New York State Court of Claims

GREVELDING v. STATE OF NEW YORK, # 2013-018-439, Claim No. 109855

Synopsis

Damages awarded for pre-impact terror and wrongful death.

Case information

UID:	2013-018-439
Claimant(s):	PETER E. GREVELDING, JR., as Executor of the Estate of JASON M. RHOADES
Claimant short name:	GREVELDING
Footnote (claimant name) :	
Defendant(s):	STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	109855
Motion number(s):	
Cross-motion number(s):	
Judge:	DIANE L. FITZPATRICK
Claimant's attorney:	MACKENZIE HUGHES, LLP By: Arthur Wentlandt, Esquire
Defendant's attorney:	ERIC T. SCHNEIDERMAN Attorney General of the State of New York By: Patricia Bordonaro, Esquire Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	September 30, 2013
City:	Syracuse
Comments:	
Official citation:	
Appellate results:	
See also (multicaptioned case)	

Decision

This Decision addresses the issues of the comparative negligence of Jason M. Rhoades, deceased, and the damages for Mr. Rhoades' conscious pain and suffering and wrongful death due to the negligence of the State in its maintenance of the Route 81 northbound Park Street Bridge the evening of January 23, 2004. The State was previously found to be negligent.[1]

For purposes of determining the issue of Mr. Rhoades' comparative negligence, the evidence submitted at the liability trial has been considered.[2] Claimant did recall certain witnesses to the accident to address the issue of Mr. Rhoades' conscious pain and suffering. The facts relating to the accident have been drawn from the evidence at the liability trial and this Court's factual findings in the liability Decision filed November 1, 2010, unless otherwise noted.

THE ACCIDENT

On the evening of January 23, 2004, Christopher Cassoni was driving north on Route 81 from the City of Syracuse to his home in Mattydale. As he reached the elevated portion of Route 81 over Park Street, he passed a slower moving SUV pulling a trailer with a snowmobile which he had been following for about one-half mile. The road conditions at the time, he described as snowy, wet, and dark with a slippery road surface. Mr. Cassoni saw the SUV slide and go out of control and said the trailer was sliding from side to side. Watching in the rearview mirror, Mr. Cassoni could see the vehicle and trailer turn almost perpendicular to the roadside barrier. He also said he could see the brake lights flashing on and off. He watched as the SUV went slowly up the snowbank and dropped straight off the edge; it did not project outward at all.

Mr. Cassoni testified at this trial that he called 911 from his vehicle immediately after he saw the SUV go off the bridge. He returned to the scene, and by that time, the police had arrived.

Mr. Cassoni gave a statement to the police a few days after the accident. He estimated he was driving about 50 mph when he passed the SUV going 40 - 45 mph.[3]

Donald Logana was recalled to testify at this trial because he had witnessed the accident. He was a backseat passenger in a vehicle driven by Tom Linda entering Route 81 northbound from the Hiawatha Street on-ramp just before it passed over Park Street. Mr. Logana saw an SUV to his left which he called "unstable." Mr. Linda slowed his vehicle and Mr. Logana watched the SUV lose control and go perpendicular to the roadway. The SUV hit the snowbank on the right side of the road and went over the barrier. At first, Mr. Logana believed the vehicle would stay on the bridge as it seemed to stop at the apex, but the vehicle went up the bank and then fell within a second or two. Mr. Logana could not judge the speed of the SUV and did not see brake lights.

At this trial, several first responders from the Syracuse Fire Department, Rural Metro, and an accident reconstructionist from the Syracuse Police Department all testified consistently. The first 911 call was received at 8:05 p.m., and the Syracuse Fire Department and Rural Metro were on the scene by 8:10 p.m.

Syracuse firefighter, Ronald Beebe,[4] was one of the first to arrive at the vehicle. He could not recall if the vehicle was stabilized before he crawled into it to access Mr. Rhoades through the passenger side window. Mr. Rhoades' seat belt was still fastened, and his head was bent forward, unnaturally, with his forehead almost touching his chest. Lt. Beebe felt for a radial pulse and then a brachial pulse and found none. He left the vehicle and a paramedic, with more medical training, went into the vehicle to verify his findings.

Lt. Beebe completed an incident report[5] on which he rated Mr. Rhoades' Glasgow Coma Score as a "3." This score reflects that in each of the three scale categories he rated Mr. Rhoades as a "1." Lt. Beebe testified that the score reflects that Mr. Rhoades had no eye opening, no verbal response, and no motor response. Mr. Rhoades was ashen in color indicating to Lt. Beebe there was no blood flow or oxygen to the head. Lt. Beebe did not recall seeing any blood in the vehicle.

Firefighter Timothy Boland, a certified paramedic, was called by the State at this trial. He also crawled into the vehicle from the passenger's side and testified there was no evidence of movement or noise from Mr. Rhoades.

Defendant's witness, Mark McEnaney, testified that at the time of the accident he worked for Rural Metro as a supervisor and had been an Emergency Medical Technician since 1987 and a paramedic since 1989. He obtained an Associate Degree as a paramedic and was certified in numerous areas of advanced life support. At that time, he had responded to thousands of motor vehicle accident scenes, and two-to-three dozen fatalities.

After Mr. McEnaney's arrival, it took 20 - 30 seconds to get to the vehicle where he attempted to communicate with Mr. Rhoades but received no response. Based on the vehicle's fall, along with Mr. Rhoades' position, Mr. McEnaney was almost certain there was a spinal cord injury and damage to his brain and other organs. Mr. McEnaney opined Mr. Rhoades was unconscious upon impact.

Rural Metro completed a report[6] which reads, "Roof collapsed to level of windows unable to visualize drivers [sic] compartment." Mr. McEnaney could not assess Mr. Rhoades' skull to determine if there were any fractures, but because there was little blood or evidence of other injury, he testified it was possible Mr. Rhoades suffered an intracranial bleed or that the crash energy was absorbed mostly by his neck. Mr. Rhoades was declared dead at 8:28 p.m.

Officer Lonnie Dotson, Jr., of the Syracuse Police Department, reconstructed the accident. Measurements of the distance the vehicle fell, the height and length of the snowbank, and the horizontal distance the vehicle traveled after it left the overpass were taken. A report containing the accident reconstruction was completed.[7] Officer Dotson testified that as Mr. Rhoades lost control of his vehicle the trailer started moving from side to side. The snowmobile was not centered on the trailer and its weight contributed to this movement. He opined that as the vehicle traveled up the snowbank, the trailer moved from side to side and pushed the SUV further up the snow ramp. The trailer then broke away, stopping at the top of the jersey barrier, north of where the SUV went off the bridge.

The police determined the vehicle fell 36.3 feet, rolled-over in midair and landed on its roof, 32 feet from the edge of the bridge. The slowest the vehicle could have been traveling when it contacted the snowbank was 22 mph, and when it left the barrier, the minimum speed was 14.48 mph, according to Officer Dotson's calculations.

Both parties called investigators from the Onondaga County Medical Examiner's Office to testify. Brian Ehret went to the accident scene, and Mr. Rhoades' body had already been removed from the vehicle. He took photographs and did a cursory external examination of the body. He noted abrasions on the left side of the nose and at the hairline on his forehead. There was petechial hemorrhaging[8] on his neck, face, and the lining of the eyelids, but none in the globe of the eye. There was minimal blood and no other evidence of head trauma.

Ronald Brunelli, from the Medical Examiner's Office, spoke with Mrs. Rhoades the day after the accident. Mrs. Rhoades indicated she did not want an autopsy performed. He

memorialized the conversation as required by his office.[9]

Dr. Scott LaPoint, a pathologist with the Onondaga County Medical Examiner's Office, testified that he spoke with Mrs. Rhoades some time after Mr. Brunelli and, pursuant to her wishes, no autopsy was performed.

