McNeill v Town of Islip
2018 NY Slip Op 31170(U)
June 11, 2018
Supreme Court, Suffolk County
Docket Number: 34486/2008
Judge: Joseph Farneti

COPY

SHORT FORM ORDER

INDEX NO. 34486/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

CAROLYN F. MCNEILL, by her parent and natural guardian, CORA MCNEILL, and CORA MCNEILL, individually,

Plaintiffs,

-against-

TOWN OF ISLIP and COUNTY OF SUFFOLK,

Defendants.

ORIG. RETURN DATE: AUGUST 17, 2017
FINAL SUBMISSION DATE: JANUARY 11, 2018
MTN. SEQ. #: 008
MOTION: MG

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Upon the following papers numbered 1 to 7 read on this motion TO SET ASIDE JURY VERDICT.
Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation and supporting papers 6, 7; it is,

ORDERED that this motion (seq. #008) by defendant TOWN OF ISLIP ("Town" or "defendant") for an Order, pursuant to CPLR 4401 (a) (sic), 4404 and 4406:

(1) setting aside the jury verdict in favor of the plaintiffs, and directing that judgment be entered in favor of the defendant as a matter of law; or, in the alternative

(2) setting aside the jury verdict in favor of the plaintiffs as contrary to the weight of the evidence, and setting the matter down for a new trial; or, in the alternative

(3) setting aside the jury verdict in favor of the plaintiffs in the interest of justice, and setting the matter down for a new trial,

is hereby **GRANTED** as set forth hereinafter. The Court has received opposition to this application from plaintiffs CAROLYN F. MCNEILL, by her parent and natural guardian, CORA MCNEILL, and CORA MCNEILL, individually ("plaintiff").[1]

A jury trial was held before this Court on May 16, 17, 18, 19, 22, 23, 25, 26, 30, and 31, 2017. On May 31, 2017, the jury returned a verdict which found that the Town was negligent, and that the Town's negligence was a substantial factor in causing injury to plaintiff CAROLYN F. MCNEILL. As such, the jury awarded plaintiff the total sum of $14,460,000, comprised of the following items of damages:

(1) Past pain and suffering $2,500,000

(2) Future pain and suffering[2] $5,000,000

(3) Past medical expenses $960,000

(4) Future medical expenses[3] $6,000,000

The Town has now made the instant written motion to set aside the jury verdict pursuant to CPLR 4401 (a),[4] 4404 and 4406.

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[1] Plaintiff CORA MCNEILL, individually, had asserted a cause of action herein for loss of services of her daughter CAROLYN F. MCNEILL. However, that cause of action was dismissed by the Court by Order dated July 10, 2015 (Martin, J.) for lack of proof of any services or other support provided by the daughter to her mother.

[2] The jury awarded plaintiff $250,000 per year for 20 years, for a total of $5,000,000.

[3] The jury awarded plaintiff $300,000 per year for 20 years, for a total of $6,000,000.

[4] Defendant states the motion is pursuant to CPLR 4401 (a), which is a mis-characterization of the statutory citation labels. Defendant is moving pursuant to CPLR Rule 4401; there is no Section 4401 (a) but rather a Section "4401-a" which pertains to medical malpractice actions not germane to these reserved intra-trial and post-trial motions. However, the reported cases quite often if not consistently cite R 4401 as Section 4401.

CPLR R 4401 MOTION:

> R 4401. Motion for judgment during trial
>
> Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties

(CPLR R 4401). In determining a motion under CPLR 4401, a trial court must decide whether the plaintiff has presented a *prima facie* case, and the motion should be granted if no rational jury could find for plaintiff based on the evidence presented (*Krakofsky v Fox-Rizzi*, 273 AD2d 277 [2d Dept 2000]).

As noted by the defendant in its submission, the Court had reserved decision with respect to defendant's motion for judgment during trial at the close of the plaintiff's case, which was renewed at the close of defendant's case after plaintiff was afforded the opportunity for rebuttal and plaintiff chose to rest on the record as had been previously developed.

The defendant pursues a litany of theories to support this request. It alleges no duty to the plaintiff; no breach of any duty; no duty based upon the absence of a visible manifestation of any dangerous or defective condition; no condition created by the Town; no reliable, probative and non-speculative evidence submitted by plaintiff to permit a rational juror to conclude that a breach of any such duty proximately caused the plaintiff's injuries; no notice of any street name sign pole spontaneously collapsing or falling; no evidence of any outside force such as a car accident or vandalism; no outside force such as wind or vibration from passing traffic on any nearby roadway. Defendant further complains that the plaintiff is the sole source of the allegation that a pole fell and hit her, and that her psychiatric history makes her an unreliable reporter (although not stated, this unreliability is presumably asserted by defendant as a matter of law); no third party witnessed the incident and there is no evidence in the record describing how the pole fell; there is no proof of the severity of the blow; there is

no medical or observational evidence of any objective sign of head trauma, no bump, no bruise, no cut, no blood; the diagnosis of post-concussion syndrome had no basis; the CT conducted after the accident showed a calcified aneurysm and no new aneurysm; defendant's expert Dr. Reiser's testimony that the plaintiff's aneurysms were congenital and therefore preexisting, and that a berry aneurysm cannot be caused either by head trauma or shearing forces resulting therefrom; that the plaintiff's expert testified only in general terms and that no specific conclusion was testified to as it pertained to the plaintiff; that no medical record provided evidence of causation; that the non-calcified aneurysms were "coincidental" and therefore unrelated to the allegation of head trauma; that the methodology of CTA differs from test-to-test, and that the first test cannot provide a baseline observation for comparison to the later test due to differing test methodologies; and that it is pure speculation that the pole fell in the absence of any evidence of any other force or cause.

The plaintiff counters these allegations by stating consistent with the testimony of third parties that the plaintiff herself made no less than four consistent reports to the responding police officer, the EMT at the scene, the triage nurse after being transported for medical care, and the ER nurse upon plaintiff's return to the hospital one day after her release, that a pole fell and hit her on the head. The pole was observed at the scene by the police officer and EMT, as well as by the plaintiff's mother when she visited the scene. The plaintiff's report, as relayed by the third parties and recorded in the relevant contemporaneous written reports, was obviously accepted as true by the jury. The plaintiff argues that the Town had a legal duty to inspect every street name sign pole installed in the mid-1960's. Apparently, street name signs were replaced over the years with U-channel poles with new street name signs placed on top. There was some confusion as to whether the street name sign "pole" alleged to have stricken the plaintiff did or did not have a street name sign atop it at the time of the occurrence.

With respect to constructive notice, the issue of rust was a point of contention by lay and expert witnesses. In addition, there was an issue of notice as to the location of the rust at the bottom of the pole. What constructive notice did the Town have? Plaintiff alleged that the rust occurred at the junction of the ground and the pole. There is no evidence in the record whether the rust alleged to have undermined the structural integrity of the pole was above, below or even with the ground. The defendant contended that the rust was concealed and therefore not sufficient notice of its condition. There was no prior incident in the

history of the Town that a street name sign pole of this type ever fell or collapsed of its own accord. The defendant claims that any rust on the pole must be more than just incidental rust but rather rust to such a degree that replacement or repair of the pole is required. Plaintiff contends that a reasonable inspection would have revealed the allegedly dangerous condition of the pole. Since there was no inspection of this pole either before or after the accident, that conclusion is speculative at best.

> Although "the appearance of rust, standing alone, is insufficient to establish constructive notice" (*Garcia v Northcrest Apts. Corp.*, 24 AD3d 208, 806 NYS2d 44 [2005]), corrosion of the structure may have been sufficient to alert defendants to a structural defect. However, given the length of time that the entire staircase went uninspected, the evidence relied on by defendants did not establish that the corrosion would not have been visible upon reasonable inspection of the bottom of the landing and the frame before the accident

(*Serna v 898 Corp.*, 90 AD3d 560, 560-561 [1st Dept 2011]).

The Town asserts that a spontaneous and sudden falling is not reasonably foreseeable. Plaintiff's expert Stanley Fein testified that traffic vibrations *could* cause the pole to spontaneously collapse. He did not affirmatively state that the traffic vibration in conjunction with the condition of this pole on that date caused the pole to collapse. That is at best speculative and conclusory without additional development of the conditions existing at the time of the accident and the condition of this pole which was not available for testing after the fact.[5]

> While the plaintiffs . . . submitted an expert affidavit from Captain Hugh Stephens, it failed to raise a triable issue of fact with respect to the dock's condition, since the expert's opinion was based on speculation. There was

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[5] The record is devoid of any evidence concerning any vibration actually caused by passing vehicles other than testimony of the plaintiff's expert that 5th Avenue at or around the intersection in question is a busy road with frequent commercial tractor trailer traffic.

> no evidence that the expert inspected the dock (*see Banks v Freeport Union Free School Dist.*, 302 AD2d 341, 342, 753 NYS2d 890 [2003]), and his opinion was based solely on the review of unauthenticated photographs of the collapsed dock (*see Hlenski v City of New York*, 51 AD3d 974, 975, 858 NYS2d 789 [2008] [expert opinion failed to raise an issue of fact where the expert relied upon unauthenticated photographs]; *Lowenthal v Theodore H. Heidrich Realty Corp.*, 304 AD2d 725, 726, 759 NYS2d 497 [2003] [expert opinion based upon unauthenticated photographs was found insufficient to raise a triable issue of fact]; *Avella v Jack LaLanne Fitness Ctrs.*, 272 AD2d 423, 424, 707 NYS2d 678 [2000] ["affidavit of the plaintiff's expert is of no probative value inasmuch as his opinion was based upon unauthenticated photographs"])

(*Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 731 [2d Dept 2008]).

In this case, there were no photographs of the pole. The expert based his opinion upon lay testimony concerning the pole and an examination of similar poles in the general area, none of which have spontaneously collapsed as a result of traffic vibration or any other cause. The only testimony regarding personal observation of the pole in question came from the responding police officer and the EMT when they responded to the scene and the plaintiff's mother when she visited the scene some time after the occurrence. None of that testimony would provide the expert with sufficient information from which to form his conclusions.

