

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX IA 20
 MALCOLM FERGUSON, Deceased, by JUANITA YOUNG
 as Administratrix of the Estate of MALCOLM FERGUSON,
 and JUANITA YOUNG, Individually,

C

Plaintiff,

Index No. 18951/01

-against-

JUDGMENT/ORDER

THE CITY OF NEW YORK and P.O. LOUIS RIVERA,
 Defendants.

Present:
 HON. KENNETH L. THOMPSON

The following papers numbered 1 to ___ read on this motion

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No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	_____
	Answering Affidavit and Exhibits	_____
	Replying Affidavit and Exhibits	_____
	Affidavit	_____
	Pleadings -- Exhibit	_____
	Stipulation -- Referee's Report -- Minutes	_____
	Filed papers	_____

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

Motion for an order of judgment notwithstanding the verdict and for a new trial is decided as follows:

On June 6, 2005 , the jury returned a verdict, finding that defendant, Officer Rivera not only used excessive force, but also negligently handled his weapon. Furthermore, the jury found the defendant, The City of New York also liable. The verdict resulted in a jury award of \$6,049 for funeral expenses; \$59,870 for past pecuniary loss; \$387,827 for future pecuniary loss; \$3,000,000 for decedent's conscious pain and suffering and fear of impending death; and \$7,000,000 for punitive damages.

Plaintiff brought suit on behalf of her son, Malcolm Ferguson, after he was shot

and killed by Officer Rivera. Rivera was attempting to detain Mr. Ferguson for involvement in suspected drug activity. The Plaintiff's son resisted arrest which led to a physical altercation with Officer Rivera, resulting in an accidental discharge of the Officer's gun, and ultimately killing Mr. Ferguson. The principal claim of damages was for violation of plaintiff's First, Fourth, Fifth and Fourteenth Amendment rights. Plaintiff also claimed that Officer Rivera used excessive and unjustified force, seeking damages for wrongful death, pain and suffering, intentional infliction of emotional distress and loss of support, loss of companionship, and punitive and compensatory damages for acquiescing in the pattern and practice of police and practice of police brutality.

The proof adduced at trial clearly established that the plaintiff failed her burden of proof to provide evidence demonstrating the decedent had suffered any conscious pain. In fact, the record shows no indication that the decedent was conscious for any period of time after he was shot. Therefore, the plaintiff failed to prove by a preponderance of the credible evidence the decedent was conscious before his death, and therefore cannot be awarded for conscious pain and suffering. Cummins v. City of Onondaga, 84 N.Y.2d 322, 324-25.

The motion to set aside the verdict for loss of past and future economic support is granted because there was no evidence presented at trial that went beyond mere speculation. Davis v. New York, 264 A.D.2d 379, 379-80; Toscarella v. Purdy, 217 A.D.2d 815, 818. Awarding damages for the alleged support of the decedent is improper when the plaintiff cannot demonstrate that the decedent was ever employed. See Papa v. New York, 194 A.D.2d 527, 530.

The motion to set aside the verdict for plaintiff for loss of services provided to

her by the decedent is denied because a parent has the right to recover for the services of a child. Barnes v. Keene, 132 N.Y.13, 15; Cuming v. Brooklyn C.R. Co., 109 N.Y. 95, 96-97; Gilbert v. Brewery, 295 N.Y. 270, 273 . The amount of damages awarded is based on the nature of the services provided by the child to the parent. Cuming, 109 N.Y. at 98. It was established at trial that the decedent provided Ms. Young with services such as bringing her to the doctors, doing the laundry, cleaning, and cooking, valued at \$6,000 per year. From the time of decedent's death until the trial, 6 years lapsed amounting to \$36,000 in past loss of services. That \$6,000 is then added to the 25 year life expectancy of the plaintiff which totals \$186,000 ($\$36,000 + (\$6,000 \times 25)$). In addition to this amount the jury award for the plaintiff for the funeral costs of \$6,049 is also sustained. Accordingly, the past pecuniary loss representing loss of household service is reduced from \$59,873 to \$36,000 and future pecuniary loss representing loss of household services is reduced from \$387,827 to \$186,000.

Lastly, a new trial is ordered to determine the proper amount of punitive damages payable by the defendant, Officer Rivera. At trial the jury found that Officer Rivera was liable for punitive damages for the manner in which he attempted to detain the decedent, and for the negligent manner in which he handled his gun. Punitive damages, "are prohibited unless the harmful conduct is intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence." McDougald v. Garber, 73 N.Y.2d 246, 254. Thus, punitive damages cannot be awarded for the negligent handling of Rivera's gun, but may be awarded for using excessive force- an intentional tort.

Furthermore, in order to determine the proper amount of punitive damages, the

assets of the defendant, Officer Rivera, must be assessed in a separate trial. Rupert v. Sellers, 48 A.D.3d 265, 272. Therefore, a new trial to determine the amount of punitive damages payable by, defendant, Officer Rivera is in order.

The motion is granted and a new trial is ordered solely on the issue of punitive damages unless within 20 days after service of a copy of this order with notice of entry upon his attorney, plaintiff stipulates to accept a reduction of damages to \$36,000 for past and \$186,000 for future loss of services and \$6,049 for funeral costs. Further, plaintiff shall serve and file in the Trial Support Office, Room 217 a written stipulation agreeing to said reduction and to the entry of an amended judgment in accordance therewith.

If plaintiff so stipulates, the judgment is modified and affirmed as amended. Those argument not addressed herein are found to be without merit.

The foregoing shall constitute the judgment and order of this Court.

Dated: JUL 09 2008



J.S.C.
KENNETH L. THOMPSON JR.