SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-12

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Arrin Collins by Alrick Collins as parent
and legal guardian,

Plaintiff(s),

- against -

INDEX. NO.: 7324/03

The New York City Dept. of Education, formerly known
as New York City Board of Education, the City of New York,
Victor Harper and Louis Mitchell,

Defendant(s).

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HON. JOHN A. BARONE:

This is a motion by defendant to set aside the jury's verdict as a matter of law or as against the credible weight of the evidence or in the alternative to set aside the award as to damages as excessive.

This case was tried to a jury and commenced on November 30, 2010. It concluded on December 4, 2010 when the jury rendered its verdict in favor of plaintiff awarding plaintiff $1,200,000.00 for past pain and suffering, $3,300,000.00 for future pain and suffering and $100,000.00 for past medicals.

The facts in this case are fairly straight forward and not in serious dispute. Arrin Collins was injured in an accident while he was attending school at Public School 168 in Bronx County at 339 Morris Avenue at 1:00 p.m. on March 25, 2002. At the time Arrin was 11 years old and classified as a special needs student due to his having been diagnosed as autistic. Based on this diagnosis he was placed in a special needs class. For such students an Individual Education Plan (IEP) is created. This was done in Arrin's case with the active participation of his father,

Mr. Alrick Collins. Arrin's IEP recommended a ratio of a 6:1:1; that is one teacher and one paraprofessional for a class of six students. At the time of the accident Arrin's group was preparing to leave their music class which was taught by Mr. Louis Mitchell with the aid of the paraprofessional Mr. Victor Harper. While Mr. Mitchell and Mr. Harper assembled the students, Mr. Harper noticed blood on Arrin's shirt. It was determined that Arrin had slipped and banged his mouth on a window ledge after jumping for and grabbing a parachute that was hanging in the classroom but the accident report is conclusory in nature because neither Mr. Mitchell nor Mr. Harper witnessed the accident. In any case neither Mr. Mitchell nor Mr. Harper testified at trial.

Arrin was taken to the nurses office and Mr. Collins was notified within five minutes of the accident. Nurse Wicks observed that Arrin's front tooth was missing. An ambulance was called. Arrin was treated by EMS technicians and taken by ambulance to Lincoln Hospital where he was treated in the Emergency Room. Arrin's treating dentist Andrea Schreiber, DDS, testified that Arrin had lost one tooth and had another pushed up and impacted in his jaw. The impacted tooth was surgically removed. Due to Arrin's age he required approximately eight changes of his temporary dentures this and other factors cause plaintiff to suffer considerable pain and irritation. In addition Arrin and his parents were required to maintain the dentures. Permanent replacement would, according to Dr. Schreiber, require bone grafting. Dr. Schreiber opined that permanent dentures would last from 20-25 years.

Two questions emerge from the underlying facts: 1) Can defendant Department of Education/City of New York be held legally liable for plaintiff's injury?; and if so; 2) What is the proper measure of plaintiff's damages? The jury answered "yes" to the first question and fixed damages in the amount of $4,600,000.00 which certainly seems at first glance to be an excessive amount.

But to deal with the issue of liability first, schools are under a duty to provide adequate

supervision for students in their charge and are liable for foreseeable injuries proximately related to failure to supervise. Mirand v. City of New York, 84 NY 2d 44. However, schools are not in the position of being insurers of the safety of their students, since they cannot possibly supervise and control all of the students movements. Schools must have specific knowledge or notice of the dangerous conduct to be liable. Janukajtis v. Board of Education, 284 AD 2d 428. Absent such knowledge or notice schools have been held not to be liable for injuries resulting from fights or horseplay between students. Janukajtis, supra; Ohman v. Board of Education 300 NY 306; Convey v. City of Rye School District, 271 AD 2d 154.

This question in turn devolves into a question of whether viewing the evidence in the light most favorable to plaintiffs there is an issue of fact as to whether the teacher and the paraprofessional adequately supervised this group of special needs students in a potentially dangerous situation and failed to take energetic steps to intervene. Wajtowicz v. Dexter Terrace Elementary School, 288 AD 2d 915. Siller v. Mahopac Central School District, 18 AD 3d 532. This jury concluded the defendant failed in its duty to provide adequate supervision. Jury verdicts must be given considerable weight. Cohen v. Hallmark Cards, 45 NY 493. To set aside its verdict it would be necessary for this court to decide that there is no valid line of reasoning or permissive inference to justify that conclusion. Zachanski v. Craig, 141 AD 2d 995. In order to render such a decision the court would have to conclude that there was no viable evidence to support the verdict. Kozlowski v. City of Amsterdam, 111 AD 2d 476.

Plaintiff's attorney argued in his summation that in the absence of direct testimony as to the accident, the failure of the defendants to produce either the teacher in charge of the class, Mr. Mitchell, or the paraprofessional, Mr. Harper, would allow the jury to draw an inference unfavorable to defendants. Generally a party's failure to call a witness who would normally be expected to support that party's version of events would allow a jury to draw such an unfavorable inference. People v. Savinon, 100 NY 2d 192; Nassau County Dept. Of Social Services v. Denise, J, 87 NY 2d 73. Apparently this is what the jury did and thereby concluded

Services v. Denise, J, 87 NY 2d 73. Apparently this is what the jury did and thereby concluded that defendants did not discharge their duty to provide adequate supervision. The court cannot say as a matter of law that this is not a permissive inference for the jury to draw.

While the jury's verdict on liability cannot be said to be irrational as a matter of law the same cannot be said for its award as to damages. In his summation plaintiff's counsel suggested that the jury award plaintiff $600,000.00 in total damages. The jury then proceeded to render a verdict in the amount of $4,600,000.00.

The court does not minimize the seriousness of plaintiff's injury but the amount of the award is far in excess of any verdict the court has ever seen sustained for a similar injury. Applying the standard of Rhubb v. NYCHA, NY 2d 200, $250,000.00 will properly compensate plaintiff for past and future pain and suffering and $50,000.00 for past and future medical expenses, for a total award of $300,000.00.

Conclusion

Verdict is modified on the facts and as a matter of discretion and a new trial is ordered on the amount of damages unless plaintiff consents to decrease the amount of damages awarded from the principle sum of $4,600,000.00 to the principle sum of $300,000.00.

This constitutes the decision and order of this Court.

Date: 11/4/11

John A. Barone, JSC