

Bertram v New York Presbyt. Hosp.

2013 NY Slip Op 30988(U)

April 19, 2013

Supreme Court, New York County

Docket Number: 103707/2007

Judge: Lucy Billings

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 103707/2007
BERTRAM, ELLIOT
vs
COLUMBIA PRESBYTERIAN/NEW YORK
Sequence Number : 001
TRIAL DE NOVO

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

motion to/for set aside the verdict

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered ~~that this motion~~ *and adjudged that:*

The court denies plaintiffs' motion to set aside the jury verdict, pursuant to the accompanying decision. C.P.L.R. § 4404(a).

FILED

MAY 08 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/19/13

Lucy Billings

LUCY BILLINGS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
-----X

ELLIOT BERTRAM, as father of YAAKOV
BERTRAM, and ELLIOT BERTRAM,
individually,

Plaintiffs

Index No. 103707/2007

- against -

DECISION AND ORDER

NEW YORK PRESBYTERIAN HOSPITAL,

Defendant
-----X

APPEARANCES:

For Plaintiffs

Eliot M. Wolf Esq.
Wolf & Furman, LLP
1453 Webster Avenue, Bronx, NY 10456

For Defendant

Theodore B. Rosenzweig Esq.
McAloon & Friedman, P.C.
123 William Street, New York, NY 10038

FILED
MAY 08 2013
NEW YORK
COUNTY CLERK'S OFFICE

LUCY BILLINGS, J.:

Plaintiff child Yaakov Bertram, through and with his father Elliot Bertram, has moved to set aside the jury verdict November 15, 2010, in favor of defendant New York Presbyterian Hospital in this medical malpractice action. C.P.L.R. § 4404(a). Plaintiffs contend that the verdict is contrary to law and to the weight of the evidence due to the conduct of defendant's attorney Theodore Rosenzweig Esq., principally in his cross-examination of plaintiffs' expert pediatric cardiologist Eric Fethke M.D. and in summation.

I. DISCLOSURE ISSUES

Preliminarily, plaintiffs maintain that Mr. Rosenzweig's aspersions on the incompleteness or inadequacy of the trial preparation by plaintiffs' attorney Eliot Wolf Esq. and by Dr. Fethke were especially unwarranted, given defendant's persistent disobedience of court orders to produce its records and eventual production only two weeks before the trial. Insofar as this late production hindered plaintiffs' trial preparation, their remedy was to move to compel the production and to impose penalties for the nonproduction, before filing the note of issue and certificate of readiness placing the action on the trial calendar. C.P.L.R. §§ 3124, 3126. Nevertheless, while defendant was free to expose incompleteness or inadequacies in plaintiffs' trial presentation, through their attorney, expert physician, other witnesses, and documentary or other evidence, aspersions on the professionalism of an adverse attorney or witness were unnecessary. E.g., Smolinski v. Smolinski, 78 A.D.3d 1642, 1643 (4th Dep't 2010); Pagano v. Murray, 309 A.D.2d 910, 911 (2d Dep't 2003); Dwyer v. Nicholson, 193 A.D.2d 70, 77 (2d Dep't 1993).

II. THE TESTIMONY OF PLAINTIFFS' EXPERT PEDIATRIC CARDIOLOGIST

Dr. Fethke's testimony was essential to plaintiffs' claims. Aside from the testimony by defendant hospital's physicians that indirectly may have exposed their deviation from accepted standards of pediatric care, Dr. Fethke was the sole witness whom plaintiffs presented to delineate directly how the failure of defendant's physicians to remove an arterial line from plaintiff

Yaakov Bertram's left leg did deviate from the applicable standards. Transcript of Proceedings at 628 (Nov. 9, 2010). He testified that from January 21 to 23, 2005, before the line was moved to plaintiff child's right wrist January 25, 2005, alternative arteries with palpable pulses were available for the line, yet the left leg, based on its lack of pulses, discoloration, and blistering, was exhibiting ischemia and was at risk of vascular injury from the line. Id. at 625-26, 628-30. On each of those January 21 to 23 dates, "every attempt should have been made to find other access and remove the arterial line from the left lower extremity." Id. at 629.

Dr. Fethke explained that, where defendant's medical records showed, through its staff's examination and through its instrumentation, pulses in the child's upper extremities on each January 21 to 23 date, id. at 633, 637-38, in fact

there was another option for the arterial line that was being used to monitor the patient; . . . there should have been an attempt to place another line in that area where the pulses were . . . present so that the other line could be removed in the left lower extremity.

Id. at 633. Based on the presence of pulses in the patient's upper extremities, other indications in defendant's records that the patient's condition was improving, and the highly skilled intensive care setting where the staff were trained in obtaining arterial access, Dr. Fethke concluded that "alternate access in the radial artery or that limb could have been obtained with high probability." Id. at 634-35. He pointed out how defendant's records also showed that the physicians in charge of Yaakov

Bertram's care January 21-23, 2005, were apprised further of the need to move the arterial line as of January 21 by the instructions of three vascular surgeons who directed that the line be moved to an alternative site due to the continuing risk of injury to the patient's left leg. Id. at 658-59.

The three questions to the jury on defendant's professional negligence asked whether those physicians in charge of plaintiff Yaakov Bertram's care January 21, 22, and 23, 2005, deviated from accepted standards of pediatric care by failing even to attempt to start an arterial line at an alternative site or to move the line there. Although the jury answered each of those three questions in the negative and therefore did not reach questions on causation of the plaintiff child's injury, Dr. Fethke also testified how the line deprived the child's left leg of adequate blood supply, creating the environment for an infection that took root in the bone, and ultimately requiring the amputation of his leg. Id. at 626-29.

III. CROSS-EXAMINATION OF PLAINTIFFS' EXPERT BY DEFENDANT'S ATTORNEY

Defendant's attorney cross-examined Dr. Fethke regarding his retention by plaintiffs through an intermediary.

Q Well, it's your understanding that in this case, you were being asked as to whether there was justification to file or commence this lawsuit?

A Through Mr. DiBlasio's communications, yes.

Q So you later found out that that couldn't be further from the truth that, in fact, this case was pending for years and they were trying to find an expert at the 11th hour.

Id. at 668. Before Dr. Fethke answered, plaintiffs' attorney objected, and the court immediately sustained the objection. Although the court did not then instruct the jury to disregard the unanswered question, and Mr. Wolf did not ask for any such instruction, the court did repeat such an instruction at both the opening and the closing of the trial.

Mr. Wolf's further objections to Mr. Rosenzweig's cross-examination concerned his methods. Mr. Rosenzweig interrupted the witness before he finished answering, id. at 663, 708; insisted on a "yes or no" answer where impossible, id. at 665; asked the witness to "read another person's mind," id. at 680; see id. at 702, or about a possibility rather than probability, id. at 740-41; omitted a timeframe, id. at 690; and failed to conform to the prior evidence in formulating a question. Id. at 661-62.

The most serious objectionable method was Mr. Rosenzweig's tendency to intersperse his questions with remarks separate from his questions. E.g., id. at 700, 722, 726-27, 739. The most egregious of these instances was the following:

Q And do you think it would be of some benefit to be fair, assuming you want it to be fair--

MR. WOLF: Objection.

THE COURT: Sustained. The jury will disregard that comment.

. . . .

It's questions only.

MR. WOLF: Your honor, if Mr. Rosenzweig could be cautioned against making those kinds of character

assassinations.

. . . .

THE COURT: He shouldn't need to be so cautioned.

Id. at 700-701. Later, the court cautioned Mr. Rosenzweig further, in response to his following remarks, unaccompanied by a question, about the witness' prior testimony:

Q Well, I could have sworn that Mr. Wolf asked you questions that identified the doctors by name and you said yes, in response to the criticism. So, if you are indicating you have no criticism of the doctors, that's fine.

MR. WOLF: Objection, your Honor. I move that that be stricken , and the jury be given an instruction that this is not summation, that gratuitous remarks like that are inappropriate and they should not be put before the jury without a question.

. . . .

THE COURT: Mr. Rosenzweig, no more of those statements, all right?

MR. ROSENZWEIG: Okay.

THE COURT: . I've instructed you at least a half dozen times, this afternoon alone, forgetting about on prior occasions, confine yourself to questions only and the jury will disregard anything that you say other than what question you pose

Id. at 726-27.

Plaintiffs' attorney posed no other objections to Mr. Rosenzweig's cross-examination. In particular, no other objections pertained to any questioning about Dr. Fethke's prior service at defendant hospital, his review of its records, or his experience, credentials, or credibility. Mr. Rosenzweig leveled no further "character assassinations" during his cross-

examination of Dr. Fethke, reserving them for summation.

IV. COMMENTS BY DEFENDANT'S ATTORNEY IN HIS SUMMATION

While defendant's attorney was permitted to attack Dr. Fethke's credibility, see Chappotin v. City of New York, 90 A.D.3d 425, 426 (1st Dep't 2011); Hancock v. 330 Hull Realty Corp., 225 A.D.2d 365 (1st Dep't 1996); Bianco v. Flushing Hosp. Med. Ctr., 79 A.D.3d 777, 779 (2d Dep't 2010); Friedman v. Marcus, 32 A.D.3d 820 (2d Dep't 2006), the attorney was not permitted to do so by relying on facts outside the evidence presented at the trial, let alone facts outside the record that may not even have been true. Nevertheless, Mr. Rosenzweig speculated:

So, . . . a month or two before the trial, three plus years after the lawsuit has begun, Mr. Wolf reaches out to a disgruntled former physician at New York Presbyterian

This is not a situation where a doctor is asked to look at a case before it's begun and say, do you think there is merit or no merit. This is a last ditch effort to find somebody who's willing to come to court, to help establish a case. And there is a dramatic difference.

You don't for a moment believe that Dr. Fethke was the first person who was contacted, do you? Or maybe the second or the fifth or the tenth?

Tr. at 1078-79 (Nov. 15, 2010). Only at this point did plaintiffs' attorney object. The court sustained the objection, instructed the jury to disregard the final paragraph set forth above, and affirmed that it exceeded fair comment. Nevertheless, Mr. Rosenzweig persisted undeterred:

Why, why did it take to September 2010 with a trial that began October 25th, 2010 to reach out to Dr. Fethke. Who, by the way, doesn't tell you the truth about his

disassociation with New York Presbyterian Hospital.

Id. at 1080. Although no evidence presented at the trial disclosed why plaintiffs' attorney may have reached out when he did to identify Dr. Fethke as an expert witness, Mr. Wolf did not object to this comment. Nor did any evidence suggest, as Mr. Rosenzweig, acting as an unsworn witness, attempted to do, that Dr. Fethke had been fired from New York Presbyterian Hospital, thus being "disgruntled," id. at 1078, and that his reasons for departing from the hospital were other than as he explained.

DiMichael v. South Buffalo Ry. Co., 80 N.Y.2d 184, 198-99 (1992); Filippone v. All Is. Lease A Car, 201 A.D.2d 433, 434 (1st Dep't 1994); Doody v. Gottshall, 67 A.D.3d 1347, 1349 (4th Dep't 2009); Vasquez v. Costco Co., Inc., 17 A.D.3d 350, 352 (2d Dep't 2005). See Rodriguez v. New York City Hous. Auth., 209 A.D.2d 260, 261-62 (1st Dep't 1994); Sanchez v. Manhattan & Bronx Surface Tr. Operating Auth., 170 A.D.2d 402, 405 (1st Dep't 1991); Maraviglia v. Lokshina, 92 A.D.3d 924, 925 (2d Dep't 2012); Smolinski v. Smolinski, 78 A.D.3d at 1644. (1) The hospital failed to follow public health guidelines in its relationship with physicians. (2) Dr. Fethke sought to focus on his private practice. Tr. at 682-83 (Nov. 9, 2010). Yet Mr. Wolf did not object to these comments by Mr. Rosenzweig either.

Unfortunately plaintiffs' attorney was hamstrung in responding through his own summation to Mr. Rosenzweig's unwarranted accusation that Mr. Wolf was scavenging for an expert in "a last ditch effort" to sustain plaintiffs' action, after

contacting ten unwilling physicians. Tr. at 1079 (Nov. 15, 2010). Plaintiffs' true reasons for contacting Dr. Fethke when plaintiffs contacted him, just like Mr. Rosenzweig's fabricated reasons and timeframe, were outside the record, prohibiting either attorney from mentioning them: a prohibition that plaintiffs' attorney faithfully observed and that Mr. Rosenzweig flagrantly violated. DiMichael v. South Buffalo Ry. Co., 80 N.Y.2d at 198-99; Filippone v. All Is. Lease A Car, 201 A.D.2d at 434; Doody v. Gottshall, 67 A.D.3d at 1349; Vasquez v. Costco Co., Inc., 17 A.D.3d at 352. See Rodriguez v. New York City Hous. Auth., 209 A.D.2d at 261-62; Maraviglia v. Lokshina, 92 A.D.3d at 925.

Plaintiffs' attorney was free, however, to respond to Mr. Rosenzweig's accusation that Dr. Fethke lied about his reasons for departing from New York Presbyterian Hospital, by reminding the jury of his consistent and uncontradicted testimony under cross-examination and the hospital's failure to present any witness with a different explanation for Dr. Fethke's departure. Tr. at 681-83 (Nov. 9, 2010). Instead, plaintiffs made a tactical choice not to draw the jury's attention back to this attack on Dr. Fethke's credibility.

Mr. Rosenzweig's summation included further distortions of Dr. Fethke's testimony to fuel defendant's attack on the expert's credibility, but plaintiffs' attorney did not object to any of these further distortions. As long as Mr. Rosenzweig's comments focussed on the testimony or other evidence in the record,

however distorted, Mr. Wolf's hands were not tied. Chappotin v. City of New York, 90 A.D.3d at 426; Hancock v. 330 Hull Realty Corp., 225 A.D.2d 365; Bianco v. Flushing Hosp. Med. Ctr., 79 A.D.3d at 779; Friedman v. Marcus, 32 A.D.3d 820. Plaintiffs' attorney was fully capable of correcting the distortions, if he made that tactical choice.

Mr. Rosenzweig also personalized his accusations that Dr. Fethke was unfamiliar with the pertinent medical records, posing a rhetorical question to the jury, and then giving the attorney's own opinion of the witness' veracity. Rodriguez v. City of New York, 67 A.D.3d 884, 885 (2d Dep't 2009).

Is that the kind of person you want to rely upon in determining anything that's critically important, whether it involves a health issue for you or someone close to you or a legal issue in the courtroom. I think not.

Tr. at 1081-82 (Nov. 15, 2010). E.g., Rodriguez v. New York City Hous. Auth., 209 A.D.2d at 261-62; Nuccio v. Chou, 183 A.D.2d 511, 514 (1st Dep't 1992); O'Neil v. Klass, 36 A.D.3d 677, 678 (2d Dep't 2007); Pagano v. Murray, 309 A.D.2d at 911. See Sanchez v. Manhattan & Bronx Surface Tr. Operating Auth., 170 A.D.2d at 405; Berkowitz v. Marriott Corp., 163 A.D.2d 52, 53-54 (1st Dep't 1990); Dwyer v. Nicholson, 193 A.D.2d at 77; Steidel v. County of Nassau, 182 A.D.2d 809, 814 (2d Dep't 1992). This line of assault did not end with Dr. Fethke. Defendant's attorney charged that David Feldman M.D., who testified how the delay in removing the arterial line from Yaakov Bertram's left leg resulted in its amputation, also was unfamiliar with the pertinent medical records, again without support in the trial

evidence. DiMichael v. South Buffalo Ry. Co., 80 N.Y.2d at 198-99; Filippone v. All Is. Lease A Car, 201 A.D.2d at 434; Berkowitz v. Marriott Corp., 163 A.D.2d at 54; Vasquez v. Costco Co., Inc., 17 A.D.3d at 352. See Rodriguez v. New York City Hous. Auth., 209 A.D.2d at 261-62; Sanchez v. Manhattan & Bronx Surface Tr. Operating Auth., 170 A.D.2d at 405; Rodriguez v. City of New York, 67 A.D.3d at 886; Pagano v. Murray, 309 A.D.2d at 911.

Directing his assault at plaintiff Elliot Bertram and his wife, plaintiff Yaakov Bertram's mother, Mr. Rosenzweig accused them of purposely "clouding the issues" when the parents insisted they were not advised of the risks to their son's leg or of any decision to sacrifice his leg to treat his underlying conditions. Tr. at 1095 (Nov. 15, 2010). Although plaintiffs claimed neither a lack of informed consent, nor a failure to advise the parents, as a departure from standards of care, plaintiffs sought to show that defendant's physicians never engaged in any decisionmaking process about removing the arterial line, but simply ignored the condition of plaintiff child's leg and the recommendations to remove the line. Mr. Rosenzweig's criticism of these laypersons' testimony, if irrelevant, would have been directed more accurately at objecting to examination on this subject and refraining from dwelling on it in his cross-examination and closing remarks. In sum, it was defendant's attorney, more than plaintiffs, who unnecessarily pursued this issue he claimed was irrelevant.

Mr. Rosenzweig's criticism of plaintiffs' expert economist, Alan Leiken Ph.D., rather than focussing on fallacies in his analysis, was nothing short of denigrating. Figueroa v. Maternity Infant Care Family Planning Project, 243 A.D.2d 424 (1st Dep't 1997); Rodriguez v. New York City Hous. Auth., 209 A.D.2d at 261; Maraviglia v. Lokshina, 92 A.D.3d at 925.

He's just a hired guy to throw up some numbers. He could [sic] care less whether the numbers are accurate or inaccurate that are given to him to form the basis for his quote "economic analysis." I think using the term economic analysis, which Mr. Professor, Dr. Leiken would like to use, is unduly charitable for what he did. . . .

You know, he's got a process. It's \$2,300 to do that page and it's 36 or \$3,800 to come to court and tell you about the page. It's not a bad gig, you know. If I could do that, I might trade places with Dr. Leiken.

