

Progressive Cas. Ins. Co. v Morton
2016 NY Slip Op 33083(U)
April 4, 2016
Supreme Court, Dutchess County
Docket Number: 4654/13
Judge: Peter M. Forman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Court/County: _____

Case Title: _____

Docket Number: 4654/2013Judge: Peter M. Forman

EXPERT(s): _____

File date: _____ Type: _____

Doc Reviewer April Llave

Mark the Correct Category	Doc Label (LBL) or Category		Doc Description
	Motion Order	_MO	LBLX
	Trial Order	_TO	LBLX
	Trial Pleading	_TP	LBLX
	Trial Motion, Memorandum, and Affidavit	_TM	LBLX
	Interrogatories	_IN	Questions only or questions and answers
	Trial Deposition and Discovery	_TD	Reports (JV ONLY) Requests for production of documents (JV ONLY) Depositions (FULL) (JV partials OK) Civil deposition affidavits
	Trial Filing	_TF	Statements Reports
	Original Transcript	_OT	Transcripts of hearings and trials (FULL)
	Verdict, Agreement and Settlement (actuals)	_VS	Verdict forms submitted to jury Signed settlement agreements with no attached order Signed stipulations with no attached order Signed plea agreements with no attached order
	Jury Instruction (actual)	_JI	Proposed and submitted jury instructions
	Expert Depositions	_ED	FULL
	Expert Transcripts	_ET	FULL
	Partial Expert Testimony	_EP	Partial Depos or Transcripts
	Expert Report and Affidavit	_ER	Expert Reports Expert Affidavits
	Proposed Order, Agreement, and Settlement	_PR	(ALL are JV ONLY) Proposed trial order Proposed plea agreement Proposed settlement agreement Proposed verdicts Proposed judgments Findings with proposed orders Stipulations with proposed orders Unsigned stipulations; Unsigned findings; Unsigned orders or verdict sheets
	Paper Only	_PO	Letters, Correspondence, other docs as instructed (JV and Court Express Archive)
	CV	_CV	Curriculum Vitae

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X

AMY FINNEY, as Administratrix of the Estate
of ROBERT C. FINNEY, JR., deceased

**DECISION AND
ORDER**

Plaintiff,

-against-

Index No. 4654/13

CHRISTOPHER A. MORTON, JR.,

Defendant.

-----X

FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents on
this application:

2016 APR 25 PM 12:01
SULLIVAN COUNTY
CLERK'S OFFICE

PAPERS NUMBERED

ORDER TO SHOW CAUSE.....	1
AFFIRMATION.....	2
EXHIBITS.....	3-5
AFFIRMATION IN OPPOSITION.....	6
EXHIBITS.....	7-8
REPLY AFFIRMATION.....	9
EXHIBIT.....	10
SEPTEMBER 2, 2015 LETTER.....	11
SEPTEMBER 8, 2015 LETTER.....	12
SEPTEMBER 11, 2015 LETTER.....	13
PLAINTIFF'S PROPOSED JUDGMENT.....	14
DEFENDANT'S OBJECTIONS.....	15
PROPOSED COUNTER JUDGMENT.....	16
PLAINTIFF'S OBJECTIONS.....	17

This is a wrongful death action arising out of a fatal motorcycle accident. A non-jury trial on the issue of liability and damages was commenced on April 27, 2015, and concluded on April 29, 2015. By Decision and Order dated July 2, 2015, this Court rendered its nonjury verdict for purposes of CPLR §4213.

Defendant now moves for an order vacating and setting aside the nonjury verdict pursuant to CPLR §4404(b), on the grounds, *inter alia*, that the damages that the Court awarded to Plaintiff for past and future household services were excessive and were not supported by the evidence at trial. Defendant also moves for an Order setting this matter down for a present day value hearing pursuant to CPLR §5041. On September 2, 2015, this Court heard oral argument on Defendant's motion. Thereafter, this Court provided counsel with permission to make additional written submissions in support of their respective positions.

For the reasons stated herein, Defendant's motion to vacate and set aside the nonjury verdict is denied. Defendant's motion for a present day value hearing is granted to the limited extent that the Court has reviewed and considered the arguments advanced by counsel on September 2, 2015, and in the additional written submissions that counsel submitted with the Court's permission. Upon such review, the Court adopts the proposed Judgment that has been submitted by Plaintiff, and has signed that proposed Judgment simultaneously with the execution of this Decision and Order.

