

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 23-01378

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

ECHO FORD, ALSO KNOWN AS HONG JU WANG, AND
J. MARK FORD, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

FAYEZ CHAHFE, M.D., M.D. CHAHFE MEDICAL PROFESSIONAL
RECRUITMENT, LLC, TANYA PERKINS-MWANTUALI, M.D.,
EAST UTICA MEDICAL GROUP, ST. ELIZABETH MEDICAL CENTER,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

PORTER LAW GROUP, SYRACUSE (MICHAEL S. PORTER OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CHARLES E.
PATTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FAYEZ CHAHFE, M.D. AND
M.D. CHAHFE MEDICAL PROFESSIONAL RECRUITMENT, LLC.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS TANYA PERKINS-MWANTUALI, M.D., EAST UTICA
MEDICAL GROUP, AND ST. ELIZABETH MEDICAL CENTER.

Appeal from a judgment of the Supreme Court, Oneida County
(Gregory R. Gilbert, J.), entered December 27, 2022. The judgment
dismissed the complaint.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action
seeking damages for injuries sustained by plaintiff Echo Ford, also
known as Hong Ju Wang, from the alleged failure of defendants to
diagnose her tuberculosis. Plaintiffs appeal from a judgment entered
upon a jury verdict in favor of defendants-respondents (defendants).
We affirm.

Plaintiffs contend that Supreme Court erred in denying their
posttrial motion to set aside the verdict pursuant to CPLR 4404
because defense counsel engaged in misconduct during the trial,
warranting a new trial in the interest of justice (see CPLR 4404 [a]).
We reject that contention. In deciding whether the actions by counsel
warrant a new trial, this Court has examined whether any improper
remarks were isolated or " constitute[d] a pattern of behavior
designed to divert the attention of the jurors from the issues at

hand' " (*Kmiotek v Chaba*, 60 AD3d 1295, 1296 [4th Dept 2009]; see *Stewart v Olean Med. Group, P.C.*, 17 AD3d 1094, 1097 [4th Dept 2005]), and whether the remarks "had any likely effect on the jury's verdict" (*Short v Daloia*, 70 AD3d 1384, 1385 [4th Dept 2010]; see *Shelp v Ratnik*, 218 AD3d 1209, 1210 [4th Dept 2023]; *Bhim v Platz*, 207 AD3d 511, 514 [2d Dept 2022]). Here, plaintiffs failed to object to the majority of the comments at issue and thus failed to preserve for our review their contention with respect to those comments (see *Dailey v Keith*, 306 AD2d 815, 816 [4th Dept 2003], *affd* 1 NY3d 586 [2004]; *Wiepert v Manchester*, 298 AD2d 947, 948 [4th Dept 2002]). With respect to the remaining comments to which plaintiffs objected, we conclude that most of those comments were not improper. However, even assuming, arguendo, that the remaining challenged comments were improper, we conclude that those comments cannot be said to have "divert[ed] the attention of the jurors from the issues at hand" " (*Kmiotek*, 60 AD3d at 1296), nor can they be said to have had any likely effect on the jury's verdict (see *Golimowski v Town of Cheektowaga* [appeal No. 2], 184 AD3d 1195, 1197-1198 [4th Dept 2020]; *Wilson v City of New York*, 65 AD3d 906, 908-909 [1st Dept 2009]).

Plaintiffs also contend that the court should have granted their CPLR 4404 motion because it erred in denying plaintiffs' request to instruct the jury regarding defendants' alleged violation of the New York Public Health Law and New York Sanitary Code. However, the court determined that plaintiffs' request was untimely, and we therefore conclude that "by failing to address [a dispositive] basis for the court's decision, plaintiffs 'effectively abandoned' any challenge to the [denial of the motion as it relates to the jury charge]" (*Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off.*, 206 AD3d 1688, 1689 [4th Dept 2022]; see *Haher v Pelusio*, 156 AD3d 1381, 1382 [4th Dept 2017]; see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).