Id. at 1106-1107. E.g., Clarke v. New York City Tr. Auth., 174 A.D.2d 268, 277-78 (1st Dep't 1992); Berkowitz v. Marriott Corp., 163 A.D.2d at 53; O'Neil v. Klass, 36 A.D.3d at 678; Steidel v. County of Nassau, 182 A.D.2d at 814. See Nuccio v. Chou, 183 A.D.2d at 514-15; Rodriguez v. City of New York, 67 A.D.3d at 885; Pagano v. Murray, 309 A.D.2d at 911; Dwyer v. Nicholson, 193 A.D.2d at 77. Mr. Rosenzweig's mockery and name calling extended to Elliot Bertram, accusing him of playing "Dr. Bertram" when Dr. Feldman sought a history of Yaakov Bertram's care from his parents. Tr. at 1096 (Nov. 15, 2010). Again, the mockery and name calling was unnecessary to a suggestion that Dr. Feldman's theory of causation may have been based on misinformation from a layperson. Smolinski v. Smolinski, 78 A.D.3d at 1643; Pagano v. Murray, 309 A.D.2d at 911; Dwyer v. Nicholson, 193 A.D.2d at 77.

Nevertheless, again, none of Mr. Rosenzweig's remarks about Dr. Feldman, Dr. Leiken, or the Bertrams was met with an objection.

At only one further point did plaintiffs' attorney object to Mr. Rosenzweig's closing argument. Referring to plaintiff Yaakov Bertram:

And we know that he has some level of developmental delays, the scope and breadth of which I don't think any of us really have [sic] a handle on His overall health status, his intellectual and cognitive capability in some fashion have to intercept with his physical disability and his physical capability

Tr. at 1103 (Nov. 15, 2010). This suggestion that maximum physical capability was less essential or less achievable for a child with delayed or impaired intellectual or cognitive capability was offensive. Wilson v. City of New York, 65 A.D.3d 906, 908 (1st Dep't 2009); Duran v. Ardee Assoc., 290 A.D.2d 366, 367 (1st Dep't 2002; Balsz v. A & T Bus Co., 252 A.D.2d 458, 459 (1st Dep't 1998); Dwyer v. Nicholson, 193 A.D.2d at 77. Again the court sustained the objection, instructed the jury to disregard any such suggestion or speculation, see Berkowitz v. Marriott Corp., 163 A.D.2d at 54; Vasquez v. Costco Co., Inc., 17 A.D.3d at 352; Torrado v. Lutheran Med. Ctr., 198 A.D.2d 346, 347 (2d Dep't 1993), and instructed Mr. Rosenzweig not to broach the subject again. Boyd v. Manhattan & Bronx Surface Tr. Operating Auth., 79 A.D.3d 412, 413 (1st Dep't 2010). See DiMichael v. South Buffalo Ry. Co., 80 N.Y.2d at 198; Filippone v. All Is. Lease A Car, 201 A.D.2d at 434.

Although plaintiffs' attorney might have countered in his summation that maximum physical capability is all the more

important to an intellectually or cognitively impaired person, again he was constrained, because the evidence did not support such an impairment. Nor did the record suggest that Yaakov Bertram's physical limitations from his amputated leg were in any measure attributable to his intellectual or cognitive status. At most, Dr. Feldman pointed out that children who experience an early trauma, although not necessarily the plaintiff child here, may be developmentally delayed, but they are not neurologically impaired, and they "catch up" to their peers. Tr. at 198 (Nov. 1, 2010). See Maraviglia v. Lokshina, 92 A.D.3d at 925.

Even in opposition to plaintiffs' current motion, Mr. Rosenzweig belabors the fact that Yaakov Bertram wore diapers to school at age five years. This lack of appreciation for the difficulty experienced by anyone, even an adult, in reaching the toilet timely when ambulation and balance are an enormous challenge is but a further display of insensitivity.

These offensive remarks by Mr. Rosenzweig, however, bore primarily on plaintiffs' damages, which the jury did not reach. Moreover, plaintiffs may have refrained from requesting a further instruction or penalty on the assumption that the jurors also would find the remarks offensive, to the jury and the trial process, as well as to plaintiffs, and an embarrassment to defendant's attorney.

V. THE CONSEQUENCES OF MR. ROSENZWEIG'S CONDUCT

Plaintiffs urge that Mr. Rosenzweig's pervasive misconduct compromised the fairness of the trial, continually and

deliberately leading the jurors astray from the evidence on which they were to determine the issues in the trial, obscuring rather than helping them to focus on and determine those issues. Wilson v. City of New York, 65 A.D.3d at 908; Clarke v. New York City Tr. Auth., 174 A.D.2d at 278; Smolinski v. Smolinski, 78 A.D.3d at 1644. See Balsz v. A & T Bus Co., 252 A.D.2d at 459; Krumpeck v. Milfeld Trading Co., 272 A.D.2d 879, 881 (4th Dep't 2000). Mr. Rosenzweig's conduct was reprehensible, Berkowitz v. Marriott Corp., 163 A.D.2d at 53, particularly because it constituted more than a mischaracterization and attack on the credibility of the evidence presented to the jury, DiMichael v. South Buffalo Ry. Co., 80 N.Y.2d at 198-99; Filippone v. All Is. Lease A Car, 201 A.D.2d at 434; Maraviglia v. Lokshina, 92 A.D.3d at 925; Dwyer v. Nicholson, 193 A.D.2d at 77, which plaintiffs' attorney might correct in his summation. See Hancock v. 330 Hull Realty Corp., 225 A.D.2d 365; Bianco v. Flushing Hosp. Med. Ctr., 79 A.D.3d at 779; Friedman v. Marcus, 32 A.D.3d 820. Mr. Rosenzweig leaped beyond the trial evidence, into unproved speculation and innuendo, which plaintiffs' attorney might correct only by engaging in equivalent diversionary tactics and committing equivalent misconduct. Moreover, Mr. Rosenzweig expressed his personal views, unsupported by the evidence, on the credibility of witnesses, Nuccio v. Chou, 183 A.D.2d at 514; O'Neil v. Klass, 36 A.D.3d at 678; Pagano v. Murray, 309 A.D.2d at 911; his observations of plaintiffs and their witnesses, Sanchez v. Manhattan & Bronx Surface Tr. Operating Auth., 170 A.D.2d at 405;

Berkowitz v. Marriott Corp., 163 A.D.2d at 53-54; Maraviglia v. Lokshina, 92 A.D.3d at 925; Dwyer v. Nicholson, 193 A.D.2d at 77, and the cause and severity of plaintiffs' injury. DiMichael v. South Buffalo Ry. Co., 80 N.Y.2d at 198-99; Rodriguez v. New York City Hous. Auth., 209 A.D.2d at 261-62; Clarke v. New York City Tr. Auth., 174 A.D.2d at 276; Doody v. Gottshall, 67 A.D.3d at 1349.

The impediment to setting aside the verdict, rather than simply reprimanding Mr. Rosenzweig soundly for his obviously intentional misconduct, is that, at the conclusion of the proceedings before jury deliberations, there were but two sets of comments to which plaintiffs had objected:

You don't for a moment believe that Dr. Fethke was the first person who was contacted, do you? Or maybe the second or the fifth or the tenth?

Tr. at 1078-79 (Nov. 15, 2010).

And we know that he has some level of developmental delays, the scope and breadth of which I don't think any of us really have [sic] a handle on His overall health status, his intellectual and cognitive capability in some fashion have to intercept with his physical disability and his physical capability

Id. at 1103. E.g., Chappotin v. City of New York, 90 A.D.3d at 426; Figueroa v. Maternity Infant Care Family Planning Project, 243 A.D.2d 424; Alston v. Sunharbor Manor, LLC, 48 A.D.3d 600, 602 (2d Dep't 2008); Wiepert v. Manchester, 298 A.D.2d 947, 948 (4th Dep't 2002). See Wilson v. City of New York, 65 A.D.3d at 908. The first comment was prefaced by the impermissible question during Mr. Rosenzweig's cross-examination of Dr. Fethke, through which Mr. Rosenzweig impermissibly attempted to make the

same point:

So you later found out that that couldn't be further from the truth that, in fact, this case was pending for years and they were trying to find an expert at the 11th hour.

Tr. at 668 (Nov. 10, 2010). Both these arguments undeniably were designed to influence the jury verdict unfairly against plaintiffs, Clarke v. New York City Tr. Auth., 174 A.D.2d at 278; Smolinski v. Smolinski, 78 A.D.3d at 1644; Rodriguez v. City of New York, 67 A.D.3d at 886, but only the first influenced a determination that the jury actually reached. Califano v. City of New York, 212 A.D.2d 146, 152 (1st Dep't 1995).

Even in hindsight, plaintiffs' attorney made an unassailable tactical choice to remain satisfied with the court's instruction that the jury disregard the first set of comments about contacting Dr. Fethke as unfair and excessive and not to focus the jury further on this irrelevancy. Chappotin v. City of New York, 90 A.D.3d at 426; Balsz v. A & T Bus Co., 252 A.D.2d at 459; Filippone v. All Is. Lease A Car, 201 A.D.2d at 434; Wiepart v. Manchester, 298 A.D.2d at 948. See Wilson v. City of New York, 65 A.D.3d at 908; 1515 Summer St. Corp. v. Parikh, 13 A.D.3d 305, 308 (1st Dep't 2004); Hancock v. 330 Hull Realty Corp., 225 A.D.2d 365; Lind v. City of New York, 270 A.D.2d 315, 317 (2d Dep't 2000). Even in hindsight, plaintiffs' attorney unassailably calculated not to object and call attention to Mr. Rosenzweig's antics, dignify them, or seek to set them straight, in the hope that defendant's attorney would continue to offend the jury and embarrass himself and his client with his

transparent tactics. Chappotin v. City of New York, 90 A.D.3d at 426; Penn v. Amchem Prods., 73 A.D.3d 493, 494 (1st Dep't 2010); Balsz v. A & T Bus Co., 252 A.D.2d at 458-59; Figueroa v. Maternity Infant Care Family Planning Project, 243 A.D.2d 424. See Wilson v. City of New York, 65 A.D.3d at 908; Lucian v. Schwartz, 55 A.D.3d 687, 689 (2d Dep't 2008); Alston v. Sunharbor Manor, LLC, 48 A.D.3d at 602; Murray v. Weisenfeld, 37 A.D.3d 432, 434 (2d Dep't 2007).

VI. THE SUMMATION BY PLAINTIFFS' ATTORNEY

Instead, plaintiffs chose to focus on the strength of their relevant evidence. Califano v. City of New York, 212 A.D.2d at 153. In fact, toward the outset of Mr. Wolf's summation, plaintiffs' attorney acknowledged that, in contrast to Mr. Rosenzweig's offensive tactics:

I am not going to take each witness and assassinate their character. . . . I don't think that's going to help you reach a decision as to who was honest and who wasn't honest. . . . Mr. Rosenzweig wants to put everybody down. The parents are lying. Eric Schaffer [the prosthetist] is lying. Professor Leiken has his gig. They are all liars. I'm not going to say that. I'm going to ask you questions for you to draw your own conclusions.

Tr. at 1115 (Nov. 15, 2010).

At the outset, and throughout, plaintiffs' attorney seized on the three vascular surgeons' recommendations to remove the arterial line from plaintiff Yaakov Bertram's left leg days before January 25, 2005, id. at 1114, 1120, 1123, 1133-34, when defendant's physicians did, finally, move the line to the child's right wrist without negative consequences. Mr. Wolf emphasized how defendant's physicians did not even discuss or deliberate

about the recommendations when they were made, but simply and completely ignored the issue, id. at 1116-17, 1125, until the same recommendation was made and immediately followed January 25, 2005, id. at 1120, 1125-26, after "it was too late" to prevent irreparable injury to plaintiff child's leg. Id. at 1120.

Mr. Wolf convincingly seized on defendant's repeated emphasis of the near-death condition imperiling Yaakov Bertram, having suffered repeated cardiac arrests and repeatedly been misdiagnosed with fatal diseases, as the explanation for his physicians completely ignoring the condition of his leg and the recommendation that would have saved it. Id. at 1123-24. They expected plaintiff child to die imminently, so of what importance was his leg? Id. at 1123, 1126.

Mr. Wolf in turn emphasized how, consistent even with the opinion of defendant's expert, Yaakov Bertram's condition did not change significantly between January 20 and January 25, 2005, so as to allow the arterial line's removal January 25 rather than January 21-23, 2005. Id. at 1127-28. The alternative radial and brachial arteries were strong and readily palpable from January 20-23, 2005. Id. at 1128. On January 21 and 22, his "blood pressures . . . were very stable." Id. at 1143. See id. at 1155. On both days, "All blood pressures were within normal limits." Id. at 1156. As of January 22, "All his organ systems were improving," according to defendant's own physician. Id. On January 23, "the blood pressure was better. Yaakov was improving based on every index." Id. at 1144.

Nor did plaintiffs' attorney shy away from pointing out how Mr. Rosenzweig's transgressions had no place in the jury's consideration of the evidence. Referring to his derogation of the unrebutted testimony by plaintiffs' orthopedist, prosthetist, and economist, none of whom defendant challenged with its own comparable experts:

He can't tell you otherwise (pointing), absolutely not. . . . He's not a sworn witness.

. . . .

. . . He does not have the license to say that. If he wanted to challenge Eric Schaffer, the way to do it is bring in a witness

Id. at 1130.

Mr. Rosenzweig could have presented an orthopedist, a prosthetist, . . . and he choose not to, and that's because there is no testimony that he would be able to elicit from any witness which would be credible enough for him to somehow contradict what either Dr. Feldman or what Mr. Schaffer said.

And I'll even go one step further. I think there are other economists out there who would testify. . . . And if he thought that Alan Leiken's numbers should be taken issue with, he could have brought in somebody to do that.

Id. at 1131-32.

Why do they keep trying to throw innuendo out there?

His treating orthopedist says he's got no neurological problems. Why do they open on it and say we're going to prove he has neurological injuries when he has none. He's not neurologically normal. There is no proof of that anywhere. And if there could be proof of that, I submit it would have been brought to court.

Id. at 1141.

Unfortunately for plaintiffs, these important points about the experts' uncontroverted testimony regarding the causation and

effects of Yaakov Bertram's injury were lost on the jury, because they never reached these issues. Nevertheless, Mr. Wolf's important and persuasive arguments on these points demonstrate plaintiffs' calculated choice to build, confidently and convincingly, on the strengths of their evidence.

VII. CONCLUSION

Counsel may not be permitted to speculate upon whether a verdict will be favorable, before asserting a claim for a mistrial. Such a motion must be made in advance of the verdict.

Califano v. City of New York, 212 A.D.2d at 153 (citation omitted). Having made the calculated choice to allow the jury to reach a verdict without any further curative instruction to address Mr. Rosenzweig's speculations about plaintiff's belated contact of Dr. Fethke and without a motion for a mistrial, plaintiffs must live with that choice. Boyd v. Manhattan & Bronx Surface Tr. Operating Auth., 79 A.D.3d at 413; Balsz v. A & T Bus Co., 252 A.D.2d at 458-59; Figueroa v. Maternity Infant Care Family Planning Project, 243 A.D.2d 424; Wiepert v. Manchester, 298 A.D.2d at 948. See Duran v. Ardee Assoc., 290 A.D.2d 366; Hancock v. 330 Hull Realty Corp., 225 A.D.2d 365; Lind v. City of New York, 270 A.D.2d at 317; Torrado v. Lutheran Med. Ctr., 198 A.D.2d at 347. Mr. Rosenzweig must live with this record of his unprofessional, reprehensible conduct, which, despite the result achieved, was a disservice to his client, and which no one would expect to be repeated.

Plaintiffs' claims were strong; their attorney's summation was persuasive; but neither was impervious. For the court to set

aside the jury verdict in defendant's favor as against the weight of the evidence, the evidence in plaintiffs' favor must have been so overwhelming that, even when all credibility assessments and inferences are drawn against plaintiffs, reasonable, fair minded jurors could not have reached a verdict against plaintiffs.

Lolik v. Big V Supermarkets, 86 N.Y.2d 744, 746 (1995); Cohen v. Hallmark Cards, 45 N.Y.2d 493, 499 (1978); Yamamoto v. Carled Cab Corp., 66 A.D.3d 603, 604 (1st Dep't 2009); Woodie v. Azteca Intl. Corp., 60 A.D.3d 535 (1st Dep't 2009). See Salter v. St. Preux, 63 A.D.3d 902, 903 (2d Dep't 2009).

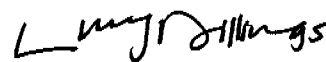
Defendant, however, presented a reasonable view of the evidence that, because plaintiff Yaakov Bertram's blood vessels were constricted throughout his extremities, no alternative sites for arterial access were available January 21-23, 2005. Defendant's expert therefore concluded that it was not feasible to move the arterial line in plaintiff child's left leg until January 25, 2005, and to have done so earlier would have jeopardized vascular supply to another extremity.

The verdict finding that the failure of defendant's physicians to remove the arterial line from the child's left leg did not deviate from accepted standards of pediatric care may be reconciled with this reasonable view of the evidence. E.g., Bennett v. Wolf, 40 A.D.3d 274, 275 (1st Dep't 2007); Smith v. Au, 8 A.D.3d 1, 2 (1st Dep't 2004); Friedman v. Marcus, 32 A.D.3d 820. Therefore defendant is "entitled to the presumption that the jury adopted that view." Zhaqui v. Gilbo, 63 A.D.3d 919, 920

(2d Dep't 2009). See Cholewinski v. Wisnicki, 21 A.D.3d 791 (1st Dep't 2005); Rivera v. 4064 Realty Co., 17 A.D.3d 201, 202-203 (1st Dep't 2005); Price v. Studley, 28 A.D.3d 1196, 1197 (4th Dep't 2006). Given a verdict thus based on a fair interpretation of the evidence, the court may not set aside the verdict as against the weight of the evidence. C.P.L.R. § 4404(a).

The court thus denies plaintiffs' motion to set aside the jury verdict. Id. This decision constitutes the court's order.

DATED: April 19, 2013



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.