

<b>Rivera v Montefiore Med. Ctr.</b>
2012 NY Slip Op 33671(U)
October 9, 2012
Sup Ct, Bronx County
Docket Number: 307017/09
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 24

-----X  
EVELYN RIVERA, as Administratrix of the Estate of  
WILBUR RODRIGUEZ, Deceased,  
Plaintiff,

**Index No. 307017/09**  
Submission Date 7/23/12

**DECISION and ORDER**

-against -

Present:  
**Hon. SHARON A.M. AARONS**

MONTEFIORE MEDICAL CENTER,  
Defendant.

-----X  
Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause and Exhibits Annexed-----	1, 2
Answering Affidavit and Exhibits-----	3, 4
Reply Affidavit and Exhibits-----	5

*Upon the foregoing papers and due deliberation, the Decision and Order on this motion is as follows:*

Defendant's motion pursuant to CPLR §§ 4404(a) and 5501(c) for an Order setting aside the jury verdict on liability as the court precluded it from questioning plaintiff's expert about a prior censure by the American College of Emergency Medicine, setting aside the \$720,000.00 jury award for loss of household service unless plaintiff stipulates to an appropriate reduction, and/or granting a new trial on both liability and damages and plaintiff's cross-moved pursuant to CPLR § 4404(a) for an Order striking from the record all testimony that the decedent died from sudden cardiac arrest and setting aside the \$0 jury award for conscious pain and suffering and increasing the award as it is inconsistent and against the weight of the evidence are decided in accordance with the annexed Decision and Order of the same date.

Dated: October 9, 2012

  
SHARON A. M. AARONS, J.S.C.

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*Upon the foregoing papers and due deliberation, the Decision and Order on this motion is as follows:*

Defendant moved pursuant to CPLR §§ 4404(a) and 5501(c) for an Order setting aside the jury verdict on liability as the court precluded it from questioning plaintiff's expert about a prior censure by the American College of Emergency Medicine ("ACEP"), setting aside the \$720,000.00 jury award for loss of household service unless plaintiff stipulates to an appropriate reduction, and/or granting a new trial on both liability and damages. Plaintiff cross-moved pursuant to CPLR § 4404(a) for an Order striking from the record all testimony that the decedent died from sudden cardiac arrest and setting aside the \$0 jury award for conscious pain and suffering and increasing the award as it is inconsistent and against the weight of the evidence. Written oppositions were submitted. Defendant's motion is granted in part and denied in part. Plaintiff's motion is denied.

At trial, plaintiff made a motion *in limine* to preclude the defendant from cross-examining her expert, Dr. Diane Sixsmith, about being censured by ACEP which found that her testimony in a prior unrelated case was not objective and was false and misleading. After oral arguments, this

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Court ruled that cross-examining Dr. Sixsmith about the censure would be more prejudicial than probative and granted plaintiff's motion *in limine*.

In New York, a witness may be cross-examined regarding any immoral, vicious or criminal act. Richardson, Evidence, § 493, p. 479 [10th ed]. The extent of cross-examination bearing on the witness's credibility is within the sound discretion of the court. See *People v. Mayrant*, 43 N.Y.2d 236, 240, 372 N.E.2d 1, 401 N.Y.S.2d 165 (1977); *People v. Sandoval*, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974). In deciding whether to allow cross-examination of a witness, the court must balance whether the evidence is relevant to a material issue in the case, and if so, whether it is more probative than prejudicial. *People v. Cass*, 18 N.Y.3d 553, 560, 965 N.E.2d 918, 942 N.Y.S.2d 416 (2012). Cross-examination about any prior immoral acts or suspension of the expert's license is permissible as it bears on the expert's credibility. *Williams v. Halpern*, 25 A.D.3d 467, 808 N.Y.S.2d 68 (1<sup>st</sup> Dept. 2006). Here, Dr. Diane Sixsmith's censure by ACEP does not amount to an immoral act and, even if it was relevant to a material issue, such evidence is more prejudicial than probative as the censure did not rise to the level of suspension from the practice of medicine or the immoral act of billing misconduct, which are the facts in the line of cases cited by the defendant. Hence, defendant's motion for a new trial on the issue of liability is denied.

At trial, plaintiff moved to preclude any testimony by Dr. Silberman, defendant's expert, regarding any possible causes of the decedent's death as defendant's expert exchange did not comply with the requirements of CPLR § 3101(d), in that, it was not specific. Oral argument was held. Defendant opposed the application as untimely because, plaintiff previously objected to the expert exchange as it did not contain information about the expert's residency (which the parties resolved), but failed to reject the expert exchange as not being specific. This Court denied plaintiff's motion

and permitted defendant's expert to testify regarding the cause of death, with the caution that the expert's testimony cannot be based on speculation.

Admission of an expert's testimony is at the trial court's discretion. *People v. Santi*, 3 N.Y.3d 234, 246, 818 N.E.2d 1146, 785 N.Y.S.2d 405 (2004). *Lyall v. City of New York*, 228 A.D.2d 566, 645 N.Y.S.2d 34 (2d Dept. 1996). The facts upon which the expert's testimony is based must be established or "fairly inferable" from the evidence, rather than based on speculation or guessing. *Aetna Casualty & Surety Co. v. Barile*, 86 A.D.2d 362, 364, 450 N.Y.S.2d 10 (1<sup>st</sup> Dept. 1982). Here, plaintiff's motion to strike defendant's expert opinion regarding the cause of death as sudden cardiac arrest is denied as it was untimely made at the time of trial.

The court has the discretionary authority to set aside a jury verdict as against the weight of the evidence and order a new trial where the verdict was not based on a fair interpretation of the evidence. *Nicastro v. Park*, 113 A.D.2d 129, 495 N.Y.S.2d 184 (2d Dept. 1985). The discretionary authority must be applied with considerable caution as the jury verdict must be accorded great deference, especially where the jury resolve conflicts between experts. *McDermott v. Coffee Beanery, Ltd.*, 9 A.D.3d 195, 206, 777 N.Y.S.2d 103 (1<sup>st</sup> Dept. 2004). "[T]he jury is entitled to accept, or reject, and expert's testimony in whole or in part." *Id* at 207. Here, after testimony from both plaintiff's and defendant's experts on the issue of causation, the jury resolved the question of decedent's pain and suffering by awarding \$0. Plaintiff's motion to modify the verdict or order a new trial on the issue of damages as to decedent's pain and suffering is denied as the court will defer to the jury.

EPTL 5-4.3 provides that an award to plaintiff in a wrongful death case must be fair and just

compensation for the pecuniary injuries resulting from the decedent's death. The calculation of the precise amount of the pecuniary loss is a question for the jury. *Zelizo v. Ullah*, 2 A.D.3d 273, 769 N.Y.S.2d 255 (1<sup>st</sup> Dept. 2003). Testimony by an economic expert, however, is relevant as to the value of household services. *De Long v. County of Erie*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983). Here, plaintiff's economic expert testified at trial that the value of decedent's past household service to his mother from January 2009 to the date of the verdict was \$39,052, and the future value of his household service to be \$247,150, considering her life expectancy of seventeen years, for a total value of \$286,202. The jury gave an award in the total amount of \$720,000, awarding \$40,000 for past economic loss, and \$680,000 for future economic loss for 17 years.

While the jury's award is not limited to the amount to which the economic expert testified, under the facts of this case, that is, the age of both the decedent and the plaintiff and the testimony of plaintiff's economist, the award for household services was excessive and was not based on a fair interpretation of the evidence. *Rubin v. Aaron*, 191 A.D.2d 547, 594 N.Y.S.2d 797 (2d Dept. 1993); *Gonzalez v. New York City Housing Authority*, 161 A.D.2d 358, 359, 555 N.Y.S.2d 107 (1<sup>st</sup> Dept. 1990), *aff'd*, 77 N.Y.2d 663, 572 N.E.2d 598, 569 N.Y.S.2d 915 (1991). Here, both the economist and the jury valued the past household service for three years at about \$40,000. The jury, however, awarded \$680,000 for future household service which is the value of \$40,000 each year for 17 years. As such, the jury award for future household service is excessive and not based on a fair interpretation of the evidence.

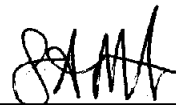
Accordingly, defendant's motion is granted only to the extent of reducing only the portion of the jury award of \$680,000 for future household service to \$340,000, and if plaintiff fails to file

a stipulation to that amount, then defendant's motion for a new trial on the issue of future household services is granted. Plaintiff's cross-motion is denied. It is hereby

**ORDERED**, that defendant serve a copy of this and Order with Notice of Entry upon the plaintiff's attorney within thirty (30) days of the date of this and Order; and it further

**ORDERED**, that an new trial is ordered on the issue of future household services unless within 30 days after service of a copy of this Order with Notice of Entry upon plaintiff's attorney, plaintiff serves and files with the Clerk of the Court a written stipulation consenting to decrease the verdict as to damages for future household services from the sum of \$680,000 to \$340,000, with the other items of the jury's verdict remaining as is, for the entry of judgment in her favor.

Dated: October 9, 2012



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SHARON A. M. AARONS, J.S.C.