

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

K.M.G. a minor, by her Tutor Roy)
 Gattuso, on behalf of the heirs and next-of)
 kin of Philip Gattuso, deceased,)
)
 Plaintiffs,)
)
 vs.)
)
 Gene Kirkpatrick,)
)
 Defendant.)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER FOR JUDGMENT**

Civil No.: 09-2011-CV-02582

PROCEDURAL HISTORY

[¶ 1] The above-entitled matter previously came before the Court on Plaintiffs’ Motion to Amend to add a claim for exemplary damages, and Plaintiffs’ Motion for Partial Summary Judgment on Liability, which were both granted by an Order dated April 11, 2012. The only remaining issue to be determined is damages. The parties agreed to have the issue of damages determined by the Court based on the submission of the parties, due to the Defendant’s inability to appear in person for the hearing. Arguments and evidence were to be submitted to the Court no later than June 12, 2013.

[¶ 2] The Plaintiffs’ submission regarding damages include: 1) a Damages Report on the Economic Loss of the Heirs of Philip Gattuso, prepared by Scot A. Stradley, Ph.D., as set forth in Exhibit A; 2) copies of security invoices, as set forth in Exhibit B; 3) copies of psychologist bills, as set forth in Exhibit C; 4) victim impact statements and attachments, as set forth in Exhibit D; and, 5) portions of the transcript from Gene Kirkpatrick’s sentencing hearing as set forth in Exhibit E. In addition, the Affidavit of Scot A. Stradley, Ph.D. dated May 31, 2013,

clarifies his calculations regarding the total present value of the economic loss sustained as a result of Dr. Philip Gattuso's death.

[¶ 3] The Defendant submitted a letter dated June 1, 2013, outlining his position in regard to damages. The Defendant's letter contains information on the financial worth of K.M.G., and his own lack of resources. He argues the submissions made by the Plaintiffs are excessive, but he provides no actual evidence in support of his assertions.

[¶ 4] The Court, having considered evidence, and all the records in this case, now makes the following:

FINDINGS OF FACT

[¶ 5] The Plaintiffs' economic damages include amounts for lost income, lost benefits, loss of household services, and lost savings, as set forth in the report and affidavit of Dr. Scot Stradley in the amount of \$4,390,883.00. Additional economic damages include: 1) security expenses for K.M.G. in the amount of \$1,787.50; 2) medical expenses for Philip Gattuso, Jr. for a psychologist in the amount of \$2,980.00; 3) burial expenses of \$10,489.00. Total economic damages are \$4,406,139.50. Based on the undisputed evidence of the economic damages, the Court finds the amounts requested to be reasonable.

[¶ 6] The Plaintiffs' noneconomic damages include pain, suffering, inconvenience, mental anguish, emotional distress, fear of injury, loss of society and companionship, loss of consortium, injury to reputation, and humiliation. K.M.G. and her two brothers have lost their father. No amount of money can replace their loss or make them whole. This Court is well aware of the continuing loss of not having a parent to care for, provide guidance, and be present at the milestones of a child's life. The Plaintiffs have shown they suffered substantial noneconomic damages; a reasonable amount of noneconomic damages is \$5,000,000.00.

[¶ 7] The evidence is clear and convincing that the Defendant acted with malice when he hired Michael Nakvinda to kill Dr. Gattuso, meriting an award of exemplary damages. The Plaintiffs have shown by clear and convincing evidence that the Defendant's conduct contributed to the death of Philip Gattuso, as shown by the Defendant's criminal conviction for Conspiracy to Commit Murder in State of North Dakota v. Gene Kirkpatrick, File No. 09-2009-CR-3845. There is a reasonable relationship between Gene Kirkpatrick's conviction and an award of exemplary damages, because the underlying conviction is based on Kirkpatrick's hiring of another to kill Philip Gattuso.

[¶ 8] Gene Kirkpatrick has been sentenced to life imprisonment without parole regarding the aforementioned conviction and is currently incarcerated in South Dakota. The Defendant's criminal conviction serves as mitigation to the award of exemplary damages, for which the Court finds \$250,000.00 to be the appropriate amount.

LAW AND ANALYSIS

[¶ 9] Under N.D.C.C. § 32-03.2-04, the trier of fact may award damages for both economic and noneconomic damages. Economic damages may include: medical expenses, medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income or support, burial costs, cost of substitute domestic services, loss of employment or business employment opportunities and other monetary losses. N.D.C.C. § 32-03.2-04(1). Noneconomic damages may include damages arising from: pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation. N.D.C.C. § 32-03.2-04(2).

[¶ 10] Exemplary damages may be awarded when it has been shown by clear and convincing evidence that the defendant is guilty of oppression, fraud, or actual malice. N.D.C.C. § 32-03.2-11(1). “Evidence of a defendant’s financial condition or net worth is not admissible in the proceeding on exemplary damages.” N.D.C.C. § 32-03.2-11(3). The amount of exemplary damages is discretionary, but the damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater. N.D.C.C. § 32-03.2-11(4). The purpose of awarding exemplary damages is to punish the wrongdoing defendant and to deter wrongful conduct. Olmstead v. Miller, 449 N.W.2d 804, 809, (N.D. 1989). Criminal sanctions imposed on a defendant may be considered as a mitigating factor when determining the basis for an exemplary damage claim. N.D.C.C. § 32-03.2-11(5)(c)(3).

[¶ 11] The Plaintiffs’ economic damages, shown by way of affidavits and reports, are basically undisputed. The Defendant concedes in his response that he has no doubt the income projections are “somewhat accurate.” However, he argues, without any evidentiary support, that Dr. Gattuso had intended to sell his medical practice and teach school, therefore, would be earning much less. The Defendant also argues that the K.M.G. has been well provided for by the various life insurance policies, as well as other investments she inherited after her father’s death. However, life insurance, death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages should not to be considered by the court as a collateral source to reduce an award of economic damages. N.D.C.C. § 32-03.2-06. Based on the evidence presented, the request for economic damages is reasonable.

[¶ 12] The Plaintiffs’ noneconomic damages are for pain, suffering, inconvenience, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, and humiliation. The Defendant has not

disputed the pain and suffering endured by the Plaintiffs' and indicated he regrets the loss and pain and that nothing replaces loss of life.

[¶ 13] Plaintiffs have argued that the Court should award at least \$9 million for noneconomic damages. Damages for pain and suffering are not susceptible to arithmetical calculation. First Trust Co. of North Dakota v. Scheels Hardware & Sports Shop, Inc., 429 N.W.2d 5, 11 (N.D. 1988). Rather, the determination of economic damages depends on the common knowledge, good sense, and practical judgment of the fact finder. Albrecht v. Metro Area Ambulance, 2001 ND 61, ¶ 12, 623 N.W.2d 367 (citations omitted). The filings by the Plaintiff do adequately support their request for noneconomic damages. However, the Defendant is incarcerated and unable to afford an attorney. Common sense would indicate that it is unlikely the Defendant will ever be able to pay any amount of noneconomic damages. While the Court deems it unlikely there will be actual recovery, it also places a greater value on Plaintiffs' loss as more than Philip Gattuso's mere economic value to his family.

[¶ 14] The Plaintiffs requested the Court award exemplary damages. As indicated above, the reason for exemplary damages is to punish the Defendant and to deter future conduct of a similar nature, both by the Defendant and by others. The Defendant's life sentence is the harshest punishment that can be inflicted on a criminal defendant under North Dakota law. The Defendant's conviction and life sentence serves to mitigate the amount of exemplary damages, because he is already being punished for the same course of conduct. Additional punishment is unlikely to have much effect. The Court has chosen to award exemplary damages in an attempt to balance the egregious nature of the conduct by the Defendant with the unlikeliness that any additional punishment is likely to deter the Defendant or others. Therefore, the Court has reduced the amount of the award requested.

CONCLUSIONS OF LAW

[¶ 15] The Plaintiffs are entitled to Judgment in their favor for economic damages in the amount of \$4,406,139.50.

[¶ 16] The Plaintiffs are entitled to Judgment in their favor for noneconomic damages, in the amount of \$5,000,000.00.

[¶ 17] The Plaintiffs are entitled to Judgment in their favor for exemplary damages, in the amount of \$250,00.00.

[¶ 18] In addition, the Defendant shall be responsible for the costs and disbursements allowable by law.

ORDER FOR JUDGMENT

[¶ 7] IT IS HEREBY ORDERED, that Judgment be entered in accordance with the foregoing. Attorney for the Plaintiffs shall prepare a Judgment in accordance therewith.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 8th day of July, 2013.

By the Court:



The Honorable Lisa K. Fair McEvers
Judge of the District Court
East Central Judicial District