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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No.: 303454/2010

ADELEI PADILLA,

Plaintiff,

-against-

Present:
HON. NORMA RUIZ

MONTEFIORE MEDICAL CENTER and
DIEGO R. CAMACHO, MD

Defendants.

The following papers numbered 1 to 5 Read on this motion Set Aside
Noticed on 3/19/13 and duly submitted as No. 13 on the Motion Calendar of 4/29/13

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to: Papers	Numbered
Notice of Motions and Affidavits Annexed.....	1-2
Answering Affidavits.....	3-4
Replying Affidavits	5
Memorandum of Law	
Other:	

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

The defendants Montefiore Medical Center ("Montefiore") and Diego R. Camacho ("Dr. Camacho") move to set aside the jury's verdict on various grounds. Upon a review of the moving papers and opposition submitted thereto, the motion is granted.

In this medical malpractice action, the plaintiff Adelei Padilla ("Padilla") alleged that the defendant, Dr. Camacho departed from good and accepted medical practice when he injured her right common iliac artery during the laparoscopic cholecystectomy (gallbladder removal surgery) he performed on March 30, 2009. As a result, she sustained a pseudoaneurysm which required an endovascular surgery to insert a stent into the right common iliac artery.

Dr. Camacho does not deny injuring Padilla's right common iliac artery during the laparoscopic cholecystectomy, however, he contends that the injury to this vessel is an accepted

complication of such surgery. As such, he did not deviate from good and accepted medical practice.

The trial commenced on January 25, 2013, concluding on February 8, 2013 with a jury verdict in favor of Padilla. The jury found that Dr. Camacho departed from good and accepted standards of medical practice during the performance of a laparoscopic cholecystectomy on the plaintiff at Montefiore. It awarded the plaintiff $800,000.00 for past pain and suffering.[1]

It is undisputed that on March 30, 2009, Dr. Camacho performed a single incision laparoscopic cholecystectomy. This surgery involves blindly inserting a Veress needle into the abdomen through the umbilicus (belly button). The abdomen is then insufflated with carbon dioxide. In turn, a surgical instrument called a Trocar is inserted through the incision in the umbilicus under direct visualization from a camera located within the trocar. The procedure is then completed under visualization from the camera with surgical instruments that are also inserted through the trocar. After the surgery, the plaintiff was transferred to the recovery room. Thereafter, she was discharged home at approximately 11:45 pm on the same day.

On April 6, 2009, Padilla returned to the emergency room complaining of pain, nausea, vomiting, chills and fever. She was diagnosed with a 7mm pseudoaneursm of the right common iliac artery and a retroperitoneal hematoma. She underwent endovascular surgery to insert a stent into the right common iliac artery at the level of the pseudoaneurysm.

The defendants now move to set aside the jury's verdict on the following grounds: (1) the plaintiff failed to establish a prima facie case; (2) as against the weight of the credible evidence; (3) the verdict was excessive; and for such other and further relief the court deems just and proper.

Legal Sufficiency of the Evidence

In a medical malpractice action, it is the plaintiff's burden to show a departure from good and accepted standards of medical practice, and that such departure was a proximate cause of the plaintiff's injuries (*Rivera v Greenstein*, 79 AD3d 564, 568 [1st Dept 2010]). Generally, the standard of care for a physician is one established by the profession itself (*Spensieri v. Lasky*, 94 NY2d 231, 238 [1999]. To sustain this burden, a plaintiff must present expert opinion testimony that the defendant's conduct constituted a deviation from the requisite standard of care (*Pace v. Jakus*, 291 AD2d 436, 436 [2d Dept 2002]). The expert's testimony

[1]The claim for future pain and suffering was dismissed by the Court.

must be based on facts in the record or personally known to the witness (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Cassano v. Hagstrom*, 5 NY2d 643,646 [1959][Court of Appeals held an expert's opinion was baseless and worthless as evidence because the expert testified, despite his lack of knowledge, as to what he assumed or believed the defendant had done and then from those assumed facts drew an inference of malpractice]). An expert cannot reach his conclusion by assuming material facts not supported by the evidence (*Cassano* at 646). Moreover, expert testimony that offers only conclusory assertions and speculation ...does not support liability" (*Rivera* at 568; Cassano at 646).

