

FSM SUPREME COURT TRIAL DIVISION

ELIZABETH LEE, RYAN LEE, SEEMA SHAH, MIE) CIVIL ACTION NO. 2009-014
BABA, YASUO BABA, and TAYLOR STRONG,)
)
Plaintiffs,)
)
vs.)
)
FEDERATED STATES OF MICRONESIA, through)
its Chief Public Defender Julius J. Sapelalut,)
)
Defendant.)
_____)

ORDER GRANTING JUDGMENT

Dennis K. Yamase
Associate Justice

Hearing: April 5, 2013
Decided: July 4, 2013
Corrected: July 19, 2013

APPEARANCES:

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HEADNOTES

Civil Procedure – Default and Default Judgments

Although a defendant has defaulted, the plaintiffs are still required to prove damages before a default judgment can be entered. Lee v. FSM, 19 FSM R. 80, 82-83 (Pon. 2013).

Torts – Damages – Pain and Suffering

Awarding damages for pain and suffering is one of the most difficult tasks for a court because the determination lies solely in the court's discretion with no fixed rules exist to aid in the determination. In making that calculation, it is proper to consider not only past pain but future pain. Lee v. FSM, 19 FSM R. 80, 83 (Pon. 2013).

Torts – Damages – Pain and Suffering

Pain and suffering serves as a convenient label under which a plaintiff may recover not only for

physical pain but also for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, terror, or ordeal and it covers disfigurement and deformity, impairment of ability to work or labor, anxiety or worry proximately attributable to an injury and mental distress caused by impairment of the enjoyment of life and it includes anxiety and embarrassment from disfigurement or limitations on activities, but to award damages for pain and suffering, such must be the result of physical injury. Lee v. FSM, 19 FSM R. 80, 83 (Pon. 2013).

Torts – Damages – Pain and Suffering

A plaintiff will be awarded damages for pain and suffering when she suffered grievous physical injury along with disfigurement and fright and anxiety in addition to the pain from the injury. Lee v. FSM, 19 FSM R. 80, 83 (Pon. 2013).

Sovereign Immunity; Torts – Damages

Since the Federated States of Micronesia has waived its sovereign immunity only to the extent of the first \$20,000 in damages, when a plaintiff's actual damages exceed that amount, judgment shall be entered in her favor for \$20,000. Lee v. FSM, 19 FSM R. 80, 83, 86 (Pon. 2013).

Torts – Loss of Consortium

Loss of consortium is more than the loss of general overall happiness and it includes components of love and affection, society and companionship, sexual relations, right of performance of material services, right of support, aid and assistance, and felicity. Lee v. FSM, 19 FSM R. 80, 84 (Pon. 2013).

Torts – Damages; Torts – Loss of Consortium

The general rule is that the uninjured spouse who loses income when he or she provides nursing care or maid service for the injured spouse is not entitled to recover damages equal to his or her lost income as part of a loss-of-consortium claim. Instead the damages are recoverable by the injured spouse and the measure of damages for nursing services supplied by a relative who leaves his or her employment to render such services is not the amount of lost earnings but rather is the reasonable value of the nursing services supplied. Lee v. FSM, 19 FSM R. 80, 84 (Pon. 2013).

Torts – Damages; Torts – Loss of Consortium

A tortfeasor who caused an automobile accident would expect to pay the market rate for the care provided to the injured party, not the wages of a stockbroker. Thus, if there is to be recovery of lost income, it cannot be part of the uninjured spouse's claim for loss of consortium because a loss-of-consortium claim is not based on economic damages. Lee v. FSM, 19 FSM R. 80, 84 (Pon. 2013).

Torts – Damages; Torts – Loss of Consortium

The uninjured spouse's loss-of-consortium claim is based upon the loss of services provided by the injured spouse before his or her injury. The uninjured spouse's income from his own employment is not a service that the injured spouse once provided. Thus, any recovery of damages for care provided to an injured spouse must be part of the injured spouse's claim. Lee v. FSM, 19 FSM R. 80, 84 (Pon. 2013).

Torts – Loss of Consortium

The performance of material services in a loss-of-consortium claim is for the non-economic services that the injured spouse used to perform for the uninjured spouse, not the services that the uninjured spouse later performed for the injured spouse. Lee v. FSM, 19 FSM R. 80, 84 (Pon. 2013).

