Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Hyung Ki Lee, as Administrator of the Estate of Nam Yoon Lee, Deceased, and Young Sook Lee, Individually,

Plaintiff,

- against -

New York Hospital Queens,

Defendant.

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Index Number: 2402/09

Motion Date: 03/13/12

Motion Cal. Number:

Motion Seq. No.:

The following papers numbered 1 to 10 read on this motion by defendant to set aside the damages verdict and for a new trial on damages.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition	5-7
Plaintiff's Post-Trial Memorandum	7
Reply-Exhibits	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendant to set aside the verdict in the sum of $7,579,560 and for a new trial on damages, pursuant to CPLR 4404(a), upon the grounds that the damages verdict is against the weight of the evidence and/or is excessive in that it deviates materially from what would be reasonable compensation, in accordance with the standard set forth in CPLR 5501(c), that the jury's verdict was tainted by the Court's improper ruling to allow plaintiff's psychiatric expert to testify as to the impact of decedent's death upon his daughter's, Jae Lin's, mental and emotional health and that the conduct of plaintiffs' attorney during her summation was inflammatory and prejudicial is decided as follows:

Without recounting the procedural history at the outset of the trial, defendant conceded liability, acknowledging that it was fully liable for the wrongful death of decedent as a result of medical malpractice and, therefore, responsible for such damages as could be established for whatever pain and suffering was sustained by decedent and whatever economic loss was sustained by plaintiffs

from June 19, 2008 until the date that decedent could have been expected to live. The trial, therefore, became one for damages only.

The trial resulted in a jury award of $5,000,000 for decedent's pain and suffering from June 19, 2008 to the date of his death on June 22, 2008, $336,000 to Young Sook Lee, decedent's wife, and Jae Lee, decedent's daughter, for past economic loss (from June 22, 2008 to the date of the verdict on December 23, 2011), and $2,243,560 to Young Sook Lee and Jae Lee for future economic loss, for a total sum of $7,579,560. Defendant contends that the jury's award of damages was contrary to the weight of the evidence and was excessive, that the jury's verdict was tainted as a result of its being permitted to hear evidence, through plaintiff's psychiatric expert, as to the effects of decedent's death upon Jae Lee's mental and emotional health and as a result of inflammatory and prejudicial conduct on the part of plaintiffs' counsel during her summation, thus requiring the setting aside of the award of damages and ordering a new trial.

In setting aside a jury award of damages as excessive pursuant to CPLR 5501(c), the Court must find that such award "deviates materially from what would be reasonable compensation." Although CPLR 5501(c) expressly addresses the Appellate Division's authority to overturn a jury's damages verdict, its "material deviation" standard has been applied to trial courts (see Osiecki v Olympic Regional Dev. Auth., 256 AD 2d 998 [3rd Dept 1998]; see also Cochetti v Gralow, 192 AD 2d 974 [3rd Dept 1993]).

CPLR 4404(a) provides that a trial court "may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence [or] in the interest of justice." A jury verdict is not against the weight of the evidence "unless the evidence so preponderates in favor of the movant that it could not have been reached on any fair interpretation of the evidence" (Evers v. Caroll, 17 AD 3d 629, 631 [2nd Dept 2005], quoting Schiskie v. Fernan, 277 AD 2d 441, 441 [2nd Dept 2000]; (see also Yalkut v City of New York, 162 AD 2d 185 [1st Dept 1990]; Nicastro v Park, 113 AD 2d 129 [2nd Dept 1985]). Indeed, "[f]or a court to conclude that a jury verdict is unsupported by sufficient evidence as a matter of law, there must be no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (Taino v. City of Yonkers, 43 AD 3d 401 [2nd Dept 2007]). Moreover, in deciding whether to set aside the verdict, the court should accord considerable deference to the jury's findings of fact (see Evers v. Caroll, supra).

