

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CAMILLE DEJESUS, Individually and as	:	
Administratrix of the Estate of Alejandro	:	CIVIL ACTION
DeJesus, Jr., Deceased, and the Estate of	:	
Felicia Lynne DeJesus, Deceased, et al.	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 02-0253
DEPARTMENT OF VETERANS AFFAIRS	:	
	:	
v.	:	
	:	
THE PHILADELPHIA VETERANS	:	
MULTI-SERVICE & EDUCATION CENTER,	:	
INC., d/b/a Landing Zone II Transitional Residence	:	
	:	
v.	:	
	:	
LANDING ZONE II	:	
TRANSITIONAL RESIDENCE	:	

Diamond, J.

September 6, 2005

In my earlier opinion in this case, I found that the Veterans Administration’s gross negligence had substantially caused the deaths of Felicia DeJesus, Alejandro DeJesus, Jr., Michael Faulk, and Aaron Faulk. I also found the VA liable for the emotional distress suffered by Mrs. DeJesus when she heard her children being murdered. See DeJesus v. Dep’t of Veteran Affairs, No. 02-0253, 2005 U.S. Dist. LEXIS 15903 (E.D. Pa. July 26, 2005).

I subsequently conducted a four-day bench trial on damages. Plaintiffs base their damages claim on: (1) the economic losses incurred as a result of their children’s deaths; (2) the

children's pain and suffering; (3) wrongful death damages, such as funeral expenses; and (4) the harm Mrs. DeJesus suffered as she heard her children being murdered. The parties agreed to reduce their damages calculations to present value. (P-93; G-72; G-73). Plaintiffs thus contend they are entitled to \$11,692,519.43 in damages. The VA counters that the damages should not exceed \$1,752,741.67.

I award damages to Camille DeJesus in the amount of \$3,774,429 and Cheryl Faulk in the amount of \$3,703,371.67.

### **FINDINGS OF FACT**

Plaintiffs presented compelling, credible evidence of the horrific events of March 23, 1999, when Alejandro DeJesus, Sr. murdered his children and the Faulk children. My "pain and suffering" determinations reflect both the pain and the dread the children experienced as they were shot, one after another, inside the living room of the small apartment in which the DeJesus family resided.

In determining "economic damages," I have generally credited the testimony offered by Plaintiffs' experts, Drs. Herman Axelrod and Michael Wachter. I have generally discredited the testimony offered by the VA's experts, Drs. Jasen Walker and Brian Sullivan. For instance, Dr. Walker, a vocational expert, opined that the "law of familial regression" makes it very likely that children will not significantly surpass their parents' educational and vocational achievements (7.30–7.32, N.T. of July 10, 2005). If the "law" of familial regression were correct — and the trial evidence underscores that this social science theory is by no means established — it is difficult to understand how human progress could ever occur. The applicability of this "law" is especially dubious here, given the obvious determination of Mrs. DeJesus and Ms. Faulk that

their children achieve and excel. (8.35–8.36, N.T. of July 27, 2005; 8.42; 8.89; 8.91). In any event, I credit Plaintiffs’ vocational expert, Dr. Axelrod, who testified that the DeJesus and Faulk children — all from impoverished backgrounds — would likely have exceeded their parents’ attainments. (9.172, N.T. of July 28, 2005). I also largely credit the testimony of Dr. Wachter, who set out the work life, potential earnings, and non-wage benefit calculations that I find applicable to the DeJesus and Faulk children. (P-93). Further, in determining economic damages, I have examined their “station in life”: the circumstances in which the decedents lived, and evidence respecting how the decedents likely would have lived had they not been murdered. (9.155–9.156; 9.160–9.164; 9.169–9.170). See McClinton v. White, 444 A.2d 85, 88 e(Pa. 1982). Accordingly, I have increased the maintenance percentages employed by Dr. Wachter respecting all four decedents.

Finally, in determining the harm Mrs. DeJesus suffered, I have fully credited the harrowing version of events offered by her and her neighbor describing how Mrs. DeJesus saw the murder of Michael Faulk and heard the murders of her own children. I have also credited the evidence showing the resulting harm Mrs. DeJesus continues to suffer.

