

**United States Court of Appeals  
for the Second Circuit**

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August Term 2021

(Argued: March 9, 2022    Decided: August 24, 2023)

No. 21-548-cv

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MIRIAM GONZALEZ, individually and  
as Executrix of the Estate of Robert R. Salazar, deceased,

*Plaintiff-Appellant,*

— v. —

UNITED STATES OF AMERICA,

*Defendant-Appellee.\**

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Before:                    CHIN, SULLIVAN, and BIANCO, *Circuit Judges.*

Plaintiff-Appellant Miriam Gonzalez, on behalf of herself and as Executrix of the Estate of Robert R. Salazar, her deceased husband, brought claims under the Federal Tort Claims Act against the United States alleging that, between October 2015 and August 2016, a U.S. Department of Veterans Affairs hospital negligently failed to diagnose Salazar with lung cancer. Prior to trial, the government

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\* The Clerk of Court is respectfully directed to amend the caption as set forth above.

conceded that the hospital's ten-month failure to diagnose Salazar was a departure from the standard of care. Following a two-day bench trial, the district court (Daniels, J.) entered judgment and awarded \$975,233.75 in damages to Gonzalez, including \$850,000 for pain and suffering and \$50,000 for loss of consortium.

On appeal, Gonzalez argues: (1) the district court erred in failing to adequately explain its factual findings and methodology for arriving at its awards for both pain and suffering and loss of consortium, as required under Federal Rule of Civil Procedure 52(a); and (2) the district court's awards for pain and suffering and loss of consortium were based on legal errors, including that the awards were inadequate in light of comparable New York cases.

As a threshold matter, we clarify that the appropriate standard of review for assessing a district court's FTCA damages award governed by New York law is whether the award "deviates materially from what would be reasonable compensation," as articulated under New York Civil Practice Law and Rules § 5501(c), not whether the award "shocks the conscience," as is the standard under federal law. We nonetheless find Gonzalez's challenges to the district court's damages awards to be unpersuasive. The district court's explanation for the awards in its factual findings and conclusions of law, as well as in its denial of the motion to amend or alter the judgment as to these awards, satisfied the requirements of Rule 52. Moreover, we discern no legal error in the district court's explanation of its determination of the awards and hold that the awards did not deviate materially from what would be reasonable compensation under New York law.

Accordingly, we **AFFIRM** the judgment of the district court. Judge Sullivan concurs in part and dissents in part in a separate opinion.

GARY A. BARBANEL, Law Office of Gary A. Barbanel, New York, NY (Peter Wessel, Law Office of Peter Wessel, PLLC, New York, NY, *on the briefs*), for *Plaintiff-Appellant*.

RACHAEL L. DOUD (Anthony J. Sun, Benjamin H. Torrance, *on the brief*), Assistant United States Attorneys, for Damian Williams, United States Attorney for the Southern District of New York, New York, NY, for *Defendant-Appellee*.

JOSEPH F. BIANCO, *Circuit Judge*:

Plaintiff-Appellant Miriam Gonzalez (“Gonzalez”), on behalf of herself and as Executrix of the Estate of Robert R. Salazar (“Salazar”), her deceased husband, brought claims under the Federal Tort Claims Act (“FTCA”) against the United States alleging that, between October 2015 and August 2016, a U.S. Department of Veterans Affairs (“VA”) hospital negligently failed to diagnose Salazar with lung cancer. Prior to trial, the government conceded that the VA hospital’s ten-month failure to diagnose Salazar was a departure from the standard of care. Following a two-day bench trial, the district court (Daniels, J.) entered judgment and awarded \$975,233.75 in damages to Gonzalez, including \$850,000 for pain and suffering and \$50,000 for loss of consortium.

On appeal, Gonzalez argues: (1) the district court erred in failing to adequately explain its factual findings and methodology for arriving at its awards for both pain and suffering and loss of consortium, as required under Federal Rule

of Civil Procedure 52(a); and (2) the district court's awards for pain and suffering and loss of consortium were based on legal errors, including that the awards were inadequate in light of comparable New York cases.

As a threshold matter, we clarify that the appropriate standard of review for assessing a district court's FTCA damages award governed by New York law is whether the award "deviates materially from what would be reasonable compensation," as articulated under New York Civil Practice Law and Rules ("CPLR") § 5501(c), not whether the award "shocks the conscience," as is the standard under federal law. We nonetheless find Gonzalez's challenges to the district court's damages awards to be unpersuasive. The district court's explanation for the awards in its factual findings and conclusions of law, as well as in its denial of the motion to amend or alter the judgment as to these awards, satisfied the requirements of Rule 52. Moreover, we discern no legal error in the district court's explanation of its determination of the awards and hold that the awards did not deviate materially from what would be reasonable compensation under New York law.

Accordingly, we **AFFIRM** the judgment of the district court.

## BACKGROUND

### I. The Trial Evidence

Salazar and Gonzalez met in 1962 and were married for nearly fifty-seven years before Salazar died in August of 2018. On October 7, 2015, at seventy-five years old, Salazar was an emergency room patient at a hospital owned and operated by the VA's New York Harbor Healthcare System (the "VA Hospital"). Dr. Robert Hessler conducted an examination of Salazar and ordered chest x-rays. Dr. Kwang Myung reviewed the x-ray results, which showed an abnormality in Salazar's lung, and recommended a CT scan be taken for further investigation. However, Dr. Hessler did not make any notation in Salazar's medical chart concerning the x-ray results, did not order any follow-up testing as recommended by Dr. Myung, and did not inform Salazar's primary care provider of the follow-up recommendation.

Following the October 7, 2015 emergency-room visit, Nurse Practitioner Catherine Glasser conducted Salazar's primary care visits at the VA Hospital. When Glasser first treated Salazar on October 13, 2015, Salazar was not experiencing chest pain, shortness of breath, or other medical problems, aside from his diabetes, and, according to Glasser, was in "pretty good shape for a 75-

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