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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2072-20**

ESTATE OF SAYOKO TANAKA,
deceased, by KIM ROSELLO,
Administrator Ad Prosequendum,

Plaintiff-Appellant,

and

ESTATE OF KEITH MARCUS
ROSELLO, deceased, by KIM
ROSELLO, Administrator,

Plaintiff-Respondent,

v.

JONATHAN R. KAZARY,
KENWALL INC., and KENWALL
AUTO BODY REPAIR, INC.,

Defendants.

Argued December 21, 2022 – Decided January 25, 2023

Before Judges Mayer, Enright and Puglisi.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Docket No. L-3636-18.

Raquel Romero argued the cause for appellant.

David B. Owens argued the cause for respondent (Molod, Spitz & DeSantis, PC, attorneys; David B. Owens and Andrew B. Small, on the brief).

PER CURIAM

The Estate of Sayoko Tanaka (Tanaka Estate) appeals from a February 22, 2021 order apportioning \$1,000,000 in settlement proceeds to resolve a survival and wrongful death action filed on behalf of the Tanaka Estate and the Estate of Keith Rosello (Rosello Estate). We affirm.

Sayoko Tanaka (Sayoko) and Keith Rosello (Keith)¹ died in a tragic accident on December 1, 2017. Defendants responsible for the accident tendered their \$1,000,000 insurance policy to settle the matter. After the settlement sum was deposited, the trial judge conducted a plenary hearing to apportion the funds between the Tanaka and Rosello Estates. After hearing testimony over the course of five days, the judge allocated the settlement proceeds as follows: ninety-three percent to the Rosello Estate and seven percent to the Tanaka Estate. The judge set forth his reasons supporting the allocation in an oral decision on February 9, 2021.

¹ Because several of the parties share the same last name, we refer to the parties by their first names. No disrespect is intended.

We summarize the testimony adduced during the hearings. The judge heard testimony from Sayoko's mother, father, and sister Yoko.² Kim Rosello, Keith's sister, testified for the Rosello Estate. The judge also considered financial expert testimony from Kristen Kucsma on behalf of the Tanaka Estate and Leonard Freifelder, Ph.D. on behalf of the Rosello Estate. Additionally, the judge heard medical expert testimony from Dr. Joseph Schulman, who treated Keith after the accident.

In or around 2000, after completing college in Japan, Sayoko moved to the United States and settled in New York City. Sayoko worked as an analyst for two different banks. She married an American man but they divorced after ten years of marriage.

In 2015, Sayoko met Keith. Keith worked as a physical therapist in New York City. Sayoko and Keith married on April 21, 2017. Four months later, the couple moved to New Jersey. Because the couple wanted to have children in the future, they decided to freeze their embryos.

On December 1, 2017, a vehicle owned and driven by defendants struck the couple while they were walking in Linden. Sayoko and Keith suffered severe injuries as a result of the accident. Sayoko died before reaching the hospital.

² Sayoko's parents divorced prior to Sayoko's death.

However, Keith survived until April 22, 2018, when he died from an infection. From the date of the accident until his death, Keith remained either hospitalized or resided at a rehabilitation facility.

Kim's testimony

Kim testified that following the accident, Keith was non-verbal and remained dependent on a ventilator and feeding tube. Kim explained that when Keith first arrived at the hospital, he had significant swelling and was in a coma. However, within two weeks, Keith was able to open his eyes. According to Kim, by January, Keith "recognized people" and "was excited when people came into [his] room." By February, Kim testified "he was blinking his eyes. His eyes were wide open." Additionally, Keith could answer Kim's questions by using his eyes to scroll through the alphabet and was able to move one arm.

Dr. Schulman's testimony

Dr. Schulman treated Keith at Genesis HealthCare Westfield Center (Genesis), a rehabilitation facility. Keith arrived at Genesis on March 9, 2018. Schulman testified he evaluated Keith at that time and reviewed Keith's medical history since the accident date. Keith's medical history included treatment notes from the hospital where Keith was admitted immediately after the accident. Schulman also reviewed notes generated by various Genesis medical personnel.