**A. The Events of March 23, 1999**

When Mr. DeJesus burst into his wife’s Media apartment, she and the four children were in the living room. (8.92–8.97). Mrs. DeJesus was seated closest to the doorway on a couch, with Felicia sitting next to her and Aaron Faulk sitting at the opposite end. (8.95–8.96). Alejandro, Jr. was sitting on a red futon on the other side of the doorway. (8.97). Michael Faulk had been seated at the computer in the corner on a diagonal from the doorway and was starting to move when Mr. DeJesus entered. (8.97). Upon seeing her husband with a gun, Mrs. DeJesus

said, “Oh my God.” (8.98). Mr. DeJesus passed within inches of Mrs. DeJesus; she saw him immediately shoot Michael. (8.98). Mrs. DeJesus then ran to the adjoining apartment of her neighbor, Doris Rovetti, to get help. (9.108).

When she entered Ms. Rovetti’s apartment, Mrs. DeJesus was frantic. (9.108). Both she and Ms. Rovetti heard gunshots in the hallway and through the common wall she shared with Ms. Rovetti. (1.173, N.T. of March 15, 2005; 9.108). When Ms. Rovetti asked Mrs. DeJesus to take a seat, Mrs. DeJesus sat down directly on the floor, exclaiming, “He shot the children.” (9.109). Ms. Rovetti phoned the police. (1.173).

As Mrs. DeJesus fled for help, Mr. DeJesus continued shooting and killing the other children before shooting himself in the head. (8.132). The entire incident took between twenty and sixty seconds. (8.135–8.137). The children sustained thirteen gunshot wounds. The parties agree that Mr. DeJesus shot Michael Faulk first. (8.98). They do not agree, however, as to the order of death among the other children, and there is insufficient evidence to make findings on this point. The evidence shows quite plainly, however, that after Michael was shot, each of the other children anticipated his or her death and witnessed the murder of the prior victims. (8.116–8.138; 8.149). Thus, the DeJesus children anticipated their deaths at the hands of their own father. I also credit the expert testimony of Dr. Dimitri Contostavlos, a forensic psychologist, who testified that the children were aware of their predicament and experienced various levels of consciousness before their deaths. (8.116–8.138).

I make specific findings regarding each decedent below.

### **B. Felicia DeJesus’s Damages**

I award Camille DeJesus \$1,984,950 in survival and wrongful death damages for the loss

of Felicia DeJesus.

### **Felicia's Background**

Felicia was six years old and in the first grade at the time of her death. On standardized tests taken in kindergarten, she scored at average levels, with above average marks in language skills. (9.156–9.157; G-66). She had close relationships with a variety of accomplished women. Despite the extraordinary burdens imposed on her by raising three children with a drug-addicted, absent father, Mrs. DeJesus obtained a PJA Paralegal School certificate. (8.177). Felicia's older sister Candida attends Delaware County Community College. (G-69). Her aunt, Lynn Viti, is a college graduate and was a certified Federal Agent until she retired. (2.5, N.T. of March 16, 2005; 9.20). Finally, the DeJesus's neighbor and close friend, Doris Rovetti, received a Bachelor of Arts degree from Mt. Holyoke College. (9.96). Experts for both sides agreed that these women would have influenced Felicia for the good. (7.75–7.76; 9.231). Further, Mrs. DeJesus was committed to the education of her children and aspired to have Felicia attend college. (8.91; 8.205). Candida DeJesus and Ms. Viti were similarly committed to Felicia's education. (2.11; 9.231)

### **Felicia's Economic Damages**

Given her background and salutary influences, it is likely that Felicia would have attended and graduated from a four-year college. Both sides' experts agreed that Felicia had the potential and ability to succeed at college. (7.151; 8.160). In opining that Felicia would not have gone beyond an associate's degree, the VA's expert employed the "law" of familial regression. (7.31–7.34). Once again, I do not accept this theory's application here, and I do not credit the expert's testimony. Rather, Plaintiff's expert, Dr. Axelrod, credibly testified that the beneficial

influences provided by Felicia's mother, sister, aunt, and neighbor, combined with Felicia's ability and the general brightening of the DeJesus family's fortunes once Mr. DeJesus left the household, made it likely that Felicia would have graduated from a four year college. (9.210).

