ironing his uniforms, doing the laundry and dishes, and organizing all the families's activities. TT at 2016. He estimated that she spent about 50 to 60 hours a week providing these household services to the family. Plaintiffs cite Glassman v. City of New York, 225 AD2d 658 (2nd Dept 1998) in support of the award, where, although, on appeal, awards to decedent's adult children were reduced, an award of $1,500,000 for loss of services to

the decedent's husband was not affected.

Defendants cite Calvin v. New York Medical Group, P.C., 286 AD2d 469 (2nd Dept 2001), where awards to the decedent's husband of $100,000 for past, and $230,000 for future loss of services were reduced to $10,000 and $100,0000 respectively, and an award of $2 million for future loss of services to decedent's two-year-old son was reduced to $430,000. In that case a 36-year-old died as a result of defendant's malpractice. Defendants also argue that in each of the following cases, the decedent, at the time of death was younger than Cheryl Raefski, who was 43 years old when she died, and each performed similar household services. See e.g., Bryant v. New York City Health & Hospitals Corp., 250 AD2d 797 (2d Dept 1998), affirmed as modified on other grounds 93 NY3d 592 (1999)(finding that $450,000 was reasonable compensation for loss of services of a 22-year-old who died from a pulmonary embolism following childbirth); Bert v Meyer, 243 AD2d 522 (2d Dept 1997)(upholding wrongful death damages of $2,010,000 with $1,010,00 to the husband of a 36-year-old who died following childbirth); Merola v. Catholic Medical Center of Brooklyn & Queens, 24 AD3d 629 (2d Dept 2005)(the trial court reduced a $4 million award to $350,000 which was further reduced to $50,000 by the Second Department).

In determining whether the jury's award is excessive, I have considered the above awards, noting that such awards provide guidance only, and have considered that the Court of Appeals has recognized, "since it is often impossible to present direct evidence of pecuniary injury, calculation of pecuniary loss is a matter resting squarely in the province of the jury." Parilla v. Feinstein, 49 NY2d 984, 985 (1991). I conclude that reasonable compensation to Darren Raefski for loss of services in the past is $500,000, and for the future is $1 million. See Glassman v City of New York, supra; Bert v Meyer, supra.

With respect to the awards to each child of $1 million for approximately six and a half years of past, and of $2 million for 10 years of future damages, it is well settled law, that recovery includes "[l]oss of support, voluntary assistance, and possible inheritance. " Gonzalez v. New York City Housing Authority. 77 NY2d 663, 668 (1991)(citation omitted). Loss of parental guidance has long been recognized as recoverable, as has recovery by adult children. Tilley v. Hudson River R.R. Co., 29 NY 252, 285-86 (1864), and includes "loss of parental nurture and care, as well as physical, moral, and intellectual training." Plotkin v New York City Health and Hospitals Corp., 221AD2d 425, 426 (2nd Dept 1995), lv dismissed 88 NY2d 917 (1996)(citation omitted).

Here, the jury heard testimony from each of the three children, Madison, born in 2002, and the twins, Page and Kyle, born in 2006. When Cheryl Raefski died, Madison was turning 11 and Page and Kyle were six years old. Darren Raefski testified that Cheryl emphasized to the children the need for an education, and, in this regard, ensured they did their homework upon returning home each day. TT at 2002, 2004-05. According to Darren, Cheryl did everything for the children, including taking them to dance class, soccer, cheerleading, softball, flag football, and activities offered by the town. TT at 2005. Darren further testified that Cheryl ensured that each child had private time and separate activities with her, and that the children, especially Madison, were able to talk with Cheryl, who would help them with problems and difficulties they may have been experiencing TT at 2006-07. In addition, Cheryl, a former high school and college soccer player, coached soccer teams and teams of other sports in which their children participated. TT at 2009-2010. Page, who, at trial, was in eighth grade and playing soccer for her travel team, testified she missed her mom as a coach, and as a friend, who she could talk to; that her mother

made them breakfast, lunch and dinner; would teach her to cook; and would take her to and from activities. TT at 2115, 2117. Kyle testified that Cheryl did everything with them; she was fun to be with; and coached him in soccer and baseball. TT at 2026. Madison, who was 17 years old at the time of trial, testified Cheryl got her through everything in life, school, sports, and that her mother was always her person, always helping her. TT at 2131. Madison further testified that she could go to Cheryl for help and advice, that her mother never turned her down, and taught her to treat everybody the same. TT at 2131, 2133. Madison described how Cheryl was her coach for everything, soccer, softball and cheerleading, and that she always made sure the whole family felt special, particularly on holidays. TT at 2132.

Plaintiffs cite to Paccione v Greenberg, 256 AD2d 559 (2nd Dept 1998) as support for upholding the $3 million award to each child. In that case, which involved claims of medical malpractice and wrongful death, the Second Department conditionally reduced awards of $2,500.000 to each of decedent's two children to $1,500,000. Plaintiffs argue if, $1,500,000 was reasonable compensation 20 years ago, $3 million cannot be considered unreasonable compensation today.

Defendants argue that a review of relevant Appellate Division case law does not support plaintiffs' argument, and cite the following cases: Garcia v. New York City Health and Hospitals Corp., 299 AD2d 268 (1st Dept 2002), lv denied 9 NY2d 507 (2003) a case involving wrongful death damages where the decedent was 40 years old and her two children were 15 and 17 years of age, the First Department affirmed a trial court's reduction of awards of $750,000 for past wrongful death damages to $375,000, and for future wrongful death damages from $1 million to $500,000 for each child; Adderley v. City of New York, 304 AD2d 485 (1st Dept), lv denied 100

NY2d 511 (2003), where the First Department affirmed an award of $1 million for loss of parental guidance for 17 years to a 20-year-old decedent's infant daughter; Facilla v. New York City Health & Hosps. Corp., 221 AD2d 498 (2d Dept 1995), where the Second Department affirmed an award of $750,000 to the 17-year-old daughter of the 37-year-old decedent; and Bryant v. New York City Health & Hospitals Corp., supra, a case in which a 22-year-old died in childbirth, where the trial court reduced the award for past and future loss of parental guidance, respectively, to $360,000 and $1,800,000, the Second Department reduced the awards to $250,000 for past, and $850,000 for future loss of parental guidance.

While the decisions discussed above, vary in the amounts awarded, I find the awards in Paccione v. Greenberg, supra and Adderley v. City of New York, supra offer guidance, when considered in the context of years in which they were decided. Moreover, the evidence regarding the relationship between Cheryl Raefski and her children, and the amount of their activities in which she was involved, clearly demonstrate the nurture and guidance which she provided to her children, and which the jury could infer she would have continued to provide in the future had she lived.

As noted above, mindful that awards in other cases offer guidance, and the deference given to awards by a jury who had an opportunity to see and hear the witnesses, I conclude that reasonable compensation to the three children for loss of parental guidance, is $1,000,000 each for six and a half years in the past, and $1,500,000 for 10 years of loss in the future.

In accordance with the foregoing decision, it is

ORDERED that defendants' motion to set aside the verdict is granted only with respect to wrongful death damages as to Darren Raefski, Madison Raefski, Page Raefski and Kyle Raefski,

and ordering a new trial on the issue of damages unless within 90 days of service of a copy of this order with notice of entry, plaintiffs stipulate to award Darren Raefski $500,000 for past damages, and $1 million in future damages, and for each of the children, $1,000,000 in past damages, and $1,500,000 in future damages, which 90 days is subject to extension in light of the COVID-19 emergency; and it is further

ORDERED that pursuant to CPLR 2103(e) a copy of this order may be filed and served.

Dated: April 16, 2020