Schulman explained Keith had "multiple fractures; [including] C spine, pelvis, chest, [and] nasal fractures[,]" noted that Keith's lung collapsed after the accident, and he had blood clots in his legs. When Keith arrived at Genesis, Schulman testified Keith suffered from "septic shock" and "fungemia," indicating bacteria and fungus in his blood stream. Keith received a variety of antibiotics and anti-fungal medications to treat these conditions. Schulman also explained that Keith suffered seizures, requiring anti-seizure medication, and he received "multiple [neurological] consults during his hospitalization."

Schulman described Keith's surgeries after the accident and before his admission to Genesis. Additionally, the doctor explained that Keith had feeding and breathing tubes which rendered him unable to speak. Keith also had a chest tube, a "transverse process fracture" and "sacral joint screw symphysis surgery."

To stabilize his spine, Keith wore a "hard collar," which significantly impeded his mobility according to Schulman. As a result of his immobility, Keith developed skin ailments. Despite these limitations, Schulman told the judge Keith's hearing was functional and he had limited sensation and mobility in his right arm and leg. Schulman also testified Keith could "hear and comprehend and follow simple commands" as of January 2018. Based on

neurological test results, Schulman recommended speech therapy to support Keith's "[e]merging functional communication."

Schulman, who saw Keith periodically during his stay at Genesis, described Keith's condition as "waxing and waning." According to Schulman, "some days when I saw him he wasn't as responsive as the next time I saw him." During periods of lucidity, Schulman testified Keith would track the doctor with his eyes and look him "in the eye when [Schulman] spoke with him." Keith responded to Schulman's questions by blinking his eyes or moving his hand. At times, Keith would attempt to mouth words in response to Schulman's questions. Schulman also explained Keith gained strength as a result of the physical therapy he received at Genesis.

Schulman prescribed Gabapentin to treat Keith's chronic pain. Additionally, the doctor told the Genesis nurses to administer Tylenol in response to Keith's expressions of pain, including facial grimacing. Schulman testified that Keith "sustained severe and ultimately devastating trauma to his body" and eventually died from "infection, from pneumonia, from a urinary tract infection, wounds despite . . . best efforts."

Testimony on behalf of the Tanaka Estate

Sayoko's parents and Yoko testified that Sayoko maintained regular contact with them while she lived in the United States. Yoko told the judge that Sayoko exchanged emails with her sisters several times a month and would telephone—though less frequently than she would email. According to Yoko, beginning in 2017, Sayoko's communications were regular but not as frequent as prior years. Sayoko's mother testified that she Skyped with her daughter every two to three weeks, and Sayoko diligently telephoned for birthdays, holidays, and other special family events. Sayoko's father also testified that she would call or write but did not specify the frequency of the communications.

Sayoko's family testified Sayoko traveled to Japan and would spend between ten days to two weeks in Japan. Her mother testified that Sayoko made trips to Japan six or seven times since she moved to the United States. According to her mother, Sayoko traveled to Japan once or twice prior to 2005, and then in July 2005, February 2008, May 2009, and January 2012. Yoko also told the judge about Sayoko's trip to Japan with Keith in 2015. According to her mother, while in Japan, Sayoko would visit family or travel throughout the country. Sayoko would stay with her mother during visits to Japan and gave her mother moderate sums of money to cover expenses during those visits.

Sayoko made no additional direct financial contributions to her family from 2005 until her death. Sayoko's sister, Yoko, lived with their mother and contributed to her mother's household expenses.

Economic testimony on behalf of the Tanaka Estate

Kucsma testified as an economic expert in support of the wrongful death claims asserted by Sayoko's parents. Kucsma opined the "total present value of the economic loss" to Sayoko's parents as a result of their daughter's death was "between \$455,102 and \$731,179." Kucsma arrived at this amount based on her calculation of the present value of Sayoko's after-tax lifetime expected wages, which she claimed was \$1,526,194.

Kucsma calculated the economic loss to Sayoko's parents based on the direct financial support Sayoko "could have provided to her parents" over the course of her expected lifetime earnings and the "alternative levels of care that she could have provided to her parents had she not died." Kucsma concluded Sayoko would have made direct financial contributions to her parents between \$336,193 and \$504,290 over the remainder of her earning life. These calculations were premised upon Sayoko contributing twenty or thirty percent of her net lifetime wages to her parents, but Kucsma explained the judge could arrive at a different number if he utilized an alternate contribution percentage.

