SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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BENJAMIN GOLDSTEIN,

Plaintiff,

- v -

ERA HANSPAL, M.D., ALLEN GERBER, M.D., MATTHEW ADAMO, M.D., ALBANY MEDICAL CENTER, ALBANY MEDICAL COLLEGE, MATTHEW MURNANE, M.D., AMC NEUROLOGY GROUP, JENNIFER DURPHY, M.D., ERIC MOLHO, M.D., JOHN DOE, M.D., JAI PERUMAL, M.D., THE NEW YORK PRESBYTERIAN HOSPITAL, NASEER CHOWDHREY, M.D., SUNNYVIEW HOSPITAL AND REHABILITATION CENTER, ST. PETER'S HOSPITAL OF THE CITY OF ALBANY, and CHRISTOPHER GUZDA, D.O.,

Defendants.

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INDEX NO. 805289/2019

MOTION DATE 10/09/2025

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 281, 282, 283, 284, 285, 286

were read on this motion to/for ATTORNEY - FEES.

In this settled medical malpractice action, the law firm of Merson Law, PLLC (Merson), moves pursuant to Judiciary Law §474-a(4), for an award of an enhanced attorney's fee, based on its contention that the fee schedule set forth in Judiciary Law §474-a(2) will not afford it adequate compensation due to extraordinary circumstances. Although the defendants do not oppose the motion, and the plaintiff himself joins in Merson's request, the motion is denied, since Merson failed to establish that the fees that it would be awarded pursuant to the Judiciary Law §474-a(2) schedule would be inadequate, or that extraordinary circumstances require the award of an enhanced fee.

On September 9, 2025, the plaintiff settled this action against all of the defendants who then remained in the action for the gross sum of $9,000,000.00. Merson legitimately incurred the sum of $54,914.73 in disbursements while litigating the action between 2019 and 2025.

Fees premised upon the schedule set forth in Judiciary Law § 474-a(2) "are calculated on the *net sum recovered* by the plaintiff after deducting 'full expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action'" (*Yalango by Goldberg v Popp*, 84 NY2d 601, 606 [1994], quoting Judiciary Law § 474-a[3] [emphasis added]). The Legislature, however, amended Judiciary Law § 488(2)(d) in 2006 (*see* L 2006, ch 635, § 1) to provide that, "in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action," a client may, under certain circumstances, elect to have the attorney pay on his or her "own account court costs and expenses of litigation," and, "[i]n such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred" (Judiciary Law § 488[2][d]; 22 NYCRR 603.25[e][3][ii]). Nonetheless, 22 NYCRR 603.25(e)(1) only permits an attorney to calculate attorneys' fees on the gross amount of recovery for "any claim or action for personal injury or wrongful death, *other than one alleging medical, dental or podiatric malpractice*" (*id.*) (emphasis added) (*see Rosario v New York Presbyterian Hosp.,* 2025 NY Slip Op 32138[U], *4 n 1, 2025 NY Misc LEXIS 5600, *5-6 n 1 [Sup Ct, N.Y. County, Jun. 13, 2025] [Kelley, J.]; *Matter of Barnhart*, 2016 NYLJ LEXIS 306, *1-2 [Surr Ct, Bronx County, Sep. 13, 2016]). Thus, the calculation of fees here must be based on the net recovery.

The sliding-scale fee schedule articulated in Judiciary Law §474-a(2) provides that an attorney who recovers money for clients in a medical malpractice action is entitled to a fee equal to 30% of the first $250,000 of the net sum recovered, 25% of the next $250,000 of the net sum recovered, 20% percent of the next $500,000 of the net sum recovered, 15% of the next $250,000 of the net sum recovered, and 10% of any amount over $1,250,000 of the net sum recovered. Hence, were that schedule applied to the recovery in this action, Merson would be entitled to an award of $1,044,508.53 in attorney's fees, which, when added to the $54,914.73 in disbursements, means that Merson would retain the sum of $1,099,423.26 from the