Torts – Damages; Torts – Loss of Consortium

The uninjured spouse's lost income or the nursing or maid services performed by the uninjured spouse, even when calculated at the reasonable maid or nursing services rate, are not part of the

uninjured spouse's loss-of-consortium claim but are rather a measure of the injured spouse's damages. Lee v. FSM, 19 FSM R. 80, 84 (Pon. 2013).

Sovereign Immunity; Statutes – Construction; Torts – Loss of Consortium

The court will not recharacterize damages as a part of the uninjured spouse's loss-of-consortium claim and alter the nature of the damages claim solely to circumvent the FSM's statutory limited waiver of its sovereign immunity that prevents the injured spouse from being awarded the full amount of the damages she suffered. The court will comply with Congress's policy choice and its intent in enacting the limited waiver. Lee v. FSM, 19 FSM R. 80, 85 (Pon. 2013).

Judgments; Torts – Damages

While the better view may be that the dollar value in the judgment reflect the amount the Japanese yen is valued at on the day the court enters judgment because that is the only way the plaintiff would receive the Japanese yen amount equal to the yen she spent on necessary medical bills and other services, the court will not decide this issue when the plaintiff's damages total between \$28,454.13 and \$30,310.37 depending on the conversion date, and the FSM has waived its sovereign immunity only to the extent of the first \$20,000 in damages so only a \$20,000 judgment can be entered. Lee v. FSM, 19 FSM R. 80, 85-86 (Pon. 2013).

Torts – Damages

Damages for an automobile that was imported from Japan into Yap and destroyed on Yap, where the U.S. dollar is the medium of exchange and where the vehicle was valued in U.S. dollars when it was imported, will be computed in U.S. dollars, not Japanese yen. Lee v. FSM, 19 FSM R. 80, 86 (Pon. 2013).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

On April 5, 2013, this came before the court for an evidentiary hearing on the plaintiffs' damages. The court sought further briefing on various issues, including the method of calculating foreign exchange conversion, the value of and liability for a spouse's services to the other spouse, and the apportionment of damages between the spouse. The plaintiffs were permitted to file their brief by April 15, 2013, the FSM's response was due by April 25, 2013, and the plaintiffs' reply was due by May 6, 2013, after which the case would be considered submitted to the court for decision. The plaintiffs submitted their brief on April 15, 2013. The FSM did not file a response. The case is therefore submitted.

I. BACKGROUND

This case arises from an August 23, 2008 head-on collision between an automobile which plaintiff Mie Baba was driving and in which plaintiffs Elizabeth Lee, Seema Shah, and Taylor Strong were passengers, and a Toyota pick-up owned by the FSM national government and driven by Simeon Waathan, an employee of the FSM Public Defenders' Office in Yap. Waathan was alleged to be at fault because the pick-up he was driving crossed the road's centerline before the collision and he was under the influence of alcohol when it occurred.

This lawsuit followed. The four automobile occupants pled negligence claims against the FSM for personal injury, emotional distress, and economic loss damages and the two plaintiff husbands,

Ryan Lee and Yasuo Baba, also made claims. Although the defendant FSM defaulted, the plaintiffs are still required to prove damages before a default judgment can be entered. FSM Civ. R. 55(b)(2); George v. Albert, 17 FSM Intrm. 25, 32 (App. 2010).

II. DAMAGES

A. *Elizabeth Lee*

Plaintiff Elizabeth Lee was seated on the left side of the car which took the brunt of the impact and caused her head to impact the window and the door frame and left her with large scars across her face. Her left arm was fractured in multiple places, particularly at the elbow.

She incurred \$540 in medical bills at the Yap Hospital emergency room. The injuries were severe enough that medical referral to Makati Medical Center in the Philippines was necessary. There she incurred medical bills of 251,128.36 Philippine pesos, which she paid for by credit card in U.S. dollars, \$5,454.22. Another 1,000 pesos (\$21.74) was paid for a neurological evaluation. Hotel lodging in Manila cost 38,221.85 pesos and was also paid by credit card at \$849.37. And to fix the dental damage, Elizabeth Lee obtained an estimate that it would cost her \$2,190. She also lost \$700 in wages from her job at Trader's Ridge on Yap. These damages total \$9,733.59. She incurred another \$959 in airline change fees and fare increase because of her need for medical care in Manila.

Because of her injuries, Elizabeth Lee was no longer able to properly perform her job duties at Trader's Ridge in Yap and instead took a less strenuous and lower paying job as a school teacher, losing \$8,000 in income. She will need expensive plastic surgery for the facial scarring and further orthopedic surgery to remove the metal hardware in her arm, which still causes pain. She also needs muscle activator technique therapy at \$120 per one hour session. The amount of these future medical bills is uncertain but the court finds that the estimated \$5,000 would more likely approach \$10,000.

Elizabeth Lee also claims damages for pain and suffering. Awarding damages for pain and suffering is one of the most difficult tasks of a court because the determination lies solely in the court's discretion and no fixed rules exist to aid in the determination. Mathebei v. Ting Hong Oceanic Enterprises, 9 FSM Intrm. 23, 26 (Yap 1999); Primo v. Refalopei, 7 FSM Intrm. 423, 434 (Pon. 1996). The difficult task of calculating damages for pain and suffering lies in the court's sole discretion, and in making that calculation, it is proper to consider not only past pain but future pain. Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 66 (Chk. 1997). Pain and suffering serves as a convenient label under which a plaintiff may recover not only for physical pain but also for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, terror, or ordeal and it covers disfigurement and deformity, impairment of ability to work or labor, anxiety or worry proximately attributable to an injury and mental distress caused by impairment of the enjoyment of life and it includes anxiety and embarrassment from disfigurement or limitations on activities. Amayo v. MJ Co., 10 FSM Intrm. 244, 252 (Pon. 2001). To award damages for pain and suffering, such must be the result of physical injury. Narruhn v. Aisek, 13 FSM Intrm. 97, 99 (Chk. S. Ct. App. 2004); see also Hartman v. Krum, 14 FSM Intrm. 526, 532 (Chk. 2007).

Elizabeth Lee suffered grievous physical injury along with disfigurement and fright and anxiety in addition to the pain from the injury. The court therefore finds that the pain and suffering inflicted on Elizabeth Lee is valued at \$18,600.

The court finds that Elizabeth Lee's damages equal \$47,292.59. However, since the Federated States of Micronesia has waived its sovereign immunity only to the extent of the first \$20,000 in damages, 6 F.S.M.C. 702(4), the clerk shall enter judgment in Elizabeth Lee's favor for \$20,000.

B. *Ryan Lee*

Ryan Lee's claim is for the loss of consortium. He was not involved in the accident. His then wife, Elizabeth Lee, was a victim of the accident. He claims \$833 in lost wages while he was caring for his wife and accompanying her to Manila as part of the value of his services in caring for his wife while she was receiving medical treatment and recuperating from the accident. He, and Yasuo Baba in the case of his injured spouse Mie Baba, seek to include their lost earnings or other damages in their loss of consortium claims.

Loss of consortium is "more than the loss of general overall happiness" and "includes 'components of love and affection, society and companionship, sexual relations, right of performance of material services, right of support, aid and assistance, and felicity.'" Amayo, 10 FSM Intrm. at 253 (Pon. 2001) (quoting Detraz v. Hartford Accident & Indem. Co., 647 So. 2d 576, 581 (La. Ct. App. 1995)). The plaintiffs correctly note that the general rule is that the uninjured spouse who loses income when he or she provides nursing care or maid service for the injured spouse is not entitled to recover damages equal to his or her lost income as part of a loss-of-consortium claim. *See, e.g., Hutchings v. Childress*, 896 N.E.2d 520, 525 (Ohio 2008); *see also* PROSSER AND KEETON ON TORTS § 125, at 933 (5th ed. 1984) ("[t]he wife who gives up her job to nurse her husband must not be allowed to recover for her loss of wages for the same reason – her husband is entitled to recover the reasonable value of needed services and nursing").

Instead the damages are recoverable by the injured spouse and "the measure of damages for nursing services supplied by a relative who leaves his or her employment to render such services is not the amount of lost earnings but rather is the reasonable value of the nursing services supplied." Hutchings, 896 N.E.2d at 525 (quoting 2 STEIN ON PERSONAL INJURY DAMAGES § 7:11, at 7-30 (3d ed. 1997)). "A tortfeasor who caused an automobile accident . . . would expect to pay the market rate for the care provided to the injured party, not the wages of a stockbroker." *Id.* at 526. Thus, "[i]f there is to be recovery of lost income, it cannot be part of the uninjured spouse's claim for loss of consortium [because a] claim for loss of consortium is not based on economic damages." *Id.* at 522.

The uninjured spouse's loss-of-consortium claim is based upon the loss of services provided by the injured spouse before his or her injury. The uninjured spouse's income from his own employment is not a service that the injured spouse once provided. Thus, any recovery of damages for care provided to an injured spouse must be part of the injured spouse's claim.

Id.

The plaintiffs contend that, in this case, the court should award the uninjured spouse economic damages based on the definition of loss of consortium as including the "right of performance of material services, right of support, aid and assistance, and felicity." The plaintiffs assert that this permits the court to award damages to the uninjured spouses (Ryan Lee and particularly Yasuo Baba) at the reasonable value of a maid or a nurse to perform the services that the uninjured spouse performed for the injured spouse. What the plaintiffs overlook in their contention is that "the performance of material services" in a loss-of-consortium claim is for the non-economic services that the injured spouse used to perform for the uninjured spouse, not the services that the uninjured spouse later performed for the injured spouse. Thus, the uninjured spouse's lost income or the nursing or maid services performed by the uninjured spouse, even when calculated at the reasonable maid or nursing services rate, are not part of the uninjured spouse's loss-of-consortium claim but are rather a measure of the injured spouse's damages.

In an ordinary case, these damages would be assessed as part of the injured spouse's damages claim without a second thought. It is only in this case that because the FSM national government is the liable party and because the FSM has limited its waiver of its sovereign immunity to \$20,000 that there is an incentive to try to recharacterize these damages as a part of the uninjured spouse's loss-of-consortium claim. The court will not alter the nature of the damages claim solely to circumvent the liable defendant's statutory limited waiver of its sovereign immunity that prevents the injured spouse from being awarded the full amount of the damages she suffered. The court will comply with Congress's policy choice and its intent in enacting the limited waiver.

Nevertheless, Ryan Lee did suffer loss-of-consortium damages. Because of the severity of Elizabeth Lee's injuries the court values Ryan Lee's loss-of-consortium damages at \$1,500 for his loss of love and affection, society and companionship, sexual relations, right of performance of material services, support, aid, assistance, and felicity while she was too injured to provide those things. The clerk shall enter judgment in Ryan Lee's favor in that amount.

C. *Seema Shah*

Seema Shah was a passenger seated in the left front seat. She sustained deep bruising to her knees and soft tissue injuries to the rest of her body. This resulted in three weeks of pain, soreness, and stiffness to her legs. After three weeks she recovered fully. Her emotional injuries caused her extreme fear and anxiety. The court therefore finds that Seema Shah's damages for pain and suffering including emotional distress equal \$1,020. The clerk shall enter judgment in Seema Shah's favor in the amount of \$1,020.

D. *Mie Baba*

Mie Baba was the car's driver. She suffered a broken bone in her right ankle, and extreme pain and discomfort in her ankle, ribs, abdomen, and knees. She was an in-patient at the Yap Hospital for three days at a cost of \$565.38. When she was discharged she was still in extreme pain. The services of a local masseuse did not help. Those services cost \$75. She flew to Japan, her home country, for further treatment at several medical facilities. The airfare cost \$1,372.70. These Yap expenses total \$2,013.08. Mie Baba's pain and discomfort in her ankle still persists. She also becomes anxious when thinking about the accident. This is triggered by the recurring pain in her ankle. The court values Mie Baba's pain and suffering, including future pain, at \$16,800. Her half of the car destroyed in the accident was worth \$5,555.50. See *infra* part II.E.

Medical treatments in Japan cost ¥154,735. Because of her injuries and inability to care for the household, she also required maid service for a total of seven days while in Japan. This cost ¥58,000. Furthermore, her husband, Yasuo Baba provided her with spousal care, which if he had hired a maid or a nurse would have cost ¥248,000. Transportation costs to medical facilities equaled ¥21,360. These expenses in Japan totaled ¥482,095. The plaintiffs contend that these damages should be converted to U.S. dollars at the current rate of ¥81 to the dollar (equaling about \$5,951.79) instead of the ¥118 to the dollar (about \$4,085.55) in effect at the time of the accident. That way Mie Baba would be made whole – she will be compensated in an amount that will give her a value equal to the amount in yen that she spent on those services in Japanese yen.

Mie Baba's damages will easily exceed the \$20,000 statutory waiver limit regardless of which yen conversion rate the court uses. Thus, while the better view may be that the dollar value in the judgment reflect the amount the Japanese yen is valued at on the day the court enters judgment because that is the only way Mie Baba would receive the Japanese yen amount (¥482,095) equal to the yen she spent on necessary medical bills and other services, the court will not decide this issue.

Mie Baba's damages thus total between \$28,454.13 and \$30,310.37, but since the Federated States of Micronesia has waived its sovereign immunity only to the extent of the first \$20,000 in damages, 6 F.S.M.C. 702(4), the clerk shall enter judgment in Mie Baba's favor for the sum of \$20,000.

E. *Yasuo Baba*

The car that was involved in the collision was owned jointly by Mie Baba and her husband, Yasuo Baba. It had an estimated pre-collision value of ¥1,200,000. The car's value in U.S. dollars when the accident took place was about \$11,111. Currently, ¥1,200,000 is worth over \$14,000. Yasuo Baba contends that in order to be made whole he should recover the current value of ¥1,200,000.

This contention overlooks the fact that the automobile was imported into and destroyed on Yap. Yasuo Baba imported the car into Yap where the U.S. dollar is the medium of exchange and where the vehicle was valued in U.S. dollars when it was imported. If Yasuo Baba had sold the vehicle when it was on Yap, it not only would have been valued in U.S. dollars, he, more likely than not, would have been paid in U.S. dollars. If instead he chose to ship it back to Japan, the shipping cost (about \$1200) would have to be deducted from the car's estimated value. Yasuo Baba will thus be awarded \$5,555.50 for the value of his half of the destroyed car.

Yasuo Baba also claims the amount of maid care services that he personally provided his wife instead of hiring someone else. As recounted above, *see supra* part II.B., these are not his damages since he is the uninjured spouse, but they are his injured spouse's damages because those services were necessary for her proper care. Unfortunately, the Babas cannot overcome the FSM's statutory \$20,000 limit on its sovereign immunity waiver by characterizing some of the injured spouse's damages claim as those of the uninjured spouse. Yasuo Baba will not be awarded any damages for caring for his wife, Mie Baba, since those are her damages.

Nevertheless, Yasuo Baba did suffer loss of consortium. Because of the severity of Mie Baba's injuries the court values Yasuo Baba's loss of consortium at \$1,700 for his loss of love and affection, society and companionship, sexual relations, right of performance of material services, support, aid, assistance, and felicity while she was too injured to provide those things.

The clerk shall therefore enter judgment in Yasuo Baba's favor in the amount of \$7,255.50.

F. *Taylor Strong*

Taylor Strong sustained injuries that caused her considerable back pain and bruising that lasted for two weeks after the accident. She also had recurring headaches and pain on the left side of her body during that period as well. She recovered from her physical injuries within three to four weeks. Emotionally, she was diagnosed with post traumatic stress disorder and went through many counseling sessions and was prescribed Prozac for six months to deal with the emotional distress. Taylor Strong was employed by the Yap Legislature and paid at the rate of \$409.02 bi-weekly. After her sick leave was exhausted she missed two weeks of work and thus suffered lost income of \$409.02. She also claims out-of-pocket expenses of \$100.

The court finds that Taylor Strong was damaged by \$409.02 in lost wages, \$100 in out-of-pocket expenses is reasonable considering the cost of Prozac and other incidentals. The court further finds that her damages for pain and suffering and for emotional distress total \$2,050. Thus, Taylor Strong's damages equal \$2,559.02. The clerk shall enter judgment in Taylor Strong's favor in that

amount.

III. CONCLUSION

Accordingly, the clerk shall enter judgment against the FSM and in favor of Elizabeth Lee for \$20,000; against the FSM and in favor of Ryan Lee for \$1,500; against the FSM and in favor of Seema Shah for \$1,020; against the FSM and in favor of Mie Baba for \$20,000; against the FSM and in favor of Yasuo Baba for \$7,255.50; and against the FSM and in favor of Taylor Strong for \$2,559.02.

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