Kucsma then testified regarding the claims by Sayoko's parents for the loss of companionship, household chores, advice, guidance, and counsel they would have received if not for their daughter's death. Kucsma arrived at her damages calculation for Sayoko's supporting services to her surviving family members by multiplying the amount of time Sayoko would have spent on such tasks by the market value of similar services in Japan.

According to Kucsma, Sayoko spent 194 hours annually providing companionship to her family because Sayoko visited her family in Japan "on average every other year and spent a couple of weeks with them." Kucsma calculated the value of the loss of companionship claim to be \$55,342.

Kucsma further testified that Sayoko "may have provided additional levels of care to her parents as they got older," either by paying for licensed nursing care or home health aide services or performing those services herself. Kucsma opined that the value of the support to the parents for the loss of Sayoko's services would be either \$118,671 or \$163,322, depending on the level of care her parents might require in the future.

Kucsma also calculated the claim on behalf of Sayoko's parents for the loss of their daughter's advice, guidance, and counsel. She assumed Sayoko would spend two hours per week providing advice and counsel to her parents,

for a total of 104 hours per year. Using data for advice and counsel services available in Japan, Kucsma valued the loss to be \$53,939.

On cross-examination, Kucsma admitted she never included the receipt of Japanese government benefits available to Sayoko's parents in her calculations. Kucsma further conceded she was unaware that Sayoko was previously married. Kucsma did not know Sayoko was solely responsible for payment of the mortgage on the home she owned with Keith nor that Keith had significant personal debt. Although Kucsma knew the couple had frozen embryos, she explained that information "was not relevant for [her] analysis."

Economic expert testimony on behalf of the Rosello Estate

The economic expert on behalf of the Rosello Estate, Dr. Freifelder, held a different opinion as to the wrongful death damages available to Sayoko's parents. He testified the total present value of damages available to Sayoko's parents would be \$78,584. Freifelder's lower valuation was not premised on a differing view as to Sayoko's expected lifetime earnings. For purposes of his analysis and valuation, Freifelder accepted Kucsma's net wage loss calculations, which were based on what "[Sayoko] was earning when she died in December of 2017," and a projection of those earnings until her expected retirement at age sixty-five as discounted for present value.

Freifelder rejected Kucsma's conclusion regarding the pecuniary losses suffered by Sayoko's parents. He testified Kucsma used an inflated rate calculation to convert net wage loss to wrongful death damages which "significantly overstated" the actual losses to Sayoko's parents resulting from their daughter's death.

Freifelder testified Kucsma's valuations were based on unsupported assumptions regarding the frequency and intensity of the support that Sayoko could, or would, provide to her parents. For example, Freifelder disagreed with Kucsma's assumption Sayoko would have contributed twenty or thirty percent of her future earnings to her parents. Freifelder explained Kucsma's supposition in this regard was unsupported by the evidence because Sayoko's parents testified Sayoko provided "a very limited amount of financial support." Based on the testimony of Sayoko's parents, Freifelder reduced Sayoko's expected future financial contribution to her parents to one percent of her expected future net earnings, which totaled \$15,836. Freifelder stated this sum was premised on an expectation that Sayoko would continue to provide "between \$5[00] and \$600" to her parents each year, consisting of nominal support and birthday gifts.

Freifelder found other errors in Kucsma's calculations. He disagreed with Kucsma's assumption that Sayoko provided 194 hours a year of companionship

to her parents. Assuming Sayoko travelled to Japan every other year and spent two weeks, sixteen hours per day, providing companionship services to her parents, Freifelder testified Sayoko would provide a maximum of 112 hours of companionship services annually. However, he noted Sayoko did not travel to Japan every two years, her time while in Japan was not entirely spent in her parents' company, and there was no evidence that Sayoko would have increased the frequency or changed the nature of her trips to Japan. Thus, Freifelder reduced the value of the companionship claim to \$35,887.