In the often cited case of *Cohen v. Hallmark Cards, Inc.* (45 NY2d 493, [1978]), the Court of Appeals held that in order for a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, it is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the concluson reached by the jury on the basis of the evidence presented at trial (*id*).

To be awarded judgment as a matter of law, pursuant to CPLR § 4401, the defendants have the burden of showing that viewing the evidence in the light most favorable to the plaintiff, the plaintiff has not made out a prima facie case (*Bryan v. Staten Island University Hospital*, 54 AD3d 793, 793 [2d Dept 2008]). The Court finds that defendants meet this burden.

Plaintiff's expert, Dr. Michael Drew, defined a complication as an event that occurs due to a procedure. That is an untoward event from something you have done to intervene. He explained that there are complications that fall within the standard of care and they are recognized complications (TT at 452). On the other hand, there are complications which are deviations from the standard of care (TT at 453). Dr. Drew defined a deviation as something you should not have done (TT at 453). He testified that the following events are accepted complications for a laparscopic cholecystectomy: wound infections, pneumonia, injury to a bile duct, injury to a blood vessel near the gallbladder, injury to a piece of intestine, bleeding, inflamation or irritation of the liver and a bile leak (TT at 453). While Dr. Drew recognized that bleeding and injury to a vessel is an accepted complication of a gallbladder surgery, he testified that the injury to the plaintiff's right common iliac artery was a deviation because this vessel was "way in the back and the surgeon [had] no business being in [that] area" (TT at 456).

Dr. Drew conceded that while he did not know which instrument caused the injury, it did not matter if it was the Veress needle or the Trocar because despite their respective safety features, it is the operator who has the last resort of the patient's safety (TT at 462).

Notwithstanding, Dr. Drew did state that he believed that it was probably the Veress needle that caused the injury since the Veress needle was inserted blindly and the Trocar was inserted with the visual aid of a camera (TT at 541). Regarding the Veress needle, Dr. Drew agreed that the standard of care for inserting a Veress needle was to stop inserting the needle upon hearing two clicks (TT at 532). When you stopped inserting the Veress needle after hearing two clicks, the needle would only be about one inch in the abdominal cavity (TT at 468). The doctor opined that it was impossible to insert the Veress needle, hear two clicks and then cause injry to the right common iliac artery. This is the case because the needle would have to be inserted four or five inches in order to reach the iliac artery (TT at 468).

On direct, Dr. Drew testified the basis of his opinion that Dr. Camacho deviated from the accepted standard of care when he injured Padilla's right common iliac artery during the gallbladder surgery was that Dr. Camacho "anatomically had no reason to be there" (TT at 498).

On cross examination, Dr. Drew conceded that he did not perform any research on anatomy prior to rendering an opinion in this case (TT at 512). He never published anything in the field of laparoscopic surgery (TT at 519). Nor did he subscribe to medical journals that focus on laparoscopic surgery (TT at 520-521). He was not aware of any research conducted by doctors on laparoscopy to provide guidance to surgeons regarding how far away the iliac vessels, the iliac artery, can be from the surface of the skin (TT at 554). His opinion on whether or not Dr. Camacho followed the standard of care was based solely upon his 18 years of experience as a surgeon (TT at 520-521).

Dr. Drew also admitted that he never used the type of Trocar used by Dr. Camacho during Padilla's surgery (TT at 523) and that he never performed a single incision laparscopic cholecystectomy (TT at 526). Dr Drew agreed that it was possible that the plaintiff's right common iliac artery could be directly beneath her umbilitis (TT at 539). Moreover, Dr. Drew agreed that if Dr. Camacho stopped inserting the Veress needle upon hearing two clicks, then he followed the standard of care (TT at 531-532).

