

[J-126-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MICHAEL CARROLL, ADMINISTRATOR	:	Nos. 14 - 15 EAP 2006
OF THE ESTATE OF KELLY ANN	:	
CARROLL,	:	
	:	Appeal from the Judgment of Superior
Appellee	:	Court entered on 2/18/05 at No. 1626 EDA,
	:	2003, affirming the Judgment of the Court
	:	of Common Pleas, Philadelphia County,
v.	:	Civil Division, entered on 5/7/03 at No.
	:	3932 January term 2000
	:	
MICHAEL F. AVALLONE, D.O., AND	:	
MICHAEL F. AVALLONE ASSOCIATES,	:	
	:	
Appellants	:	ARGUED: October 16, 2006

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: December 28, 2007

I agree with the majority's holding that Appellants sufficiently challenged the damages evidence with regard to Appellee's survival action such that the jury's award in that action should not have been disturbed on appeal. As the majority observes, Appellants extensively cross-examined Appellee's expert on damages in the context of the possibility of Decedent Kelly Ann Carroll's return to employment and the extent of economic loss if such an assumption was not realized or if she returned to work in a capacity different than initially contemplated by the expert. See Majority Opinion, slip op. at 6. Given this cross-examination and the resulting admissions, the evidence was sufficiently disputed to support the jury's award for the survival action, obviating the

need for a new trial on damages for that action. See generally Kiser v. Schulte, 538 Pa. 219, 226-27, 648 A.2d 1, 4 (1994) (explaining that a survival action, brought by the administrator of the estate, is designed to recover damages for the decedent's pain and suffering, the loss of gross earning power from the time of injury to death, and the loss of earning power, less personal maintenance expenses, for the estimated working life span of the decedent).

I disagree, however, with the majority's holding to the extent that it does not award a new trial on damages for Appellee's wrongful death action. See id. at 226, 648 A.2d at 4 (stating that a wrongful death action is designed to compensate the spouse, children and parents for the loss they have sustained as a result of the death, including the present value of services that would have been rendered to the family, as well as funeral and medical expenses). In this regard, Appellee's expert opined that the value of Decedent's household services over the course of her lifetime would have been in the amount of \$414,960. See N.T. 10/23/2002 at 73. Appellants' cross-examination on this figure was limited to questioning whether it would be decreased if Appellee had assumed greater household chores. See id. at 88.¹ This cross-examination was not as extensive as the questioning surrounding Decedent's potential earnings and, in my view, did not adequately controvert the testimony from Appellee's expert. That being the case, I believe that the jury's award of \$29,207 in the wrongful death action, the stipulated amount for the medical bills and funeral expenses resulting from Decedent's

¹ Although asserted in the context of the loss of earnings determination, it is arguable that, by challenging the expert's calculation of Decedent's life expectancy based upon her hypertension and smoking, Appellants also were disputing the total value assigned by the expert to the loss of Decedent's household services. See N.T. 10/23/2002 at 83-84.

death, did not bear a reasonable relation to Appellee's uncontroverted evidence of the damages recoverable in such an action.²

Finally, I would refrain from discussing the propriety of the admission of the evidence surrounding the presence of PCP and phenmetrazine in Decedent's system, as well as the causation evidence offered by Appellants on this point. See Majority Slip Op. at 3 n.2. The sole issue before this Court involves the Superior Court's award of a new trial on damages based upon its determination that the jury's award bore no reasonable relationship to the proven damages. Appellants did not focus upon the presence of PCP and phenmetrazine during the cross-examination of Appellee's damages expert and did not argue to the jury that the existence of these substances should affect the determination of damages for either the wrongful death or survival actions.

Accordingly, I would reverse the Superior Court's award of a new trial on damages for the survival action, but would affirm its holding with respect to the wrongful death action.

Mr. Justice Baer joins this concurring and dissenting opinion.

² The majority appropriately notes that Kiser is in tension with the notion that a jury may reject evidence; further, it is in tension with this Court's acceptance of the possibility of compromise verdicts. See Stokan v. Turnbull, 480 Pa. 71, 77-78, 389 A.2d 90, 93 (1978). Nevertheless, Appellants do not argue that Kiser should be overruled, but rather, merely differ with its proper interpretation. Thus, our analysis is confined to an application of the decision.