

<b>Avila v City of New York</b>
2014 NY Slip Op 30801(U)
March 31, 2014
Sup Ct, New York County
Docket Number: 401719/04
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
Justice

PART 61

Avila, Destiny

INDEX NO.

40171964

MOTION DATE

City of NY

MOTION SEQ. NO.

84

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for Set Aside 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 *is decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

APR 01 2014

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: MARCH 31, 2014

ROC  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
DESTINY GONZALEZ AVILA, by her mother and  
natural guardian SORAYA AVILA, and SORAYA  
AVILA, Individually,

DECISION AND  
ORDER

Plaintiffs,

Index No.  
401719/04

-against-

THE CITY OF NEW YORK, THE NEW YORK  
CITY HEALTH & HOSPITALS CORPORATION,  
HARLEM HOSPITAL and "JOHN DOES 1-10,"  
as employees of HARLEM HOSPITAL,

**FILED**

Defendants.

APR 01 2014

-----X  
NEW YORK  
COUNTY CLERK'S OFFICE

HON. ANIL C. SINGH, J.:

Plaintiff moves pursuant to CPLR 4404(a) to set aside the jury verdict rendered on May 2, 2013, in favor of defendants Harlem Hospital and the New York City Health & Hospitals Corporation in this medical malpractice action, contending that the verdict is against the weight of the credible evidence.

Defendants oppose the motion.

Plaintiff Destiny Gonzalez, by her mother, commenced this medical malpractice action alleging that the hospital and its staff deviated from good and accepted standards of care by failing to perform a cesarean section during her

birth, and that this caused her to sustain a hypoxic event, which was responsible for neuro-cognitive deficits diagnosed as cerebral palsy.

Plaintiff's counsel asserts that the jury's verdict was "patently inconsistent" and must be set aside. Plaintiff points out that the jury was presented with three separate departure and causation interrogatories to answer on the verdict sheet. The jury responded affirmatively to two out of three interrogatory questions, thereby determining that the hospital was negligent and deviated from the standard of care in two ways. The jury answered the causation questions to these same interrogatories in the negative. Plaintiff contends that this verdict is inconsistent and against the weight of the credible evidence.

Plaintiff asserts that the questions of negligence and causation were "inextricably interwoven" because the focus of the legal and factual issues concerned only one issue – that is, the adequacy of oxygen getting to the fetus during labor and delivery. As the jury determined that the hospital was negligent in not doing a fetal assessment during labor and in not delivering the baby earlier by cesarean section, "it only stands to reason that they agreed that the baby was being deprived of oxygen, which was the cause of her hypoxic brain injury."

CPLR 4404(a) provides that the court may set aside a verdict and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it

may order a new trial where the verdict is contrary to the weight of the evidence, or in the interest of justice. A verdict may be set aside only when “there is simply no valid line of reasoning and permissible inferences” which could have led to the conclusion reached by the jury” (Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493 [1978]). A verdict “will not be set aside unless the preponderance of the evidence is so great that the jury could not have reached its verdict upon any fair interpretation of the evidence” (Pavlou v. City of New York, 21 A.D.3d 74, 76 [1<sup>st</sup> Dept., 2005]). Moreover, the evidence must be construed in the light most favorable to the party that prevailed at trial (Motichka v. Cody, 279 A.D.2d 310 [1<sup>st</sup> Dept., 2001]).

“As a general rule, the question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions” (79 N.Y.Jur.2d Negligence section 58). “The existence of proximate cause is properly a question of fact for the jury when the facts of the case are the subject of conflicting evidence that would support various reasonable inferences” (Id.).

The jury in this matter heard conflicting testimony from numerous experts. Plaintiff’s experts asserted that the child has cerebral palsy. By contrast, defendants’ experts asserted that the child has autism, not cerebral palsy.

“Where there is a conflict in the opinion of the experts, the resolution of the

conflict is peculiarly within the province of the trier of fact, which may accept any one of the opposing theories that in its view best explains the point at issue and is supported by the evidence presented” (58A N.Y.Jur.2d Evidence and Witnesses section 674). “The issue of whether the plaintiff’s or the defendant’s expert witness is more believable is a credibility determination properly left to the trier of fact and is a jury issue in a case tried by a jury” (Id.)

As the record reflects, plaintiff’s and defendants’ experts battled for days over whether the child’s behavior bears the hallmarks of autism as opposed to cerebral palsy. The jury credited the testimony of defendants’ expert, Dr. Kairam, that Destiny’s stay at Harlem Hospital was uneventful. The Neoped and New York City Board of Education records provided Dr. Kairam with an evidentiary basis to opine that Destiny was autistic. Ultimately, it was up to the jury to decide which experts were more believable. The jury’s answer on causation is supported by a fair interpretation of the evidence.

**FILED**

Accordingly, it is

APR 01 2014

NEW YORK

ORDERED that the motion ~~COUNTY CLERK'S OFFICE~~ is denied.

The foregoing constitutes the decision and order of the court.

Date: 3/31/14  
New York, New York

  
Anil C. Singh  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE