[* 1]

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

CHRISTOPHER HOTALING and AMY HOTALING,
Plaintiff,

- v -

CITY OF NEW YORK and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

Index No.: 110790/00
Motion Date: 2/7/05
Motion Seq. No.: 01
Motion Cal. No.: 50

The following papers, numbered 1 to 2 were read on this motion to set aside the verdict.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Defendants move to set aside the verdict and dismiss the complaint on the ground that plaintiff failed to prove that defendants did not comply with the New York City Building Code (Building Code) and therefore defendants cannot be held liable on a theory of negligent design defect. Defendants also challenge the jury verdict as excessive and seek to have the action dismissed as against co-defendant City of New York. Defendants' motion shall be denied.

Defendants' expert architectural witness testified that in

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

his opinion the fire doors complied with the Building Code and industry standards in effect at the time the doors were installed in 1970. However, as argued by plaintiff, defendants' expert also testified that while there was a Building Code standard for stair doors entering the path of travel of a stairway, there was no Building Code standard applicable to double doors or to the fact that a door may impede the path of travel of a door adjacent to it. As stated in the First Department case Wyckoff v Jujamcyn Theaters, Inc. (11 AD3d 319, 320 [1st Dept 2004]), curiously relied upon by defendants, where a Building Code provision is inapplicable to the condition alleged to have caused the accident it cannot be used to support a finding of liability. It is axiomatic that in and of itself the silence of the Building Code with respect to a particular condition is not sufficient to defeat such a finding.

Also misplaced is defendants' reliance upon Beecher v Northern Men's Sauna (272 AD2d 281, 282 [2d Dept 2000],) which involved a decedent's death from smoke inhalation as the result of a fire inside a building. There, the plaintiff premised her claim of negligence upon the violation of a Building Code with respect to the placement of the exit doors. Here, plaintiffs do not base their theory of liability on a Building Code violation. Furthermore, since evidence of a violation of a local ordinance or administrative rule, such as the Building Code here, does not

constitute negligence per but only some evidence of negligence (see Elliott v City of New York, 95 NY2d 730 [2001]), it follows that the absence of a Building Code violation does not absolve the defendants from liability in the face of other evidence of negligence. Nor have the defendants put forth any evidence of a Building Code provision specifically governing the configuration or design of the double fire doors with respect to impeding the travel path of a person using one of such doors.

The court further finds that contrary to defendants' argument there was sufficient evidence in the record to support the jury's verdict that the defendants were negligent in designing the door layout. The jury was permitted to rely upon the testimony of plaintiff's expert as to "human factors" relating to the design of the door configuration. See Elmlinger v Board of Educ. of Town of Grand Island, 132 AD2d 923, 924 (4th Dept 1987) ("the testimony and opinion of the human factors analyst . . . combined with plaintiff's testimony, was sufficient to establish a prima facie case"); see also Wichy v City of New York, 304 AD2d 755, 756 (2d Dept 2003) ("Supreme Court abused its discretion in precluding the plaintiff's expert . . . from testifying to 'human factors' as they relate to the alleged dangerous condition represented by the allegedly oversized riser at the base of the partition doorway"). Elmlinger and Wichy

establish that expert testimony as to "human factors" in the case at bar is sufficient to meet plaintiff's burden.

The cases cited by the defendants are inapplicable to this action and therefore do not compel a contrary result. In Diaz v New York Downtown Hosp. (99 NY2d 542, 544 -545 [2002]) the Court merely held under the facts presented in that case the affirmation of plaintiff's expert did not create a triable issue with respect to the existence of an accepted industry practice or standard because "plaintiff's expert failed to provide any factual basis for her conclusion that the guidelines establish or are reflective of a generally-accepted standard or practice . . . [and] made no reference either to her own personal knowledge acquired through professional experience or to evidence that any hospitals have implemented such a standard." In Capotosto v Roman Catholic Diocese of Rockville Centre (2 AD3d 384, 386 [2d Dept. 2003]) the Court held that based on prior precedent "the use of asphalt or blacktop as a playground surface for touch football is not inherently dangerous" as a matter of law and therefore expert testimony could not be used to assert that a higher standard of care was imposed upon the defendant. See also Pinzon v City of New York, 197 AD2d 680 (2d Dept 1993) (playground guidelines were inadequate to establish the defendants' negligence where plaintiff was 34 years old and the standards were established for children between the ages of 5 and

12); Merson v Syosset Cent. School Dist., 286 AD2d 668, 670 (2d Dept 2001) ("plaintiffs failed to raise a triable issue of fact as to whether the alleged departures from these guidelines were a proximate cause of the accident"). None of these cases involved the consideration by the jury of "human factors" as presented as an element of an expert's testimony as to a design defect and negligence and therefore have no applicability to this action.

Defendants also argue that because the jury initially awarded no damages for loss of services, the court must strike that portion of the jury's verdict awarding Amy Hotaling $500,000 in loss of services, since the court further instructed it to reconsider an inconsistent verdict only as damages for past pain and suffering. Plaintiff is correct that "upon reconsideration, the jury was free to substantively alter its original statement so as to conform to its real intention, and was not bound by the terms of its original verdict." Bowes v Noone, 298 AD2d 859, 860 (4th Dept 2002). See also Warner v New York C.R. Co. , 52 N.Y. 437 (1873).

Defendants further seek to have the jury's award of $500,000 to Amy Hotaling for loss of services reduced as excessive because it deviates materially from reasonable compensation. The court agrees with plaintiff that the jury was entitled to credit the testimony of the plaintiffs and the medical testimony which demonstrated that Christopher Hotaling suffered crippling brain

injuries and requires the care and support of Amy Hotaling to recover. The court derives guidance on this issue from the First Department decision in Louis v Kimmelman, 8 AD3d 206, 207 (1st Dept 2004) wherein the court stated

> There is uncontradicted proof that plaintiff sustained brain damage as a result of defendant's negligence, leaving her with severe neurological deficits, including complete deafness in the right ear, headaches, vertigo and balance problems, inability to distinguish sounds, and severe fatigue. In this light, the jury's award of $1.25 million and $750,000 to Louis for past and future pain and suffering, and $200,000 to her husband for loss of services, prior to economic adjustment in accordance with CPLR article 50-A, did not deviate materially from what is reasonable compensation under the circumstances.

Arguably, the jury by its verdict in this case determined that the injuries suffered by Christopher Hotaling in this case were more severe than those in Louis and there was testimony by the plaintiffs of the extent to which Amy Hotaling not only lost the services of Christopher Hotaling but was now required to participate in his care and rehabilitation. Based on the record evidence, this court finds that the jury's verdict represents fair and reasonable compensation. The defendants fail to cite any case law relevant to the injuries suffered by the plaintiff in this action which would suggest otherwise.

Finally, the defendants' motion to dismiss the City of New York as an improper party is untimely as it was not raised at trial before this court. Kroupova v Hill, 242 A.D. 218 (1st Dept. 1997).

Accordingly, it is

ORDERED and ADJUDGED that the defendants' motion is DENIED in its entirety.

This is the decision and order of the court.

Dated: August 11, 2005 ENTER:

DEBRA A. JAMES J.S.C.
J.S.C.