As for the advice and guidance claim, Freifelder again relied on the testimony of Sayoko's parents, which cast doubt on the frequency of the alleged support that would have been provided by Sayoko. Kucsma assumed Sayoko provided two hours of advice and counsel per week to her parents. However, based on the record and literature in the field, Freifelder testified that one hour per week, representing a half hour for each parent, was an appropriate figure. Thus, he reduced the value of the advice and counsel damages to \$26,861.

Additionally, Freifelder questioned Kucsma's claim that Sayoko would have provided between \$118,671 or \$163,322 for future care services if one or both of her parents became incapacitated. Freifelder reduced the net present value of that claim to zero dollars because he considered those damages to be

too speculative. He noted that Kucsma failed to consider Sayoko's younger sister lived with their mother, the sister contributed to the mother's household, and the sister would likely contribute to the mother's household into the future. Nor did Kucsma consider the government-provided healthcare benefits available to Sayoko's parents in Japan.

After hearing the testimony and reviewing the evidence, the judge rendered a decision on the apportionment of the \$1,000,000 settlement proceeds. The judge found the testimony of Dr. Schulman credible and concluded Keith was "conscious often" after the accident and "given significant medication for pain." The judge further found that Keith had a valid survivorship claim, and he consciously suffered pain for the four and a half months between the date of the accident and his death. The judge valued Keith's survivorship claim at \$1,125,000, calculating a sum of \$250,000 per month for his pain and suffering damages.

With respect to the Rosello Estate's wrongful death claim, the judge concluded Keith failed to present evidence sufficient to conclude that Keith suffered pecuniary loss related to the death of Sayoko, and awarded no money for wrongful death damages. Additionally, the judge awarded funeral expenses

in the amount of \$7,000 to the Rosello Estate. The judge calculated the Rosello Estate was entitled to \$1,132,000.

The judge then considered Sayoko's wrongful death claim and recounted the testimony related to that claim. First, the judge found Sayoko and her father had a close but long-distance relationship. While the two would speak by telephone, in-person visits were rare. The judge determined Sayoko stayed in touch with her sister, Yoko, and accepted Yoko's testimony that Sayoko visited Japan "approximately [five] or [six] times in the [sixteen] years" since she moved to the United States. The judge also noted Yoko's testimony that Sayoko communicated less frequently starting in 2017 because Sayoko was "very busy."

The judge then reviewed Sayoko's relationship with her mother. The judge agreed that Sayoko and her mother communicated frequently by telephone and email and the mother relied on Sayoko for advice as part of those communications. However, the judge emphasized that Sayoko's mother received a pension and benefited from government-provided healthcare services in Japan.

The court then considered the expert testimony. The judge had "significant issues with Ms. Kucsma's testimony." He found her testimony "not to be credible," specifically finding that she did not know the following

information: the living arrangement for Sayoko's family in Japan; Sayoko's prior marriage; Sayoko's ownership of the marital home; and the extent of Keith's debt. He noted Kucsma failed to consider the couple's frozen embryos because she deemed the issue to be irrelevant. The judge characterized Kucsma's testimony as "simply, not tethered to the facts," noting her valuation of Sayoko's direct financial support to her parents was unsupported by the evidence. Based on the record, the judge determined Sayoko made only nominal gifts to her parents and that Sayoko and Keith appeared committed to spending their resources in the United States, where they intended to start a family. The judge also found Kucsma significantly inflated the amount of time Sayoko would have spent providing companionship services to her parents. Additionally, he held the evidence demonstrated the advice Sayoko provided to her parents consisted of generalized statements and did not give rise to a "substantial . . . economic loss."

Conversely, the judge found Freifelder to be credible. The judge explained that Freifelder provided accurate and fair valuations. Based on Freifelder's testimony, the judge concluded that pecuniary damages to Sayoko's parents totaled \$78,584. Of that amount, the judge found \$15,836 for lost direct financial support, \$35,887 for lost companionship, and \$26,861 for lost advice

and guidance. The judge rejected damages for the future care services because there was no testimony that Sayoko contributed significantly to household chores for either parent. The judge also awarded funeral expenses to the Tanaka Estate in the amount of \$7,000. Thus, the judge calculated the total wrongful death claim for the Tanaka Estate to be \$85,584.

