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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MICHAEL BELOYIANIS and VIRGINIA BEATON, Co-Administrators of the Estate of EDWARD BELOYIANIS,

Plaintiffs,

Index No.: 14121/04

-against-

THE NEW YORK AND PRESBYTERIAN HOSPITAL formerly known as THE PRESBYTERIAN HOSPITAL in the CITY OF NEW YORK a/k/a COLUMBIA PRESBYTERIAN MEDICAL CENTER, DAVID PRICE ROYE, JR., M.D., CRAIG STANTON RADNAY, M.D., SANJEE V. SURATWALA, M.D., MARC SETH ARKOVITS, M.D., ELIZABETH HEIDI JEROME, M.D., BERND HINRICH THIESSEN, M.D., ALAN ARTHUR JOHNSON, M.D., STEPHEN CHAN, M.D., CARRIE BRENDA RUZAL SHAPIRO, M.D., ROBERT LOUIS DELAPAZ, M.D., TIMOTHY ROBIN GERSHON, M.D., NEW YORK ORTHOPAEDIC HOSPITAL ASSOCIATES, P.C., JOHN DOE 1- 10, M.D., JANE DOE 1- 10, M.D. (the names being fictitious, true names unknown, said individuals being employees of the New York and Presbyterian Hospital and are named to preserve causes of action that plaintiffs may have against said individuals in the event it is discovered they created, contributed or are otherwise culpable in their conduct for causing this accident),

ORDER

Present:

Hon. Howard H. Sherman
J.S.C.

Defendants.

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On the court's own application, the decision/order of May 16, 2017 in the above entitled matter is hereby recalled and vacated and the accompanying Amended Decision/Order is signed this date.

Dated: May 18, 2017
Bronx, New York

Howard H. Sherman
J.S.C.

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COUNTY OF BRONX

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Defendants.

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AMENDED DECISION/ORDER

Present:

Hon. Howard H. Sherman
J.S.C.

In this medical malpractice action, Defendants Dr. David Roye and the New York Presbyterian Hospital (NYPH), and Drs. Craig Stanton Radnay, M.D., Sanjee V. Suratwala, M.D., Marc Seth Arkovits, M.D., Elizabeth Heidi Jerome, M.D., Bernd Hinrich Thiessen, M.D., Alan Arthur Johnson, M.D., Stephen Chan, M.D., Carrie Brenda Ruzal Shapiro, M.D., Robert Louis DelaPaz, M.D., and Timothy Robin Gershon, M.D. move pursuant to CPLR Sec. 4404(a) to set aside a jury verdict and enter judgment for defendants, or in the alternative, directing a

new trial on the one departure from good and accepted medical practice and proximate cause the jury found, to wit, the failure to send Edward Beloyianis for a CAT scan, and in the alternative, vacating any wrongful death awards to plaintiffs Virginia Beaton and Michael Beloyianis or in the alternative, directing a new trial on damages for past pain and suffering if the plaintiffs do not stipulate to a reduced amount.

This action arises from spinal surgery performed on plaintiff Edward Beloyianis who was, at the time of surgery on November 22, 2002, fourteen years old. The surgeon was Dr. David Roye. The other named defendants were all physicians at NYPH who had some contact with the patient and or case, including orthopedic surgeons, radiologists, and interventionists.

The case against Heidi Jerome, M.D., the anesthesiologist, was discontinued at trial.

The surgery was performed at NYPH and had been deemed necessary to attempt to reduce severe congenital scoliosis of the spine. In fact, Edward Beloyianis had 3 spine curves: in the thoracic, thorolumbar, and in the sacral spine. In addition to the severity of these spinal curvatures, he also had a history of prior surgeries, as well as vascular conditions that made the surgery all the more difficult and risky. The surgery required the placement of screws, and the attachment of rods to the screws at several levels of the thoracic and lumbar spine.