This is a wrongful death action arising out of the death of plaintiffs' decedent Nam Yoon Lee on June 22, 2008 as a result of the malpractice of defendant. Decedent was admitted to New York Hospital Queens on June 18, 2008 with bilary colic and was diagnosed with cholelithiasis, which is inflammation of the gallbladder. He was scheduled for surgery to remove his gallbladder on the morning of June 19, 2008. However, due to the admitted malpractice of the hospital, the surgery did not take place on that date. The hospital also, inexcusably, failed to perform the surgery on June 20 or on June 21, 2008. During this period, decedent was kept without food or water in preparation for surgery and he developed systemic sepsis as a result of the delay in removing the infected gallbladder. At 2:45 p.m. on June 22, 2008, decedent suffered respiratory distress and the hospital's rapid response team, after an unsuccessful attempt to give decedent oxygen with a mask during which attempt he became violent and had to be restrained, decided to intubate him at 2:50 p.m. As a result of the hospital's malpractice in terms of never performing the gallbladder surgery and the manner in which the intubation was performed, decedent asphyxiated during the intubation, became brachycardic and suffered full cardiac arrest at 3:02 p.m. He was pronounced dead at 3:50 p.m.

Decedent's hospital records indicate that on June 19, 2008, he was given morphine at 10 A.M. and had no overnight complaints of pain and that he was ambulating with no significant complaints, that as of 7 P.M. he had no complaints of pain or discomfort and that he walked to the bathroom in his room without difficulty, and that at 11 P.M. he requested pain medication, was administered morphine and slept comfortably throughout the night without distress.

On June 20, 2008, decedent requested pain medication at 8:30 A.M., was given morphine and thereafter reported no pain and did not request pain medication again until 7 P.M., at which time he received morphine. The records also reflected that decedent was again given pain medication at 4 A.M. on June 21, 2008 and thereupon felt no pain. Sometime that morning, it was indicated that decedent had mild tenderness in his right upper quadrant, and that pain was decreasing. The progress notes from the nurses and surgical team indicated that he did not complain of abdominal pain, was walking about his room with no difficulties and was clinically improving. Decedent requested pain medication again at 7 P.M.

Plaintiff's expert in the field of general surgery, Dr. Victor Lazaron, testified that decedent presented to the hospital because of severe pain from the gallbladder as is consistent with gallbladder disease and that from June 19 through the morning of June 22 he received pain medication. He also explained that decedent had cholecystitis and that the pain from such condition is continuous but waxes and wanes, and that, based upon his review of

the hospital chart, decedent was experiencing such manner of ongoing pain.

Decedent's wife, Hyung Lee, testified that when she arrived at the hospital on Saturday morning, June 21, decedent told her that he had pain "like a knife stabbing" and that because the pain medication gave him headaches, he would only complain when the pain became severe. She also testified that he continuously complained of pain that day and that after a nurse gave him a painkiller at 7:00 p.m. he looked much better and more relaxed.

The hospital records also reflect that on June 22, 2008 decedent had difficulty breathing and was shivering. He also complained of pain at that time, which he rated as an 8 out of 10 on the pain scale, whereupon he was given a nebulizer and morphine, which, according to the hospital records, resulted in the abatement of his asthma attack and his pain. The nurses' notes indicate that as of 11 A.M. decedent denied that he had any pain, and that he was stable and walking about. The surgical team also noted that he was awake, alert, with no complaints of pain and no distress. However, Mrs. Lee testified that she went to visit him after the church service she attended had ended at 12:30 p.m.. She testified that he complained of pain, hunger and thirst and had very dry lips. Thereafter, she went to see her daughter Jae, who was also admitted to the hospital, during which time she received a call from decedent. She related that he told her as follows: "He say pain is killing me. Just like I had early morning. My whole body is shaking and I had severe pain on my bone of my leg. He said hurry up and come down to me."

Dr. Lazaron testified that decedent's shivering and shortness of breath indicated that he was developing systemic sepsis emanating from the infected gallbladder and that he was going into shock. He also testified that he reviewed the autopsy report which noted that the gallbladder was obstructed with a stone in the cystic duct, was very thickened, that there was development of micro abbesses and there was hemorrhaging into the wall, indicating that the tissue of the gallbladder was necrotizing, or dying, a condition consistent with severe cholecystitis. He stated that this condition is extremely painful. Indeed, defendant's own colorectal surgical expert, Dr. Michael Grieco, agreed that severe acute cholecystitis produces an acute necrotizing gangrenous gallbladder, and conceded that such is a very painful condition "most of the time".