settlement proceeds, with the sum of $7,900,576.74 payable to the plaintiff from those proceeds. In its affirmation in support of the motion, Merson miscalculated the fee to which it would be entitled under the statutory schedule as $1,050,000.00, inasmuch as it calculated the fee based on the gross recovery of $9,000,000.00, which it mischaracterized as the net recovery, not on the actual net recovery of $8,945,085.27, which is calculated by subtracting the reimbursable expenses of $54,914.73 from the gross recovery of $9,000,0000.00. Based on Merson's calculation, any fee awarded pursuant to Judiciary Law §474-a(2) constituted only 11.67% of the gross recovery, although the court calculates the correct percentage as 11.61%, representing the ratio of the $1,044,508.53 fee to the gross recovery of $9,000,000.00. Notwithstanding these calculations, Merson requests that it be awarded an enhanced fee equal to 15% of the net recovery, which this court calculates as $1,341,762.79, and, when added to the $54,914.73 reimbursement of expenses, comes to $1,396,677.52 of the settlement proceeds, leaving $7,603,322.48 as the plaintiff's share of the proceeds, or $297,254.26 less than the $7,900,576.74 to which the plaintiff is statutorily entitled.

In reversing an award of enhanced fees in a medical malpractice action, the Court of Appeals explained in *Yalango* that

> "[i]nadequacy of the statutory fee schedule is the touchstone of the section 474-a (4) inquiry. The analysis must begin with the recognition that the section 474-a (2) scheduled fees are presumptively reasonable in all malpractice cases (*see*, *Gair v Peck*, 6 NY2d 97, 113, 114, *supra*). To succeed on a request for excess compensation, then, the applicant bears the burden of rebutting that presumption by establishing that the fee schedule was inadequate to compensate counsel for the representation provided in the particular case (*id*.; *Matter of Clinton*, 157 Misc 2d 506, 510, *supra*). Thus, before departing from the statutory fee schedule, the court must make a threshold finding that a departure from the fee schedule is justified because the authorized fee did not equitably compensate counsel. That a threshold showing of inadequacy must be made before relief based on extraordinary circumstances may be granted is self-evident from the plain and unequivocal language of the statute which expressly calls for that predicate . . .
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> "The considerations which are relevant to an assessment of the adequacy of the section 474-a(2) fees are those related to the economics of the litigation and any concomitant financial hardship suffered by plaintiff's counsel. In other words, in determining whether extraordinary circumstances caused the fee to be inadequate, governing emphasis should be placed on whether the award--viewed

> as a whole or broken down to its hourly equivalent--equitably compensates counsel for 'the amount of time reasonably and necessarily spent' in litigating the claim (*People v Perry*, 27 AD2d 154, 161). Under this formulation, the statutory fee may be inadequate, for example, where the case involves an extremely complicated procedural history or where plaintiff's counsel is required to expend an inordinate amount of time in pursuing the medical malpractice claim, thereby rendering the hourly rate of compensation exceptionally low or causing a loss of other income or some other financial detriment. Once that threshold showing is made, counsel must then justify a departure from the fee schedule by demonstrating that extraordinary circumstances caused the statutory fees to be unreasonable in the particular case"

(*Yalango v Goldberg v Popp,* 84 NY2d at 607-608).

In the *Yalango* action, a computed tomography scan of the patient's brain revealed a collection of fluid, known as bifrontal subdural hygromas, and, when the patient's condition deteriorated on the following day, the defendant physician performed emergency surgery to relieve the pressure on the patient's brain. The patient ultimately sustained severe and permanent injuries, including brain damage, spastic quadriparesis, and cortical blindness, and required continuous skilled nursing care for the remainder of his life. The parties settled the action for the gross sum of $1,930,000.00. Based on the sliding scale fee schedule of Judiciary Law §474-a(2), the plaintiff's attorney would have been entitled to a fee in the amount of $338,731.74, but he moved for approval of an enhanced fee award, equal to one third of the net recovery, that is, a fee of $629,105.81. The Court of Appeals held that the statutory fee award of $338,731.74 was not inadequate. In this respect, it reasoned that, although the plaintiff's attorney expended 620 hours in representing the plaintiff over a five-year period, including meeting with experts both in and out of state, conducting extensive depositions covering over 1,000 pages of transcript, and negotiating a favorable medical malpractice settlement despite sharply disputed causation issues, the application of the statutory schedule compensated the attorney at a rate of almost $550.00 per hour (*see id*. at 608-609). Inasmuch as the Court concluded that the plaintiff's attorney did not make the requisite threshold showing that his compensation was inadequate, it concluded that it need not even reach the issue of whether there were extraordinary circumstances warranting the award of an enhanced fee.