Based on the dollar amounts calculated by the judge, he determined the value of Sayoko's wrongful death claim represented seven percent of the total damages for the combined estates. Thus, the judge allocated the \$1,000,000 settlement sum by assigning ninety-three percent to the Rosello Estate and seven percent "to the Estate of [Tanaka] to go to her parents." He awarded the sum of \$930,000 to the Rosello Estate and \$70,000 to Sayoko's parents.

The Tanaka Estate appealed the judge's apportionment of the settlement proceeds. In analyzing the Tanaka Estate's appeal from the judge's allocation, we highlight the distinctions between the Survivor's Act, N.J.S.A. 2A:15-3, and the Wrongful Death Act, N.J.S.A. 2A:31-1 to -6. Survival claims are personal injury claims brought by a decedent's representatives that could have been made by a decedent had he or she survived the injury, and allow the "decedent's estate to recover any loss to the decedent that accrued between injury and death." Smith v. Whitaker, 160 N.J. 221, 234 (1999). The purpose of the Wrongful

Death Act is intended "to compensate survivors for the pecuniary losses they suffer because of the tortious conduct of others." Id. at 231 (quoting Alexander v. Whitman, 114 F.3d 1392, 1398 (3d Cir. 1997)). The Wrongful Death Act limits the damages available to survivors to "pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased." N.J.S.A. 2A:31-5.

Damages under the Wrongful Death Act are not "payable to the decedent's estate." F.F. v. G.A.D.R., 331 N.J. Super. 23, 28 (App. Div. 2000). Under N.J.S.A. 2A:31-4, wrongful death damages

shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same except if there is a surviving spouse of the decedent and one or more surviving descendants of the decedent they shall be entitled to equal proportions for purposes of recovery under this chapter notwithstanding the provisions of Title 3B of the New Jersey Statutes. If any of the persons so entitled in accordance with this section were dependent on the decedent at his death, they shall take the same as though they were sole persons so entitled, in such proportions, as shall be determined by the court without a jury, and as will result in a fair and equitable apportionment of the amount recovered, among them

Where a court is asked to disburse settlement proceeds on claims involving both wrongful death and survivor claims, the settlement amount "must be

proportionally allocated between the claims based on the Wrongful Death Act and the Survivor's Act." F.F., 331 N.J. Super. at 28.

Under N.J.S.A. 2A:31-4, a trial court has "wide discretion in arriving at a fair and equitable apportionment" of amounts recovered under the Wrongful Death Act. Suarez v. Berg, 117 N.J. Super. 456, 462 (App. Div. 1971) (quoting Jurman v. Samuel Braen, Inc., 47 N.J. 586, 602 (1966)). We review the trial judge's apportionment ruling for abuse of discretion. Id. at 464. We will reverse discretionary rulings of a trial court "only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

We also apply a "deferential standard" in reviewing a trial court's findings of fact and credibility determinations. Balducci v. Cige, 240 N.J. 574, 594 (2020) (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). The factual findings of the trial court "are binding on appeal when supported by adequate, substantial, credible evidence." Seidman v. Clifton Sav. Bank, SLA, 205 N.J. 150, 169 (2011) (quoting Cesare, 154 N.J. at 411-12). We accord deference to

a trial judge's credibility findings because the trial judge has the ability to see and hear the witnesses. Cesare, 154 N.J. at 411-12.

When distributing the proceeds of the net recovery from a wrongful death action, the trial court should conduct a plenary hearing "with a full development of the evidence." Suarez, 117 N.J. Super. at 460. The purpose of such a hearing is to determine the most equitable division of the net proceeds among the decedent's intestate heirs, focusing on the award of damages to those who were dependent on the decedent. Jurman, 47 N.J. at 602. "The word 'dependency' implies a present existing relation between two persons where one is sustained by another or looks to or relies on the aid of another for support or for reasonable necessities consistent with the dependent's position in life." Bohrman v. Pa. R.R. Co., 23 N.J. Super. 399, 404 (App. Div. 1952) (quoting Peterson v. Indus. Comm'n, 331 Ill. 254, 256 (Sup. Ct. 1928)). The trial judge must "fairly and equitably discriminate between dependent beneficiaries in the distribution of the recovery." Jurman, 47 N.J. at 601.