On cross examination, Dr. Drew reiterated that his opinion that Dr. Camacho deviated from the standard care was based entirely on the premise that the retroperitoneal vessels are located at least four or five inches away from the abdominal wall (TT at 546-547). When defense counsel asked Dr. Drew to consider the opinion that the iliac artery can be two centimeters from the surface of the skin in a thin woman, he disagreed with such an opinion based on the two to three thousand surgeries he performed (TT at 555). Dr. Drew went on to say that even if research books, journals and articles claim the location could be as close as two

centimeters he would still disagree based on his experience (TT at 556).

The evidence regarding how the surgery was performed was the operative report and Dr. Camacho's deposition and trial testimony. According to Dr. Camacho, his practice is to perform all of his cholecystectomies the same way. Had he done anything different in Padilla's surgery he would have noted such in his operative report (TT at 652). He expressed uncertainty with regards to which instrument caused the injury to the vessel. Ultimately, he also believed that it was the Veress needle because it was inserted blindly (TT at 208). He explained that at the end of the Veress needle there is a hub which connects to the machine that pumps the carbon dioxide (TT at 80). Customarily, he holds the Veress needle with his right hand half way down the shaft with the tip of his finger approximately two to two and a half inches away from the sharp end of the needle. He holds the needle this way because if you hold it by the upper part of the needle, it can angle when being inserted and go into the subcutaneous space (fat) as opposed to inside the abdominal cavity. Dr. Camacho explained that holding it the way he holds it provides more precision when inserting the needle (TT at 666-667). Moreover, holding the Veress in this manner prevents it from going any deeper than two and a half inches into the body (id).

Dr. Camacho testified that it was his practice to insert the Veress needle until he heard the two clicks. He explained that the clicks occur as the needle passes the anterior and posterior fascia (TT at 82). Dr. Camacho testified that he did perforate the plaintiff's right common iliac artery during the operation (TT at 694). However, he explained had he punctured the artery, he would have immediately seen blood come back into the Veress needle. What he believed happened was that the Veress needle lacerated the wall of Padilla's right common iliac artery and spread the tissue apart. Over time, the high pressure system weakened the artery's wall, causing a slow and creating the pseudoaneurysm (TT at 694).

Dr. Camacho further testified that injury to the iliac artery is a reported risk associated with this surgery (TT @ 696). He disagreed with Dr. Drew's opinion that the only way the Veress needle can injure the iliac artery is by being inserted deep at least for or five inches. Dr. Camacho stated that the anatomy of a thin person is such that there can be a two centimeter distance from the fascia to the retroperitoneal (TT at 671-672, 715). Moreover, he explained that the anatomy of a woman's spine differs slighty than that of a man's spine, in that a woman's pelvic cavity is a bit more concave at the bottom because women tend to have more fat in their buttocks (TT @ 647-648). As a result, a man's backbone is straight while a

woman's backbone is pushed slightly inward (*id*). This slight concave configuration at the bottom of a female spine affects the dimensions of the abdominal cavity (id). When a woman is in a supine position, her buttocks will push her backbone up a little bit more into the abdominal cavity (TT @ 649). Because of this, studies have been conducted on women and their structures in relation to the umbilical area (id).

This case did not involve any novel or complicated medical theories. Since Dr. Drew testified that injury to vessels and or veins located within the surgical field were accepted complications, the essential question was: what was the distance between Padilla's abdominal wall and her right common iliac artery. Without any qualifications, Dr. Drew stated that the right common iliac artery was four to five inches away from the abdominal wall. While there was some discrepancy in the medical records regarding Padilla's weight (anesthesiologist records noted 130 pounds and discharge papers noted 119 pounds), by all accounts she was a thin woman on the day of the surgery. According to Dr. Drew, 65% to 70% of his practice involves abdominal surgery which includes laparoscopic colon resections, gallbladder, bariatric surgery, bypass and bands. He further estimated that he performed approximately 2000 laparoscopic cholicystectomies during his career. Clearly, Dr. Drew is an experienced surgeon, however, there was no testimony regarding how may of the two thousand to three thousand patients he operated on were similar in size to Padilla. Nor did he make any qualifications when he opined that the right common iliac artery is four to five inches away from the abdominal wall. As the defendants note in their moving papers, Dr. Drew's opinion as testified to in court, presumes that all patients, regardless of size or weight have the same anatomy. Dr. Drew conceded that he did not perform any research on this issue. Notwithstanding his 18 years of experience, it was not sufficient for Dr. Drew to draw a line in the sand and conclude that the distance from the abdominal wall to the common iliac artery was four to five inches without further elaboration.