The complexity of the surgery and the risks involved were extensive. Informed consent or lack thereof was one of the issues raised and decided at trial.

The surgery began on the morning of November 22, 2002with Dr. Arkovits, a resident at the time, performing what was called the initial approach. Dr. Roye was not present for most of this portion of the surgery. At some point, Dr. Roye came in to the operating room, and made some adjustment to the approach and the positioning of the patient, and then began the spinal

portion of the surgery. Eventually, he began placing the screws in the spinal column. Plaintiff's spinal chord sensory functioning was being monitored intraoperatively. At some time prior to completion of the placement of the screws, the monitor indicated a loss of somato and motor evoked potential signals that could be an indication of a spinal chord injury and possible paralysis.

Unfortunately, there was damage to the spinal chord and paralysis occurred and it continued until Edward's death some eight years later. The cause of the damage, whether due to an ischemic event or to screw placement and direct trauma to the spinal chord, and what Dr. Roye, and the other NYPH physicians did to determine the cause, and if possible, reverse the paralysis, has been the subject of this multi-year litigation.

The jury was asked seven departure questions on the verdict sheet. They were as follows:

1) Did Dr. Roye depart from accepted medical practice by not being present in the operating room during the approach?

2) Did Dr. Roye depart from accepted medical practice by his placement of the screws during the surgery of November 22, 2002?

3) Did Dr. Roye depart from accepted medical practice by not performing a wake up test when the SSEP and MEP signals were lost?

4) Did Dr. Roye depart from accepted medical practice by replacing the screws after he had removed them?

5) Did Dr. Roye depart from accepted medical practice by not ordering a CT scan?

6) Did Dr. Arkovits (NYPH) depart from accepted medical practice by starting the procedure without Dr. Roye being present in the room?

7) Did NYPH, by any member or members of its medical team, depart from accepted medical practice by not sending Edward Beloyianis for a CT scan?

The jury answered no to five of the seven questions, and answered yes to both departures posed in Questions 5 and 7 and proceeded to apportion 50% fault to each Dr. Roye and NYPH.

The jury also found that before obtaining the consent of Edward's parents to the surgery, Dr. Roye had provided them with appropriate information.

Both defendants Roye and NYPH move to set aside the verdict arguing that it is against the weight of the evidence. Specifically, they argue that not only was the failure to order or to perform a CAT scan was not a departure from accepted medical practice, but that there is little, if any, evidence on this record that it was a substantial factor in either causing or contributing to Edward's paralysis or adversely affecting his recovery.

The jury went on to award the plaintiff's estate $40,000,000.00 for Edward Beloyianis' past pain and suffering in addition to awarding his parents $5,655,000.00 for their past and future economic loss claims.

For purposes of this decision and order, the court has consolidated both defendants' motions.

In addition to their assertion that the departures found are unsupported, or alternatively, against the weight of the evidence, defendants argue that evidentiary rulings made in error, and the conduct of the trial itself, deprived defendants of a fair trial. They argue that the length of the trial, and specifically of the examination of Dr. Roye, as well as the type of questions asked by plaintiffs' counsel and comments made during his summation all contributed to prejudicing

the jury against defendants.

Fourteen (14) witnesses testified over fifty-four (54) days and this testimony had been preceded by a lengthy jury selection that commenced in late September 2014. A verdict was rendered in late May 2015.

Testimony was taken over the course of approximately 5 ½ months from November 25, 2014 to and including May 15, 2015. During the period that testimony was taken, there were, a number of one or two day continuances and a number of longer continuances and/or breaks including those necessitated by holidays and year end judicial recess period. Some breaks were for the court's needs, some were for attorneys' needs on both sides. In addition, the court took pains to accommodate the obligations of the jurors and witnesses. In fact many of the witnesses in this case came from different parts of the country and world and they had pre-planned professional and personal engagements across the globe. All of this created scheduling difficulties contributing to the length of the trial.