Dr. James Maurer, a defendant when the trial began but who was discontinued against during the trial, testified that he knew that decedent had shaking chills, and that the hospital chart indicated that at 2:00 p.m. he was again agitated, asking for oxygen and was

shivering and shaking. Dr. Maurer also testified that it was probably correct to say that such shaking chills was from the infection in his body, and he admitted that if decedent's gallbladder had been removed on Thursday, it would not have become inflamed and decedent would not have developed an infection. Moreover, Dr. Grieco conceded that there is no doubt that decedent was very septic by 2:00 p.m.

Plaintiff's expert anaesthesiologist, Dr. Sheldon Deluty, testified that decedent's complaints of pain from June 19, 2008 to the time of his intubation on June 22, 2008 were managed with morphine and that such provided relief. He also testified that according to decedent's chart, at various times he was ambulating and reported no pain, that he had mild right upper quadrant tenderness, that his vital signs were stable and that he was clinically improving.

Therefore, there was evidence presented at trial by which the jury could reasonably have concluded that decedent suffered intermittent severe pain from June 19, 2008 until the time just prior to his respiratory arrest on June 22, 2008 as a result of the delay in performing the surgery to remove his gallbladder, and that he was afforded only temporary respite from the pain when he was given morphine.

Plaintiff's counsel also contended at trial that a major component of decedent's pain and suffering during this period was mental and physical distress as a result of defendant's concededly negligent 4-day delay of his abdominal surgery. Counsel propounded to the jury that decedent suffered mental distress over the unexplained delay as well as physical distress in being kept only on intravenous fluids during this period without solid food or water (the medical terminology for being kept without the oral ingestion of food or water is "NPO").

In this regard, Mrs. Lee testified that she visited her husband on Saturday (June 21), was told by the nurses that he would have the surgery that day and conveyed that information to her husband. She testified that late in the afternoon she found out that they were not going to operate and that her husband was "very upset" to learn that he was not going to have the surgery that day. Dr. Lazaron opined that most patients are extremely anxious prior to an operation and that the anxiety is heightened each day that the operation does not occur. He also opined that communication with the patient as to why an operation is being postponed is extremely important for the patient's sense of well-being and that, conversely, the lack of an explanation makes the patient anxious and worry.

With respect to decedent's being kept NPO for this four-day period, Dr. Lanzaron testified that when a patient is NPO, even though he is being kept hydrated by intravenous fluids, his mouth becomes dry and sticky, he experiences hunger pains and that such condition is uncomfortable and unpleasant. Dr. Maurer also testified that excessive thirst causes the patient's lips to become dry and cracked and is a very difficult, painful experience. Therefore, the evidence presented at trial supports a finding that decedent endured significant pain and suffering as a result of being kept NPO for four days.

Counsel for the parties do not apprise the Court of any jury verdicts involving this or any similar factual situation, and the Court is unaware of any. However, it is the opinion of this Court that the hunger and dry mouth experienced by decedent who was kept NPO for four days in preparation for a surgery that never took place, combined with the evidence of the severe, albeit intermittent, pain endured by decedent as a result of the hospital's failure to perform the surgery to remove his gallbladder which, as a result of the delay, became inflamed and necrotic, by any fair measure, constitutes pain and suffering of sufficient magnitude as to merit an appreciable component of damages. The periods of relief from the pain of his necrotic gallbladder were only as a result of the administration of morphine, which itself tends to confirm the high level of pain that decedent complained he was experiencing.

Thus, ample evidence was presented at trial from which the jury could have reasonably concluded that decedent experienced substantial pain and suffering from June 19, 2008 until the time just prior to his intubation on June 22, 2008.

Even if, arguendo, the only period for which decedent experienced his most significant conscious pain and suffering was the period from the time of his intubation at 2:50 P.M. on June 22, 2008 to the time he became hypoxic, brachycardic and unconscious at 3:02 P.M. that same day, a period of approximately 12 minutes, it is the opinion of this Court that such pain and suffering was alone so terrible as to justify a significant award of damages, even for such a short period of time.