Here, the damages available to Sayoko's survivors under the Wrongful Death Act were limited to the "pecuniary injuries" suffered by her parents as a result of her death, "together with the hospital, medical and funeral expenses incurred for the deceased." N.J.S.A. 2A:31-5. Damages available to the parents

of a decedent under New Jersey's Wrongful Death Act are set forth in the seminal case of Green v. Bittner, 85 N.J. 1 (1980). In Green, our Supreme Court identified four types of pecuniary damages recoverable by parents seeking to recover under the Wrongful Death Act. Id. at 4. The damages include: the loss of value of household chores done by the decedent; the loss of direct financial contributions from the decedent; the loss of companionship of the decedent; and the loss of the decedent's advice and counsel. Ibid.

We first address the lost wage claim asserted by the Tanaka Estate. It argues the judge should have established the value of the Tanaka Estate as a threshold issue before evaluating the wrongful death claim. We reject this argument.

Proceeds under the Wrongful Death Act proceeds are not payable to the decedent or the decedent's estate. See F.F., 331 N.J. Super. at 28 ("It has long been settled that the recovery under the wrongful death statute forms no part of the estate of the deceased.") (quoting Schmoll v. Creecy, 54 N.J. 194, 200 (1969)). Rather, "the Wrongful Death Act 'created a separate cause of action for the loss suffered by designated beneficiaries" Ibid. (quoting Alfone v. Sarno, 168 N.J. Super. 315, 323 (App. Div. 1979), aff'd as mod., 87 N.J. 99 (1981)). A "cause of action for wrongful death and the deceased's own cause of

action for personal injuries are separate and distinct claims The decedent's personal claim is an asset of his estate; the death claim is not." Ibid. (quoting Schmoll, 54 N.J. at 200 n.1). Thus, damages for wrongful death do not pass through the estate of the decedent but are awarded directly to intestate heirs in the manner described by N.J.S.A. 2A:31-4.

The Tanaka Estate failed to cite any case law requiring a trial court, prior to apportioning wrongful death damages, to first value the decedent's estate or the entirety of the decedent's lost wages as a threshold issue. The cases relied upon by the Tanaka Estate, Aronberg v. Tolbert, 207 N.J. 587 (2011), and Beim v. Hulfish, 216 N.J. 484 (2014), do not support such a position.

Here, both economic experts relied upon the same calculation of Sayoko's lifetime lost wages, more than \$1.5 million, as the starting point for their respective determinations regarding the wrongful death damages suffered by Sayoko's parents. After determining Freifelder's testimony to be more persuasive than that of Kucsma, the judge accepted Freifelder's calculations as to the portion of Sayoko's lost wages to be given to her parents for direct financial contributions, companionship, advice, and guidance. The judge properly applied the Green factors and based his award on the amount of time Sayoko would have spent providing services to her parents over her lifetime,

and assessing the dollar amount for such services. The judge did not need to value Sayoko's estate or lost wages prior to conducting the Green analysis and then awarding pecuniary damages to Sayoko's parents. Having reviewed the record, we are satisfied the judge accurately analyzed the sums that Sayoko's parents should receive as damages for their pecuniary losses stemming from their daughter's death.

We next address the Tanaka Estate's claim that the judge erred in failing to consider future pecuniary losses to Sayoko's parents in apportioning the settlement proceeds. It argues the judge improperly considered evidence regarding the relationship between Keith and Sayoko, their life plans, and their financial arrangements during their marriage and, thus, rejected any award for future pecuniary losses. We disagree.

The apportionment decision demonstrates that the judge considered the pecuniary losses to Sayoko's parents from the date of her death and into the future. The judge stated his award of damages was based on Freifelder's calculations. Freifelder explained his calculations were based on the amount Sayoko would earn from the date of her death until her expected retirement at age sixty-five. Freifelder's calculations presumed that Sayoko's trips to Japan

and communication with her parents would have continued in the future had she not died.