The parties agreed in their calculations of lost earning power for a high school graduate, college graduate, and holder of an associate's degree or certificate. (P-93; G-72; G-73). They disagreed, however, as to whether to include certain fringe benefits, such as health insurance, in the calculations, and how to calculate maintenance. The VA estimated economic damages for Felicia at \$361,699 — assuming a high school degree, 74% maintenance expenditures, and nonwage benefits at 3% of salary. (G-72). Dr. Wachter (Plaintiffs' expert) estimated the damages at \$2,096,886 — assuming a bachelor's degree, 35% maintenance expenditures, and nonwage benefits at 20% of salary. (P-93).

I generally credit Dr. Wachter's testimony, and find that Felicia's economic damages should be in the higher range indicated by Dr. Wachter. I employ a maintenance percentage of 45%, however. I therefore award \$1,774,288 to Camille DeJesus for Felicia's economic damages.

### **Felicia's Pain and Suffering**

In making my determinations on the decedents' pain and suffering, I considered not only Dr. Contostavlos's testimony, but the uncontradicted physical evidence. Felicia suffered three close contact wounds to her chest. (8.123–8.124). She was found on the floor a short distance away from her father. (8.126). Because she suffered no head wound, it is likely that she remained conscious and experienced severe pain for some period after being shot. (8.124; G-57). She also witnessed her father shooting Michael Faulk and anticipated her own injuries. I

therefore award her estate \$150,000 compensation for the pain and suffering associated with her death, and \$50,000 for her anticipation of death.

**Felicia's Wrongful Death Damages**

The parties have stipulated to Plaintiffs' wrongful death damages in the amount of \$10,662 for Felicia's funeral and burial expenses. I therefore award that amount to Camille DeJesus.

**C. Alejandro DeJesus, Jr.'s Damages**

I award Camille DeJesus \$1,289,479 in survival and wrongful death damages for the loss of Alejandro DeJesus, Jr.

**Alejandro, Jr.'s Background**

Alejandro, Jr. was twenty-two years old at the time of his death (not eighteen, as I mistakenly noted in my earlier opinion). (8.66). He was diagnosed with cerebral palsy when he was one year old, and was limited in his ability to participate in certain activities throughout his childhood. (8.68-8.72). He attended primarily special education classes throughout his school career. (7.51-7.53; 8.188). He also was a Social Security disability recipient for most of his life, and held only part-time and seasonal employment. (8.199; 8.85-8.86). Nonetheless, Alejandro was determined to overcome his disability, discarding his leg braces in the ninth grade against the advice of doctors, (8.71), and wrestling on his high school team against disabled and non-disabled individuals, often without accommodation. (9.219-9.221).

Alejandro, Sr. created obstacles and difficulties that in no small measure impaired Alejandro, Jr.'s ability to achieve. Shortly after his graduation from high school, his parents separated, and Alejandro, Jr. resided with his father for a number of months. (8.84-8.85). This

was certainly a troubled period for him. He had witnessed his father's assault of his mother and was himself a victim of his father's physical and emotional abuse. (1.136–1.137; 8.85). In the months following his decision to reside with his mother, however, Alejandro, Jr.'s attitude changed. (7.137–7.138; 9.19). Mrs. DeJesus and Alejandro, Jr. had begun to explore the possibility of continuing his education. (8.86). Shortly before Alejandro, Jr.'s death, Doris Rovetti took him to visit the Delaware County Community College. (9.106). He spoke with academic counselors and received an application and financial aid forms. (9.106–9.107). Alejandro, Jr. told Ms. Rovetti that he would be applying to the College in the Fall. (9.107). He was excited at the prospect of continuing his education. (9.105). The College had an office specializing in services to disabled individuals, including those with cerebral palsy. (9.150–9.151). I credit the testimony of Dr. Axelrod — whose expertise includes teaching the disabled and handicapped — that the College could have accommodated Alejandro, Jr.'s needs. (9.150–9.152). He was murdered before he could apply for admission to the College. (8.198).

### **Alejandro, Jr.'s Economic Damages**

I find it likely that Alejandro, Jr. would have achieved an associate's degree had he survived. (9.33). Alejandro, Jr. had a slight limp, but was physically fit and able to walk quickly. He had obtained employment in the past. (9.99–9.100). Freed from his father's influence, Alejandro, Jr. was beginning to accept adult responsibilities and was actively pursuing opportunities for higher education. Like Felicia, he benefitted from the influences of Mrs. DeJesus, Candida DeJesus, and Ms. Rovetti, all of whom clearly intended to encourage Alejandro, Jr.'s ambitions. (8.89; 9.96–9.97).