DISCUSSION

A. CPLR §4405

Plaintiff opposes Defendant's CPLR §4404(b) motion to vacate the nonjury verdict on the grounds, *inter alia*, that Defendant did not timely make this motion within the fifteen-day time period provided by CPLR §4405. This argument is rejected for several reasons.

First, Plaintiff did not timely raise this objection in its opposition papers. Rather, Plaintiff only raised this objection for the first time in a fax that was sent to the Court on the morning of the September 2, 2015 hearing, six days after this motion had been fully submitted. Therefore, Plaintiff waived any argument that this motion was not timely made.

Second, Plaintiff's argument is based upon the date that the nonjury verdict was signed, not the date that it was entered in the Clerk's Office. However, the relevant fifteen-day time period begins to run on the date of entry. [Cone Mills Corp., v. Becker, 67 Misc2d 749, 750 (Sup. Ct. Nassau County 1971); Wierzbieniec v. Przewlocki, 54 Misc2d 83, 84 (Sup. Ct. Erie County 1967); Arlen of Nanuet, Inc., v. State, 52 Misc2d 1009, 1010 (Sup. Ct. 1967)]. Here, the nonjury verdict was entered in the Clerk's Office on July 8, 2015, and Defendant filed the motion to vacate on July 20, 2015. Therefore, the motion was timely made within the relevant fifteen-day time period.

Finally, the fifteen-day time period set forth in CPLR §4405 has not been strictly construed. [see Pioli v. Morgan Guaranty Trust Company of New York, 199 AD2d 144, 148 (1st Dept. 1993)], particularly when there has been no showing of prejudice associated with a relatively short delay in filing such a motion [see Estate of Peterson v. See, 23 Misc3d 1, 3 (Sup. Ct., App Term., 9th and 10th Jud. Dist. 2009); Mora v. Cassino, 196 Misc2d 403, 404-05 (N.Y. Civ. Ct. 2003)]. Indeed, a trial court may freely ignore this fifteen-day time period when it seeks to set aside a decision in a nonjury case on its own initiative. [Matter of Alison VV, 211 AD2d 988, 989 (3d Dept. 1995)].

Even if the statutory fifteen-day time period arguably began to run when the nonjury verdict was signed, the motion was filed a mere three days after the statutory time period lapsed, and Plaintiff has not demonstrated that she will suffer any prejudice if the Court entertains this motion. Accordingly, even if this motion was arguably filed after the expiration of the fifteen-day time period, this Court exercises its statutory authority to extend the time fixed by any statute for the performance of an act [CPLR §2004], and upon such extension will entertain Defendant's motion to vacate or set aside the nonjury verdict [see Johnson v. Suffolk County Police Department, 245 AD2d 340, 341 (2d Dept. 1997)].

[* 6]

B. CPLR §4401 and CPLR §4404(b)

Plaintiff also opposes Defendant's CPLR §4404(b) motion to vacate the nonjury verdict on the grounds that Defendant failed to make a CPLR §4401 motion for a directed verdict at the close of Plaintiff's case. Plaintiff argues that Defendant's failure to move for a directed verdict implicitly conceded that there were triable issues of fact regarding Plaintiff's damages for past and future household services, and that Defendant is therefore now precluded from making a CPLR §4404(b) motion arguing that these damages were not supported by the evidence at trial.

However, none of the cases that Plaintiff relies on in support of this argument have any bearing on a CPLR §4404(b) motion to vacate a nonjury verdict. Rather, those cases focus exclusively on a CPLR §4404(a) motion to vacate a jury verdict. Because the standard for granting a CPLR §4404(a) motion to vacate a jury verdict is different than the standard for granting a CPLR §4404(b) motion to vacate a nonjury verdict, the cases relied upon by Plaintiff are wholly inapplicable.

Specifically, under CPLR §4404(a), a court may set aside a jury verdict and direct that judgment be entered in favor of a party entitled to judgment as a matter of law. Alternatively, a court may set aside a jury verdict and order a new trial if the verdict is contrary to the weight of the evidence, or in the interest of justice. Under CPLR §4404(b), a trial court may set aside its decision or any judgment entered thereon; may make new

[* 7]

findings of fact or conclusions of law, with or without taking additional testimony; may render a new decision and direct entry of judgment; and may order a new trial.

