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Zandre T. v Beulah Church of God in Christ Jesus, Inc.
2009 NY Slip Op 51748(U)
Decided on August 13, 2009
Supreme Court, Kings County
Battaglia, J.
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Decided on August 13, 2009

Supreme Court, Kings County

**Zandre T., an infant under the age of Fourteen years by his
mother and natural Guardian, Opal T., Plaintiff,**

against

Beulah Church of God in Christ Jesus, Inc., Defendant.

30801/02

Plaintiff was represented by Edward S. Goodman, Esq. of Simonson Hess & Leibowitz, P.C.
Defendant was represented by Lamont R. Bailey, Esq. of Bailey & Bailey, LLC.

Jack M. Battaglia, J.

From September 1997 until July 1998, the infant plaintiff, Zandre T., resided with his parents at 929 Marcy Avenue, Brooklyn, in a building owned by defendant Beulah Church of

God in Christ Jesus, Inc. On July 7, 1998, when Zandre was two years and two months old, his blood lead level was measured at 27 micrograms per deciliter (ug/dl). Zandre's mother, plaintiff Opal T., commenced this action on his behalf, seeking damages for injuries allegedly sustained by Zandre as a result of exposure to lead in paint at 929 Marcy.

After trial, on February 18, 2009, a jury determined that there was peeling or chipping paint in the apartment in which the Plaintiffs resided; and that exposure to lead paint in the apartment was a substantial factor in bringing about injury to Zandre. The jury awarded him \$400,000 for past pain and suffering, and \$600,000 for future pain and suffering, the latter intended to compensate him for 63 years.

Defendant now renews its motion, made pursuant to CPLR 4401 at the close of Plaintiff's evidence, for a directed verdict in its favor, and moves pursuant to CPLR 4404 (a) for judgment notwithstanding the verdict, or for a new trial, or for reduction of the amount of the award (*see also* CPLR 5501 [c].) Defendant's motions are based essentially on contentions that Plaintiff's evidence on causation was insufficient to support any award, but that, in any event, the amount of the award is excessive.

Factually, the motions are based on evidence that, even before moving into the apartment at [*2]929 Marcy Avenue, Zandre was a hyperactive child and showed delayed speech development, and on July 18, 1997 his blood lead level had been measured at 10 ug/dl, "the blood level that the Centers for Disease Control and Prevention has defined as elevated' and associated with decreased performance on intelligence tests and impaired neurocognitive development and growth." (*See New York City Coalition to End Lead Poisoning, Inc. v Vallone*, 100 NY2d 337, 343 [2003].)

A motion for a directed verdict pursuant to CPLR 4401 and a motion for judgment notwithstanding the verdict pursuant to CPLR 4404 (a) may only be granted where the moving party is "entitled to judgment as a matter of law." A motion for a new trial may be granted where the jury's verdict is "against the weight of the evidence, [or] in the interest of justice" (*see* CPLR 4404 [a].) "[A]n award is excessive or inadequate if it deviates materially from what would be reasonable compensation." (*See* CPLR 5501 [c].) "Although phrased as a direction to New York's intermediate appellate courts, § 5501 (c)'s deviates materially' standard . . . instructs state trial judges as well." (*Gasperini v Center for Humanities, Inc.*, 518 US 415, 424 [1996] [*citing, inter alia, Shurgan v Tedesco*, 179 AD2d 805, 806 (2d Dept 1992)].)

"There must be no valid line of reasoning and permissible inferences which could possibly

lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial' in order to set aside a judgment and direct judgment in favor of a party entitled to judgment . . . A jury verdict should not be set aside and a new trial ordered unless the jury could not have reached the verdict on any fair interpretation of the evidence.'" (*Le Patner v VJM Home Renovations, Inc.*, 295 AD2d 322, 323 [2d Dept 2002] [*quoting Cohen v Hallmark Cards*, 45 NY2d 493, 499 (1978) and *Nicastro v Park* 113 AD2d 129, 134 (2d Dept 1985)]; [see also Taylor v Martorella, 35 AD3d 722](#), 723-24 [2d Dept 2006].)