The court acknowledges that the length of time that Dr. Roye was on the witness stand was longer than might be expected. Arguably, longer than necessary. While this may be true and may be in part, the responsibility of the court, it in no way prejudiced the jury against Dr. Roye. Some of it was caused by extensive questioning by plaintiffs' counsel, some as a result of breaks in the testimony and the need for some repetition of testimony after lengthy breaks at least one of which was necessitated by Dr. Roye's schedule. The jury was attentive throughout his direct and cross examination. In fact, the jury was remarkably so, and engaged, appearing promptly throughout the entire trial. Interestingly, they were asked 6 departure questions concerning Dr. Roye, and answered no to 5 of them. The majority of the questioning of Dr. Roye concerned the

pre-op and operative periods for which again, no departure was found. A review of the record of Dr. Roye's questioning does not provide any basis for finding prejudice by virtue of either the questions asked or the length of the questioning.

As to comments, questions, and actions of plaintiffs' counsel from the early days, to and including summation, there were times over the six months of this hard-fought and at times emotional trial, that objectionable questions were asked or comments made. While this occurred throughout the trial, it would be unfair to say that only plaintiffs' counsel engaged in objectionable questioning. The three trial attorneys all represented their clients zealously and with proper respect. While plaintiffs' counsel spent more time with witnesses and asked more questions or made more to comments, to which objections were made, this does not mean that all of the questions or comments were not proper. Going into much detail about what Dr. Roye did, or did not do, in November 2002, or what he did or did not write in his report or in the patient's chart during that period; what he did or did not write in an article at that time, before, or years later, and what he did or did not say at his deposition and/or previous testimony in a complicated malpractice case is not on its face inappropriate or abusive. Dr. Roye's actions at the time, his memory, and his credibility were all at issue for the jury's consideration. Especially so, on the issue the CAT scan. Objections were overruled and sustained as called for on both sides. In fact, a review of the transcript of the questioning of Dr. Husted, plaintiffs' orthopedic expert, and summation comments about him and his testimony provide a glimpse into some pointed questioning and comments by defense counsel.

This was an emotionally charged case, spanning the course of several months, with three excellent attorneys, each with different styles of litigating, and on a detailed review of the

transcripts, the court finds no basis to support a finding that the behavior of plaintiffs' counsel in questioning Dr. Roye created an atmosphere which deprived either Dr. Roye or the hospital of a fair trial (*compare*, Smith v Rudolph, 2017 WL 1377809 [1st Dept. 4/18/17]). The court is also aware that none of the conduct or questions by any attorneys and in particular plaintiffs', when reviewed in the totality of this trial, deprived any defendant of a fair trial or prejudiced the jury.

As to plaintiff's summation, a review of it all these months later, demonstrates that while it could certainly be considered an intense summation, it did not improperly and substantially prejudice the defendants' rights to a fair trial (People v Galloway, 54 NY 2d 396 [1981]). While movants point out a few comments that taken alone may be questionable, the summation has to be considered as a whole (Schechtman v Lappin, 161 AD 2d 118 [1st Dept. 1990]). Plaintiffs' summation, this court believes, would fall under the category of a "vigorous and robust" summation with which the court should not interfere (Cohen v Covelli, 276 AD 375 [1st Dept. 1950]).

EVIDENTIARY RULINGS

There are three primary evidentiary issues raised by the defendants in these motions. One, concerning evidence of the parents' economic loss, will be addressed on the issues of damages. The other two, raised primarily by Dr. Roye, concern the report of the autopsy done after plaintiff's death. Defendants argue that the admission into evidence of some autopsy photographs and the Nassau County Medical Examiner's autopsy report, redacted for the cause of death was in error.

Both sides acknowledge that to be admissible photographs must be relevant and tend to prove or disprove a material issue, or corroborate or illustrate other relevant evidence. Moreover,

they should be excluded only if their sole purpose is to arouse the emotions of the jury and prejudice defendant (People v Wood, 79 NY 2d 958 [1992]) . They have to be relevant to a jury's consideration of medical testimony and the assessment of damages, albeit, they may be gruesome (Colon v NYCHA, 248 AD 2d 254 [1st Dept. 1998]; Gallo v Supermarkets General Corp., 112 AD 2d 345 [2nd Dept. 1985]). Here, the photographs permitted by the court to be admitted into evidence were relevant to illustrate and elucidate medical testimony and damages. They were probative on the issues of plaintiff's scoliosis condition, and hemangiomas, which impacted the surgery, bleeding prior to his death, and in part, screw placement. Their relevance to plaintiffs' proof outweighed any prejudice.

In addition to the photographs, the court ruled , after much argument at trial, that it would only allow the redacted autopsy report into evidence. The portion redacted was the medical examiner's opinion as to the cause of death: a pre-existing vascular condition. The medical examiner 's opinion in an autopsy report is inadmissible hearsay (Schelberger v. Eastern Savings Bank, 93 A.D.2d 188 [1st Dept. 1983]). In this case, the ultimate determination as to the cause of death and its connection , or lack thereof to the events of November 22, 2002 and the days thereafter, was for the jury to decide. Defendants had the opportunity to bring in any witness they chose to on that issue, including the medical examiner who conducted the autopsy. Defendants' reliance on Cheeks v. City of New York , 123 AD 3d 532 [1st Dept. 2014], is misplaced. In *Cheeks,* the cause of death, while disputed , was not the ultimate issue for the jury to determine. That issue was whether in reliance on the medical examiner's findings identifying malnutrition as the cause of death and excluding a causative medical defect, a police officer had probable cause to arrest a mother and sole caregiver for suspicion of causing her infant's death

through neglect. Under these circumstances and in light of the defendant's suggestion of an alternative theory predicated on a medical defect, the trial court's denial of the City's request to publish an unredacted autopsy report was held to be prejudicial error warranting a new trial. Here, the jury was asked to determine specifically whether the injury sustained during the surgery was a substantial factor in bringing about Edward Beloyianis' death (Question No. 11, Verdict Sheet).

SUFFICIENCY OF THE EVIDENCE FOR THE TWO DEPARTURES

Defendants argue strongly that the two departures found by the jury concerning the failure to order or do a CAT scan are not supported by this record. More importantly the failure to do the CAT scan was not a proximate cause of plaintiff's paralysis and ultimately his death.

Certainly no one has argued that the CAT scan was the cause of the initial loss of signals and paralysis. There is a dispute as to whether or not the loss of signal and paralysis was a result of a screw's placement in the spinal chord or due to an ischemic event. Defendants argue in part that the record sufficiently supports Dr. Roye's initial conclusion that it was an ischemic event although this is challenged by plaintiffs. Defendants do however further argue that under any circumstances the record does not support the jury's finding that the failure to do a CAT scan was a substantial factor in not only causing the paralysis but in not reversing the paralysis or at least providing the opportunity to reverse or reduce it.

For a trial court to set aside a jury verdict as not being supported by sufficient evidence the court must find that "there is simply no valid line of reasoning and permissible inferences which could lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" Cohen v Hallmark Cards,45 NY 2d 493 [1978].

Additionally for the trial court to find that the verdict is against the weight of the credible evidence, it must conclude that "the evidence so preponderated in favor of the losing party that the verdict could not have been reached on any fair interpretation of the evidence" Cohen v Hallmark, *supra*; McEachron v State Farm Ins. Co., 7 AD 3d 929 [3rd Dept. 2004].

When giving consideration to whether or not a verdict is either supported by sufficient evidence or is against the weight of the evidence, the court must provide the prevailing party [plaintiff] with all reasonable inferences and view the evidence in the light most favorable to plaintiff. Campbell v City of Elmira, 84 NY 2d 505 [1994]; Motichka v Cody, 279 AD 2d 310 [1st Dept. 2001]).

Additionally, credibility of witnesses, including expert medical witnesses and the resolution of conflicting proof is within the purview of the jury (Mazariegos v NYCTA, 230 AD 2d 608 [1st Dept. 1996]; Ayoung v Epstein, 177 AD 2d 460 [1st Dept. 1991]). This even if the court disagrees with the opinion of the experts and disagrees with the result. Absent a showing of a substantial injustice a litigant is entitled to the benefit of a favorable verdict. Mazariegos v NYCTA, *supra*.

Defendants claim that under the circumstances presented including, Dr. Roye's initial presumed etiology of an intra operative vascular compromise causing the loss of signal; Dr. Roye's partial removal of the screws intra operatively at levels L1, T12 and T1, which screws had been placed immediately before the signal loss; and the failure of signal return upon the temporary removal, an intra operative CAT scan was not ordered or required. Subsequent steroid spinal shock therapy, an MRI four days later, and a myelogram were performed. The myelogram was performed with a neuroradiology fellow, Dr. Alan Johnson and the Chief of Radiology, Dr.

Robert DeLaPaz. Neither Dr. Johnson or Dr. DeLapaz ordered the CAT scan either in conjunction with the myelogram or independent of it.

Dr. Roye testified that the decision on whether or not to order a CAT scan depended on the situation in each case. He acknowledged that a CAT scan is a way of determining screw placement and that he could have told the neurologist to do it after the myelogram. He further gave some inconsistent testimony at his deposition as to whether or not he had ordered a CAT scan and whether or not he had seen a CAT scan.

Dr. Johnson testified that nothing prevented defendants from ordering the CAT scan post operatively and that a CAT scan was the best way to determine screw positioning in the spine. He further testified the MRI of November 24, 2002 was significant for a vascular origin for the paralysis and the myelogram demonstrated no midline penetration of the spinal canal and no blockage of the spine. Further evidence of a vascular cause. Dr. Johnson also acknowledged the "artifact" problem attendant to MRIs in cases such as this. Two of defendants' experts, Dr. Morgello, a neuropathologist and Dr. Olewski, an orthopedic surgeon testified on behalf of Dr. Roye.

Dr. Morgello testified to reviewing the autopsy slides as well as tissue section re-cuts. Essentially her opinion was that the screws did not penetrate the spinal chord. It was her opinion based on her review and the timing of the loss of signal, vis a vis, the placement at T11, that it was an ischemic event and infarction which would have allowed approximately four (4) minutes before permanent paralysis and thus there would have been no benefit to a CAT scan.

Dr. Olewski testified to the difficulty of this surgery with this young man's history and curvature. He further opined that there was no transection or penetration of the spinal chord and

thus it was a vascular event and most importantly, a CAT scan would not have changed the outcome.

Plaintiffs' expert, orthopedic surgeon, Dr. Husted testified that the failure of Dr. Roye and the hospital MD defendants to send plaintiff for a CAT scan was a departure and a substantial factor in causing his permanent paralysis. He explained that the CAT scan would have clearly shown the screw placement in particular the screws that were abutting the chord in the canal. He testified that hospitals routinely do CAT scans in similar circumstances while they are still intubated.

In addition to Dr. Husted's extensive testimony on departures and causation, plaintiffs also rely on Dr. Roye's own testimony concerning the belief or possibility that screws penetrated the canal, the efficacy of his use of CAT scans in similar situations, and the need for complete removal of screws if there was chord involvement. There was indeed much testimony on both sides by expert parties and non parties much of which is pointed out by the two defendants and plaintiffs' moving papers. The court will not address all of it in detail other than to say it is extensive, proffered by various specialists and is in conflict. It is conflicting as to if there was chord trauma/contact and if so, the extent of chord trauma/contact, if there was an ischemic event, if the brief screw removal was sufficient, also if the screw removal occurred at all and of course in view of the above and in view of the subsequent myelogram and MRI should a CAT scan have been done and if done, would it have benefitted the patient in any way. In reviewing the facts and opinions on all sides, with a view towards those facts and opinions that support the verdict, the court also has to consider the jury's responsibility to consider all of the witnesses' credibility. Thus when Dr. Roye testifies about doing or not doing a CAT scan, reading or not

reading a CAT scan, explaining or not explaining the several chart references to the CAT scan, removing but not documenting the removal of the screws and the timing of his recalling it along with the background and credibility of experts on both sides the court must step aside, not substitute its feelings or findings on these issues even if it feels strongly about them and in this way determine if the record supports the evidence. This is the critical question on this motion. This is true not only on Dr. Roye's departures, but also on the issue of the hospital's departures. Dr. Husted's testimony regarding the actions or inaction of the attendings and residents in the PICU and or radiology departments provides further support for the hospital's departures. This coupled again with the above testimony of Dr. Roye himself and Dr. Johnson provide further support for the verdict. Morever, in any medical malpractice action where causation is always difficult to prove, a plaintiff only has to offer sufficient evidence from which a reasonable person might conclude that is was more probable than not that the injury was caused by defendants, and that it was probable that some diminution in chance of survival had occurred. (Scalisi v Oberlander, 96 AD 3d 106 [1st Dept. 2012]; Pearce v Klein, et. al., 293 AD 2d 593 [2nd Dept. 2002]; Borawski v Huang, 34 AD 3d 409 [2nd Dept. 2006]). This record contains numerous instances of such testimony starting with was it even an ischemic event. Thus the jury's finding on departures and causation is supported by this record and the court will not set it aside.

The court does however agree with defendant hospital on one point. The record does not support an apportionment of liability for the failure to order a CAT scan, of 50% each. Based on the testimony of Drs. Roye, Johnson and Husted an apportionment of 60% responsibility to Dr. Roye and 40% to Columbia would be more in line with the evidence.

DAMAGES

The damages awarded present more difficulty in sustaining the verdict. While it is settled law that damages for personal injury are generally to be determined by a jury, if the jury's award is against the weight of the evidence and/or excessive, the court has the power to set it aside. (Donlon v City of New York, 284 AD 2d 13 [1st Dept. 2001]).

Moreover, while CPLR 5501(c) clearly refers to a review of damages by the Appellate Division, there are numerous decisions and have been many times where trial courts have reviewed and lowered or even added to damages and in fact have a duty to.

In a case referred to by defendant Columbia's attorney, in an opinion written 34 years ago by Justice Anthony Mercorella, Bronx County the court stated "usually the amount of damages will not be disturbed. However a court may not stand idly by when it is clear that a verdict is grossly excessive. A jury's verdict must have some relation to reality and it is the court's duty to keep it so....Although the court is reluctant to disturb a jury award for pain and suffering, it is duty-bound to eliminate grossly excessive awards as the one herein." Thornton v Montefiore Hospital, 120 Misc 2d 21003, (Supreme Court, Bronx County 1983).

If a damage award must be set aside as excessive the court which tries the case is in a better position to make that determination (Kligman v CNY, 281 AD 93 [1st Dept. 1952]). The standard for the reduction of a damages award is to be set by judicial precedent (Paek v City of New York, 28 AD 3d 207 [1st Dept 2006]). The court has reviewed innumerable cases provided by both plaintiffs and defendants. (see, Aguilar v NYCTA, 81 AD 3d 509 [1st Dept. 2011]; Bissel v Town of Amherst, 56 AD 3d 1144 [4th Dept. 2008]; Turturo v CNY, 127 AD 3d 732 [1st Dept. 2015]; Bergamo v Verizon, 95 AD 3d 916 [2nd Dept. 2012]; In re NY Asbestos Litigation v

Crane, 28 AD 3d 255 [1st Dept. 2006]; Ruby v Budget Rent A Car, 23 AD 3d 257 [1st Dept. 2005]). Many of the plaintiffs' cases are of lower court jury verdicts with no follow up and provide little value for review.

With this guidance in mind, the court is put in the position of determining how much the pain and suffering of a 14 year old, who by any account was an active, bright, creative and popular young man in spite of his lifelong health problems. After November 22, 2002 his problems were multiplied by an unknown factor because of his paralysis and his ultimate death. In spite of his changed condition, he, remarkably, remained a bright, creative, active and popular young man which remains a testament to his will to survive, strength, and what an incredible young man he was. Beyond that, he was, from the beginning to the end of his life, a loving son whose parents loved him and were more than proud of him. With that said they have suffered the pain that only someone in similar circumstances can imagine.

How then do you determine a rational amount to attach to the pain and suffering Edward Beloyianis experienced for the almost eight years he lived. Again the law provides a basis, without emotion, based on precedence, of awarding fair and just compensation to a young man whose life before the surgery was not easy but whose life after was significantly changed.

With that the court finds that the award for past pain and suffering deviates materially from what is reasonable and fair and is excessive and will vacate the award of 40 million dollars and remand for a new trial on damages unless plaintiffs stipulate to an award of Nine Million One Hundred Seventeen Thousand ($9,117,000.00) dollars for past pain and suffering for the 7 years and 10 months he lived. This, based on cases cited, represents One Million One Hundred Thousand dollars a year for the 7 years, 10 months he lived in addition to $500,000.00 for the last

two weeks of his life while consciously and painfully facing his death.

As to the award for the parents on their wrongful death claim totaling $5,625,000.00 dollars, the court believes this award is not supported by the record. Damages for wrongful death are limited to fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought (Bumpurs v NYCHA, 139 AD 2d 438 [1st Dept. 1988]). They are limited solely to the economic injuries suffered by the distributees. They cannot be based on speculation and uncertainty (Franchell v Sims, 73 AD 2d 1 [4th Dept. 1980) . Moreover, when the claim is made by the parents of a young adult decedent the parents must establish they had a reasonable expectation of further support.

Here the award of 5.65 million dollars for past and future loss to plaintiff's parents is not supported by this record. While the court did allow this question to go to the jury it did not allow testimony on this record as to the parents' further expectation of support. The court did allow testimony, in particular from Michael Beloyianis as to Edward's contribution to his business and at home and his losses stemming from that in addition to some testimony from Virginia Beaton. Plaintiffs' claim that defendants waived their objection is not supported by a record replete with their objections.

Accordingly, the court will order a new trial on wrongful death pecuniary damages unless plaintiff stipulates to a reduction of $100,000.00 past loss to Michael Beloyianis and $25,000.00 past loss to Virginia Beaton on their wrongful death claims.

The court has considered the other points by both defendants on their motions and finds them to be without merit.

Accordingly the motion to set aside the verdict and enter judgment for one or both

defendants is denied; the motion to set aside the verdict and set down for a new trial on the sole departure found of not ordering and/or doing a CAT scan by one or both defendants is denied; the motion to set aside the verdict by both defendants for not providing defendants with a fair trial and/or based on evidentiary ruling is denied; the motion to set aside the verdict unless plaintiffs stipulate to a reduced amount of damages for past pain and suffering and wrongful death is granted and the action set down for a new trial on damages for pain and suffering and wrongful death unless plaintiffs stipulate to damages of $9,117,000.00 for pain and suffering and $125,000.00 for wrongful death; the apportionment of liability between defendants, as found by the jury of 50% each, is vacated as against the weight of the evidence and adjudged to be 60% to Dr. Roye and 40% adjudged to NYPH. The motions are again denied in all other respects.

This constitutes the decision and order of this court.

Dated: May 18, 2017
Bronx, New York

Howard H. Sherman
J.S.C.