In the liability trial, the parties stipulated that the injuries that caused the death of Jason M. Rhoades were sustained as a result of the fall of his vehicle from the deck of the Park Street Bridge to the ground below.[10]

In lieu of an autopsy, the Medical Examiner's Office completed an external examination and took several X-rays. The evidence of trauma was listed in the resulting report[11] as follows:

1. A 2.5 cm abrasion on the anterior forehead slightly to the right of midline;

2. A 0.8 cm abrasion on the left bridge of the nose;

3. Fractures of the upper incisors;

4. Fractures of the lower cervical vertebrae, the left clavicle, left ribs #1-3 and right rib #1.

The cause of death was multiple blunt force injuries due to a motor vehicle accident.**COMPARATIVE NEGLIGENCE**

The State bears the burden of proving that Mr. Rhoades was negligent (CPLR 1412) and that his negligence was a substantial cause of his injuries (*see Rodriguez v Budget Rent-A-Car Sys., Inc.,* 44 AD3d 216, 219-220 [1st Dept 2007]). Defendant has proffered many acts of negligence committed by Jason Rhoades for which it urges a finding of comparative negligence. Relying upon the police accident report,[12] the State argues that Mr. Rhoades was traveling too fast for the conditions;[13] that his vehicle had tires with uneven tread wear which may not have passed a New York State inspection; and that despite the availability of four-wheel drive, he was driving the vehicle in two-wheel drive. Defendant also argues that the snowmobile was not centered on the trailer and contributed to Mr. Rhoades' loss of control. The lead investigator on the case, Officer Lonnie Dotson, was questioned about the contributing factors listed in the accident report during the liability trial. He acknowledged that he could not calculate the speed at which Mr. Rhoades was driving at the time the vehicle went out of control, and he had no way of telling what mode, two-wheel drive or four-wheel drive, the vehicle was in when Mr. Rhoades lost control.[14] He did say it was possible Mr. Rhoades was driving too fast for the conditions. Mr. Cassoni, the only eyewitness to estimate Mr. Rhoades' speed, thought Mr. Rhoades was traveling about 40 - 45 mph in a 55 mph zone. He also expressed his concern that Mr. Rhoades seemed to have difficulty controlling his vehicle and trailer before he passed him.

Bruce L. Clarke, the Garage Supervisor for the Syracuse Police Department, inspected the Rhoades' vehicle and testified at the liability trial that the rear tires would pass inspection but were borderline, and there were areas on the front tires that were below the minimum acceptable depth. He also noted that the selector switch showed that the vehicle was in two-wheel drive mode and the gear shift was in park. When vehicles are towed, the truck driver will sometimes change the settings, according to Mr. Clarke. On cross-examination, Mr. Clarke admitted that the tires would technically pass inspection, but he testified he would not have passed the vehicle.[15]

The State cites *Ether v State of New York,* 235 AD2d 685 [3d Dept 1997] and *Stein v Trans World Airlines,* 25 AD2d 732 [1st Dept 1966], in support of its position that Mr. Rhoades was negligent in his handling of his vehicle, as many other vehicles traversed the roadway that night safely. *Stein* states "[s]uch evidence is relevant and often persuasive on the question of whether a given condition should be classified as dangerous" (cites omitted) at 732. Defendant mistakes the issue. Here, the dangerous condition was the buildup of plowed snow against the bridge barrier, and it has already been found to be a dangerous condition by the Appellate Division.

The question is whether Defendant has established Mr. Rhoades' conduct in driving his vehicle with marginally acceptable tire treads at approximately 40 - 45 mph that night breached his duty of care and contributed to his injuries and death. The Court does not conclude, based upon the factual evidence, that the snowmobile was placed on the trailer inappropriately or that his vehicle was in two-wheel drive at the time of the accident. The Court finds that Defendant has not met its burden. However, even if the minimally compliant tire treads and his speed contributed to his loss of control of the vehicle that night, Claimant correctly argues that these factors were not a proximate cause of Mr. Rhoades' injuries and death. Officer Dotson concluded, based upon his investigation, that the vehicle would not have left the roadway without the positive 35 degree grade of the compressed snowbank in front of the barrier. Moreover, the State has stipulated that the cause of Mr. Rhoades' death was the "fall of his vehicle from the deck of the Park Street bridge to the ground below."[(16)]

Although there may be more than one proximate cause of an accident (*Forte v City of Albany,* 279 NY 416, 422 [1939]), based upon the facts and injuries Mr. Rhoades suffered, the Court finds that Defendant has not established that any comparative negligence of Mr. Rhoades contributed to the cause of his injuries and death. Defendant bears 100 percent liability for Mr. Rhoades' injuries and death.

CLAIM FOR CONSCIOUS PAIN AND SUFFERING

Dr. Scott LaPoint was working in the Onondaga County Medical Examiner's Office at the time of this accident and was working in Erie County doing forensic pathology at the time of trial. He was Board Certified in Anatomic and Clinical Pathology in 2001, and runs the pathology labs in numerous hospitals in the western and southern tiers of New York. He also teaches autopsy pathology, forensic pathology, and neuropathology at the University of Rochester. He did the external examination of Mr. Rhoades and took X-rays. Mr. Rhoades had petechiae on his upper torso, neck and face, around his eyes, and in his mouth. Three of his upper teeth were fractured, and he noted the facial abrasions that were included in his report. By manipulation, he could feel the fractured collarbone and neck.

During trial, Dr. LaPoint used the X-rays to point out the injuries as he saw them, as well as the lack of certain injuries. There were no skull fractures and no fractures below the upper ribs. The neck fracture was placed at C6-7 or C7-T1, the lower cervical vertebrae. The cervical fracture, according to Dr. LaPoint, was not a crush injury from the roof collapsing, which would result in a higher level injury in his neck or head, because the space between the vertebrae was not compressed. He opined the fracture was caused by torsion, the lateral or twisting force as the roof of the vehicle pushed on his flexed neck, snapping it. Dr. LaPoint said a neck fracture often includes injury to the spinal cord. Based upon the photographs of the scene and the X-rays, it appeared Mr. Rhoades' shoulders and neck took the brunt of the fall. He opined that the neck fracture probably would have left Mr. Rhoades paralyzed from the neck down but respiration, including the diaphragm, are controlled at the C3, C4, and C5 levels, and would not be affected by the fracture. He opined that Mr. Rhoades lived for one-to-two minutes after impact, but was struggling to breathe because of his position. Dr. LaPoint said it was probable that Mr. Rhoades passed due to an element of asphyxia based on his positioning in the vehicle,

as evidenced by the petechiae in the face and upper body.

Dr. LaPoint explained that when stating the cause of death, it is standard practice to identify the underlying cause, not, what he called, the mechanism of death. In this case, he opined the cause of death was multiple blunt force trauma and the mechanism of death was asphyxia.

On cross-examination, Dr. LaPoint acknowledged he was not Board Certified in Forensic Pathology. He explained that usually performing an autopsy was the decision of the Medical Examiner, but Onondaga County had a practice of abiding by the family's decision. He agreed that determining the cause of death is more precise with an autopsy, as there can be internal injuries that can only be documented by that procedure. Trauma to the brain, other internal organs, or internal bleeding are some possibilities which may have caused Mr. Rhoades' death. The cervical fracture Dr. LaPoint identified in Mr. Rhoades would be fatal over time and could cause the loss of certain body functions. It could also cause bleeding in the spinal canal which can result in brain injury. However, he maintained that without damage to the brain or a break higher in his neck, Mr. Rhoades' respiration and heart would not be paralyzed. Mr. Rhoades' neck and shoulders took the brunt of the force. There was no evidence, in the absence of an autopsy, that would permit Dr. LaPoint to know with reasonable certainty whether Mr. Rhoades was rendered immediately unconscious; but based upon the injuries, Dr. LaPoint felt it unlikely. Dr. LaPoint agreed that, as far as is known, when a person is unconscious there is no feeling, although a person in such a state would be breathing or attempting to breathe. Dr. LaPoint agreed that Mr. Rhoades was deceased when the EMT's arrived. He further acknowledged that there was no evidence of consciousness, such as movement or speech after impact. It was his opinion that the cervical fracture Mr. Rhoades suffered would ultimately cause death but not necessarily immediate unconsciousness.

During his investigation, after seeing the X-rays and the petechiae, Dr. LaPoint suspected asphyxiation. He testified that small hemorrhages can result from a person hanging upside down. In his more contemporaneous report, however, Dr. LaPoint did not mention asphyxia. He explained that since it was not a documented finding, he omitted from his reported opinion that Mr. Rhoades' position resulted in his asphyxiation, the mechanism of death. When petechial hemorrhages develop after death, Dr. LaPoint indicated that they tend to be larger and are called Tardieu spots. Dr. LaPoint said he did see some larger areas of hemorrhage that some would call Tardieu spots, which he did not attribute to asphyxia.

Dr. Michael Baden testified for the defense and is also Board Certified in Anatomic Clinical Pathology as well as Forensic Pathology which requires another year of training before one can be eligible to take the board examination. He explained the different focuses of each area of pathology, noting that anatomic and clinical pathologists deal with natural diseases or deaths, while forensic pathologists handle unnatural conditions such as suicides, homicides, and accidents. Dr. Baden provided an overview of his extensive experience in forensic pathology, including performing more than 20,000 autopsies.

In preparation for testifying, Dr. Baden reviewed the Medical Examiner's Office report and X-rays, photos from the scene, police, fire, and EMT reports, as well as numerous legal documents. He opined that, based upon the height from which the vehicle fell, landing completely on its roof, and the observable injuries, Mr. Rhoades sustained considerable internal injuries which caused his death. It was also his opinion that Mr. Rhoades would have been rendered unconscious upon impact. He was found within five minutes without a pulse.

Dr. Baden testified that the most common types of injuries that cause death in motor vehicle accidents are head and brain injuries. In this instance, the crush of the roof against Mr. Rhoades' head would be forceful enough to cause bleeding in and around the brain, with or

without skull fractures. He based his opinion on the facial injuries and the manner of the accident. On cross-examination, Dr. Baden acknowledged that there was no notation by Dr. LaPoint of any injury to the rear of Mr. Rhoades' skull or back of his neck.

Dr. Baden also opined that rib fractures punctured the lungs, so there would be bleeding into the lungs if the person lived for any period of time after the impact. Here, there was no existence of blood in the diaphragm from the lungs bleeding. The X-rays show a fracture of the left clavicle or collar bone, fractures of the left upper ribs and right upper ribs. Dr. Baden pointed out in the X-rays[17] that there was air in the lungs but also air under the skin on the left and around the lung on the right side, as a result of lung perforation. Air is black on an X-ray, while bone and blood are white. Dr. Baden conceded that the lung injuries would not cause immediate unconsciousness or death.

Dr. Baden disagreed with Dr. LaPoint regarding the location of the spinal fracture. From reviewing the X-rays, he testified he did not see a fracture at C6-7 but higher at C2. It was his opinion that the movement Dr. LaPoint felt upon manipulation of the neck was movement at C2. On one of the X-rays,[18] Dr. Baden identified a fracture of the odontoid process, the top of the second cervical vertebrae. A fracture there would cause immediate loss of consciousness, in his opinion. Brain hemorrhaging, he believed, resulting from the impact would also cause

unconsciousness. Skull fractures are not necessary for this to occur.

In Dr. Baden's opinion, when completing a forensic death certificate, it is unusual to distinguish between cause of death and mechanism of death. It is more common to do so in cases of natural death. He agrees with Dr. LaPoint's cause of death in this case, to wit: multiple blunt force trauma. He also agreed that with petechiae, one should consider asphyxia, but without an autopsy that should not be identified as the cause of death. Many types of asphyxiation do not cause petechial hemorrhage. In positional asphyxiation cases, the heart can continue to beat for a period of time because the body still has oxygen. Dr. Baden opined that if Mr. Rhoades had died of positional asphyxia, the first responders would have found signs of life.

When asked about the significance of petechiae, Dr. Baden explained that asphyxiation does not cause it. Rather, it is the obstruction of blood flow in the venous system that causes the blood to back up into the capillaries and rupture. Strangulation causes both asphyxia and petechial hemorrhage. One cannot make a diagnosis of asphyxia solely on the basis of petechiae because it can be caused in many ways and they can form after death. Tardieu spots are caused by the settling of blood rupturing the capillaries after death. In Dr. Baden's opinion, the petechiae seen on Mr. Rhoades were caused by the force with which the roof collapsed on him along with being suspended upside down for a period of time after impact. He further opined that Mr. Rhoades did not asphyxiate but was rendered immediately unconscious from the blunt force injuries to his brain, lungs and, maybe, his heart.

The Court finds that although Mr. Rhoades may have lived, breathing and heart beating for a moment or two after impact, after careful review, there is no direct or circumstantial evidence that Mr. Rhoades was conscious. Without sufficient proof of consciousness, or some level of cognitive awareness, a claim for conscious pain and suffering cannot be sustained. Evidence that shows "practically instantaneous death" will not support an award for conscious pain and suffering (*Estate of Ferguson v City of New York,* 73 AD3d 649, 650 [1st Dept 2010]; *see also Cummins v County of Onondaga,* 84 NY2d 322 [1994]; *McDougald v Garber,* 73 NY2d 246, 255 [1989]; *Boston v Dunham,* 274 AD2d 708 [3d Dept 2000]).

Richard Hermance, an accident reconstructionist, testified for Claimant. Using

measurements from the police report,[19] he calculated the time it took for Mr. Rhoades' vehicle to travel the 14 feet across the snowbank. Using a drag factor of .5, which is consistent with the literature for a vehicle traveling on a snowy surface, it took between .54 and .72 seconds. If the road was icy, the drag factor would change to about .3. Mr. Hermance testified the range of time was due to the different speeds witnesses attributed to the vehicle as it encountered the snowbank.

The police calculated the entry speed at 22 mph which would result in a time lapse of .72 seconds. Using an entry speed of 20 mph, Mr. Hermance found a .54 second time lapse. He explained that a faster entry speed takes the vehicle a longer time to traverse the snowbank because it digs into the snow more, thereby adding resistance. Mr. Hermance did not feel the trailer movement or road conditions would have any significant impact on his calculations.

By using the police calculations of an initial velocity of 14 mph, take-off angle of 35 degrees, and vertical drop-off of 36.3 feet, Mr. Hermance determined it took 1.8 seconds from leaving the bridge to impact. The total time elapsed from entering the snowbank to hitting the ground was 2.52 seconds.

Mr. Hermance also described the movement of the vehicle as it rode up and over the snowbank. Contacting the snowbank at an angle of 30 - 40 degrees, the vehicle's right front tire would lift, first tilting the vehicle toward the driver's side. As it went over the rail, the right front would then pitch forward and downward. The vehicle then barrel-rolled, landing on its roof. Mr. Hermance opined it did not flip because the front of the vehicle was still oriented in the same direction it was headed.

Claimant called Robert S. Kennedy, Ph.D., to explain the perception and reaction of Mr. Rhoades as his vehicle rode up the snowbank and over the barrier. Dr. Kennedy has Master's and Doctorate Degrees in Experimental Psychology, which he described as the academic brand of the science of human behavior, human factors, or ergonomics. He spent 22 years in the United States Navy where he worked with pilots and helped design cockpit displays to enhance human performance. After the Navy, he continued with similar projects mostly for the Federal Government. He also teaches numerous college and graduate courses.

Dr. Kennedy described the physiology of human perception and reaction. It starts with a stimulus such as light or sound which is energy that travels along a nerve pathway to a receptor in the brain. Then there is cognition which takes between two-tenths and four-tenths of a second depending upon the sensation. Audition or hearing is the fastest sense, then touch and vision. Basically, in less than a half second information gets to the brain, deliberation can occur, and then a motor response occurs. The information is brought to the brain in about one-half the time that one can blink or move a hand. Dr. Kennedy used the example if one trips, it takes about half a second to reach the ground, but the response of putting one's arms out is made before one hits the floor. That response takes longer than the experience of a startle. A startle can be elicited by hearing a gunshot or pulling a chair out from under a person. These startle situations are experienced almost immediately after the brain receives the information. You can also elicit a startle in situations of falling. Fear of falling, according to studies, can be seen in babies or animals. Dr. Kennedy described this fear as innate, developing only a few months after birth.

Dr. Kennedy opined, without opposition, that Mr. Rhoades experienced fear over the course of the accident from the perception of the visual and linear changes occurring. Breaking down the accident, beginning with the skidding, Mr. Rhoades would have realized a loss of control. Next, he would anticipate a crash but as the vehicle went up the ramp of snow instead of being stopped, there would be apprehension and fear. These responses would occur within ½ second, and the fall alone took approximately 1.87 seconds. The time it took the vehicle to

ride up the snowbank was about .72 seconds. Because of the heightened arousal, the responses would be clearly and indelibly perceived. As the vehicle went over the top of the barrier, the visual input is no longer in accord, as the angles and linear positions change, causing fear and confusion. This would initiate the innate and significant fear of falling.

When Mr. Rhoades initially lost control of his vehicle, although surely feeling concern, he was not necessarily in fear of imminent grave injury or death. His fear of serious injury or death would have arisen as he approached the top of the snowbank without stopping.

Although it is impossible to determine with any certainty what Mr. Rhoades experienced that day, such uncertainty does not preclude an award where reasonable inferences can be drawn from the facts and evidence to conclude he likely endured a period of time of acute fear of death or serious harm.

The facts of this accident coupled with Dr. Kennedy's testimony provided sufficient scientific evidence to convince this Court that Mr. Rhoades suffered pre-impact terror for more than two seconds (*see Stein v Leibowitz-Pine View Hotel,* 111 AD2d 572 [3d Dept 1985]). In order to determine what would be "reasonable compensation" for Mr. Rhoades' pre-impact suffering, this Court has referenced what some other courts have found to be a reasonable award for comparable periods of such suffering (*see Maracallo v Board of Educ. of City of N.Y.,* 21 AD3d 318 [1st Dept 2005] [fourteen year old went under water twice, surviving for six to seven minutes while drowning $1,250,000]; *Lang v Bouju*, 245 AD2d 1000 [3d Dept 1997] [several seconds of Mr. Lang seeing truck and trying to stop motorcycle before fatal collision, $100,000]). Based upon this review and the circumstances herein, the Court awards Claimant, as Executor of the Estate, $250,000 for Mr. Rhoades' pre-impact terror.

WRONGFUL DEATH CAUSE OF ACTION

Claimant also seeks damages for the State's negligence in causing Mr. Rhoades' wrongful death. In accordance with EPTL § 5-4.3 (a), damages for a wrongful death are to be "fair and just compensation for the pecuniary injuries" resulting from Mr. Rhoades' death for the distributees for whom the action was brought. In this case, the distributees are Mr. Rhoades' wife, Isabelle Rhoades, born August 23, 1973, and their two children, Luke, born April 10, 2002, and Amelia, born November 17, 2003. Mrs. Rhoades was 30 years old at the time of the accident; Luke was not quite two, while Amelia was just two months old.

Although the tragedy of Mr. Rhoades' death is overwhelming, and the grief, sadness, and emotional loss suffered by his family were clearly evidenced at trial, the Court is limited by the law to make an award solely for pecuniary loss. The deep sorrow, loss of affection, and loss of companionship cannot be compensated by money damages under the statute (*see Gonzalez v New York City Hous. Auth.,* 77 NY2d 663 [1991]). The only damages that may be recovered are the loss of support, voluntary assistance, possible inheritance, and medical and funeral expenses. Mr. Rhoades' children may also recover for the loss of parental guidance, nurture, care, and physical, moral, and intellectual training (*Id.,* at 668). In assessing the amount of damages, consideration is given to Mr. Rhoades' earning potential, which includes past and future earnings and potential for advancement, as well as Mr. Rhoades' age, health, life expectancy, character, and the circumstances of the distributees, including their number, age, and health (*Johnson v Manhattan & Bronx Surface Tr. Operating Auth.,* 71 NY2d 198, 203 [1988]). Given the unique factors relevant to any wrongful death action, each case must be examined on its own merits (*DeLong v County of Erie,* 89 AD2d 376, 386 [4th Dept 1982], *affd* 60 NY2d 296 [1983]).

Mr. Rhoades was born on September 8, 1975; he was 28 years old at the time of his death. His wife, mother-in-law, and some of his friends testified about his life and

accomplishments. Claimant, Mr. Rhoades' uncle, described Mr. Rhoades' youth and young adulthood.

By way of background, when he was young, Mr. Rhoades was a quiet and reserved child. He enjoyed sports, and in his senior year in high school he made the varsity football team, and his uncle noticed he seemed to develop more confidence. Then, at 17 years of age, he lost both his parents. Claimant was executor of their estate and trustee of a trust for Mr. Rhoades. Mr. Rhoades lived briefly with his grandparents then got his own apartment. He finished high school and attended college at Syracuse University. He took extra courses at LeMoyne College and graduated from Syracuse University more than a year early. Then he obtained an MBA from LeMoyne College in a year. The costs of his education were covered by scholarships, grants, loans, and his own trust funds. Claimant believed Mr. Rhoades was debt-free when he completed his schooling.

In addition to getting his degrees, Mr. Rhoades was elected to the East Syracuse-Minoa School Board and to the Village Board of Trustees. Thereafter, he became Mayor of the Village of East Syracuse at the age of 24. Mr. Rhoades' friend, Anthony Albanese, testified about all he did to improve the village and how hard he worked to do it.

During the time that Claimant was trustee of the trust for Mr. Rhoades, he oversaw Mr. Rhoades' financial circumstances. As time passed, he relinquished more responsibility as Mr. Rhoades showed himself as very capable of handling his own affairs. The trust was to end when Mr. Rhoades turned 28, but Claimant ended it a few years early because Mr. Rhoades was so competent.

Mr. Rhoades purchased his first house in the Village of East Syracuse and did much of the repair work on it himself, according to Claimant. Mr. Rhoades owned a two-family house in East Syracuse when he married. He also owned a second house which he rented to his aunt. He bought vacant land in the Town of Manlius and had a share in two hunting camps near Cortland, New York.

On June 17, 2001, Mr. Rhoades married Isabelle Antoniou. Claimant said that was one of the best things that ever happened to Mr. Rhoades. Mrs. Rhoades said she could not have asked for a better husband or friend. Mrs. Rhoades' first language is French and much of her family does not speak English. Mr. Rhoades was learning French and would stay up nights practicing so he could communicate with his in-laws.

Mrs. Rhoades testified that her husband loved being outdoors and enjoyed maintaining the house into which they moved in 2001 in Tully, New York. He did the plowing and landscaping but also helped with the laundry and dishes. Mr. Rhoades was a runner, physically fit, and in great health.

Mr. Rhoades' life expectancy, as of the date of his death, was 47.3 years (1B NY PJI 3d, Appendix A). Mrs. Rhoades has a life expectancy of 50.5 years, and the children, Luke and Amelia, would be expected to live 73.1 and 79.4 years respectively (*Id.*).

FUNERAL EXPENSES

Isabelle Rhoades identified the funeral bill[(20)] and receipt. The total amount paid to Eaton-Tubbs-Schepp Funeral Home was $10,412.68. She also identified the paid receipt for the cemetery plot[(21)] in the amount of $2,790, and the headstone[(22)] in the amount of $2,400. These expenses are properly part of the wrongful death damages (EPTL § 5-4.3; *Parilis v Feinstein,* 49 NY2d 984, 985 [1980]). The Court awards Claimant, as the executor of the estate on behalf of distributee, Isabelle Rhoades, $15,602.68 for the amounts paid for funeral and

burial expenses (*see Malvaso v State of New York,* 15 Misc 2d 585, 589 [NY Ct Cl 1959] *affd* 10 AD2d 663 [4th Dept 1960]).

LOSS OF CARE, GUIDANCE, AND NURTURING

Although limited to an award for their pecuniary loss, the Courts have long held that this may include the loss of the pecuniary advantage from a parent's care and nurturing, and physical, moral, and intellectual training. These losses may be "considered within the calculation of 'pecuniary injury' " (*DeLong v County of Erie,* 89 AD2d 376, 386 [4th Dept 1982], quoting *Tilley v Hudson River R. R. Co.,* 24 NY 471, 475 [1862]).

Every witness described Mr. Rhoades' enveloping love for his children and daily involvement in their care and development. Mrs. Rhoades testified that although Mr. Rhoades worked full-time, he was home by 5:30 p.m. almost every evening and readily cared for the children, calmly and lovingly. The Court viewed a video[(23)] of Mr. Rhoades with his family which revealed his loving demeanor and deep involvement with his children. Mr. Rhoades' friend, Mr. Albanese, said he would not go out in the evenings until the children were asleep. His mother-in-law said he took Luke everywhere with him, and he rocked him to sleep every night. She described Mr. Rhoades as very intelligent, very kind, and very generous; an admirable person.

Although the children were very young at the time of Mr. Rhoades' death, the testimony and evidence established a very strong bond between Mr. Rhoades and his children, especially Luke. They were together constantly at night and on weekends. He was teaching Luke words in French as he was studying. Mrs. Rhoades testified that they joked that Luke didn't have legs when his dad was home, because he always had Luke in his arms. He also spent time with Amelia and would rock her at night when she was colicky. Despite their young ages, Mr. Rhoades had already established New York State 529 College Savings accounts for both children, obviously preparing for their educational futures.

Claimant called Dr. James Mikesell, who had a Ph.D., in Psychology, Human Development and Family Studies to testify about the loss of a father on children. Dr. Mikesell did not examine or meet with Luke or Amelia, but his testimony generally set forth the profound impact an involved father can have on his children's development. Although their grief and loss would not be as complex, even children as young as Luke and Amelia can suffer an indirect impact from the acute bereavement of other family members.

The absence of a father places children at a greater risk for mental health issues, such as depression and anxiety, substance abuse, and delinquency. Family dynamics are changed; the mother often takes on dual roles and a son may try to fill the father's role. There is reorganization and recalibration over time in the family. Dr. Mikesell noted, not surprisingly, that the more resources a family has, the better the family will be able to handle the changes. He also noted that individual resiliency, social and family supports, financial and community resources can all minimize the negative risks of losing the father.

Since Mr. Rhoades' death, the children have lived with both Mrs. Rhoades and her mother. On the night of the accident, Mrs. Antoniou was staying at the Rhoades' home, and it was anticipated even before that night that she would be living for extended periods with the family. Mr. Rhoades was designing an in-law apartment in their basement so she could stay in comfort. After they received the news of the accident, Mrs. Rhoades was so distraught she was hospitalized for a number of days; her mother cared for the children, and Mr. Grevelding handled the estate. Mrs. Antoniou has resided with Mrs. Rhoades and the children since the accident. Their current home has a separate in-law apartment for her.

Mrs. Rhoades spoke about her overprotectiveness of the children and her hyper concern

for their safety. Both she and her mother described periodic events since Mr. Rhoades' death in which the children have reacted to the loss of their father.

The evidence more than adequately depicts the loss of guidance, care, and nurturing Amelia and Luke have suffered from the loss of their father which must be compensated. It is without question that Mr. Rhoades was an involved, loving father, and an exceptional role model for his children. Based upon the evidence, there is nothing to indicate that this would not have continued. Both Luke and Amelia have suffered and will continue to suffer the loss of their father's physical, moral, and intellectual care and guidance. Placing a dollar value on the loss of a parent's nurture, care and guidance is inherently difficult, and the Court has considered other cases to assess what has been found to be reasonable (*see Bryant v New York City Health & Hosps. Corp.,* 93 NY2d 592 [1999] [$250,000 past lost parental guidance, $850,000 future]; *DeLong,* 89 AD2d 376 [$600,000 for three young children]; *Carlson v Porter,* 53 AD3d 1129 [4th Dept 2008] [$250,000 past loss of parental guidance per child, $750,000 future]; *Garcia v New York City Health & Hosps. Corp.,* 230 AD2d 766 [2d Dept 1996] [$750,000 for son, $850,000 for daughter]; *Smith v State of New York,* 2006-028-009 [Ct Cl, Sise, P. J., March 15, 2006] [$1,150,000 past, $200,000 future]; *Phelan v State of New York,* 11 Misc 3d 151 [Ct Cl 2005] [$800,000 past, $1,400,000 future]). Based upon the evidence and a review of case law, the Court awards Claimant, as Executor, the sum of $900,000 for Luke and $900,000 for Amelia for their loss of Mr. Rhoades' past parental care and guidance. As for their future loss of parental care and guidance, the Court awards for the children until they reach majority, the sum of $1,100,000 for Luke and $1,300,000 for Amelia.

LOSS OF INCOME, SUPPORT, AND HOUSEHOLD SERVICES

Numerous witnesses and documents were presented to establish Mr. Rhoades' earning power, character, and habits. Mr. Rhoades began his career in telecommunications and continued in that field. Over the course of his short career, he changed companies a few times to obtain a better position and higher salary, but had been continuously employed for many years prior to his death. When he died, he was employed at Cornell University by Cornell Information Technologies as Director of Communications Products and IT with a salary of $142,424. Both Mrs. Rhoades and Claimant spoke of how much Mr. Rhoades loved his job at Cornell. He enjoyed the variety of people with whom he worked, the location, and the salary. He found it challenging and felt it was where he was meant to be.

Mr. Rhoades also took care of the household finances. He saved prudently and invested in the stock market. He made a $106,500 down payment on the house in Tully from his trust fund. He established Individualized Retirement Accounts (IRAs) for himself and Mrs. Rhoades and made regular contributions. He started New York State 529 plans for the children's education. When he lost his parents, Mr. Rhoades had trust fund accounts with Morgan Stanley, and he continued to use that firm for other financial dealings.

The income tax returns[(24)] from 2000 to 2004 and the social security itemized statements[(25)] from 1996 reflect the following:

YEAR	EMPLOYER	GROSS EARNINGS	TOTAL EARNINGS
1996	Verizon (New York)	$49,703	
1996	Village of East Syracuse	$2,400	$52,103
1997	Verizon (New York)	$55,500	

1997	Village of East Syracuse	$600	$56,100
1998	Verizon (New York)	$22,035	
1998	Verizon (New England)	$110,700	$132,735
1999	Verizon (New England)	$3,323	
1999	Choice One Communications	$81,063	$84,386
2000	Choice One Communications	$38,708	
2000	Telergy Network	$26,928	
2000	Fairpoint-Carrier	$59,225	$124,861
2001	Village of East Syracuse	$6,300	
2001	Telergy	$48,591	
2001	Cornell University	$83,711	$138,602
2002	Village of East Syracuse	$8,400	
2002	Cornell University	$148,910	$157,310
2003	Village of East Syracuse	$2,100	
2003	Cornell University	$140,942	$143,042
2004-Jan. 23	Cornell University	$23,775	$23,775

Mary D. Zielinski, the Associate Director for Compliance, Financial Education and Retirement Programs at Cornell University, testified for Claimant. Mr. Rhoades' semimonthly paycheck (24 per year) dated January 15, 2004[(26)] was reviewed. His gross earnings were $5,934.00 out of which taxes were deducted. Three items were deducted from Mr. Rhoades' pay: 25% of his health insurance premium, a tax-deferred annuity, and parking. The exhibit also shows the benefits Cornell University paid on Mr. Rhoades' behalf: 75% of his health insurance premium, life insurance premium, long-term disability premium, and retirement plan. Ms. Zielinski said, pursuant to the IRS Code, the maximum amount an individual less than 50 years of age could contribute to a tax-deferred annuity in 2004 was $13,000. Mr. Rhoades was on track to contribute $12,999.84, and had contributed the maximum allowable since he was hired. In addition, Cornell University pays 10% of an employee's gross salary into the retirement plan. For Mr. Rhoades, in January 2004, the amount per pay statement was $593.43. His retirement account summary[(27)] was provided which contained both the tax-deferred annuity and the Cornell University retirement. The combined total, as of June 30, 2004, was $49,260.28.

Other benefits were or would become available to Mr. Rhoades through his continued employment at Cornell University. For Cornell employees, tuition is waived for up to four credit hours per semester. Cornell would also make contributions to a job-related

class at other schools. There was no evidence that Mr. Rhoades was planning to continue his education, however. Cornell also offered the Children's Tuition Program, which was described at length by Ms. Zielinski, and a chart of the tuition benefits was admitted.[(28)] Mr. Rhoades was not yet eligible for this program at the time he died, but would have become eligible in the summer of 2005.

Tammy Blasz, a Human Resource Generalist at Cornell University, was called to provide information regarding Mr. Rhoades' salary benefits. She explained that the University has a Salary Improvement Program set up by the Senior Leadership and Board of Trustees. Each department is annually given an allotment of money and a minimum salary percentage increase for eligible employees, of which Mr. Rhoades was one. There is some flexibility in each department, so higher performing employees can get a greater than minimum percentage increase. Ms. Blasz determined that Mr. Rhoades had met the performance standards during his employment for the increase. She conservatively applied the minimum salary increase for the fiscal years 2004 - 2013 to Mr. Rhoades' salary. Those figures were submitted[(29)] along with Cornell University's contribution to his retirement and the maximum amount he could contribute for a tax-deferred annuity for the same time frame.

Michael R. Figler from Morgan Stanley Wealth Management testified for Claimant. He is a Senior Vice-President Financial Advisor who helps clients design investment programs to fit their needs and risk tolerance. Mr. Rhoades was one of his clients. He identified the trust account[(30)] held for Mr. Rhoades' benefit by Claimant as trustee. As of December 31, 1994, the inherited trust account balance was $210,430.50; this included no money from Mr. Rhoades' earnings. Statements from that account were submitted that encompassed the years 1999 - January 2004.[(31)] In 1999, the account balance was $402,786.41 which included mutual funds, money market funds, stocks, and a bond. The account balance changed over time due to market fluctuations and usage. In January 2004, there was a balance of $205,009.58. A withdrawal was made from this account in December 2001 of $107,000. The documents[(32)] for the purchase of the Rhoades' home in Tully reflect a cash payment of $106,523.04, with a closing date of December 20, 2001. A deposit of $77,697.50, was made into that account in October 2003, from the sale of a house in East Syracuse.

Mr. Rhoades had other accounts including an IRA rollover account[(33)] with Morgan Stanley with a balance of $89,389.71, as of January 31, 2004. Mr. Figler believed this account was probably the result of Mr. Rhoades taking his 401K from previous employment and putting it into an IRA to avoid taxes and penalties. There was also a Roth IRA account[(34)] funded in October 2003 with $3,000, and an IRA in the name of Isabelle

Rhoades.[35]

Mr. Figler described Mr. Rhoades as very bright and well informed with a particular interest in the stock market, especially technology and telecommunications stock. In the last 40 years, the average annual rate of return in the stock market, based on the Standard and Poor 500 Index, was 9.98%. The last 30 years had a rate of return of 11.44%, and the last 20 years was 8.5%. He agreed that stocks can be more volatile compared with treasury bills or money market accounts.

Daniel McGowan, a Ph.D., forensic economist also testified. He completed an economic loss evaluation. He began by reviewing Mr. Rhoades' earned income. From 1995 to 2005, his earnings grew at a rate of 10.6% and from 2000 to 2006 at an average annual rate of 9.9%. To be conservative, Dr. McGowan looked at the long-term increase in the monetary wage and assumed that Mr. Rhoades' income would grow at 2.5% per year. This was less than the increase projected with the Cornell Salary Improvement Plan.[36] The calculations of Mr. Rhoades' wage increases were not tied specifically to Mr. Rhoades' employment at Cornell but were based on statistical data. Dr. McGowan submitted a report[37] which summarized his analysis and Mr. Rhoades' projected income, fringe benefits, and household production.

Using the Pattern Jury Instructions (PJI) tables, Dr. McGowan found Mr. Rhoades' work-life expectancy to be 34 years. Using Mr. Rhoades' 2003 income and a growth rate of 2.5% over 34 years, Dr. McGowan calculated a total expected earnings loss of $7,713,000. He also computed the anticipated fringe benefits Mr. Rhoades received from Cornell. The accumulated fringe benefits totaled $1,542,800, being approximately 20% of the annual income figures.[38]

When determining household production, Dr. McGowan used a 1987 study as it provided a more detailed breakdown of data. He used a 2.5% growth rate that is consistent with the growth rate of the New York State minimum wage over the last 30 years. He also included a significant increase in household production after retirement followed by a decline around 70 as the person ages. He calculated the total value of household production over Mr. Rhoades' life expectancy as $653,393.

Dr. McGowan deducted an amount for personal consumption - that is what Mr. Rhoades would use for himself, from the earning and household production figures. Using a study of personal consumption statistics for a four-person family, Dr. McGowan made an annual deduction of 11.1%. He adjusted the amount as each child reached age 18 resulting in personal consumption of 12.2% with a three-person family, and 16.1% for a two-person family. The total personal consumption for Mr. Rhoades' life expectancy is $1,181,212. In arriving at this figure, Dr. McGowan acknowledged that he did not consider the actual spending habits of the Rhoades' family or what Mrs. Rhoades actually expended to replace Mr. Rhoades' household production.

The summary of Dr. McGowan's analysis shows a total economic loss of $8,728,980 from loss of earnings and loss of household production after deducting for personal consumption. In addition, Dr. McGowan looked at the loss of Cornell's Children's Tuition Scholarship and determined a value for that benefit. Dr. McGowan said the tuition benefit, whether used or not,

was still a benefit with value.

Mr. Rhoades, however, had not yet qualified for the Tuition Scholarship benefit. The benefit extends to attendance at Cornell, and given that it is unknown whether the children will attend college or where they will go, the Court finds the value of this benefit in the damage award is unreasonably speculative. Although, at the time of his death, Mr. Rhoades was very happy with his employment with Cornell University, it is entirely too speculative to assume he would have remained there until the children were college age. Mr. Rhoades demonstrated, through his work history, that he was not constrained to stay with one employer, and he actively pursued new and better opportunities. Polley McClure, the Vice President for Information Technology at Cornell testified that she anticipated, given Mr. Rhoades' talents, that he would advance to other positions in the technology field at other universities or in the private sector.

The State called Anthony Riccardi, a Forensic Economist and Enrolled Actuary with degrees in Mathematics and Economics. He, too, reviewed the financial documents and depositions involved in this case. In his opinion, Dr. McGowan's salary growth rate of 2.5% was aggressive. Over the last 20 years, wages have had a difficult time keeping up with the Consumer Price Index (CPI). Also, he felt that Dr. McGowan's calculations rely upon Mr. Rhoades maintaining employment at Cornell for the remainder of his working life, and this is belied by published data from the Bureau of Labor Statistics. The data shows that people of Mr. Rhoades' age tend to change employment four - to - five times, and he suggested that those changes do not necessarily result in greater income. Dr. McGowan's calculations, however, did not rely upon Mr. Rhoades staying at Cornell; rather, his work history supported the fact that his job changes consistently resulted in wage increases.[(39)] Also, Mr. Rhoades was highly motivated based upon the evidence. He seemed driven to advance his earnings and savings. It is unlikely that he would have chosen a lesser paying job while he had children and a wife to support.

Mr. Riccardi also took issue with the loss for household production opining that it was more accurately assessed by the actual expenditures for the services that had been performed. He also felt that the significant increase in household production (about 70%) at the time of retirement is inflated. Mr. Riccardi felt Dr. McGowan's use of a 1987 study increased by the CPI, was inaccurate because this reflects variation in household production patterns over 26 years.

On cross-examination, Mr. Riccardi conceded that the growth rate for wages at Cornell between 2004 and 2013 exceeded Dr. McGowan's 2.5% rate. However, he still opined this reflected a high end growth rate and an optimistic assumption. Despite his objection to the 26-year-old household production patterns Dr. McGowan used, he could not say what differences exist now, just that he felt they would not be the same.

The determination that the Court must make is what is the reasonable expectancy of future assistance of support and income from Mr. Rhoades that was prematurely terminated by his wrongful death (*Gonzalez,* 77 NY2d at 668). Relevant to the determination of pecuniary damages related to both loss of support and loss of inheritance, are Mr. Rhoades' present earnings and future earning potential, expectations for advancement, and probability of means to support heirs (*Id.*). The loss of household services is the cost of replacing Mr. Rhoades' services (*see Klos v New York City Tr. Auth.,* 240 AD2d 635 [2d Dept 1997], *lv dismissed* 91 NY2d 846 [1997]).

The proof well establishes that Mr. Rhoades was a hard-working, driven to excel, ambitious individual. He had prospered during his short career and invested wisely. He was financially responsible for his family and had carefully managed their developing wealth. Mrs. Rhoades was a stay-at-home mother at the time of the accident, and it seems from the

evidence that this would have continued while the children were minors. Mr. Rhoades had sufficient income to support his family comfortably without the need of a second income.

After reviewing Dr. McGowan's report,[(40)] the assumptions he made in arriving at his projections have not been convincingly challenged. Although Mr. Riccardi felt a 2.5% growth rate was high, it is less than Mr. Rhoades' potential base increases at Cornell from 2004 - 2013. Although the household production figures are purely statistical, it is clear from the testimony that Mr. Rhoades was very involved with the maintenance of the house and yard, as well as assisting with childcare and household chores which undisputedly has a monetary value (*DeLong,* 89 AD2d at 386-387). There is no requirement that Claimant produce actual expenditures to support his expert's evaluation, and proof of costs for services incurred is not necessary for an award in a wrongful death action (*see Mono v Peter Pan Bus Lines, Inc.*, 13 F Supp 2d 471, 480 [S.D.N.Y. 1998]; *Phelan,* 11 Misc 3d at 170, n. 25; *Horton v State of New York,* 50 Misc 2d 1017 [Ct Cl 1966]). The Court, therefore, accepts the loss of income, personal consumption, and loss of household services figures supplied by Dr. McGowan in his report.[(41)] Based upon the evidence, the Court awards the distributees the following:

A total of $1,796,346 past loss of income, support and loss of household production ($1,731,797 for past loss of income and support and $64,549 for past loss of household production); and a total of $6,932,634 for future losses ($6,343,790 for future loss of income and support and $588,844 for future loss of household production).

LOSS OF INHERITANCE

The distributees of Mr. Rhoades may also recover the loss of prospective inheritance attributable to Mr. Rhoades' premature death. An award for such loss is not always given, particularly with such a young decedent, since to predict what will be inherited many years into the future in many cases would require pure speculation bordering on clairvoyance (*see Zaninovich v American Airlines,* 26 AD2d 155, 160-161 [1st Dept 1966]). Most of the cases that have awarded such damages do not adequately explain the proof of loss presented that lifted that case out of the realm of conjecture (*see Motelson v Ford Motor Co.,* 101 AD3d 957 [2d Dept 2012]; *Nussbaum v Gibstein,* 138 AD2d 193, 210 [2d Dept 1988]; *Long v City of New York,* 81 AD2d 880 [2d Dept 1981]; *Sternfels v Metropolitan St. Ry. Co.,* 73 AD 494 [1st Dept 1902], *affd* 174 NY 512 [1903]; *Coyne v Etra,* 183 Misc 2d 514 [Sup Ct Nassau County 1999]; *Mahler v American Airlines,* 49 Misc 2d 693, 699 [Sup Ct NY County 1966]). To the extent that there is evidence a decedent had a propensity to build his estate and had distributees that would have, in the normal course, been expected to outlive the decedent, an award for loss of inheritance is permitted (*Daniel v City of New York* 8 AD3d 6 [1st Dept 2004]). The determination of what is an appropriate award is a question of fact, not necessarily limited to the "dollars and cents proof." (*Parilis v Feinstein,* 49 NY2d 984, 985 [1980]; *Daniel*, AD3d at 7).

Claimant called an Investment Management Consultant, Steven Pomerantz, Ph.D., to evaluate Mr. Rhoades' ability to accumulate wealth had he not died. For his evaluation, he reviewed historical financial information for Mr. Rhoades and used Dr. McGowan's report.[(42)] He also had to make some assumptions such as a 2.5% salary growth, an investment return of 8.2% and regular contributions to the IRA accounts during Mr. Rhoades' work life. He assumed there would be contributions and withdrawals from the 529 plans[(43)] established for the children's education.

The 8.2% earnings rate was derived looking historically at a long-term average of a portfolio consisting of 50% stocks and 50% bonds, as set out in an analysis by Vanguard. He also considered information received from Morgan Stanley as to prospective rates. This rate is

also in keeping with Mr. Figler's growth rates. Dr. Pomerantz also assumed Mr. Rhoades would continue contributing the approximately 5% of his annual salary to his IRA accounts during his work life. The 529 contributions were about 1.5% of his salary and would be used for the children's college educations, but Dr. Pomerantz assumed that after the children finished or left school, Mr. Rhoades would continue to save that same percentage of his salary through retirement. Dr. Pomerantz tracked only the investment gain, and did not include any of the contributions made because they are just a transfer of income. He prepared a spreadsheet[(44)] that reflects these assumptions with a return of 8.2%. He assumed all contributions stop at age 62 when Mr. Rhoades would have been expected to retire with additional growth attributed only to investment gains. According to Dr. Pomerantz, the total growth in investments over the course of Mr. Rhoades' life expectancy at a 5% savings rate amounted to $4,008,265.[(45)] At a savings rate of 2% until he reached age 62 with gains accruing until age 75, his accumulated growth would be $1,603,306. Those figures do not include the 1.5% contributions made in lieu of the 529 plans after the children finished college, as Dr. Pomerantz provided that information separately.[(46)] The analysis also did not include any portion of the Morgan Stanley investments that originated as part of Mr. Rhoades' trust or the IRA Rollover Account with Morgan Stanley. Nor did Dr. Pomerantz's projections include any portion of Mr. Rhoades' retirement savings through his employment with Cornell. Dr. Pomerantz did not and could not speculate as to what accounts Mr. Rhoades would have used during his retirement.

Mr. Riccardi reviewed Dr. Pomerantz's projection of Mr. Rhoades' accumulation of assets during his lifetime and felt it was simplistic and speculative. He opined that the 8.2% growth rate was obtained from two investment companies, which Mr. Riccardi attributed to advertising hype. The growth rate based upon the Standard and Poor 500, is not what a 50/50 investment philosophy would yield. Also, Mr. Riccardi noted that the Standard and Poor 500 had barely returned to the 2007 level at the time of trial. For these reasons he felt the 8.2% was unreasonable. Mr. Riccardi also noted that Mr. Rhoades would have to take distributions from his IRA accounts by age 70. Dr. Pomerantz did not address this in his report or testimony.

Mr. Riccardi opined that the 1.5% treasury bond rate was the appropriate growth rate. It is the most risk-averse way to invest. At that rate, Mr. Riccardi calculated that Mr. Rhoades' IRA accounts would be worth about $200,000 at age 70.

Although compensated above for the loss of support and income attributable to

Mr. Rhoades' death, the evidence also supports that Mr. Rhoades would have accumulated greater wealth, and his estate would have been significantly larger if he had lived to his normal life expectancy. Where there is an evidentiary basis upon which to predict probable future accumulated wealth, an award for loss of inheritance can be made (*see Motelson v Ford Motor Co.,* 101 AD3d at 962-963; *Daniel v City of New York,* 8 AD3d 6 [1st Dept 2004]). Here, the evidence supports the reasonable conclusion, that Mr. Rhoades would have had many years as a high wage earner and investor. He had a well-established inclination to contribute significantly to his retirement accounts. Claimant has submitted proof isolated solely for the gains from two of Mr. Rhoades' IRA retirement investments.[(47)] It is only this amount that the Court has considered in finding that an award for loss of inheritance is warranted to the distributees who are all healthy and have longer life expectancies than Mr. Rhoades, making it highly probable they would have survived Mr. Rhoades if he had died at his normal life expectancy. The Court has not considered his other retirement accounts and voluntary and involuntary contribution plans through his employment with Cornell, his Morgan Stanley rollover IRA account or trust account or any of the real estate he owned.