Similarly, in *Siu Kiu Lam v Loo* (155 AD3d 660 [2d Dept 2017]), the attorney for the plaintiff prosecuting that medical malpractice failed to establish the inadequacy of an award of attorney's fees in the sum of $376,198.50, as calculated pursuant to the Judiciary Law §474-a(2) schedule. The Court explained that

> "[t]he law firm expended approximately 970 hours, *that included 9 days of trial*, over the course of the 7½ years it represented the plaintiffs in this medical malpractice action . . . The record is devoid of any evidence that the amount of time spent on the representation of the plaintiffs resulted in an exceptionally low hourly rate of compensation, or that it caused the law firm any financial detriment"

(*id*. at 660 [emphasis added]). As in the *Yalango* case, the Appellate Division, Second Department, concluded that "[i]nasmuch as the law firm failed to make the threshold showing that compensation in this case was inadequate, it is not necessary to reach the issue of whether extraordinary circumstances existed" (*id*.). In *Ponzo v Landskowsky* (2019 NY Slip Op 33006[U], *2-3, 2019 NY Misc LEXIS 5447, *2 [Sup Ct, Kings County, Oct. 4, 2019]), the court denied the request of the plaintiff's attorneys for an award of "25% of the net recovery after the claimed disbursements are deducted, or $672,996.82," which they "based on the 'numerous obstacles' presented by the case and the 'extraordinary efforts' on behalf of their client." While the court did not dispute those efforts, it nonetheless concluded that the record did not demonstrate that "'the amount of time spent on the representation of plaintiffs resulted in an exceptionally low hourly rate of compensation, or that it caused the law firm any financial detriment'" (*id*., quoting *Siu Kiu Lam v Loo*, 155 AD3d at 660). The court in *Ponzo* explained that the plaintiff's attorney did not indicate whether the time devoted to the plaintiff's case detracted from his firm's work on other cases, imposed a hardship on the firm, or otherwise rendered the statutory fee exceptionally low (*see Ponzo v Landskowsky*, 2019 NY Slip Op 33006[U], *3, 2019 NY Misc LEXIS 5447, *2). The *Ponzo* court further concluded that

> "[e]ven if the threshold of inadequacy had been met, extraordinary circumstances do not exist in this case to warrant an enhanced fee. *'[F]actors such as the degree of diligence or success achieved by counsel . . .do not render a case extraordinary for purposes of the section 474-a(4) application*' ([*Yalango*] at 609)

> The efforts and obstacles described by counsel are generally customary in prosecuting a medical malpractice action. 'Medical malpractice actions are by their nature complex, warranting extensive and sophisticated preparation' (*id*. at 610). The complexity of a medical issue or problems with proximate cause will not render a case 'extraordinary' (*id.*). In this case, plaintiff's decedent's death did not create any unusual or exceptional circumstances that would not ordinarily be present in any other medical malpractice action involving a terminally ill patient. Conducting a deposition at home, retaining an expert to opine on the cause of death, petitioning for letters of administration and amending the complaint are all expected consequences of representing a plaintiff who is terminally ill. Similarly, spending considerable time searching and consulting with different experts, digesting voluminous depositions and medical records, and learning about a plaintiff's illness are all within the usual scope of representing a medical malpractice plaintiff"

(*id*., 2019 NY Slip Op 33006[U], *4, 2019 NY Misc LEXIS 5447, *3-5 [emphasis added]).

The court concludes that, under the circumstances presented in this action, which are remarkably similar to those presented in *Yalango*, *Siu Kiu Lam,* and *Ponzo*, the award of an enhanced fee to the plaintiff's attorney is not warranted.