The cases cited by Plaintiff stand for the proposition that a party must make a motion for a directed verdict pursuant to CPLR §4401 in order to preserve for appellate review the denial of a CPLR §4404(a) motion seeking judgment as a matter of law. These cases do not also require a party to make a motion for a directed verdict to preserve for appellate review the denial of a CPLR §4404(a) motion seeking a new trial. Therefore, to the extent that Defendant's motion seeks a new trial, rather than entry of judgment as a matter of law, the cases cited by Plaintiff do not preclude that motion regardless of whether the challenged verdict was rendered by a jury or by the court.

More importantly, the cases cited by Plaintiff have no bearing on a CPLR §4404(b) motion to vacate and set aside a nonjury verdict. Simply put, a motion to vacate a nonjury verdict pursuant to CPLR §4404(b) is not subject to the same procedural limitations that constrain a motion to vacate a jury verdict.

[Siegel, McKinney's Practice Commentaries to CPLR §4404, C4404:6 ("When the trial is to the court instead of a jury, procedure is always more flexible. Hence the additional options available to the court in the nonjury case under subdivision (b) of CPLR 4404)"].

Plaintiff has not cited any cases that support her claim that a motion for a directed verdict is a mandatory predicate for a CPLR §4404(b) motion to vacate a nonjury verdict. The Court's independent research also fails to reveal any cases that support this argument. Therefore, recognizing the increased flexibility that the Legislature has extended to a motion to vacate a nonjury verdict, the Court holds that Defendant was not required to move for a directed verdict at the close of Plaintiff's case in order to make this CPLR §4404(b) motion to dismiss Plaintiff's lost household services claim as a matter of law.

C. The lost household services claim

Defendant seeks an Order vacating that portion of the nonjury verdict that awarded Plaintiff damages for lost household services. Specifically, the nonjury verdict awarded \$16,000.00 to Plaintiff as damages for lost household services prior to the verdict. The nonjury verdict also awarded \$353,758.00 to Plaintiff as damages for future lost household services.

As explained in the nonjury verdict, these damages were based upon the unrefuted testimony of Plaintiff's expert, Dr. Thomas Fitzgerald, who holds a Ph.D. in economics from Rutgers University. Dr. Fitzgerald testified as an expert in the field of evaluating pecuniary loss in wrongful death and personal injury actions, with a specialty in valuing economic loss.

Dr. Fitzgerald's testimony as to the value of the decedent's lost household services was based upon statistical studies that calculate the value of these services for a typical two-person household based upon a variety of factors, including the age of the members of that household. That testimony was based solely on these statistical studies, and was not based upon any information obtained from the decedent's family. Although Defendant also retained an expert witness regarding economic issues, Defendant did not call that expert witness at trial.

Defendant argues that the damages awarded for lost household services by the nonjury verdict must be vacated because Plaintiff failed to submit any evidence to support her lost household services claim. Specifically, Defendant asserts that Plaintiff did not produce any evidence identifying the household services that the decedent actually performed prior to his death. Therefore, Defendant argues that the expert testimony provided by Dr. Fitzgerald cannot support a claim for lost household services because it is based solely on statistical averages, without any underlying testimony as to the services that were actually provided by the decedent.

However, in a wrongful death action, an award of damages for loss of household services will be upheld where "the expert's valuation is based on a statistical average rather than an exact calculation of services lost." [Rivera v. Montefiore Medical Center, 123 AD3d 424, 427 (1st Dept. 2014)]. See also DeLong v.

Erie County, 60 NY2d 296, 307 (1983) (finding that an economist was properly permitted to provide expert testimony regarding "the market value of the type of services performed by the average housewife in the decedent's circumstances")]. Here, Dr. Fitzgerald's unrefuted testimony was sufficient to support the lost household services damages that were awarded to Plaintiff in the nonjury verdict. [see Sanchez v. City of New York, 97 AD3d 501, 506-07 (1st Dept. 2012) (finding that a jury verdict which substantially reduced the value of lost household services established by unrefuted expert testimony based upon statistical averages must be vacated and a new trial conducted, unless defendant stipulated to an Order doubling the amount of the verdict for lost household services)].

