134 A.D.3d 1563
Supreme Court, Appellate Division,
Fourth Department, New York.

Brandon William GARDNER, Individually and as Administrator with Will Annexed of the Estate of William G. Gardner, Deceased Cynthia Ann Gardner and Ryan J. Gardner, Claimants–Respondents–Appellants,
v.
STATE of New York, Defendant–Appellant–Respondent. (Claim No. 109520.).

Dec. 31, 2015.

Synopsis

Background: Claimants brought personal injury and wrongful death action against the State. The Supreme Court, Appellate Division, Diane L. Fitzpatrick, J., 79 A.D.3d 1635, 914 N.Y.S.2d 537, entered judgment in favor of plaintiffs on issue of defendant's liability, and upon remitter, the Court of Claims, Diane L. Fitzpatrick, J., 43 Misc.3d 211, 978 N.Y.S.2d 736, awarded damages to plaintiffs for, inter alia, loss of inheritance, past and future loss of financial support, past and future loss of parental guidance, and preimpact terror. Both parties appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] award for loss of inheritance was not against the weight of the evidence;

[2] award for loss of inheritance could be paid in periodic payments;

[3] award of damages for loss of support was not supported by the evidence;

[4] award for future loss of support did not deviate from what would have been considered reasonable; and

[5] award for preimpact terror did not deviate materially from what would have been reasonable.

Affirmed as modified.

Attorneys and Law Firms

****806** Eric T. Schneiderman, Attorney General, Albany (Frederick A. Brodie of Counsel), for Defendant–Appellant–Respondent.

****807** Anthony F. Endieveri, Camillus, for Claimants–Respondents–Appellants.

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, and DeJOSEPH, JJ.

Opinion

MEMORANDUM:

***1563** Claimants' decedent died of injuries he sustained when the vehicle he was driving slid across the roadway, struck a snowbank packed against the concrete barrier, and vaulted off the highway bridge onto the roadway below. Following a trial on liability, the Court of Claims dismissed the claim, but on appeal we concluded that defendant was negligent and that its negligence was a proximate cause of decedent's accident (*Gardner v. State of New York,* 79 A.D.3d 1635, 1637, 914 N.Y.S.2d 537). We thus granted judgment on liability and remitted the matter to the Court of Claims for a trial on the issues of damages only (*id.*). Defendant now appeals and claimants cross-appeal from the judgment awarding damages for, inter alia, loss of inheritance, past and future loss of financial support, past and future loss of parental guidance, and preimpact terror.

[1] **[2]** With respect to the award of damages for loss of inheritance, we reject claimants' contention that the court erred in using a personal consumption rate of 45%. Claimants' expert used a personal consumption rate of 28.5%, while defendant's expert ***1564** used a rate of 95–99%. The court properly concluded that the figure used by defendant's expert was too high in light of the evidence that decedent was frugal, but claimants' expert failed to consider decedent's spending habits the few years prior to his death and his limited assets at the time of his death. The court's determination is not against the weight of the evidence (*see generally Black v. State of New York* [Appeal No. 2], 125 A.D.3d 1523, 1524–1525, 3 N.Y.S.3d 837). We further reject claimants' contention that the court erred in awarding claimants only 50% of the amount it determined that decedent would have

accumulated in savings and investments at his normal life expectancy. The award of damages for loss of inheritance "may be based upon the decedent's age, character, earning capacity, [and] life expectancy, and the circumstances of the distributees" (*Motelson v. Ford Motor Co.*, 101 A.D.3d 957, 962–963, 957 N.Y.S.2d 341, *affd.* 24 N.Y.3d 1025, 997 N.Y.S.2d 678, 22 N.E.3d 186). We conclude that the court considered those factors in its determination, which is not against the weight of the evidence (*see generally Black*, 125 A.D.3d at 1524–1525, 3 N.Y.S.3d 837).

[3] We reject defendant's contention that the court erred in directing the award of damages for loss of inheritance to be paid in periodic payments pursuant to CPLR 5041(e). Defendant relies on CPLR 5041(b) in arguing that the award should have been paid in a lump sum, but we reject that argument. CPLR 5041(b) provides, in relevant part, that "[t]he court shall enter judgment in lump sum for past damages, for future damages not in excess of [$250,000], and for any damages, fees or costs payable in lump sum or otherwise under subdivisions (c) and (d) of this section." CPLR 5041(b) is not applicable because the loss of inheritance award does not constitute past damages (*see generally Milbrandt v. Green Refractories Co.*, 79 N.Y.2d 26, 33, 580 N.Y.S.2d 147, 588 N.E.2d 45), or future damages less than $250,000, and CPLR 5041(c) and (d) are not applicable. Although defendant contends that this was an oversight by the Legislature, we note that, "[i]f a change should be made, it is for the Legislature, and not the courts, to make" (*Liff v. Schildkrout*, 49 N.Y.2d 622, 634, 427 N.Y.S.2d 746, 404 N.E.2d 1288).

****808** **[4]** **[5]** **[6]** We agree with defendant that the award of damages for past loss of financial support, i.e., the 8 ½ years between the date of the accident and the date of the court's decision, is not supported by the evidence and must be set aside (*see generally Carlson v. Porter* [Appeal No. 2], 53 A.D.3d 1129, 1133–1134, 861 N.Y.S.2d 907, *lv. denied* 11 N.Y.3d 708, 868 N.Y.S.2d 601, 897 N.E.2d 1085; *Allison v. Erie County Indus. Dev. Agency*, 35 A.D.3d 1159, 1161, 829 N.Y.S.2d 294). Damages may be recovered for the loss of support to claimants (*see Gonzalez* ***1565** *v. New York City Hous. Auth.*, 77 N.Y.2d 663, 668, 569 N.Y.S.2d 915, 572 N.E.2d 598). The court "may consider both the evidence of the support decedent provided to the [claimants] before [his] death and evidence of the support the [claimants] could reasonably have expected but for [his] death" (*Valicenti v. Valenze*, 68 N.Y.2d 826, 829, 507 N.Y.S.2d 616, 499 N.E.2d 870). The court's awards of damages for past loss of financial support of $275,100 for decedent's older son, who was 19 years old at the time of decedent's death, and $473,400 for decedent's younger son, who was 15 years old at the time of decedent's death, are not supported by the evidence. We instead conclude that an award of damages of $175,000 for the older son and $250,000 for the younger son for past loss of financial support are the maximum amounts that are supported by the evidence (*see generally Allison*, 35 A.D.3d at 1161, 829 N.Y.S.2d 294). We therefore modify the judgment accordingly, and we grant a new trial on damages for past loss of financial support only unless claimants, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce the award of damages for past loss of financial support to $175,000 for decedent's older son and $250,000 for decedent's younger son, in which event the judgment is modified accordingly. Contrary to defendant's further contention, the award of damages for future loss of financial support is supported by the evidence.

[7] **[8]** We reject defendant's contention that the award of damages for past and future loss of parental guidance deviates materially from what would be considered reasonable compensation (*see* CPLR 5501[c]). Here, decedent's children were teenagers, but it is well settled that an award of damages for loss of parental guidance is not limited to children, and the court may even award damages to financially independent adults (*see Gonzalez*, 77 N.Y.2d at 668–669, 569 N.Y.S.2d 915, 572 N.E.2d 598). We decline to disturb the award, which totaled $875,000 for both children for both past and future loss of parental guidance. Contrary to claimants' contention, the award of $250,000 for preimpact terror did not deviate materially from what would be reasonable compensation (*see generally Lang v. Bouju*, 245 A.D.2d 1000, 1001, 667 N.Y.S.2d 440; *cf. Klos v. New York City Tr. Auth.*, 240 A.D.2d 635, 636–638, 659 N.Y.S.2d 97, *lv. dismissed* 91 N.Y.2d 846, 667 N.Y.S.2d 680, 690 N.E.2d 489, 91 N.Y.2d 885, 668 N.Y.S.2d 556, 691 N.E.2d 628).

Defendant contends that, on the prior appeal, we should have directed that on remittal there should also be a new trial on the issue of decedent's alleged contributory negligence, as we did in the similar case of *Grevelding v. State of New York*, 91 A.D.3d 1309, 1310–1311, 937 N.Y.S.2d 782. That contention, however, was raised by the claimant in the appeal in *Grevelding*, and it was not raised in the prior appeal in this case. We note in any

***1566** event that, "even if decedent was negligent in the operation of his vehicle, such negligence would not have resulted in the vehicle leaving the roadway. Rather, the snow ramp defendant negligently created was the sole proximate cause of decedent's vehicle ****809** vaulting over the concrete guard barrier" (*Grevelding v. State of New York* [Appeal No. 2], 132 A.D.3d 1332, 1334, 17 N.Y.S.3d 813).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by setting aside the award of damages for past loss of support, and as modified the judgment is affirmed without costs, and a new trial is granted on damages for past loss of support only unless claimants, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce the award of damages for past loss of support to $175,000 for decedent's older son and $250,000 for decedent's younger son, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

All Citations

134 A.D.3d 1563, 24 N.Y.S.3d 805, 2015 N.Y. Slip Op. 09753

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