"In determining damages for conscious pain and suffering experienced in the interval between injury and death, when the interval is relatively short, the degree of consciousness, severity of pain, apprehension of impending death, along with duration, are all elements to be considered" (Ramos v Shah, 293 AD 2d 459, 460 [2nd Dept 2002] [quoting Regan v Long Island R.R. Co., 128 AD 2d 511, 512 [2nd Dept 1987]). Contrary to the argument of defendant's counsel, therefore, the measure of damages is not to be determined

exclusively by the duration of the pain and suffering, but also by the degree and quality of the pain and suffering experienced.

In determining whether an award constitutes a material deviation from what would be reasonable compensation, the Court is required to compare the jury's verdict to those verdicts resulting from factually similar situations (see Donlon v City of New York, 284 AD 2d 13 [1st Dept 2001]). Defendant fails to apprise the Court of any cases involving a similar fact pattern. The only case brought to the attention of the Court involving a sufficiently similar fact pattern so as to be of guidance to the Court in assessing whether the jury's verdict in the instant matter was excessive is the case of Rivera v City of New York (80 AD 3d 595 [2nd Dept 2011]), submitted by plaintiff. The fact pattern in that case is not set forth in the decision of the Appellate Division, Second Department. However, plaintiff's counsel annexes to his opposition papers excerpts of the record on appeal thereof. In that case, the asthmatic 10-year-old decedent died from a tension pneumothorax as a result of several intubations performed without administering pain medication or paralytics. The record therein indicates that the decedent endured pain and suffering for a period of four hours and 45 minutes. The jury's verdict awarding plaintiff $3,500,000 was deemed not excessive.

In our case, the undisputed evidence presented at trial was that decedent asphyxiated while conscious and unable to move or indicate his distress. The intensity of such suffering, in the opinion of this Court, was disproportionate to its 12-minute duration, hence, explaining the $3,500,000 verdict awarded in Rivera for a similar suffocation death suffered over the course of four hours and 45 minutes as opposed to the much lower verdicts awarded for the traumatic accident injuries involved in the cases cited by defendant. Moreover, the cases cited by defendant are all more than a decade old, further explaining the disparity in the jury verdicts between those cases and Rivera.

Conversely, it is also clear, extrapolating from the jury verdict in Rivera, that the jury's award in our case of $5,000,000 for a much lesser duration of pain and suffering from asphyxiation as that endured by the decedent in Rivera, is excessive and deviates materially from what would be reasonable compensation. However, the Court must also factor in the additional pain and suffering endured by decedent in our case that the decedent in Rivera did not experience. It is the opinion of this Court that based upon the terrible pain and suffering experienced by decedent as he suffocated and choked to death during intubation while fully conscious over the course of 12 minutes, coupled with the additional and significant, although lesser degree of intermittent pain and suffering, that he endured over the hospital's unexplained

failure to perform the scheduled surgery, including his hunger and thirst from being kept NPO for four days, the jury's award for pain and suffering was only excessive and deviated materially from what would be reasonable compensation to the extent that it exceeded $3,750,000.

With respect to the jury's awards for past and future economic loss, plaintiffs contended that pecuniary loss was sustained for past lost earnings, past and future household expenses and past and future loss of parental guidance.

The Court concurs with defendant's counsel that no proof of earnings of decedent was demonstrated for the years 2008 through 2011. "Loss of earnings must be established with reasonable certainty, focusing, in part, on the plaintiff's earning capacity both before and after the accident" (Harris v City of New York, 2 AD 3d 782 [2nd Dept 2003]). The only evidence of any earnings proffered was decedent's 2007 tax return which indicated that he earned $8,400 in 2007. No objective proof of employment or earning capacity was proffered for any year thereafter through the date of his death. Therefore, there is no basis upon which the jury could have made an award for past lost earnings.

However, with respect to the value of decedent's general household services, past and future, Young Sook Lee testified that decedent performed home repairs, did the laundry, the cooking and the cleaning, assisted in or did the shopping and drove her wherever she needed to go. She testified that he performed approximately 20 hours per week doing household chores and work. In addition, and most significantly, there was extensive testimony as to the services provided by decedent to his daughter, Jae Lee, and the value of replacing those services.

