

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA23A**

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Zalaya Tart, an infant by her mother and natural  
guardian, Kia Bynoe and Kia Bynoe, individually,

Index No.: 301311/07

Plaintiffs,

Decision and Order

-against-

New York Bronx Pediatric Medicine, P.C., Ronald  
Arevalo, M.D., Anthony Njapa, M.D., Christopher  
Leong, M.D., and St. Barnabas Hospital,

Defendants.

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**HON. ALEXANDER W. HUNTER, JR.**

Defendants Ronald Arevalo, M.D. and New York Bronx Pediatric Medicine, P.C. (hereinafter "Bronx Pediatric") as well as defendant St. Barnabas Hospital, have submitted two separate post-trial motions that will be decided herein. The motion by Dr. Arevalo and Bronx Pediatric for an order setting aside the jury verdict pursuant to C.P.L.R. §4404 and directing a new trial is denied. The motion by Dr. Arevalo and Bronx Pediatric for an order, in the alternative, reducing the jury's verdict as excessive, is also denied.

The motion by St. Barnabas Hospital for an order directing the entry of judgment in its favor and dismissing all claims against it, adjudging that it has no liability to plaintiffs, is denied. St. Barnabas Hospital's motion in the alternative, for an order directing a new trial on the ground that the evidence presented at trial was insufficient to support a finding of liability on behalf of St. Barnabas Hospital, is denied. St. Barnabas Hospital's further motion in the alternative to set aside the jury's award as excessive, is also denied.

The cause of action was for medical malpractice brought on behalf of the infant plaintiff by her mother. The infant plaintiff was born at St. Barnabas Hospital after 23 ½ weeks gestation. While she was in St. Barnabas Hospital's neo-natal intensive care unit (NICU), plaintiff alleged, at trial, that Dr. Arevalo and Bronx Pediatric failed to promptly remove a catheter from the infant's right radial artery after cyanosis was noted, which led to the loss of parts of four fingers on the infant's right hand.

The trial of this matter took place between February and March of 2012. On March 19, 2012, the jury rendered a verdict in plaintiff's favor in the amount of \$4,500,000.00. Of that amount, \$300,000.00 was for past pain and suffering for a period of 7 years and \$4,200,000.00 was awarded for future pain and suffering for 68 years.

Dr. Arevalo and Bronx Pediatric now move to set aside the jury's verdict and assert that the jury's finding of liability against Dr. Chowdhury was against the weight of the credible evidence. Defendants refer to the testimony of plaintiff's expert, Dr. Stuart Dranoff, who testified, *inter alia*, that if the arterial line would have been removed immediately when the nurse noted cyanosis, the infant would not have lost her fingers. He opined that the infant's blood gas could have been measured through a venous line. Defendants contrast that testimony with that of

their expert, Dr. Warren Rosenfeld, who testified that the infant required the arterial line to measure her blood gas and record her blood pressure to keep her alive. Dr. Rosenfeld testified that since the arterial line was so essential to the infant's survival, it could not just be removed as Dr. Dranoff suggested. Dr. Rosenfeld also opined that bruising or cyanosis in a premature baby's fingertips is not uncommon. Defendants then refer to the testimony of Dr. Arevalo, which was in accordance with that of Dr. Rosenfeld. Defendants argue that the jury's conclusion that there were departures by Dr. Chowdhury which proximately caused the infant's injuries, is against the weight of the credible evidence and should be set aside.

Next Dr. Arevalo and Bronx Pediatric move to set aside the jury's verdict on the ground that there was no competent proof to establish that Bronx Pediatric should be held liable for the acts of Dr. Chowdhury. Defendants argue that Dr. Arevalo testified that Dr. Chowdhury was a "moonlighting neonatologist" on the date of plaintiff's injury. Dr. Chowdhury was not a named defendant in this action. Defendants contend that plaintiff failed to sustain her burden that Dr. Chowdhury was an employee of Pediatric P.C. and it was error for this court to determine as a matter of law that Bronx Pediatric was vicariously liable for the acts of Dr. Chowdhury. Moreover, the evidence established that Dr. Chowdhury was not an employee of Bronx Pediatric and the fact that Dr. Lezcano, the head of Bronx Pediatric, made up a schedule that included Dr. Chowdhury, is insufficient to establish an employer/employee relationship.

Dr. Arevalo and Bronx Pediatric further move to set aside the jury's verdict on the ground that the jury did not fairly evaluate the evidence with respect to the infant's pain and suffering. Defendants argue that neither the testimony adduced at trial nor the medical records suggest that the infant endured significant pain and suffering warranting an award of \$4,500,000.00. As such, defendants allege that the jury's award was based upon sympathy and confusion and should be set aside.

Dr. Arevalo and Bronx Pediatric further argue that the jury's verdict should be set aside due to prejudicial errors that occurred at trial. Specifically, the failure to give uniform appropriately tailored liability questions as to each defendant caused the jury to be confused. Moreover, the court reporter inappropriately read back requested testimony by leaving out the fact that a particular question had no response and instead combined two questions. Defendants further take issue with the fact that this court failed to allow the jury to determine the issue of whether Bronx Pediatric was responsible for the acts of Dr. Chowdhury and held as a matter of law that Bronx Pediatric was vicariously liable for his acts.

Defendants further assert that the verdict should be set aside as a result of jury misconduct involving juror number 4 who informed the court that certain members of the jury were texting "back and forth" with alternate jurors who had been sequestered. Moreover, defendants allege that it was inappropriate for this court to "force" juror number 4 to continue deliberations after she said she could not.

Finally, defendants assert that this court curtailed their counsel from making a record and also made prejudicial comments to defense counsel. Even though most of the exchanges occurred outside the presence of the jury, defendants contend that "the cumulative effect of them over the course of the trial was to create a decidedly hostile environment." (Quinn Aff., p. 29, para. F).

Defendants further claim that the jury's award should be reduced as it was excessive.

Defendants cite to cases which they acknowledge are not analogous, in support of their contention that the jury's award herein was not based on a fair evaluation of the evidence and deviates materially from what would be reasonable compensation.

St. Barnabas Hospital moves for an order directing the entry of judgment in its favor and dismissing all claims against it on the ground that there was no ruling during trial that would render it vicariously liable for the acts of Dr. Chowdhury. St. Barnabas further moves to set aside the jury's verdict as excessive.

St. Barnabas Hospital contends that the jury rendered no decision as to any liability by St. Barnabas Hospital and St. Barnabas Hospital was not mentioned on the jury's verdict sheet. Additionally, there was no ruling by this court during trial that St. Barnabas Hospital would be vicariously liable for any malpractice ascribed to Dr. Chowdhury nor did the evidence at trial support such a finding. St. Barnabas Hospital further contends that after the jury rendered its verdict, said defendant promptly moved for judgment and dismissal of the complaint and all claims against it based on a prior summary judgment order of Justice Mark Friedlander dated July 10, 2010 which granted partial summary judgment to St. Barnabas Hospital. St. Barnabas Hospital contends that Justice Friedlander's decision was that the only involvement of St. Barnabas Hospital was on behalf of vicarious liability for Dr. Arevalo and Dr. Njapa. In view of the jury's verdict in favor of both of those defendants, the case should be dismissed as to St. Barnabas Hospital.

St. Barnabas Hospital asserts that no issue of any potential relationship between St. Barnabas Hospital and Dr. Chowdhury was presented to the jury and this court cannot now rule on a post-verdict motion that St. Barnabas Hospital is vicariously liable for Dr. Chowdhury's medical malpractice. As such, its motion should be granted. Additionally, St. Barnabas Hospital argues that if the court denies its motion for entry of judgment in its favor or deems St. Barnabas Hospital liable for Dr. Chowdhury's medical malpractice, there must be a new trial on that issue as a post-trial shifting of the liability of a non-party to a party that had no opportunity to chart a course at trial and to present closing arguments in response to that ruling is "inherently unfair." (Buckley Aff., para. 22).

St. Barnabas Hospital moves, in the alternative, to set aside the jury's award as excessive. St. Barnabas Hospital contends that the jury's award reflects a "runaway verdict" which is plainly reflected in plaintiff's counsel's suggestion in summation that the jury award \$2,000,000.00 in damages but the jury awarded \$4,500,000.00 instead. St. Barnabas Hospital cites to cases which are not analogous, to support its contention that the award herein is excessive.

Plaintiff opposes the motion by all defendants and argues that the order of Justice Friedlander is clear that St. Barnabas Hospital is vicariously liable for all attending doctors who treated the infant plaintiff at its facility. Plaintiff asserts that when Dr. Arevalo was *voir dired* about the monthly schedule which showed that Dr. Chowdhury had been hired to work at an assigned time the third and last day of the month, he admitted that the schedule had been made up by Dr. Lescano, the head of Bronx Pediatric. Dr. Arevalo further testified that his group is contracted by St. Barnabas Hospital to run the NICU. Plaintiff argues that since Dr. Chowdhury's status is the same as that of Dr. Arevalo, St. Barnabas Hospital is clearly vicariously liable for him as well.

Additionally, with respect to Bronx Pediatric's responsibility for Dr. Chowdhury, plaintiff

argues that this court's ruling as a matter of law was correct. The head of Bronx Pediatric published a schedule and assigned Dr. Chowdhury to work on April 3 and April 30, 2005. Where there is no conflict in the evidence, the question may be determined by the court as a matter of law. Plaintiff cites to case law which holds that where a hospital or clinic holds out an independent contractor to be its agent or employee, it may be estopped from asserting such independent contractor status if the patient has relied on that representation. As such, both St. Barnabas Hospital and Bronx Pediatric are responsible for Dr. Chowdhury's negligence as a matter of law.

Plaintiff further asserts that at his deposition, Dr. Arevalo testified that he was the physician on duty overseeing the infant's care on April 30, 2005 when her fingernails were noted to be cyanotic. He is a principal of Bronx Pediatric and should now be equitably estopped from disclaiming responsibility for the person who Dr. Arevalo, for the first time at trial, said was actually in charge of the infant's care at the time at issue. Plaintiff contends that if Dr. Arevalo at deposition named Dr. Chowdhury as the responsible physician, then he would have been added as a defendant.

With respect to the verdict sheet, plaintiff contends that there was no confusion in asking the jurors first whether Dr. Arevalo departed from good and accepted medical malpractice and then asking whether Dr. Chowdhury departed from good and accepted medical practice. Additionally, plaintiff alleges that the motion to set aside the jury's verdict should be denied with respect to the allegation by Dr. Arevalo and Bronx Pediatric that this court made prejudicial comments to their counsel. Plaintiff's counsel contends that defense counsel's actions "went far beyond the bounds of propriety" first by creating an "ethical conundrum" when defending both Bronx Pediatric and Dr. Arevalo and by allowing Dr. Arevalo to recant his sworn deposition testimony that he was the doctor on duty when the infant's fingernails turned blue. Moreover, once defense counsel's "case went sour" he continually screamed to the court about his "need to make a record." (Landers Aff., para. 6). Plaintiff further points out other inappropriate behavior by counsel for defendants Arevalo and Bronx Pediatric and argues that the verdict should not be set aside.

With respect to juror #4, plaintiff contends that this court handled the deadlocked jury issue appropriately.

Finally, with respect to defendants' allegation that the verdict was excessive, plaintiff points out that there is no similar case with which to compare the present one as all reported cases involve men who have had a work-related accident or injury involving a vehicle. In one case cited by plaintiff, the jury awarded \$40,000,000.00 for a 39 year old woman who lost four fingers on her left hand because of an I.V. infiltrating and the trial court reduced the verdict to \$5,000,000.00. In another case involving a 20 year old male who had a subway accident and lost three fingers and a portion of his hand, the jury awarded \$19,142,000.00. Plaintiff contends that the jury in the case at bar, observed the infant's hand and heard testimony about her limitations because of it. Therefore, an award of \$4,200,000.00 for 68 years does not deviate from reasonable compensation.

The motions by defendants to set aside the jury's verdict are denied. It is well established that a trial court can set aside the jury's verdict and order a new trial "only if there was 'no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented.' The test...is not whether

the jury erred in weighing the evidence, but whether any viable evidence existed to support the verdict.” (citations omitted). Lolik v. Big V Supermarkets, Inc., 86 N.Y.2d 744 (1995). Moreover, it is well established that the court’s discretionary power pursuant to C.P.L.R. §4404, “must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict. Fact-finding is within the province of the jury, not the trial court. Thus, a verdict should not be set aside unless the jury could not have reached the verdict on any fair interpretation of the evidence. Brown v. Taylor, 221 A.D.2d 208 (1<sup>st</sup> Dept. 1995).

This court finds that the jury’s verdict should not be disturbed. The jury in the case at bar weighed the evidence as it saw fit and made its own credibility determinations with respect to the testimony of plaintiff’s expert and defendants’ expert with respect to whether or not there was a departure by Dr. Chowdhury and the verdict was not against the weight of the credible evidence. Cohen v. Kasofsky, 55 A.D.3d 859 (2<sup>nd</sup> Dept. 2008). Moreover, Dr. Arevalo and Bronx Pediatric have failed to show that there was any substantial confusion by the jury as a result of the verdict sheet. Martinez v. Te, 75 A.D.3d 1, 4-5 (1<sup>st</sup> Dept. 2010). Therefore, there is no basis to order a new trial on that ground.

The other allegations by Dr. Arevalo and Bronx Pediatric with respect to alleged prejudicial comments and alleged inappropriate coercion of a juror to continue with deliberations are without merit and do not serve as a basis to set aside the jury’s verdict.

The request by St. Barnabas Hospital to enter judgment in its favor is denied as there was ample evidence at trial by which both St. Barnabas Hospital and Bronx Pediatric could be found to be responsible for Dr. Chowdhury’s negligence.

With respect to the jury’s award to the plaintiff for damages, courts have held that the amount of damages to be awarded for personal injuries is primarily a question of fact for the jury. Iazzetti v. City of New York, 216 A.D.2d 214 (1<sup>st</sup> Dept. 1995). In order to determine if an award is excessive or insufficient, the standard that has been applied in the appellate courts and which has been applied at the trial court level as well is, “deviates materially from what would be reasonable.” C.P.L.R. §5501( c). Thus, the amount of damages awarded by a jury may be set aside if it deviates materially from what would be reasonable compensation. See, Donlon v. City of New York, 284 A.D.2d 13 (1<sup>st</sup> Dept. 2001).

The cases cited by defendants in support of their motion are not analogous to the facts in the case at bar and this court does not find that the jury’s award was excessive or deviated materially from what would be reasonable compensation.

Accordingly, the respective motions to set aside the jury’s verdict are denied.

This constitutes the decision and order of the court.

Dated: July 11, 2012



J.S.C.

ALEXANDER W. HUNTER JR