In the first instance, the court is concerned that, although the plaintiff himself submitted an affidavit in which he "concur[red]" with everything in Merson's motion papers, "including counsel's application to fix the attorneys' fee at 15% of the net settlement recovery and reimburse disbursements as set forth therein," he did not indicate that he recognized that he would be forfeiting $297,254.26 of the proceeds to which he otherwise would be entitled. Moreover, both attorney Jordan K. Merson and the plaintiff himself both refer to "seven years of litigation," although the court notes that, notwithstanding the fact that this action was commenced on September 5, 2019 and settled on September 9, 2025, a period of six years, virtually no work was performed by Merson between January 29, 2020, when one of its partners or associates appeared for a preliminary conference, and April 21, 2021, when an attorney from its firm appeared for a compliance conference. All court filings were suspended between March 17, 2020 until May 5, 2020, and the courts were closed between March 17, 2020 and June 10, 2020. After electronic filings resumed, there is no indication that Merson served or filed any items of discovery until 2021. Thus, it appears that the actual litigation time in which Merson

was involved spanned only five years. Moreover, apart from listing the tasks that his firm performed, Jordan K. Merson did not articulate the number of hours that his firm expended on each task, vaguely asserting only that the number of hours was "immeasurable." Hence, Merson failed to establish that the amount of compensation to which it was entitled pursuant to the Judiciary Law was somehow inadequate. Hence, this court need not reach the issue of whether the circumstances presented here were extraordinary.

Even were the court to reach that issue, it concludes that, regardless of the length of time that it took to resolve the action, the work undertaken by Merson, although certainly of substantial quality, and yielding a truly excellent result, does not present a case of "extraordinary circumstances." In his affirmation, Jordan K. Merson enumerated the tasks that he and other attorneys at his firm undertook in prosecuting and settling this action as follows:

> "a. Obtained copies of all relevant hospital and medical records;
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> "b. Evaluated and conducted extensive review and analysis of all medical records and consulted with medical experts in multiple specialties regarding liability, causation, and damages;
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> "c. Conducted extensive research on the medical issues involved in the case, obtaining and reviewing numerous medical texts, journals, and other literature in order to be prepared for all of the issues that would arise during the course of the depositions and trial. These evaluations occurred at varying and repeated times throughout the course of this litigation;
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> "d. Retained board-certified experts in life care, economics, neuroradiology and neurosurgery to opine on issues of liability and damages;
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> "e. Prepared for and attended examinations before trial of plaintiff and nine defendants who were originally in the caption. Each of these depositions, were conducted by senior partners of Merson Law;
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> "f. Prepared Plaintiff extensively for examination before trial;
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> "g. Consulted repeatedly and extensively with medical experts before Examinations Before Trial of all Defendants to assist in developing theory of the case and comprehensively addressing medical issues involved;
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> "h. Prepared and served the legal papers necessary to bring a medical malpractice action, including a summons and verified complaint;

"i. Drafted, prepared, and/or served extensive pleadings and discovery documents including bills of particulars; supplemental bill of particulars; medical authorizations; demands for bill of particulars; notices for discovery; expert reports; photographs and videos; and the note of issue;

"j. Scheduled discovery and Examinations Before Trial and attended numerous Court appearances, both in person and virtually via Zoom or Microsoft Teams;

"k. Obtained a review, analysis, and life care plan from an expert in rehabilitation counseling, including a report as to plaintiff's condition. The life care planner determined the annual costs in today's dollars for the medications, care, and evaluations by physicians, diagnostic testing, aids, as well as costs for care that plaintiff will require over his lifetime;

"*l*. Obtained a review, analysis, and report on the financial aspects of the case from an economic expert. The economist projected the total economic loss, consisting of lost earnings, loss of fringe benefits, and the cost of future medical and related care suffered by plaintiff as a result of the medical malpractice of the defendants;

"m. Obtained medical records from plaintiff's treating physicians, his current health condition, and prognosis;

"n. Successfully opposed numerous motions including summary judgment motions made by all defendants and a motion to change venue;

"o. Participated in multiple conferences and mediation regarding settlement; and

"p. Prepared the instant papers."

Other than opposing the motion to change venue, and moving for an award of an enhanced fee, this enumeration appears to be a précis describing the *bare minimum* of work that a law firm representing a plaintiff in a medical malpractice action must perform in order to obtain a successful result (*see Ponzo v Landskowsky*, 2019 NY Slip Op 33006[U], *3, 2019 NY Misc LEXIS 5447, *4). Almost all of these tasks are performed by attorneys in every medical malpractice action, and the preparation and submission of opposition to summary judgment motions usually is required in 40%-50% of medical malpractice actions. In this respect, the court notes that, in its order determining the several defendants' four respective summary judgment motions, it awarded summary judgment dismissing the complaint insofar as asserted against Matthew Adamo, M.D., Albany Medical College, AMC Neurology Group, Matthew

Murnane, M.D., Jennifer Durphy, M.D., Eric Molho, M.D., Sunnyview Hospital and Rehabilitation Center, The New York Presbyterian Hospital, and Naseer Chowdhrey, M.D., and awarded summary judgment dismissing several particular claims against the remaining defendants Albany Medical Center, Era Hanspal, M.D., Allen Gerber, M.D., and Jai Perumal, M.D.

The court further notes that, although the court initially scheduled jury selection for July 7, 2025, it adjourned that date at the request of the parties so that it could conduct additional settlement conferences. Ultimately, this case settled prior to trial only two months after that date, and at least several weeks prior to any new trial date, so that Merson did not need fully to prepare for trial at that juncture, let alone represent the plaintiff in an anticipated three-week trial, where a significant portion of the time needed to prosecute this medical malpractice action likely would have been expended.

In any event, although Jordan K. Merson identified the particular tasks that his firm performed, he did not explain why the number of hours or amount of time that his firm expended on any particular task was necessary, let alone "extraordinary," or how those amounts of time exceeded what would normally be expected in a medical malpractice action. In addition, Merson made no showing that the issues in this action were novel or difficult, or whether such novelty or difficulty might have met the definition of "extraordinary circumstances." Rather, the medical issues presented in this action involved a dispute between experts as to whether the defendants Albany Medical Center, Era Hanspal, M.D., Allen Gerber, M.D., and Jai Perumal, M.D., departed from good and accepted practice by failing timely and properly to diagnose and treat the plaintiff for arteriovenous fistula, and instead incorrectly diagnosed him with the autoimmune disease neuromyelitis optica that manifested itself as transverse myelitis, and improperly treated him for that disease and condition, all of which caused or contributed to a significant and severe deterioration in his physical condition, a delay in the proper treatment of the fistula, and the loss of an opportunity for a better outcome. In this respect, this action is no different than any other malpractice action involving a failure to diagnose or a misdiagnosis.

Of course, the severity of the plaintiff's injuries was one of the most important factors in driving the amount of the settlement that Merson obtained for the plaintiff, since those injuries included brain damage, multiple surgeries, hemiplegia, paralysis, paraplegia, aphasia, aphagia, neuritis, emotional pain and suffering, physical pain and suffering, dyspnea, demyelination of peripheral and central nerve cells, dysphasia, dysphagia, bilateral lower extremity weakness, fatigue, bowel and bladder incontinence, severe cognitive impairment and deficiencies, scarring, and the inability to ambulate. The severity of those injuries, however, is not a sufficient ground on which to award an enhanced fee.

Accordingly, it is,

ORDERED that the motion is denied, and Merson Law, PLLC, shall be entitled to retain the sum of $1,044,508.53 from the proceeds of the settlement of this action as an for its attorney's fees, along with the sum of $54,914.73 as and for the reimbursement of its expenses, for a total of $1,099,423.26, and shall pay the remaining sum of $7,900,576.74 to the plaintiff from those settlement proceeds; and it is further,

ORDERED that, on or before December 8, 2025, Merson Law, PLLC, shall serve a copy of this order with notice of entry upon the plaintiff at his last known address by overnight delivery, and shall file proof of said service on or before December 18, 2025.

This constitutes the Decision and Order of the court.

12/2/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE