NEW YORK SUPREME COURT
COUNTY OF BRONX - **IAS PART 4**

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MARIETTA SMALLS, THE PUBLIC ADMINISTRATOR OF KINGS COUNTY, AND CLAUDETTE NESBITT, AS CO-ADMINISTRATORS OF THE ESTATE OF MIGUEL NESBITT, DECEASED,
Plaintiff(s),

-against-

CITY OF NEW YORK, THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION AND PRISON HEALTH SERVICES,INC.,
Defendant(s).

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Index №. 23325/03

DECISION and ORDER

HON. HOWARD H. SHERMAN
J.S.C.

Defendants move, pursuant to CPLR 4404(a) and 5501(c) to set aside the verdict in the above captioned action rendered after a jury trial on February 22, 2019.

The relevant facts, briefly stated are as follows. Sometime in the fall of 2001 plaintiff/decedent Miguel Nesbitt tested positive for tuberculosis while serving a two year prison sentence for a felony drug conviction in Florida. While there he was started on a treatment course of 900 milligrams of ISONIA21D (INH) two times a week.

In November of 2001 he was transferred to the Brooklyn House of Detention to await trial on several felony charges including attempted murder and criminal possession of a weapon filed in New York. His treatment for tuberculosis continued in Brooklyn and in December 2001 he was transferred to Rikers Island to await trial. His treatment with INH continued there. The care was provided by the Prison Health Services, Inc. (PHS) pursuant to a contract with the New York City Health and Hospitals Corporation (NYCHHC). It is the care and treatment provided at Rikers Island from December 7, 2001 until his death on June 1, 2002 that provide the underlying basis for the claims made by plaintiff. In particular it is the care or lack of care or monitoring for

a period of 55 days in solitary starting April 5, 2002 and continuing two days after his release from solitary that is at the heart of this case. On April 5 Mr. Nesbitt was placed in the Punitive Segregation Unit, sometimes referred to as solitary confinement. From his release on May 28 until his transfer to Elmsford Hospital in the early morning hours of May 30 and his transfer to Mt. Sinai Hospital that night where he died the next morning Mr. Nesbitt had been seen two times at Rikers Island by health care professionals. The only record of him seeing any Healthcare provider during the 55 days in solitary was on Apirl 11th when he saw a physicians assistant for a rash. The cause of death was complications of hepatic failure due to the INH therapy.

Defendants seek to overturn the jury verdict on liability as being against the weight of the evidence. Interestingly, movant spent much more time arguing the damages as against the weight of the evidence than the liability portion of the verdict.

Defendants point to several evidentiary rulings by the court, opinions of experts and records and testimony which they believe should be the basis of setting aside the verdict.

These rulings and evidence do not provide the basis for setting aside the verdict. A jury verdict should only be set aside when there is no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the jury *Cohen v. Hallmark 45 NY2 493 (1078).* Here the jury had to consider the overall care and monitoring of plaintiff/decedent during his stay at Rikers Island. Their findings that defendant departed from accepted practice concerning performance of lab testing, general monitoring, and face to face monitoring in solitary, and delaying in hospitalizing him are not against the weight of the evidence. While there was testimony contrary to their findings including that of defendants' expert, the court cannot say as a matter of fact or law that the jury findings are not supported by

the record.

Moreover the court also notes that there were instances where even defendants' expert acknowledged that the monitoring protocol was not fully followed according to the records in this case. He further acknowledged that had the deceased been examined and had blood drawn before his release from solitary there may have been an overall better picture of his condition and possibly a chance for a transplant at Mount Sinai.

While his testimony on the face to face observation and monitoring reflected protocols in effect for the general population the jury clearly accepted plaintiffs expert opinion regarding proper care and standards. This is especially true in the context of this case which concerns a patient in a prison setting, who at the critical time in question is in solitary confinement for 55 days and whom is seen immediately upon his release from solitary by a prison guard, not a health professional, who tells him how bad he looks and further tells him to see the doctor. At that point it was already or close to being too late based upon all of the above and the entire trial record. It can not be said that the verdict is not supported by a reasonable view of the evidence, *Goldstein v. Snyder*, 3AD3 332, AD (1st Dept 2004).

As to the balance of the motion which seeks to set aside the various damage awards it is not as clear to the court that this record does in fact support the amount of the awards. The standard for review of damage awards pursuant to CPLR 5501 is whether or not the award deviates materially from what would be reasonable compensation. This standard is applicable to Appellate Division review, but it also applies to trial court review on a motion pursuant to CPLR 4404 *Wendell v. Supermarkets General*, 189 AD2 (3rd Dept 1993); *Shurgan v. Tedesco*, 179 AD2 805 (2nd Dept 1992). While the most common way to determine whether a particular award

"deviates materially" is to compare it to similar cases the Court of Appeals has recognized the difficulty in making such a determination. *Cipraio v. Chrysler Corp.*, 52 NY2 114 (1981). Both sides have, in their motion papers, provided or attempted to provide the court with what I would consider case law guidance. The difficulty noted by the Court of Appeals in Cipraio has never been more obvious to this court than in this case. The difference between the facts, circumstances, and awards in this and the provided "comparable" cases is extensive. Having said that, the excessiveness of the awards in this case are clear. The jury awarded plaintiff eight million dollars for pain and suffering, eight million dollars for emotional pain & suffering for his fear of impending death and six million for loss of guidance to his daughter Jendaya. Defendants argue not only that all three awards were excessive but that the separate line item for fear of impending death was in error. At the outset the court will note that it is clear that an award of damages on all three claims was supported by the record. It is equally clear that all three awards are excessive.

The difficulty in determining an appropriate award in similar cases is, as mentioned, is all the more apparent because of the unique circumstance of a prisoner in isolation. Having said that a few things do stand out. First is the period of time with in which decedents condition deteriorated and his suffering began and ended. The medical records, testimony of plaintiff's experts and testimony of Mr. Nesbitts mother do provide a basis to award pain and suffering for a period of two to three weeks from his time in solitary, to his release and ultimately lapsing into a coma at Mount Sinai Hospital. While there are few if any comparable cases provided by either side *Lee v. New York Hospital Queens* is somewhat instructive. The pain and suffering in Lee appears to be of shorter duration and more intense. The reduced award in Lee also included

damages for "sense of impending death" which again was a separate item here. With that, the award of $3,750,000.00 was sustained. Based upon the above the award of 8 million dollars is reduced to $2,750,00.00 dollars.

As to the award for eight million dollars for the fear of impending death apart from the separate line issue the question is should there be any award for fear of impending death in this malpractice case at all. Interestingly, defendant does not argue that fear of impending death is not a viable claim. In fact the First Department has previously recognized such a claim as a sub-category of conscious pain and suffering. In the matter of *91st Crane Collapse v. Lomma, et al* 154 AD3 139 (1st Dept. 2017). There a crane operator who was crushed to death in a crane collapse was awarded 2 million dollars for fear of impending death. While the record provided evidence of what could be called sheer terror over a period of seconds or minutes the court approved the reduced award compensating the estate for the fear decedent experienced from the moment of appreciating the danger until the moment of death. Defendants go on to argue that there are other cases in which this award has been sustained but they all involve car crashes with seconds of terror knowing ones life is about to end. While this does make up the majority of cases relevant to this issue defendant does not cite any authority for arguing fear of impending death does not apply to medical malpractice claims. It is also true that plaintiff only cites one case in which an appellate court did sustain a damage award which include fear of impending death albeit not as a separate item *Mancuso v. Kaleihn Health*, 172 AD3 1931 (4th Dept., 2019).

This Court is not prepared to find as a matter of law that a claim for fear of impending death either within pain and suffering or as a separate item can not be brought in a malpractice action. While one could argue that the fear expressed by a patient in a hospital who may in fact

be facing death albeit not with one hundred percent certainty and even with a bit of hope for the remote possibility of a better outcome is not experiencing the sheer terror of a horrific auto accident victim it is not unreasonable to believe they are experiencing a real fear of death that merits an award under appropriate circumstances. Based on all the circumstances surrounding Michael Nesbitts care over the last few weeks of his life in solitary confinement until his hospitalization, and his remarks to his mother shortly before his death the record on these facts support an award for fear of impending death.

However, under these same circumstances the award is excessive and the Court will reduce it to $500,000 for fear of impending death.

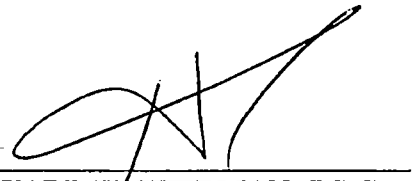
The last award of six million dollars to Jendaya for loss of guidance is likewise excessive. Defendants argue that not only is the amount excessive on its face but additionally the Courts exclusion of evidence concerning the nature and details of the charges the deceased was facing in New York deprived the jury the opportunity to fully and fairly consider the true guidance and support the child would have received. The Court will not on this motion in anyway change its decision to exclude ths evidence. The jury had a chance to consider evidence of the decedents life and lifestyle up until his return to New York, his relationship with his family, particularly his daughter, his education, work history, etc., for better or for worse in each instance. Allowing the jury to hear further evidence of charges that may or may not have resulted in a conviction and may or may not result in a long sentence or short sentence would not provide a basis to allow otherwise inadmissible evidence. With that said the Court feels that the award of 6 million dollars for Jendaya in light of the record that was presented is clearly excessive. An award of 1.25 million dollars would be more in line with fair and just compensation.

In accordance with the above Defendants motion are granted solely to the extent of

setting aside the verdict unless plaintiff stipulate to damages as follows; 1) Pain and suffering - 2.75 million dollars; 2) Fear of impending death -$500,000 dollars; 3) loss of support for Jendaya 1.25 million.

This constitutes the decision and order of the Court.

Date: March 11, 2020



HOWARD H. SHERMAN, J.S.C.