The cases cited by Defendant do not compel a different result. For instance, in Kastick v. U-Haul Company of Western Michigan, 292 AD2d 797 (4th Dept. 2002), the Fourth Department concluded that a jury verdict that failed to award any damages for lost household services was justified because no evidence was provided regarding the market value of those lost services. Here, Dr. Fitzgerald provided unrefuted testimony as to the value of the decedent's lost services based upon statistical evidence.

Likewise, Defendant's reliance on Schultz v. Harrison Radiator Division General Motors Corp., 90 NY2d 311 (1997), is misplaced. That case was not a wrongful death action, nor did it involve a claim for the loss of household services from a

decedent. Rather, Schultz was a personal injury action in which the injured plaintiff sought an award for the value of his own lost household services. As pointed out in another case relied upon by Defendant, "the holding of Schultz is inapplicable to this wrongful death action." [Mono v. Peter Pan Bus Lines, 13 FSupp2d 471, 480 (SDNY 1998)].

Finally, to the extent that Defendant relies on Mono to support his argument that the lost household services damages in this case were excessive, that federal district court decision has no precedential value. Specifically, the damages that are recoverable in a wrongful death action is exclusively a matter of state law, and any interpretation of state law by a federal court is not binding. [Cox v. Microsoft Corp., 290 AD2d 206, 207 (1st Dept. 2002) ("Federal case law is at best persuasive in the absence of State authority; it is largely irrelevant to a peculiarly local question"). See also Hartnett v. New York City Transit Authority, 200 AD2d 27, 32 (2d Dept. 1994) (Rosenblatt, J.), *aff'd* 86 N.Y.2d 438 (1995), quoting Marsich v. Eastman Kodak Co., 244 AD2d 295, 296 (2d Dept. 1935), *aff'd* 269 NY 621 (1936)].

D. CPLR §5041

When a verdict in a wrongful death action awards future damages in excess of \$250,000, the trial court is required to determine what form of structured judgment should be entered [CPLR §5041]. This determination includes a number of issues,

[*12]

including: the amount to be awarded to Plaintiff as a lump sum; the amount to be paid from the award as attorneys fees and disbursements; the prejudgment and postjudgment interest to be applied; and the present value discount to be applied to the future damages.

The Court has reviewed the proposed Judgment that has been advanced by Plaintiff, and the proposed Counter-Judgment that has been advanced by Defendant. The Court has also considered the arguments advanced by counsel at the September 2, 2015 hearing, and the additional written submissions that counsel submitted with the Court's permission after that hearing. Upon such review, the Court adopts the proposed Judgment that has been submitted by Plaintiff.

Specifically, the Court finds that the proposed Judgment accurately sets forth the monetary damages that were awarded in the nonjury verdict, including the reduction of those damages to reflect the Court's finding that the decedent was 5% responsible for the accident that caused his death. The Court also finds that the proposed Judgment properly applies statutory interest to the past damages and future damages awarded by the nonjury verdict [Rohring v. City of Niagara Falls, 84 NY2d 60 (1994)]. The Court also finds that the proposed Judgment properly applies a 3.19% discount to the award for future lost household services over a 30.14 year period, because that was the yield on a 30-year Treasury note on the date that the nonjury verdict was rendered.

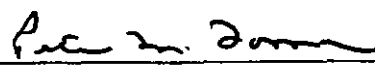
On that same date, the rate for a 10-year Treasury note was 2.40%, and the rate for a 20-year note was 2.90%. Therefore, the Court also finds that the proposed Judgment properly applies a blended 2.65% discount to the award for future lost earnings over a 17.89 year period, and to the award for future lost benefits over a 15.89 year period. The Court also finds that the proposed Judgment properly discounts the present value of the future damages to the date of death for purposes of calculating pre-verdict interest [Toledo v. Iglesia Ni Cristo, 18 NY3d 363 (2012)]. The Court also finds that the proposed Judgment properly calculates the lump sum amount to be paid from the award as attorneys fees and disbursements pursuant to CPLR §5041(c), and that the proposed Judgment properly applies the statutory 4% inflationary factor to the structured payments as required by CPLR §5041(e). Based on the foregoing, it is hereby

ORDERED, that Defendant's motion to vacate and set aside the nonjury verdict is denied; and it is further

ORDERED, that the Court adopts the proposed Judgment that has been submitted by Plaintiff.

The foregoing constitutes the Decision and Order of this court.

Dated: April 4, 2016
Poughkeepsie, New York



Hon. Peter M. Forman
Acting Supreme Court Justice