Evidence was presented at trial that Jae, 32 years old, is mentally retarded, schizophrenic, has the IQ of an 8-year-old, is unable to control her temper and suffers from epilepsy and seizures. She is unable to live on her own and cannot be left alone. Decedent was her primary care giver who attended to her 24 hours per day. She now resides at Hope House, a group home for the mentally retarded. She calls her mother 20 to 30 times per day and comes home several times a week to spend time there, eat Korean food and watch Korean television. Plaintiff's expert, Dr. Scott Bienenfeld, a psychiatrist, testified that Hope House is merely a transitional living facility geared to enable patients to transition to live on their own or to move back with their families, and that the normal length of stay at said facility is one to two years. He testified that it was not a place where people are meant to live for ten or twenty years. He also testified that independent living is not an option for Jae and that it was in her

best interest to return home. He opined that had her father not died, she would have relied upon him for the rest of his life.

Dr. Bienenfeld testified that in order for Jae to return home, she would require services to replace those that were provided by her father, including the administering of her seizure medication, which Mrs. Lee testified he performed. Dr. Bienenfeld testified that the lowest level of services that would be adequate to safely replace those provided by her father would be those of a licensed practical nurse (LPN). When asked if an LPN was necessary as home replacement services for decedent regarding Jae's care, he replied, "An LPN would be necessary because an LPN, a licensed practical nurse, is the lowest level of care that's going to safely be able to address Jae's medical and psychiatric needs. And they're extensive. She ask be having seizures [sic], she can have medication side effects like she's had in the past, she can have psychiatric symptoms kind of come back like they have before, and somebody needs to be there to be able to recognize when she's having problems, to be able to give her help for her problems when she's having them and then to be able to help her get more help if she needs it. Her father was totally doing that."

Therefore, without merit is the argument of defendant's counsel that the services provided by decedent to Jae were those of a mere babysitter and that the services of an LPN are thus not an equivalent replacement. There was sufficient evidence adduced whereby the jury could have rationally determined that the care provided to Jae by decedent could only be replaced at a minimum by an LPN.

Dr. Bienenfeld testified that an LPN would be needed for at least two shifts per day during the week and one shift per day on weekends. He was also familiar with the cost of an LPN's services for patients with Jae's disabilities and that such cost is approximately $35 per hour.

Mrs. Lee also testified at length about the level of parental guidance provided by decedent to Jae. In light of the evidence presented at trial concerning the profound disabilities and special needs of Jae, projected to continue for her lifetime and, most certainly, for the 19.4 year statistical life expectancy of decedent, and the evidence of both loss of household services and loss of parental guidance, which damages are not duplicative but distinct (see Vasquez v County of Nassau, 91 AD 3d 855 [2nd Dept 2012]), the jury's verdict awarding $336,000 for past economic loss and $2,243,560 for future economic loss, even if those awards reflected only the value of decedent's household services relating to the care of Jae and to the value of his parental guidance and did not include either lost earnings or lost household services

other than those relating to the care of Jae, did not deviate materially from what would be reasonable compensation and was not against the weight of the evidence.

Finally, the arguments by defendant's counsel that the jury's verdict was tainted by the Court's improper ruling to allow Dr. Bienenfeld to testify as to the impact of decedent's death upon Jae's mental and emotional health and that the conduct of plaintiffs' attorney during her closing argument was inflammatory and prejudicial warranting the setting aside of the jury's verdict are without merit.

This Court overruled the objection of defendant's counsel to plaintiff's questions to Dr. Bienenfeld as to the effects of decedent's death upon Jae's psychiatric condition. This Court disagreed then, and disagrees now, with defendant's counsel that Jae's medical condition as exacerbated by the stress of the loss of her father is not at issue and, therefore, that such line of questioning was incompetent. Jae's condition, both before and after the death of her father, was directly relevant to the measure of care she required after his death and will require in the future. Thus, contrary to counsel's assertion at trial that defendant is not responsible for Jae's condition, it is responsible for the cost of replacing her primary caregiver's services to her.