Here, Mr. Rhoades had a good job with retirement benefits. It is reasonable to conclude that Mr. Rhoades and Isabelle could have drawn from his other accounts at retirement

preserving the Roth IRA accounts for inheritance. Mr. Rhoades contributed regularly and significantly (about 4%) to these IRA accounts. The Court did not include the additional 1.5% Mr. Rhoades was contributing to the children's New York State 529 Plan for those years after the children would have attended college. The Court also is not persuaded that Mr. Rhoades would have continually maintained the same rate of investment throughout his life since, undoubtedly, there would be unexpected contingencies encountered or the costs of college tuition,[(48)] which might well require more of his income.

To account for these fluctuations in Mr. Rhoades' ability to contribute to these two retirement accounts, the Court finds that the 2% contribution over his work life expectancy is a reasonable expectation of the loss of accumulated wealth. Although Mr. Riccardi opined that mandatory distributions would be required from these two IRA accounts when Mr. Rhoades reached age 70.5 years, because these accounts were Roth IRAs, pursuant to the Internal Revenue Code, no distributions would be required (*see* 26 U.S.C.A. § 408 [a] [6]). Therefore, the Court finds the loss of inheritance for these distributees is $1,603,306. Claimant suggests that the *Kaiser* formula be used to apportion the loss between the distributees, however, the Court finds this formula inapplicable to an award for loss of inheritance, which is not dependent upon the numbers of years each distributee would anticipate decedent's support. Here, the Court finds that distribution based upon EPTL § 4-1.1, the most appropriate guidance for apportionment of each of the distributees' pecuniary loss.

Isabelle Rhoades - $826,653.00

Luke Rhoades - $388,326.50

Amelia Rhoades - $388,326.50

The Court is also charged with setting forth the period of years over which this award is intended to be paid (CPLR 4213 [b]; CPLR 4111 [e]). This award is undisputedly an award for future damages; that is, the amount the distributees would have inherited if Mr. Rhoades had lived to his normal life expectancy (*see Milbrandt v Green Refractories Co.,* 79 NY2d 26, 33 [1992] [decision on another point]; *but compare Coyne v Etra,* 183 Misc 2d 514, 516-520 [Sup Ct Nassau County 1999] [found loss of inheritance award past damages]). Although a loss of inheritance award more easily lends itself to a lump-sum[(49)] payment, pursuant to CPLR 4111 (e) and CPLR Article 50-B, this Court shall direct payment of this future damage award over the balance of Mr. Rhoades' life expectancy, which is the time frame over which his wealth accumulation would have occurred, from the date of this Decision.

DAMAGES RECAPITULATED, TO BE PAID TO CLAIMANT AS EXECUTOR:

PERSONAL INJURY CAUSE OF ACTION

Past Award for Mr. Rhoades' Pre-Impact Terror - **$250,000**

WRONGFUL DEATH CAUSE OF ACTION

Past Damages:

Funeral Expenses - $15,602.68

Loss of Care, Guidance & Nurturing - $1,800,000

Luke - $900,000

Amelia - $900,000

Loss of Income, Support & Household Services - $1,796,346

Isabelle - $970,026.84

Luke - $395,196.12

Amelia - $431,123.04

Total Past Wrongful Death - $3,611,948.68

Future Damages:

Loss of Care, Guidance & Nurturing - $2,400,000

Luke - $1,100,000

Amelia - $1,300,000

Loss of Income, Support & Household Services - $6,932,634

Isabelle - $3,743,622.26

Luke - $1,525,179.48

Amelia - $1,663,832.16

Loss of Inheritance - $1,603,306

Isabelle - $826,653.00

Luke - $388,326.50

Amelia - $388,326.50

Total Future Wrongful Death Damages - $10,935,940

TOTAL DAMAGES - $14,797,888.68

Since the amount of future damages exceeds $250,000.00, a structured judgment is required pursuant to CPLR 5041 (e). The Chief Clerk is directed to stay entry of judgment in accordance with this Decision until a hearing is held pursuant to CPLR Article 50-B,[(50)] which will be scheduled as soon as practicable. If Defendant also seeks a collateral source offset pursuant to CPLR 4545, Defendant should make a request for a hearing in writing within 45 days of the date of filing of this Decision with the Clerk of the Court.

For purposes of CPLR Article 50-B, the Court encourages the parties to agree upon the discount rate to be applied and to formulate a structured settlement of their own (CPLR 5041 [f]). In the event the parties fail to reach agreement, each party shall submit a proposed order directing judgment in writing conforming to the requirements of the CPLR Article 50-B within 90 days of the date this Decision is filed with the Clerk of the Court.

Any filing fee paid by Claimant shall be recovered pursuant to § 11-a (2) of the Court of Claims Act.

All trial motions not heretofore decided are now deemed denied.

September 30, 2013
Syracuse, New York

DIANE L. FITZPATRICK
Judge of the Court of Claims

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1. After trial, this Court dismissed the claim. The Appellate Division, Fourth Department reversed and remanded this case (*Grevelding v State of New York*, 91 AD3d 1309 [4h Dept 2012]).

2. All trial exhibits refer to the damages trial unless specifically noted otherwise.

3. Although Mr. Cassoni estimated he and Mr. Rhoades were traveling slower at this trial, the Court finds the statement he gave to police, as found by this Court in its liability Decision (p. 3), to be more reliable.

4. At the time of trial, Mr. Beebe had been promoted to lieutenant.

5. Exhibit A.

6. Exhibit B.

7. Exhibit 1. This exhibit was received during the liability trial in 2008 as Exhibit 3.

8. Petechiae . . . minute hemorrhagic spots, of pinpoint to pinhead size in the skin . . . (Stedman's Medical Dictionary 1337 [26th ed., 1995]).

9. Exhibit ZZ.

10. Exhibit 74.

11. Exhibit 17.

12. Exhibit 1.

13. Vehicle & Traffic Law § 1180 (a).

14. Exhibit OOOO, Liability Trial Transcript, Vol. 1, pp. 175-178.

15. Exhibit OOOO, Liability Trial Transcript, Vol. 5, pp. 631-632.

16. Claimant's Exhibit 74.

17. Exhibit 84.

18. Exhibit 90.

19. Exhibit 1.

20. Exhibit 66.

21. Exhibit 67.

22. Exhibit 68.

23. Exhibit 103.

24. Exhibits 48 - 52.

25. Exhibit 53.

26. Exhibit 99.

27. Exhibit 55.

28. Exhibit 101.

29. Exhibit 47.

30. Exhibit 62.

31. Exhibit 58.

32. Exhibits 64 and 65.

33. Exhibit 61.

34. Exhibit 60.

35. Exhibit 61.

36. See Exhibit 47.

37. Exhibit 54.

38. This does not include the Cornell children's tuition benefit.

39. There was one exception between 1998 and 1999 which is unexplained.

40. Exhibit 54.

41. Exhibit 54.

42. His analysis did not include any growth in Mr. Rhoades' trust accounts from his inheritance.

43. Exhibit 63.

44. Exhibit 83.

45. Exhibit 83.

46. Exhibit 83, page 2.

47. Exhibit 83.

48. Since the Court agrees with Mr. Riccardi's position that given Mr. Rhoades' probable job changes, it does not consider Cornell's tuition benefits.

49. The only case this Court could find that discussed the issue is *Coyne v Etra,* 183 Misc 2d at 520-522, in which the Court found the loss of inheritance award past damages which should be reduced to present value as of the date of the fatal accident and paid in a lump sum.

50. All interest calculations shall be determined at such hearing.