The VA estimated Alejandro, Jr.'s economic damages at \$0 — assuming he would never

be regularly employed or obtain an associate's degree. (G-72). Plaintiffs estimated his economic damages at \$1,557,483 — assuming an associate's degree, 35% maintenance expenditures, and nonwage benefits at 20% of salary. (P-93). Once again, I look to an award in the higher range, both because of Alejandro's aspirations and his family influences. Because of Alejandro, Jr.'s disability, however, I believe his maintenance expenditures would have been somewhat higher than those of the other decedents. Accordingly, I employ a maintenance percentage of 55%. I thus award \$1,078,257 to plaintiff Camille DeJesus for Alejandro, Jr.'s economic damages.

#### **Alejandro, Jr.'s Pain and Suffering**

Alejandro, Jr. suffered seven gunshot wounds: one to the head, five to the back at close range, and one to the right thigh. (8.117). He was found between the living room and the entry to the kitchen, likely attempting to flee. (8.118–8.120). The way the wounds were inflicted indicates that he experienced some period of physical pain before death. (8.117–8.120). He also witnessed his father shooting Michael Faulk and anticipated his own injuries. (8.98). I therefore award his estate \$150,000 for pain and suffering associated with his death, and \$50,000 for his anticipation of death.

#### **Wrongful Death Damages**

The parties have stipulated to wrongful death damages in the amount of \$11,222 for Alejandro, Jr.'s funeral and burial expenses. I therefore award that amount to Camille DeJesus.

#### **D. Michael Faulk's Damages**

I award Cheryl Faulk \$2,260,124.67 in survival and wrongful death damages for the loss of Michael Faulk.

### **Michael's Background**

Michael Faulk was sixteen years old and in the tenth grade at the time of his death. A gifted student who scored high on standardized tests, Michael was extremely well-rounded — as comfortable on the chess team or doing sketches as he was playing junior varsity football. (8.30–8.33). He attended a magnet school for gifted children during most of his life, and aspired to attend college and become a professional. (8.35; 9.164–9.165). Shortly before his death, he obtained a part time job at a local pizza parlor, but was murdered before he was able to begin work. (8.35). Although Michael's grades had declined in high school, his tenth grade college aptitude test confirmed that he was a strong candidate for college admission. (8.163; P-75).

The Faulks were a close-knit family. Like Mrs. DeJesus, Ms. Faulk was a devoted mother, enormously invested in her children's well-being. Concerned about their Manhattan neighborhood, Ms. Faulk moved the family to Media, Pennsylvania. (8.12–8.15). A single mother with three sons, she eventually earned a diploma from a technical school and found a higher paying job at a cancer treatment center. (8.12–8.15; 8.20–8.22). I credit the testimony of Dr. Axelrod that Ms. Faulk strongly influenced her children for the good. (8.166).

### **Michael's Economic Damages**

I find it likely that Michael would have achieved a bachelor's degree had he lived. Michael was a highly motivated, gifted child. His brother, Mark, was admitted to a four-year college. (7.159; 8.25–8.26; 9.165–9.166). Unfortunately, emotional problems brought on by his brothers' murders caused Mark to drop out of college. (7.159). Nonetheless, had Michael survived, it is likely that Mark would have encouraged Michael to attend college.

The VA estimated Michael's economic damages at \$1,030,514 — assuming an

associate's degree, 57% maintenance expenditures, and nonwage benefits at 3% of salary. (G-72). Plaintiffs' estimate was \$2,478,937 — assuming a bachelor's degree, 35% maintenance expenditures, and nonwage benefits at 20% of salary. (P-93). Because I find that Michael would have received at least a bachelor's degree, I again look to the higher range. I employ a maintenance percentage of 45%. I thus award \$2,097,563 to plaintiff Cheryl Faulk for Michael's economic damages.

### **Michael's Pain and Suffering**

As soon as Mr. DeJesus entered his wife's living room, he shot Michael in the head and forearm. (8.13; 8.131–8.132). Police took Michael to the hospital, where he died of his wounds. Unlike the other decedents, it is likely that Michael did not have the opportunity to anticipate his death. (9.12–9.13). Accordingly, I award his estate \$150,000 for the pain and suffering associated with his death.

### **Wrongful Death Damages**

The parties have stipulated to wrongful death damages in the amount of \$5335.24 in funeral and burial expenses and \$7226.43 in medical expenses for Michael Faulk. I therefore award \$12,561.67 to Cheryl Faulk.

### **E. Aaron Faulk's Damages**

I award Cheryl Faulk \$1,443,247 in survival and wrongful death damages for the loss of Aaron Faulk.

### **Aaron's Background**

Aaron Faulk was fourteen years old and in the ninth grade at the time of his death. Less motivated than either of his brothers, he had difficulties in school and did not test well on

standardized reading and math assessments. (G-56; 9.168). Ms. Faulk and both sides' experts agreed that Aaron found it very difficult to adjust from the mostly minority school he had attended in Manhattan to the primarily non-minority school he first attended in Media. (7.162–7.163; 8.38–8.40; 9.167–9.168). These problems diminished, however, with the help of Aaron's brothers once he started high school. (8.39).

### **Aaron's Economic Damages**

I find it likely that Aaron would have achieved an associate's degree had he survived. Though not as motivated or, perhaps, as talented as either of his brothers, Aaron was beginning to adjust to high school in Media and expressed interest in becoming a chef, thus emulating his great uncle, with whom he was very close. Had it not been for the VA's gross negligence, both of Aaron's brothers would have attended college and, along with his mother, would have encouraged him to pursue a degree beyond his high school diploma. (8.42). With these beneficial influences, I find it likely that Aaron would have obtained an associate's degree.

The VA estimated Aaron's economic damages at \$310,654 — assuming one to three years of high school, 75% maintenance expenditures, and nonwage benefits at 3% of salary. Plaintiffs' estimate was \$2,520,904 — assuming a bachelor's degree, 35% maintenance expenditures, and nonwage benefits at 20% of salary. Because I find that Aaron would have received at least an associate's degree, I look to the middle of this range. I employ a maintenance percentage of 45%. In addition, I note that because Aaron was eight years younger than Alejandro, Jr., his working life would have been longer than Alejandro, Jr.'s. I therefore award \$1,259,895 to plaintiff Cheryl Faulk for Aaron's economic damages.

### **Aaron's Pain and Suffering**

Aaron suffered two wounds, one to the right abdomen and the other to his head — entering his right cheek and exiting behind his left ear. (8.127–8.129). He was found in the same spot he had been in before the shooting began. (8.130). Accordingly, I find that he was shot quickly after Mr. DeJesus entered the room.

Aaron witnessed his brother's death, and briefly anticipated his own injuries. He also experienced the physical pain of being shot. I therefore award his estate \$150,000 compensation for the physical pain and suffering associated with his death and \$25,000 for his anticipation of death.

### **Wrongful Death Damages**

The parties have stipulated to wrongful death damages in the amount of \$8352 for Aaron's funeral and burial expenses. I therefore award that amount to Cheryl Faulk.

### **F. Damages for Camille DeJesus's Emotional Distress**

I have found that Camille DeJesus heard her husband shoot and kill her children. DeJesus, 2005 U.S. Dist. LEXIS 15903, at \*60. As I noted, “[t]he grief and horror she has suffered were painfully obvious. Hearing the murder of her children has caused Mrs. DeJesus to suffer stress, anxiety, depression, and post-traumatic stress disorder.” See id. In making my determination respecting the harm she suffered, I have credited her testimony, that of Candida DeJesus, and that of Ms. Rovetti, as well as the records of her therapist, John Kessler. I award Mrs. DeJesus \$500,000 on this claim.

Mrs. DeJesus was medicated at the emergency room on the night of the murders, and saw a therapist, Mr. Kessler, for approximately one year after the killings. (8.99). Mr. Kessler

diagnosed Mrs. DeJesus with depression, “adjustment disorder,” and post-traumatic stress disorder, and noted that she had trouble concentrating, eating, and sleeping for a period after the murder of her children. (G-68; P-88; P-89). The trauma she experienced has also caused Mrs. DeJesus to have memory problems. (G-68). She continues to relive the events of March 23rd, particularly in her sleep. (8.100; 9.110). Mrs. DeJesus cannot sleep without a light on; in public places she will sit near walls because she is afraid to have an open door at her back. (8.100–8.102).

In sum, hearing the murders of her children has caused Mrs. DeJesus to suffer severe emotional distress. I award her \$500,000 for this distress.

## **CONCLUSIONS OF LAW**

### **A. Economic and Wrongful Death Damages Generally**

Under Pennsylvania’s Survival Act, economic damages are properly measured by the loss of earning power less personal maintenance expenses from the time of death through a decedent’s estimated working life span. Incollingo v. Ewing, 282 A.2d 206, 229 (1971). The law does not require mathematical exactness; a plaintiff need only provide evidence of a reasonably fair basis for calculating losses. Smail v. Flock, 180 A.2d 59, 61 (Pa. 1962). In calculating the loss of earning power, it is proper for a fact finder to make use of average earnings based upon government statistics. Weaver v. Ford Motor Co., 382 F. Supp. 1068, 1074–75 (E.D.Pa. 1974), aff’d 515 F.2d 506 (3d Cir. 1975). Personal maintenance is defined as the “necessary and economical sum which a decedent would be expected to spend, based upon his station in life, for food, clothing, shelter, medical attention, and some recreation.” McClinton, 444 A.2d at 88. Maintenance is an amount smaller than the total personal

expenditures of a given individual but larger than that necessary for basic subsistence. Id. at 87, 88.

Under Pennsylvania's Wrongful Death Act, survivor beneficiaries are entitled to funeral and medical expenses plus any pecuniary loss suffered by reason of a decedent's death. 42 Pa. Const. Stat. § 830; Kiser v. Schulte, 648 A.2d 1, 4 (Pa. 1994).

### **B. Judicial Estoppel as to Alejandro, Jr.'s Economic Damages**

Alejandro, Jr. was receiving Social Security disability benefits at the time of his death, as he had been for much of his life. (8.199, N.T. of July 27, 2005). The VA argues that because he qualified for these benefits – that his disability made him “unable to engage in any substantial gainful activity” – his estate is estopped from now claiming that he would have become gainfully employed had he survived. See 42 U.S.C. § 1382c(a)(3)(A) (2004). I disagree.

The Supreme Court has held that receiving social security disability payments does not automatically bar the recipient from later claiming ability to work. See Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 798 (1999). A contention made by someone seeking Social Security Disability Insurance that he is disabled is not a “purely factual statement,” but is instead a “context-related legal conclusion,” to which the usual judicial estoppel analysis does not apply. Id. at 802; see also Detz v. Greiner Indus., 346 F.3d 109, 116 (3d Cir. 2003) (explaining that the Cleveland Court distinguished “conflicting *legal* positions” from “contradictory *factual* assertions” for estoppel purposes). Instead, when a defendant claims judicial estoppel in this context, a plaintiff “cannot simply ignore” previous statements made to the Social Security Administration, but must explain why that SSDI contention is consistent with any subsequent assertion made for other purposes. Cleveland, 526 U.S. at 798.

Mrs. DeJesus does not contend that Alejandro, Jr. was able to work during the time he was receiving Social Security benefits. Instead, she submits, and I have found, that he would have become able to work in the future. This is consistent with the Social Security Administration's program that encourages claimants to develop a vocational plan and to obtain work and so reduce their reliance on disability benefits. See 42 U.S.C. § 1382b(a)(4) (2004) (excluding from the SSDI determination "such resources [necessary for the fulfillment of] a plan for achieving self-support approved by the Commissioner of Social Security"); 20 C.F.R. § 416.1181 (2001) (defining "plan to achieve self-support"). I have also credited the testimony of Dr. Axelrod, an expert in the education of children with disabilities, that Alejandro, Jr. could have been trained to perform a variety of jobs in the workplace, especially if his potential employers made "reasonable accommodations" for him, as required by the Americans with Disabilities Act. (8.136; 8.153–154). See 42 U.S.C. § 12111(8).

Thus, Alejandro, Jr.'s estate has not taken a position before me that is inconsistent with that which Alejandro, Jr. took before the Social Security Administration. On the contrary, the facts as I have found them underscore that the positions are reconcilable. Accordingly, I reject the VA's estoppel argument. Cleveland, 526 U.S. at 798.

### **C. Recovery for Decedents' Pain and Suffering**

Under Pennsylvania's Survival Act, all causes of action survive the death of the plaintiff. See 42 Pa. Cons. Stat. § 8302. The estate of each decedent is entitled to compensation for their physical pain and suffering before death. Mecca v. Lukasik, 530 A.2d 1334, 1345 (Pa. 1987). The VA acknowledges that the law allows recovery for the pain and suffering associated with the decedents' deaths. See Def. United States' Proposed Findings of Fact and Conclusions of Law

Concerning Damages at 34–37 (Aug. 8, 2005). The VA contends, however, that the mental anguish the decedents suffered immediately before their deaths is not compensable. I disagree.

Under the Survival Act, a plaintiff representative is entitled to all damages to which a decedent would have been entitled under Pennsylvania law had he or she lived. Harsh v. Petroll, 840 A.2d 404, 437 (Pa. Commw. Ct. 2003). I am obligated to apply Pennsylvania law as announced by that state’s Supreme Court, and to anticipate how that Court would decide an open legal question. See Packard v. Provident Nat’l Bank, 994 F.2d 1039, 1046 (3d Cir. 1993). Pennsylvania Commonwealth and Superior Court decisions, although not dispositive, are persuasive authority in this regard. Id. at 1047.

Pennsylvania law is unsettled as to whether damages for pre-impact fright are recoverable. See Nye v. Commonwealth, Dep’t of Transp., 480 A.2d 318, 322 (Pa. Super. 1984) (“[W]e need not decide whether such a recovery [for pre-impact fright] is permitted in Pennsylvania”). The weight of authority is in favor of allowing such a recovery, however. See Potere v. City of Philadelphia, 112 A.2d 100, 104 (Pa. 1955) (where physical injury is “accompanied by fright or mental suffering directly traceable to the peril in which the defendant’s negligence placed the plaintiff, then mental suffering is a legitimate element of damages”); cf. Niederman v. Brodsky, 261 A.2d 84, 85 (Pa. 1970) (extending Potere to cases where there is no physical impact). Other states with statutes similar to Pennsylvania’s Survival Act allow recovery for pre-impact fright. See, e.g., Platt v. McDonnell Douglass Corp., 554 F. Supp. 360, 363 (D. Mich. 1983) (interpreting the Michigan Wrongful Death Act); D’Angelo v. United States, 456 F. Supp. 127, 142 (D. Del. 1978) (interpreting Maryland law).

The VA offers authority addressing the requirement under Pennsylvania law that a living

plaintiff claiming infliction of emotional distress demonstrate a physical manifestation of that distress. See, e.g., Sinn v. Burd, 404 A.2d 672, 686 (Pa. 1979); Robinson v. May Dep't Stores Co., 246 F. Supp. 2d 440, 445 (E.D. Pa. 2003) (“Manifestation of physical injury is necessary to sustain a claim for negligent infliction of emotional distress.”). Indeed, Pennsylvania courts require proof of physical manifestation in emotional distress cases as a substitute for proof of injury caused by a physical impact. See Neiderman, 261 A.2d at 85 (rejecting the “impact rule,” which had required proof of “contemporaneous impact,” because the plaintiff could show physical manifestations of his emotional distress); Nelson v. Monroe Regional Medical Center, 925 F.2d 1555, 1561 (7th Cir. 1991). The law thus draws a clear distinction between the anguish the decedents experienced immediately before their murders, and the emotional distress suffered by someone who experiences no physical impact.

In these circumstances, I anticipate that the Pennsylvania Supreme Court would allow recovery for the dread and fright the decedents experienced immediately before they were murdered.

BY THE COURT:

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Paul S. Diamond, J.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>CAMILLE DEJESUS, et al.,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiffs,</b>	:	
	:	
<b>v.</b>	:	<b>NO. 02-253</b>
	:	
<b>UNITED STATES OF AMERICA</b>	:	
<b>DEPARTMENT OF VETERANS</b>	:	
<b>AFFAIRS</b>	:	
	:	
<b>Defendant.</b>	:	

**ORDER**

AND NOW, this 6th day of September 2005, judgment is hereby entered in favor of Plaintiff Camille DeJesus in the amount of \$3,774,429, and in favor of Plaintiff Cheryl Faulk in

the amount of \$3,703,371.67, and against Defendant United States of America Department of Veterans Affairs.

BY THE COURT:

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Paul S. Diamond, J.