Thus, contrary to the Tanaka Estate's argument, the judge's award of \$78,584 was not limited to past pecuniary losses suffered by Sayoko's parents. The judge appropriately awarded Sayoko's parents future damages for the loss of services that would have been provided by their daughter until her retirement. Because we are satisfied that the judge awarded sums for future pecuniary losses suffered by Sayoko's parents, we need not address the argument that the judge relied on impermissible evidence in denying future pecuniary losses.

We next consider the Tanaka Estate's claim related to the judge's award of funeral expenses. It argues that the judge arbitrarily awarded a lesser amount for Sayoko's funeral expenses than the amount requested. Again, we disagree.

An award of funeral expenses in wrongful death cases is governed by N.J.S.A. 2A:31-5, which states the court may award "such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses[.]" The authority to award funeral expenses in a survivorship claim is governed by N.J.S.A. 2A:15-3, which allows a party to "recover all reasonable funeral and burial expenses[.]"

Here, the Tanaka Estate failed to provide documentary evidence to support its claimed funeral expenses. Moreover, the judge noted the Rosello Estate claimed significantly more than \$7,000 in funeral expenses. Based on the evidence, the judge awarded each estate the sum of \$7,000 for funeral expenses. On this record, we discern no abuse of discretion in the judge's equal award of funeral expenses.

We next consider the Tanaka Estate's argument that the judge erred in qualifying Dr. Schulman as an expert and allowing him to testify regarding Keith's conscious pain and suffering. We reject this argument.

There is nothing in the record reflecting the filing of a motion for a N.J.R.E. 104 hearing regarding Schulman's testimony. Nor is there any written or oral decision provided by the Tanaka Estate on the disposition of any request for such a hearing. More importantly, counsel for the Tanaka Estate did not object to, or otherwise question, Dr. Schulman's qualifications prior to the judge concluding that the doctor had sufficient training and experience to testify as an expert in family and osteopathic medicine. Additionally, the Tanaka Estate presented no contrary expert medical testimony related to Keith's conscious pain and suffering. On this factual record, we are satisfied that the Tanaka Estate failed to present any evidence that the lack of a Rule 104 hearing prior to Dr.

Schulman's testimony adversely impacted the presentation of a case on its behalf.

We also reject the argument by the Tanaka Estate that Dr. Schulman's testimony constituted impermissible net opinion. The Tanaka Estate never filed a motion to preclude Dr. Schulman's testimony. In the absence of a motion to bar Dr. Schulman's testimony, the issue is not properly before this court. "[I]t is only the orders designated in the notice of appeal that are subject to the appeal process and review." Petersen v. Meggitt, 407 N.J. Super. 63, 68 n.2 (App. Div. 2009) (quoting W.H. Indus., Inc. v. Funicao Balancins, Ltda., 397 N.J. Super. 455, 458 (App. Div. 2008)).

Even if the Tanaka Estate had filed such a motion, we are satisfied Dr. Schulman's testimony did not constitute net opinion. A net opinion occurs when an expert "speculate[s] as to what actually occurred." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 542 (App. Div. 1996), abrogated on other grounds by Jerista v. Murray, 185 N.J. 175, 188-89 (2005). So long as an expert's findings are based on some facts or data, an expert providing opinion testimony is appropriate. Townsend v. Pierre, 221 N.J. 36, 55 (2015). Moreover, when qualifying someone as an expert, their opinion "can be based on what the witness has learned from personal experience or from persons with adequate training

and experience." Bellardini v. Krikorian, 222 N.J. Super. 457, 462 (App. Div. 1988). "It has long been established that an expert may rely on his own knowledge, as well as on facts supplied to him by others." Id. at 463.

Dr. Schulman reviewed Keith's medical records from the hospital prior to Keith's transfer to Genesis. Additionally, the doctor considered his personal treatment of Keith at Genesis as well as Keith's medical records and treatment notes from his time at Genesis. Dr. Schulman explained his reasons in support of Keith's conscious pain and suffering from the date of the accident until Keith's death. Under well-settled case law, it was permissible for Dr. Schulman to rely on medical records and facts supplied to him by others in forming his expert opinion.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION