SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 59

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MCHELE DANIEL, an infant by her mother and natural guardian MARILYN DAVIS,

Index No. 6310/11

Plaintiff,

-against-

DECISION AND ORDER ON POST-VERDICT MOTION
Jack M. Battaglia
Justice, Supreme Court

ANDRE THOMAS and KHAMELA A. FORD,

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on Defendants' motion for an order, pursuant to CPLR 4404, setting aside jury verdicts:

- Notice of Motion and Affirmation in Support
  Affirmation in Support
  Exhibits A-B
- Plaintiff's Affirmation in Opposition
- Reply Affirmation

As determined by the jury after the liability phase of this personal injury trial, on June 11, 2005 the infant plaintiff, Mchele Daniel, was struck by a vehicle owned by defendant Khamela A. Ford and driven by defendant Andre Thomas. The jury found that both the infant plaintiff and defendant Thomas were at fault in causing the occurrence, and allocated fault 65% to defendant Thomas and 35% to the infant plaintiff. After the damages phase of the trial, the jury awarded $500,000 for past pain and suffering, $200,000 for future pain and suffering, and $50,000 for future medical expenses.

Defendants move, "Pursuant to CPLR 4404 seeking to set aside the verdict of the trial had in this matter on the grounds that it was against the weight of the evidence dismissing the action against these defendants, or in the alternative, setting the matter down for a new trial." (*See* Notice of Motion and Affirmation in Support dated July 23, 2013.) Defendants' asserted grounds for setting aside, as will appear, both the liability verdict and a part of the damages verdict confuse the three grounds for setting aside a jury verdict and the respective consequences of each. That confusion continues through counsel's Affirmation in Support.

CPLR 4404(a) provides that a jury verdict may be set aside where (1) a party is "entitled to judgment as a matter of law," in which case the court will "direct that judgment be entered in favor of [that] party"; or (2) where the verdict is "contrary to the weight of the evidence," in which case the court will "order a new trial of a cause of action or separable issue"; or (3) where the "interest of justice" requires it, in which case, again, there will be a new trial. The "interest of justice" ground "encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise." (*See Allen v Uh*, 82 AD3d 1025, 1025 (2d Dept 2011].) None of that is contended here.

The other two grounds require an assessment of the evidence. Judgment as a matter of law will be granted only where "there is no valid line of reasoning and permissible inference which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial." (*See Bacon v Bostany*, 104 AD3d 625, 627 [2d Dept 2013] [internal quotation marks and citation omitted].) "When presented with such a motion, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant." (*See id.* [internal quotation marks and citation omitted].)

"A jury verdict on the issue of damages may be set aside 'as against the weight of the evidence only if the evidence on that issue so predominated in favor of the plaintiff that the jury could not have reached its determination on any fair interpretation of the evidence'." (*Curry v Hudson Val. Hosp. Ctr.*, 104 AD3d 898, 900 [2d Dept 2013] [quoting *Carter v New York City Health & Hosps. Corp.*, 47 AD3d 661, 663 (2d Dept 2008)]; *see also Doran v McNulty*, 107 AD3d 843, 844 [2d Dept 2013]; *Soto v Elmback Owners, LLC*, 106 AD3d 986, 986 [2d Dept 2013].) "Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors." (*Id.* [quoting *Nicastro v Park*, 113 AD2d 129, 133 (2d Dept 1985)].) "Where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view." (*Johnson v Yue Yu Chen*, 104 AD3d 915, 916 [2d Dept 2013].) "It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses." (*Doran v McNulty*, 107 AD3d at 844 [quoting *Exarhouleas v Green 317 Madison, LLC*, 46 AD3d 854, 855 (2d Dept 2007)]; *see also Soto v Elmback Owners, LLC*, 106 AD3d at 986.)

Five witnesses testified during the liability phase of the trial: the infant plaintiff, Mchele Daniel; her mother, Marilyn Davis; her brother, Richard Daniel; and defendants Andre Thomas and Khamela A. Ford. On damages, the infant plaintiff and her mother testified, as did an orthopedic surgeon, Dr. Jeffrey S. Kaplan. With this motion, Defendants are not challenging the jury's awards for pain and suffering, but contend that the award for future medical expenses cannot stand.

The site of the occurrence was MacDonough Street in Brooklyn, between Tompkins and Marcy Avenues, a long block by all accounts. There is no dispute that the infant plaintiff, who was eight years old, entered the roadway between two parked vehicles, some distance from the

crosswalks at the ends of the block. The primary dispute was whether the front of the Thomas/Ford vehicle struck the infant plaintiff on her right side, as she testified, or whether she ran into the driver's side of Defendants' vehicle, as they contend.

The jury was charged as to negligence generally (PJI 2:10), negligence of an infant (PJI 2:48), foreseeability (PJI 2:12), pedestrian crossing a highway, including Vehicle and Traffic Law §1152 (PJI 2:75), violation of a statute by an infant (PJI 2:49), causation (PJI 2:70), and comparative fault (PJI 2:36), including the different burdens of proof of (PJI 1:60). Defendants do not challenge the charge or the legal principles stated therein.

The Court assumes that, had the jury accepted Defendants' version of the occurrence, that determination would have been sustainable. (*See Moskowitz v Israel*, 209 AD2d 676 [2d Dept 1994]; *Rubin v Pecoraro*, 141 AD2d 525 [2d Dept 1998].) The Court has no difficulty, however, in concluding that the jury's acceptance of the infant plaintiff's version is supported by, and consistent with, the weight of the evidence. Indeed, since it was undisputed that the infant plaintiff sustained injury to the right side of her body, including a displaced fracture of the right leg, if any party's testimony was "so manifestly untrue, physically impossible, or contrary to common experience as to render it incredible as a matter of law" (*see Gambino v City of New York*, 60 AD3d 627, 628-29 [2d Dept 2009]), it was defendant Thomas's. As the Court explained after the verdict, however, there is a version of the occurrence that fully comports with the infant plaintiff's version without requiring the conclusion that Mr. Thomas testified falsely.

The jury's allocation of fault does give the Court some pause. As Defendants contend, Plaintiff concedes, and the jury clearly found, the infant plaintiff was also at fault in causing the occurrence, either by not looking before entering the street, or not looking carefully. As a general principle, a party who violates a statute might be considered more at fault than a party who, although negligent, did not violate a statute. Although an infant, Mchele clearly understood the command of Vehicle and Traffic Law §1152; indeed, she purported to have complied with it. Given the total circumstances, however, including Defendants' testimony that, moments before the occurrence, the infant plaintiff's brother had run across the path of their vehicle and was almost struck, although the Court as fact-finder may well have allocated a higher percentage of fault to the infant plaintiff, it cannot be said that the jury's allocation is not supported by a fair interpretation of the evidence.

As to future medical expenses, the jury was charged:

> "Plaintiff is entitled to recover for any anticipated surgery that is reasonably certain to be performed in the future, and that was necessitated by Plaintiff injuries sustained in the accident. If you find that Mchale Daniel is entitled to an award for surgery to be incurred in the future, you will fix the dollar amount and include that amount in your verdict." (*See* PJI 2:285.)

Dr. Kaplan, Plaintiff's medical expert, presented the only medical evidence at trial. Among

other things, Dr. Kaplan testified that the infant plaintiff had a valgus deformity of her left leg and an antalgic gait, *i.e.*, a "limp," that could be corrected by surgery. He described the surgical options, and testified, "That is about $75-$100,000 procedure."

Defendants contend that the jury's award of $50,000 for future medical expenses was based upon "uninformed speculation" (*see Mohamed v New York City Tr. Auth.*, 80 AD3d 677, 679 [2d Dept 2011]), because it is less than the $75,000 lower estimate testified to by Dr. Kaplan. Defendants contend, "The jury would be compelled to accept the proferred testimony or completely reject it; the jury had no competent basis for interposing an alternative value" (*see* Reply Affirmation ¶24.) Defendants cite no case in which a jury's award for economic damages was set aside because the jury awarded *less* than the estimated cost testified to by an expert, nor do they cite any authority to support their all-or-nothing conception of a jury's discretion. Nor is the Court aware of any.

Defendants' motion is, therefore, denied in its entirety.

September 11, 2013

Jack M. Battaglia
Justice, Supreme Court