The "material deviation" standard of CPLR 5501 (c) seems more clearly suited to review of the *amount* of damages awarded, rather than to determinations that damages in some amount have *in fact* been sustained. "Although economic awards are quantifiable, awards for pain and suffering, or for loss of services and society, do not lend themselves as easily to computation." (*Okraynetes v Metropolitan Tr. Auth.*, 555 F Supp 2d 420, 435 [SDNY 2008].) "Prior awards are regarded as instructive, but not binding, by courts performing CPLR § 5501 (c) review." (*Id.* at 436 [*citing, inter alia, Senko v Fonda*, 53 AD2d 638, 639 (2d Dept 1976)].)

A plaintiff in a lead-paint case must establish "prima facie causation" both as to elevated blood lead levels as a result of exposure to lead-based paint on the premises and as to any cognitive, behavioral, or other deficiencies or disorders. (*See Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 648 [1996]; *see also Stoves v City of New York*, 293 AD2d 666, 667 [2d Dept 2002].) Speculation alone by a defendant as to other causes for an infant's deficiencies and disorders will not be sufficient to rebut a plaintiff's *prima facie* showing. (*See Juarez v Wavecrest Mgt. Team*, 88 NY2d at 648.) Generally, the weighing of expert testimony in lead-paint cases, as in others, is for the jury. ([See Jiminez v City of New York, 7 AD3d 268](#), 269 [1st Dept 2004]; *Seay v Greenridge*, 292 AD2d 173, 173 [1st Dept 2002]; *Gonzalez v Cheng*, 287 AD2d 595, 596 [2d Dept 2001].) [*3]

Defendant contends in the first instance that there is insufficient evidence to support the jury's finding that there was peeling or chipping paint in the apartment at 929 Marcy Avenue during the period of occupancy by the Plaintiffs. The testimony of Zandre's parents on this issue was sparse, to say the least, and were it the only evidence on the issue, the Court might well find it insufficient to support the finding. But also in evidence was the report of a Department of Health inspection of the premises on July 14, 1998, supported by the testimony of Michel Meulens, a Public Health Sanitarian with the Department. Mr. Meulens did not himself inspect the apartment, but he explained the recorded observations of the inspector, which would themselves be sufficient to support the jury's finding. In addition, the report states that the

inspector was told by Zandre's father, "Child constantly picks and eats paint chips from the living room doors and window openings," and Mr. Meulens read the statement to the jury.

There is no question as to "weight of the evidence" on this issue, since Defendant's evidence on the condition of the paint in the apartment was virtually non-existent.

Plaintiff's evidence as to injury and causation came primarily from two experts, neuropsychologist Marcia Knight, Ph.D., who evaluated the infant plaintiff on November 3, 2006, when he was in the fourth grade, and neurologist Hal Gutstein, M.D., who examined him on July 5, 2007. For Defendant, neuropsychiatrist Alberto Goldwasser, M.D., testified; he evaluated Zandre on October 10, 2007. Zandre and both his parents also testified. The probity of their testimony, however, is highly dependent as to injury and causation on the probity of the expert testimony.

Dr. Knight's "primary" diagnosis of Zandre was "attention deficit hyperactivity disorder, predominantly hyperactive impulsive type." (Trial Transcript ["T."] at 135.) Other diagnoses were expressive language disorder, coordination disorder, and oppositional defiance disorder, the last a consequence of the attention deficit hyperactivity disorder ("ADHD.") Zandre tested at a full-scale IQ of 102, which, Dr. Knight testified, is in the high-average range. "This is an average or better child." (T. at 137.) But Dr. Knight also testified to an opinion that, had Zandre not been exposed to lead, his IQ "potentially" would have been "closer to like 115," at the top of the average range. (T. at 141-42.) Her general "prognosis" was that Zandre "will continue having problems in those areas [*i.e.*, "cognitive deficits and the ADHD"] for the rest of his life." (T. at 141.) In Dr. Knight's opinion, Zandre's blood lead level of 27 ug/dl was a substantial factor in bringing about those problems.

The probative value of Dr. Knight's testimony is undermined by her acknowledgment on cross-examination that she didn't "know exactly when [Zandre] became hyperactive or if he was more hyperactive or less before he had lead poisoning" (T. at 153), and did not know that Zandre had tested at a blood lead level of 10 ug/dl on July 18, 1997, before his parents took him to 929 Marcy Avenue. On direct examination, she testified that, except for IQ, "there is no dose dependent relationship" between blood lead level and its consequences; for instance, the more lead you have, the more hyperactive you will be." (T. at 111.) But on cross-examination, after being told of the 10 ug/dl level, the "degree of disability" sustained by Zandre was "dose [*4]related." (T. at 162.) "If it was starting to cause problems below ten, it certainly made them worse and very worse because he developed - - there was no sign he was hyperactive in the same

way he became after he had the 27 when he had it at ten." (T. at 163.)

Although Dr. Knight acknowledged that "IQ starts going down as it approaches 10" (T. at 158), and that a blood lead level of 10 ug/dl "could lead to classroom behavioral difficulties," "could also lead to neurocognitive disorders," "could also lead to attention deficit hyperactivity disorder," and "can also lead to a coordination disorder" (T. at 160-61), on redirect examination she maintained her opinion that Zandre's "lead level of 27 was a substantial factor in causing . . . the condition that [she] told the jury about" (T. at 165.)

To the extent that Dr. Knight testified that the effects of exposure to lead paint were not dose related, she was contradicted by Plaintiff's other expert, neurologist Hal Gutstein (T. at 176-77.) He essentially agreed, however, that "the previously noted level . . . of 10 was minimal or not significant in this particular case" (T. at 181.) More generally, Dr. Gutstein described his examination of Zandre. "Everything was normal except . . . a mild right left confusion on multi-step commands" and "some mild impairment in naming" "not normal for a child of this age" (T. at 182.) Dr. Gutstein thought that these effects "reflect[] the injury as a result of the lead poisoning that occurred when [Zandre] was a child." (T. at 182.) Also, based primarily on Dr. Knight's findings, Dr. Gutstein had the opinion that Zandre "had impairments of cognition, academic and behavioral issues as a result of this very high lead level at a very important part, stage in his maturation." (T. at 184.)

Like Dr. Knight, however, Dr. Gutstein did not know at the time he examined Zandre and formed his opinions that Zandre had tested at 10 ug/dl approximately two months before his family resided at 929 Marcy Avenue. Nonetheless, Dr. Gutstein maintained that "the proximate cause of this patient's cognitive, emotional, behavioral issues is the lead level that reached up to 27, that occurred sometime later"; "[a]nything before that was not medically significant or not actionable, let's put it that way." (T. at 198.)

Defendant's expert, neuropsychiatrist Alberto Goldwasser disagreed. His opinion was that "living in that place on Marcy Avenue did not cause [Zandre's] psychiatric ailments"; "[w]hatever he was suffering from, he had it before he moved into this apartment." (T. at 247.) These "ailments," the "speech delay and the hyperactivity" "existed in significant, with significant, severity before he moved in." (T. at 253.) Dr. Goldwasser did agree, however, that "as a general proposition with lead poison . . . the higher the blood lead level, the greater the potential for injury." (T. at 262.)

The Court concludes that, based upon the testimony of Dr. Knight and Dr. Gutstein, a

rational jury could decide that Zandre's blood lead level of 27 ug/dl resulted from his exposure to lead paint at 929 Marcy Avenue, and was a substantial factor in causing him injury of the nature described by the experts. Recognizing, moreover, the jury's role in assessing the credibility of expert testimony in light of all of the other evidence in the case, the jury's verdict was not against [*5]the weight of the evidence.

The Court's conclusions assume, however, that Plaintiff did not bear the burden of establishing that Zandre suffered no injury by reason of his blood lead level of 10 ug/dl, or if he did suffer some injury, the burden of establishing a basis for an allocation of damages for injury before and after he was exposed to lead paint at 929 Marcy Avenue. Even Dr. Knight testified that "IQ starts going down as [blood lead level] approaches 10" (T. at 158), and a jury determination that Zandre suffered no injury at all by reason of lead-paint exposure before his exposure at 929 Marcy Avenue might well be against the weight of the evidence.

Plaintiff contends that this case is governed by the principle that "where two parties by their separate and independent acts of negligence, cause a single, inseparable injury, each party is responsible for the entire injury." (*See Ravo v Rogatnick*, 70 NY2d 305, 310 [1987]; *see also id.* at 312 ["single indivisible injury"].) Here, there is no evidence that Zandre's blood lead level was affected by the negligence of any other party. The principle has been applied, however, to "prenotice and postnotice periods of exposure" to lead paint (*see La Fountaine v Franzese*, 282 AD2d 935, 938 [3d Dept 2001]), and to "periods of time that [the defendants] respectively owned the building in which plaintiff's injuries were sustained" from lead-paint poisoning (*see Tejada v 116 West Corp.*, 293 AD2d 261, 261 [1st Dept 2002].)

Defendant has not suggested any compelling reason why the principle should not be applied here, and the Court sees none. The cited caselaw establishes, at least presumptively, that "lead-paint poisoning" is a "single indivisible injury." The defendant bears the burden of establishing that the particular plaintiff's injury is divisible, perhaps because of factors other than lead-paint exposure, and of providing a basis for allocation. Defendant here did not attempt to do so; rather, its expert testified that Zandre's entire injury was the result of lead-paint exposure or other factors before he resided at 929 Marcy Avenue.

The amount of damages awarded by this jury presents a more difficult problem. The evidence was sparse on the likely consequences to Zandre, past and future, as a result of his exposure to lead paint at 929 Marcy Avenue. The Court will quote it all, beginning with the testimony of Dr. Knight.

"QDo you have an opinion to a reasonable degree of neuropsychological certainty if the cognitive and behavioral conditions that you found in Zandre affect his social and emotional well-being?

AYes.

QWhat is your opinion?

AWell, you will know, I saw, you know, numerous notes from school about how he behaves with other children. He gets into fights. He is disrespectful to teachers. He is constantly bothering people. I don't see how he could do very well socially with that kind of behavior. It is certainly bad on him. [*6]

...

AThat he is a really - - in his case, what it mostly hurt was his behavior. This part of his brain that controls your impulses was very severely affected.

QNow, I want you to assume that [Opal T.] testified yesterday that Zandre was recommended for special education, but she chose not to place him in it. Do you have an opinion to a reasonable degree of neuropsychological certainty if that decision was a reasonable decision?

AYes, I recall seeing that in the earlier school records. They wanted to put him in a program to eight to one to one, very small program. That would have been a public school special ed. program. My experience with those programs is he would have been with children who, you know, would have had behavior problems even worse than his and intellectual learning problems even worse than his. I think that would be more of the issue. *This is a potentially very bright child.* . . . I think she rightly saw the potential in her child that he should be able to function at least academically, and some other way of helping him behaviorally needs to be found.

...

QDo you have an opinion to a reasonable degree, neuropsychological certainty, if there are services, either academic, medical, psychological that would prove beneficial to Zandre?

AWell, I think the best case scenario, again, I couldn't guarantee it would be a very

specialized private school that's geared to *children who are bright, who have good academic, intellectual potential* and who are very, you know, focused on dealing with the behavioral issues that those children have. There are schools that do just that. They claim they have good outcomes. I think that would be the best possible hope for him that I can think of.

...

QDo you have an opinion to a reasonable degree neuropsychological certainty how Zandre's lead poisoning and organic conditions will affect him in the future?

AYes, I do.

QWhat is your opinion?

AThat he will always have these problems. As you get older, the brain matures more, and you should have them to a lesser degree, but they are still there on some level. Usually, it's a sense of restlessness, inability to stay in your seat during your job, you need a lot of breaks. There's always a restlessness that these people report as they get older.

QWill the diagnosis you made of Zandre, will they affect the type of job that he is able to have? [*7]

AYes, I mean he can't be in a job where he has to sit in a desk all day. He would be better off doing work where he can be active. So, you know, that would limit him, even though *he is bright enough to do white collar kind of work*, but I don't think he would be, I think he would be too restless to stay at a desk. But, on the other hand, I don't see him doing construction work because he is so impulsive, and he isn't that great with visual motor skills. You have to be very careful. I am not sure what he could do. He is limited in other ways, too. You would not want him climbing or installing expensive equipment." (T. at 142-42; 146; 149-50 [emphasis added].)

Dr. Gutstein provided the only other evidence as to the likely consequences of Zandre's lead-paint exposure.

"QDo you have an opinion to a reasonable degree of medical certainty, what, if any, long term consequences Zandre will face as a result of his lead poisoning?

...

AThere are two general categories of issues in that question or the answer to that question.

The first issues, issue is, as a result of the brain injury that occurred and the subsequent ADHD and oppositional defiant disorder and the other issues that you mentioned, those are lifelong issues. So as a result, as I wrote in my report, there will be interference, impairments of occupational, recreation, social, civic, personal issues indefinitely.

What I mean by that, you know, people with those deficits have difficulty adjusting to new environments. They have difficulty maintaining, establishing and maintaining solid relationships. They have difficulty with employment because they have trouble with multitasking and getting along with co-workers. All areas of their adult life can be materially affected in terms of not reaching their fullest potential, had they not been exposed to high levels of lead as a child. The other issue is - - more medical issues - - it has been found or determined that exposure to lead at an early age puts you at significantly higher risk for kidney problems, hypertension and heart disease. Those issues are also common in the general population, are more common in the population of people who have been exposed to lead at an early age. He will need to be monitored more carefully for heart disease, kidney disease and hypertension." (T. at 190-91.)

It is important to note that the jury was not asked to make any award for medical, educational, or other remedial expenses, or for loss of future earning potential, nor was evidence presented that would have supported any award for any such damages. (*See Jackson v Chetram*, 300 AD2d 446, 447-48 [2d Dept 2002].) The jury's award was only for pain and suffering, past and future, including loss of enjoyment of life.

The Court has concluded, based upon the evidence presented in this case, and a [*8] comparison with sustained jury awards in comparable cases, that the amounts awarded here for both past and future pain and suffering are not sufficiently supported by the evidence, and deviate materially from reasonable compensation.

The Court is aware of 12 appellate court decisions in the First and Second Departments in which the court reviewed awards for lead-paint exposure, including awards for pain and suffering. In nine of the decisions, the sustained awards for the total of past and future pain and suffering was \$600,000 or less. (*See Woolfalk v NY City Hous. Auth.*, 10 AD3d 524 [1st Dept 2004] [\$125K past; \$275K future; \$400K total]; *Jiminez v City of New York*, 7 AD3d 268 [1st Dept 2004] [\$75K past; \$360K future; \$435K total]; *Mayi v 1551 St. Nicholas LLC*, 6 AD3d 219 [1st Dept 2004] [\$565K total]; *Ghaznavi v Ditmas Mgmt. Corp.*, 2 AD3d 579 [2d Dept 2003] [\$500K future]; *Guerrero v Djuko Realty, Inc.*, 300 AD2d 542 [2d Dept 2002] [\$100K past; \$400K future; \$500K total]; *Padilla v Jols Realty Corp.*, 284 AD2d 512 [2d Dept 2001]

[\$150K past; \$450K future; \$600K total]; *Hiraldo v Khan*, 267 AD2d 205 [2d Dept 1999] [\$100K past; \$400K future; \$500K total]; *Esteves v NY City Hous. Auth.*, 266 AD2d 502 [2d Dept 1999] [\$500K total]; *Davis v City of New York*, 264 AD2d 379 [2d Dept 1999] [\$125K past; \$150K future; \$275K total].)

Of the other three, the total sustained award in one was \$650,000. (See *Jackson v Chetram*, 300 AD2d 446 [2d Dept 2002] [\$150K past; \$500K future; \$650K total].) In another the total was \$850,000. (See *Stoves v City of New York*, 293 AD2d 666 [2d Dept 2002] [\$200K past; \$650K future; \$850K total].) In only one case, which involved two infants, did the sustained awards total \$1 million or more. (See [Peguero v 601 Realty Corp.](#), 58 AD3d 556 [1st Dept 2009] [\$350K past; \$1M future; \$1.35M total; and \$250K past; \$750K future; \$1M total].)

Most of these decisions provide little, if any, description of the plaintiff's injuries. One of the few decisions that does describes injuries similar to those here. In *Davis v City of New York* (264 AD2d 379), the infant plaintiff's injuries included ADHD; his condition was "characterized by hyperactivity, impulsiveness, and distractability" (*id.* at 379-80.) His "full scale and verbal IQ placed him within the average range of potential." (*Id.* at 380.) He would "likely have some difficulty throughout his life with personal relationships and work- and school- related pursuits," but "the plaintiffs failed to present evidence, other than speculation, that the infant plaintiff's academic and future employment opportunities would be limited as a result of his rather mild disorder." (*Id.* at 379-80.) "The jury award of \$1,000,000" was deemed "excessive, given the lack of severity of the infant plaintiff's condition." (*Id.* at 380.)

A decade has passed since the decision in *Davis*, but it has been one marked by low inflation. The more recent decisions indicate that the appellate courts in the First and Second Departments would not today accept a \$1 million verdict for pain and suffering in a lead-paint case in the absence of evidence of more substantial impairment than presented in *Davis* and this case. Indeed, notwithstanding the deficiencies she identified, Dr. Knight consistently described Zandre's intellectual ability and potential in very positive terms. Any loss of potential, as Dr. Knight saw it, may well constitute compensable harm, but it is necessarily speculative, its effects [*9]elusive, and no vocational or economic expert attempted to quantify it. (Compare *La Fontaine v Franzee*, 282 AD2d at 940-41.)

Plaintiff's experts testified that the behavioral aspects of Zandre's injury had and would continue to affect his school, work, and other relationships, but neither expert described the place of those consequences among the many other factors that make up the complex of

personal relationships. That Zandre manifested developmental delay, hyperactivity, and "oppositional" behavior that, according to Plaintiff's experts, were not the consequence of lead poisoning, illustrates the difficulty. Again, the jury is not therefore deprived of the ability to compensate for the harm, but the security and strength of the foundation for the jury's valuation must be questioned.

The testimony of Plaintiff's experts, necessary for a causal link between any identified deficiency or disorder and an effect on Zandre's life, past or future, is insufficient to support the award made by the jury. In particular, the evidence is insufficient to support an award higher than that sustained in the great majority of appellate decisions, even considering the passage of time.

Defendant's motion is granted to the extent that the parts of the jury verdict awarding damages for past and future pain and suffering (and the period of time for the latter) are set aside, and a new trial ordered on damages only; unless, within thirty (30) days after service upon her of a copy of this order with notice of entry, Plaintiff files with the clerk of the court a written stipulation to a reduction of the award for past pain and suffering to \$240,000 and a reduction of the award for future pain and suffering to \$360,000.

Any judgment that has been entered on the jury's verdict and any related enforcement are hereby vacated, but this part of the order is stayed until the expiration of thirty (30) days from service with notice of entry, to allow Plaintiff, if so advised, to seek a further stay from the Second Department.

August 13, 2009 _____

Jack M. Battaglia

Justice, Supreme Court

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