Moreover, the Court notes Dr. Drew did not provide any testimony regarding the length of the Veress needle. He did, however, bring in a Veress needle to court and it was introduced into evidence. The length of the Veress needle was approximately five inches.[2] Dr. Camacho testified he held the Veress needle by the middle of the shaft (halfway down from the top)

[2] Defendant's medical expert testified that he measured the Veress needle and from the end of the plastic hilt (referred to as "hub" by Dr. Camacho) it was about five inches long (TT at 847).

leaving approximately two and a half inches between his finger tip and the sharp end of the needle. According to Dr. Drew, if the Veress needle was inserted four inches that would leave only one inch for Dr. Camacho to hold the Veress needle. If it was inserted five inches, that left zero space for Dr. Camacho to hold the Veress needle and the entire needle would have been inserted into Padilla's abdominal cavity. Dr. Camacho would have had to have been holding the Veress needle from the hub, located at the end of the Veress needle. Neither scenario was supported by the facts in the record. As noted above, an expert may not reach his conclusion by assuming material facts not supported by the evidence (*Cassano* at 646).

The Court finds that Dr. Drew's expert opinion was not supported by the facts in evidence. The Court further finds that since Dr. Drew did not explain, or in any way support his opinion with medical evidence, his opinion was speculative and conclusory. Given these deficiencies in the testimony of Dr. Drew, the court finds there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury (*Bustos v. Lenox Hill Hospital*, 105 AD3d 541, 541 [1st Dept 2013][The trial court's decision to set aside the jury's verdict was affirmed since the expert failed to "explain or in any other way support his opinion, which therefore was speculative and conclusory and without probative force"]).

Accordingly, that branch of the motion which seeks to set aside the jury's verdict on the grounds that evidence was legally insufficient is granted. The jury's verdict is hereby vacated and this action is dismissed.

Verdict Was Against the Weight of the Evidence

Assuming arguendo, that the plaintiff's evidence was legally sufficient, this Court would have set aside the jury's verdict as against the weight of the evidence.

The court's authority to set aside a verdict as against the weight of the evidence and order a new trial is an inherent one and demands a discretionary balancing of many factors. Such authority is codified in CPLR § 4404(a), which provides in pertinent part, that : ". . . the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight . . . " It is a settled rule that a jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence. *McDermott v. Coffee Beanery, LTD*, 777 N.Y.S.2d 103 (1st Dept. 2004). Great deference is accorded to a jury's verdict in tort cases when deciding a motion to set aside a verdict as against the weight of the evidence (*Chdewinski v. Wisnicki*, 21 AD3d 791, [1st Dept 2005]). A verdict should only be set aside as against the weight of the evidence where it is palpably wrong and

the jury could not have reached its conclusion upon any fair interpretation of the evidence (*Rivera v. 4064 Realty Co.*, 17 AD3d 201, 203 [1st Dept 2005]).

As set forth above, the Court finds that Dr. Drew's expert opinion was not supported by the facts in evidence. In addition, Dr. Drew's opinion was speculative and conclusory. Moreover, on cross Dr. Drew did not deny that in 2008 he provided an expert opinion in an unrelated case captioned *Gallagher v. Holmes Surgical Assoc., Inc.*, that a Veress needle was not capable of causing any vascular injuries (TT 550-551). Nor did Dr. Drew deny that he also opined that the vena cava of the plaintiff in Gallagher (who was 5'9 and weighed 150 lbs) was 8, 10 or 12 inches deep (TT at 553). The testimony in *Gallagher* was in stark contrast to the expert testimony Dr. Drew provided in the case at bar.

On the other hand, Dr. Scott Belsley opined with a reasonable degree of medical certainty that Dr. Camacho performed the laparoscopic cholecystectomy on Padilla within the accepted standard of medical practice. There was no deviation (TT at 835, 853). He further opined that great vessel injury is an accepted risk of laparoscopic surgery that occurs at an incidence of one in 1,000 and one in 10,000 times, every time a laparoscopic procedure is performed (TT at 836).

Dr. Belsley explained that the great vessels start at the heart. The veins bring the blood to the heart and the arteries take the blood away from the heart. They circle around the top part of the chest and go down into the abdomen. Right at the level of the umbilicus. The aorta splits into two, the left common iliac and the right common iliac (TT @ 837).

The doctor further explained that when a person lays supine (flat) the abdominal content will shift around a little (TT @ 841). In addition, during the surgery, the person is perfectly paralyzed and there is no musculatue whatsoever (TT @ 841). As a result, when you push into the abdomen, you are going to push far into the abdomen (id). When you push downwith the needle, the whole abdominal wall deforms and the distance could be as little as two centimeters (an inch) (*id*). The basis of his statement that the distance can be as little as two centimeters was based on general medical knowledge. Dr. Belsley stated that there are between a dozen and two dozen articles written about complications of laparoscopy which include injuring the vessels during the procedure (TT @ 843). The studies were based on CT scans and MRIs taken to measure the actual distance between the abdominal wall and the vessels (TT @ 844).

Dr. Belsley further opined that Dr Drew's testimony that you would have to be four or five inches in with the Veress needle, or the trocar, in order to injure the large vessels in the retroperitoneum was completely false (TT @ 847). Dr. Belsley's opinion was based on the medical studies that are generally accepted as surgical knowledge that put the number closer to two or three centimeters (id).

In contrast to Dr. Drew, Dr. Belsley's opinion that the distance could be as litttle as two

centimeters was based on a thin person in a supine position under anaesthesia. Moreover, Dr. Belsley supported his opinion by stating that he relied on medical studies that used CT scans and MRIs to measure the actual distance between the abdominal wall and the vessels.

Based on the forgoing, this Court finds the jury could not have reached its conclusion upon any fair interpretation of the evidence (*Rivera v. 4064 Realty Co.*, 17 AD3d 201, 203 [1st Dept 2005]). As such, the jury's verdict is against the weight of the evidence.

Plaintiff's Counsel Improper Conduct Deprivated the Defendant of a Fair Trial

The jury's verdict should also be set aside because the Court finds that plaintiff's counsel, Mr. Howard, repeatedly made inflammatory, prejudicial and improper comments to the extent that the defendants where deprived of a fair trial.

Mr. Howard inappropriately implied that the defendants had a burden of proof in this case. In his opening, he stated : "The only people, the evidence is going to show, that were in the operating room were two people besides my client, Doctor Camacho and one assistant, David O'Connor. Look to them to explain what happened and if they don't, ask yourself if should this have happened" (TT at 28). And during summations, he made the following comments:

> It is a funny thing when we look at the operative report, real funny thing. We are going to get to Doctor Broderick in a second, but it is clear uncontested in the evidence here that the only person that actually helped Doctor Camacho was the chief resident you keep hearing about, an amazing title to have and his name is David O'Connor. You heard him, Mr. Brennan, you heard in Mr. Brennan's opening that somebody would have stopped him if something had gone wrong and he insterted the Veress needle or the trocar out of control. I put it to you, did we hear from David O'Connor (TT at 1056)?

Despite the Court sustaining the defendants objection to this comment, Mr. Howard repeated the inappropriate conduct in his very next sentence by stating: "I put it to you with regard to Miss Padilla's testimony about the consent form when they say in closing here that. there was a witness and Doctor Camacho says that witness is a nurse that works in his office, where was she" (TT at 1056).

Mr. Howard inappropriately appealed to the jury's sympathy by implying in his opening that the plaintiff almost died as a result of this malpractice. He made the following comments: "Miss Padilla on April 6th was in a life or death situation" (TT at 19) and "Ms. Padilla walked in with a non-critical problem that required medical attention, and she walked out with a critical life threatening problem" (TT at 28). None of the medical evidence indicated or even suggested that the plaintiff was in a life or death situation.

Mr. Howard made improper comments to cast negative aspersions on Dr. Camacho's character. During summation he made the following comments in a mocking tone of voice:

> [Dr. Camacho] was brought before you like an amazing doctor who left his humble beginnings in what we know to be a very impoverished country, Guatemala, to come here and make himself better and the world better for medicine. And I put to you that is a hunk of hewey. He is here enjoying the privileges of his ambitious quest for recognition in the field of medicine. You never heard anything about him going back to Guatemala and help anyone and I submit to you that there is a need for good doctors in Guatemala" (TT @ 1044 lines 21-25, 1045 lines 1-4).

Mr. Howard over stepped his bounds into the province of the jury and determined which witnesses were credible and which witnesses were not worthy of belief. He repeatedly referred to the plaintiff and her witnesses as humble, honest and credible and to the defendants and the defendants' witnesses as liars. The overall effect of these comments created an air of its "us against them." "Us" being the humble and honest plaintiff and "them" being the young handsome ambitious doctors.

Mr. Howard began planting this "us" verus "them" idea in summations by stating "[t]hey start out by suggesting this is a matter of a young, magnificent doctors against the ancient, no good or outdated doctors. You would think that these people that just got their professional appointments out of their post graduate studies in 2006 somehow saved the world and changed medicine. I beg to differ (TT @ 1040). He continued by stating "[a]ll you heard is how amazing [Dr. Camacho's] story was and when he worked in a small hospital by the border of Texas and helping people and doing great things, he was a great man (TT @ 1045). But when my doctor, Doctor Drew, gets on the stand who is connected with LIJ, the Forest Hills branch of Long Island Jewish Hospital, though he is in the small community branch of it, that is garbage in comparsion to what [Dr. Camacho] does (TT at 1045).

Mr. Howard referred to the plaintiff as credible (TT at 1075) and to Miss Crespo the plaintiff's mother as a "humble woman from the Bronx" (TT at 1050). In contrast, he referred to Dr. Camacho in a mocking fashion as "the handsome doctor" or magnificent or great doctor (TT at 230-231, 1042, 1044, 1045). Mr. Howard also implied that Dr. Camacho's patients were nothing more than numbers to him. He referred to Dr. Camacho as a doctor "who refers to a lot of the procedures he does as the bread and butter of the practice. Equating the practice of helping people with rapidly turned out procedures that earn a lot of money for an institution and earn him numbers and recognition" (TT at 1045).

In addition, Mr. Howard claimed that Dr. Drew and the plaintiff were the only people who came in and testified honestly (TT at 10). He stated that Dr. Drew was honest and telling the truth five separate times (TT at 1040, 1053, 1055, 1059, 1075. He accused Dr. Camacho of lying five separate times (TT at 1044, 1046, 1051 lines 18-20 and lines 20-24; 1053). Mr.

Howard stopped calling Dr. Camacho a liar when admonished by the Court (TT at 1055). Nevertheless, he went on to accuse the defendants' expert Dr. Belsley of lying on three separate occasions (TT 1051, 1052, 1064). Mr. Howard also claimed in his summation that defendants' witness Dr. Carlene Broderick the anesthesiologist, fabricated testimony. After Mr. Howard made creditability determinations of all the witnesses, he then went on to imply that the medical records were also suspect. He told the jury "[t]he record is not the holy bible. These people are treating hundreds of people at the same time, I will give you that. But for them to come in here and recreate what happened to Miss Padilla against her word, against Dr. Drew, against our representation is an invitation for you to believe in a pipe dream" (TT at 1061).

Lastly, Mr. Howard personally attacked the defendants' expert Dr. Belsley by calling him "Buffy" (TT at 1041, 1054), stating that Dr. Belsley was the most arrogant person he ever met in real life (TT at 1041). Mr. Howard also referred to Dr. Belsley as the defendants "savior" (TT at 1066). Also stating that "I see Dr. Belsley and I think of "Downtown Abbey" (TT at 1066).

"It is fundamental that the jury must decide the issues on the evidence, and therefore fundamental that counsel, in summing up, must stay within the four corners of the evidence and avoid irrelevant comments which have no bearing on any legitimate issue in the case" (*People v. Ashwal*, 39 NY2d 105, 110 [1976][internal citation omitted]).

The Court finds Mr. Howard's personal attacks on the defendants went beyond the realm of zealous representation. The name calling and the casting of negative aspersions on Dr. Camacho's and Dr. Belsly's character was inflammatory and prejudicial to the defendants and could only be designed to obscure the issues at the trial (*see;Escobar v. Seatrain Lines, Inc.*, 175 AD2d 741, 743 [1st Dept 1991]; *Maraviglia v. Lokshina*, 92 AD3d 924, [2d Dept 2012]; *Vassura v. Taylor*, 117 AD2d 798 [2d Dept 1986]; *Bagailuk v. Weiss*, 110 AD2d 284 [3rd Dept 1985]. Since the misconduct was repeated, it cannot be deemed inadvertent or harmless (*Escbar supra*).

After the plaintiff's summation and the Court's charge, the case was given to the jury for deliberations. In approximately 40 minutes the jury reached a verdict without asking for a single piece of evidence. They did not review any of the medical records, did not examine the Veress needle or Trocar, nor did they ask for any read back of the testimony. In addition, the jury awarded the plaintiff $50,000 more than what Mr. Howard suggested in his summations. While the court can not say as a matter of law, that the hasty deliberations in favor of the plaintiff was a result of Mr. Howard's improper and prejudicial comments made during summations, the Court will say that it certainly appears that way. "When misconduct of counsel in summation so violates the rights of the other party to the litigation that extraneous matters beyond the proper scope of the trial may have substantially influenced or been determinative of the outcome, such breaches of the rules will not be condoned" (*Escobar* at 744). In Escobar, the Appellate Division First Department aptly noted "[i]t is time that the bar should realize that when counsel . . .resort to such practices to win a verdict, they imperil the very verdict which they seek (*id*).

As such, even if the plaintiff's evidence was legally sufficient, the Court would have nevertheless set the jury's verdict aside because of Mr. Howard's improper conduct during summations.

The Jury's Award for Past Pain and Suffering was Excessive

The Court finds that the jury's award of $800,000.00 for past pain and suffering was excessive. There was absolutely no medical evidence to support the plaintiff's subjective complaints of continued pain in the scar located in her groin area or the shooting pain in her leg. Plaintiff's expert, Dr. Drew testified that her vascular surgeon believed the plaintiff's symptoms were related to her back and referred her to a neurologist for an EMG (TT at 510). The results of the nerve conduction test were normal (TT at 291-292). Moreover, Dr. Drew testified that a person with a hematoma on the psoas muscle would consistently feel the pain only until the blood collection was resolved (TT at 485). There was testimony from Dr. Belsley that the type of hematoma the plaintiff had should have resolved in about 4-6 weeks (TT at 862). In light of the above, the court finds the award of $800,000.00 was excessive.

Accordingly, the motion is granted. The plaintiff's complaint is dismissed and the Judgment entered is hereby vacated.

This constitutes the decision and order of the court.

Dated: 6/17/13
Bronx, New York

HON. NORMA RUIZ, J.S.C.