

I. DEFENDANT’S MOTION TO BAR THE ECONOMIC PORTION OF DECEDENT’S CLAIM SHOULD HAD BEEN DENIED

At the outset, defendant’s motion amounts to a motion for reconsideration. On September 29, 2009, Judge Harz heard oral argument on a motion to dismiss plaintiff’s wrongful death claim, specifically because plaintiff had not provided decedent’s tax information. Judge Harz denied this motion. As such, this motion amounts to a motion for reconsideration. (*Exhibit B, October 1, 2009 Order*).

Of course, as the Appellate Division reminds us, “motions for reconsideration are granted only under very narrow circumstances.” Specifically:

Reconsideration should be used only for those cases which fall into that narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.

Fusco v. Board of Education, 349 N.J.Super. 455, 462 (App. Div. 2002); (*citing*, *D’Atria v. D’Atria*, 242 N.J.Super. 392, 401 (Ch.Div.1990); R. 4:49-2; accord *Cummings v. Bahr*, 295 N.J.Super. 374, 384 (App.Div.1996)).

Although defendant cited no law in support of the extraordinary measure it seeks, presumably it is moving for reconsideration pursuant to *Rule 4:49-2* which requires that the motion for reconsideration include “a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.” R. 4:49-2. The basis to such a motion, thus, focuses upon what was before the court in the first instance. *D’Atria*, 242 *N.J.Super.* at 401. The rule was not intended to become the vehicle for a second bite at the apple or to make new arguments. *Lahue v. Pio Costa*, 263 N.J.Super. 575 (App.Div. 1993); *Id.* Indeed, as the Court in *D’Atria* eloquently noted:

[M]otion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

D’Atria, 242 *N.J.Super.* at 401-02. In fact, the order for which reconsideration is sought should be left undisturbed unless it results from a clear abuse of discretion. *Housing Authority of Morristown v. Little*, 135 N.J. 274, 283-84 (1994); *Hodgson v. Applegate*, 31 N.J. 29 (1959); *Resolution Trust v. Associated Gulf*, 263 N.J.Super. 332, 340 (App. Div.), *cert den.*, 134 N.J. 480 (1993).

Moreover, *Rule 4:49-2* also states that the motion has to be made within 20 days of service of the order at issue. As is clear from the return date of the motion, it does not appear movant has met this requirement and the motion should be further denied on this basis. As such, defendant’s motion to bar decedent’s economic claim should be denied as this issue has already been decided by the Court and defendant has not met or even acknowledged its heavy burden under the reconsideration standard.

However, if the Court is inclined to reach the substance of the instant motion, movant's request, that the Court strike decedent's lost wage claim is unfounded and unsupported in law. Without authority, defendant presupposes that, in order to sustain a lost wage claim a dearth of documentation is needed. However, lack of documentation (tax returns, W2s, 1099s, pay stubs, ect.) regarding a plaintiff's lost wages does not preclude the claim. Rather, the lack of documents is a factor for the jury to consider in evaluating the weight of plaintiff's lost wage claim. *Hawkins v. 248 Haynes St. Assoc., Inc.*, No. A-5648-93T2, 1995 WL 378462, at *9 (N.J. Super. App. Div.).

In this instance, decedent, Goran Strlovski (28 at the time of his death) immigrated to the United States from Macedonia only years before the 2007 crash. (*Exhibit A, Deposition of Icko Strlvoski, at 10-12*). He came to the United States with hopes of attending the prestigious Julliard School of Music . In fact, just prior to his death, Goran Strlovski met with a professor at the school and had been given materials for his audition for entrance to the school, which was set to take place in the summer of 2007 (Goran never was able to attend because of the negligence of defendant driver, Soon Yang on the afternoon of October 19, 2007). (*Exhibit A, Deposition of Icko Strlvoski, at 13*).

While in the United States, Mr. Strlovski played in a band and worked as a construction day laborer from time to time. (*Exhibit A, Deposition of Icko Strlvoski, at 17*). According to decedent's brother (who also played in the Goran's band, "Nostalgia", and worked at the construction company, at which Goran was a day laborer) Goran's band played at a local restaurant, Before the Rain, every Friday and Saturday if the band had not been booked for a wedding. When Goran played at Before the Rain he would get paid \$100 each night plus tips. Icko Strlovski further testified that the amount of tips would vary but that Goran would make between \$200-\$250 each night total when he played at Before the Rain. (*Exhibit A, Deposition of Icko Strlvoski, at 18-19*). Icko also testified that Goran would also play at a Macedonian Church in Totowa, New Jersey on Sundays, holiday, or special occasions. (*Exhibit A, Deposition of Icko Strlvoski, at 17*). When Goran played on holidays or special occasions he would be paid. (*Exhibit A, Deposition of Icko Strlvoski, at 18, 22*). In total, Icko, estimated that his brother earned approximately \$14,000.00-\$15,000.00 per year playing with the band and at church. (*Exhibit A, Deposition of Icko Strlvoski, at 34*).

In addition to playing with the band, Goran Strlovski worked part time construction for Cheromino Control Group. (*Exhibit A, Deposition of Icko Strlvoski, at 32-33*). According to Icko Strlovski, who also worked for Cheromino Control Group, depending on the availability of work Goran would make approximately \$12,000.00 - \$15,000.00 per year from construction. (*Exhibit A, Deposition of Icko Strlvoski, at 34*). Accordingly, based on the testimony of Icko Strlvoski, the brother of Goran Strlovski and the administrator of his estate, at the time of his death, Goran Strlovski earned approximately \$30,000.00 per year. This estimate Icko Strlvoski provided at his deposition comports with the answers to interrogatories in this matter.

Additionally, plaintiff has provided various documents including (but not limited to) records regarding decedent's joint bank account with his fiancé, Katerina Petrova as well as a pay stub from Cheromino Control Group and pay stubs from the Macedonian Church in Totowa at which Goran had played on the Easter preceding his death. Despite the documents provided and the specific testimony in this case from decedent's brother who happens to have an intimate understanding of

how much Goran earned prior to his death, defense counsel makes the instant motion to bar plaintiff's lost wage claim because it is unhappy with the amount of documentary evidence provided. In support of its motion, defendant does not cite to the law and inaccurately insinuates that plaintiff has not provided responses to discovery. In fact, plaintiff has responded to each notice to produce. Regardless of defendant's position, the amount or quality of documents supporting an decedent's economic claim does not preclude the claim as to decedent from making a lost wage claim. The same is inequitable and without basis in law.

It is well settled that testimony alone from a surviving member of an estate is sufficient to establish the decedent's net income. See *Langley v. Allstate Ins. Co.*, 206 N.J. Super. 365, 370-71 (App. Div. 1985). In *Langley*, the plaintiff was unable to produce documentation of her deceased son's employment as a bartender because, according to plaintiff's testimony, her son had been paid "under the table." *Id.* at 368. The Court recognized that the plaintiff was "trapped by an underground sub-culture of illegal wage payments which cheat governments of taxes and deprives employees of social security benefits and minimum wage protection." *Id.* at 370. Therefore, the Court held plaintiff's testimony was adequate to establish her deceased son's net income because such illegal conduct by employers "should not deprive individuals of benefits properly owing from an insurance company." *Id.*

Likewise, in *Yube v. Bernberg*, No. L-1926-02, 2005 WL 3954743, at *3 (N.J. Super. App. Div.), the plaintiff was not required to present documentary evidence to establish his net income. Similar to *Langley*, the plaintiff in *Yube* was unable to provide documentation of his employment at a restaurant because he was paid off the books. *Yube v. Bernberg*, at *3. Consequently, the plaintiff could not produce tax returns or pay stubs because they did not exist. *Id.* at *6. Once again the Court found it would be inequitable to bar the plaintiff's lost wage claim due to employers failure to provide tax documents to his employees. *Id.*

Additionally, it is well settled that a plaintiff need not present an expert to support an estimate of lost wages. Where it is certain that some damage has resulted, mere uncertainty as to the amount thereof will not necessarily preclude the right of recovery. *Betenbaugh v. Princeton Hospital*, 50 N.J. 390, 392 (1967). Rather, where exact figures are not available, "the approved practice is to leave it to the good sense of the jury . . . to form from the evidence the best estimate that can be made under the circumstances . . ." *Id.* In this instance, as documented above and as documented in plaintiff's discovery responses as well as the testimony of Icko Strlovski, plaintiff has provided more than sufficient information to sustain decedent's economic/lost wage claim.

Therefore, defendant's motion should be denied.