Although it is true that Jae was not a plaintiff in this action and, therefore, the aggravation of her medical condition resulting from defendant's negligence in causing the death of her father is not a compensable item of damages, plaintiff was not seeking such damages and did not argue to the jury that such additional damages should be awarded. Defendant's argument to the jury was that decedent was nothing more than a babysitter for Jae and, therefore, the replacement value of his services to her could not exceed the cost of babysitting services, for which no evidence was presented. Defendant also elicited testimony from its expert, Dr. Steven Fayer, a psychiatrist, that Jae was actually getting better and, in fact, could live independently in her own apartment. Plaintiff countered with evidence in the form of testimony by Mrs. Lee and Dr. Bienenfeld that the details of the care that decedent gave to Jae in relation to her medical condition, including his skill in getting her to take her medication, could only be replaced, at a minimum, now that he is deceased, by the services of an LPN. The complication of her condition did not alter or add to plaintiff's request for damages in this regard. Whether or not decedent's death worsened Jae's condition because of her primitive coping mechanisms did not alter plaintiff's contention, and evidence presented, to the jury that only an LPN could replace decedent's services and, therefore, that it should calculate an

award for loss of services based upon the hourly rate charged by an LPN of $35 for two shifts per day Monday through Friday and one shift per day for Saturday and Sunday, times the projected life expectancy of decedent.

The questioning of Dr. Bienenfeld regarding the effects upon Jae's psychiatric condition of the loss of her father was, therefore, a fair line of questioning meant merely to underscore plaintiff's position that the minimum competent level of care that could be provided to replace the care given by decedent to Jae for the disabilities she suffered while he was alive and caring for her was that of an LPN, and to rebut both defendant's contention that Jae was improving in her institutional setting and was able to live independently and its contention that the fair replacement of a father's special skills in taking care of a mentally retarded schizophrenic daughter was the services of a mere babysitter.

Thus, defendant's counsel's protestations that Dr. Bienenfeld's testimony concerning the effects of decedent's death upon Jae's mental condition was prejudicial in that the jury might have awarded damages for the exacerbation of her condition are disingenuous and belied by the fact that no evidence was presented and no argument was made to the jury that the level of care Jae required to replace that given by her father was greater as a result of the worsening of her psychiatric condition after his death than it would have been had she not suffered the stress of her father's loss. Rather, the evidence presented was that what was done by decedent to attend to Jae's condition as it was while she was living with him at home could only be replaced, if Jae were to return home, by an LPN.

Finally, contrary to defendant's contention, plaintiff's counsel's comments made in her summation, while at certain points potentially pushing the envelope of fair commentary and vigorous advocacy, did not rise to the level of being inflammatory and prejudicial so as to mandate a mistrial, as defendant's counsel sought at that time, and, therefore, does not now merit the setting aside of the verdict for the purpose of ordering a new trial.

It is the opinion of this Court that the jury's award for pain and suffering is excessive and deviates materially from what would be reasonable compensation to the extent that its award for pain and suffering was in excess of $3,750,000, but that its award of $336,000 for past economic loss and $2,243,560 for future economic loss was not against the weight of the evidence and did not deviate materially from what would be reasonable compensation.

Accordingly, the motion is granted solely to the extent that a new trial is directed on the issue of plaintiff's damages unless

within 20 days after service upon plaintiff's attorney of a copy of this order with notice of entry, plaintiff serves and files with the Clerk of the Court a written stipulation consenting to decrease the verdict as to damages for pain and suffering from the sum of $5,000,000 to the sum of $3,750,000, with the other items of the jury's verdict remaining as is, for the total sum after remittitur of $6,329,560 (see Ashton v Bobruitsky, 214 AD 2d 630 [2nd Dept 1995]; Barcliff v Brooklyn Hospital, 212 AD 2d 562 [2nd Dept 1995]).

For the reasons heretofore stated, the motion is denied in all other respects.

Serve a copy of this order with notice of entry without undue delay.

Dated: April 16, 2012

KEVIN J. KERRIGAN, J.S.C.