As to the injury itself, accepting the notations in the records and the recipients retelling of the plaintiff's statements that the pole fell and hit her in the head, there is no proof whether the plaintiff suffered a glancing blow or direct blow to the head of any kind. There is no evidence whatsoever in the record as to the severity of the blow. It was not characterized in any regard by the plaintiff in her reporting of the occurrence. The medical records contain no evidence of an *external* head injury. The symptoms of post-concussion syndrome headaches and vomiting led to the further radiological studies. Defendant attacked the plaintiff's credibility based upon her mental health history, and attacked the credibility of plaintiff's mother due to alleged inconsistencies between her

deposition and trial testimony. Defendant seems to be arguing that because of the plaintiff's mental health history, while the jury may have deemed that the witnesses who recorded and reported the plaintiff's statements were credible, there is no basis in the record to deem that the initial recollection and retelling originated from a reliable source. That is sophistry at best.

> Where, as here, plaintiff is the sole witness to the accident, "summary judgment is only appropriate if the defendant has presented no evidence of a triable issue of fact relation to plaintiff's credibility or materially different versions of how the accident occurred. On the other hand, mere speculation as to plaintiff's credibility is insufficient to raise a question of fact. (*See Franco v Jemal*, 280 AD2d 409, 721 NYS2d 51 [1st Dept 2001]). Nor is a credibility issue raised merely because plaintiff's testimony presents various possibilities as to the precise chain of events leading up to the accident. (*See Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 740 NYS2d 16 [1st Dept 2002])

(*Ward v Uniondale WG, LLC*, 2015 NY Slip Op 31215[U] [Sup Ct, NY County 2015]). There was no psychiatric or psychological evidence in that regard proffered at trial. The indication of the reliability of the plaintiff's claim is the consistency with which she reported it, while able to do so, to four separate disinterested third parties (*see Weber v Baccarat, Inc.*, 70 AD3d 487 [1st Dept 2010]; *cf. Smigielski v Teachers Ins. & Annuity Ass'n of Am.*, 137 AD3d 676 [1st Dept 2016] [finding that when a plaintiff is the sole witness to an accident, an issue of fact may exist where she provides inconsistent accounts of the accident]).

How did the pole fall? That is unknown. Is that in and of itself failure of proof with respect to the plaintiff's burden? All the possibilities are unknown. If we accept the fact that the pole struck plaintiff in the head, how did it happen? Did someone push it? Did a car hit it? Did it fall without contact with anyone or anything? How can the jury know how it happened? The plaintiff never said she hit her head *on* the pole. She said she was hit *by* the pole. We do not know if she was sitting or standing or something else. The record contains no evidence as to what caused the pole to fall. The plaintiff's argument is that rust and deterioration caused the pole to collapse under its own weight, somehow

influenced by vibrations caused by passing tractor-trailer traffic, then fell in the direction of the plaintiff and struck the plaintiff at the precise moment the plaintiff was in proximity to the pole.

> Even though plaintiff's case may be dubious, a verdict may not be directed, since the standard is not whether a verdict on [her] behalf would be set aside as contrary to the weight of the credible evidence, but whether the jury could find for [her] by any rational process

(*Prince v New York*, 250 NYS2d 107, 108 [1st Dept 1964]; *cf. Diemer v Goad*, 78 AD2d 752 [3d Dept] [holding that the test of rationality to support a jury verdict is not satisfied by evidence which, at best, would establish a fact by mere conjecture, surmise, speculation, bare possibility or a mere scintilla]).

In an action to recover damages for personal injuries, a trial court's direction of a verdict in favor of the defendant was error, since plaintiff's version of the incident was corroborated by an independent witness and was not incredible as a matter of law, thus presenting a question of fact which was within the sole province of the jury to determine (*see Del Cerro v New York*, 46 AD2d 898 [2d Dept 1974]). Moreover, courts have been reluctant to grant summary judgment where the injured plaintiff is the sole witness to the accident, absent a showing, other than mere speculation, that a bona fide issue exists as to plaintiff's credibility (*see Urea v Sedgewick Ave. Assocs.*, 191 AD2d 319 [1st Dept 1993]). Here, we are without any third-party corroboration by an independent witness in terms of any observation or description of how the incident actually occurred. This case relies solely upon the oral statements of a plaintiff to third parties either responding to the scene or rendering emergency medical treatment, which were not subject to any test of credibility, whether by deposition, cross-examination or otherwise.

The defendant asserts that not only is there an absence of proof of the occurrence, but further, that the Town owed no duty to the plaintiff and did not breach any duty by its failure to inspect street name sign poles. These are two separate assertions. First, all municipalities, like all landowners, owe a duty to properly maintain their facilities and fixtures. "A municipality's liability depends on whether or not, having in mind the circumstances of each case, it has neglected and failed to keep its public thoroughfares – whether the sidewalk of a street or the pathway in a park – in a condition reasonably safe for pedestrians" (*Loughran*

v New York, 298 NY 320, 322 [1948]). "A municipality owes a duty to all persons lawfully using the sidewalks to exercise care in maintaining them in a reasonably safe condition for their ordinary, customary and usual modes of use" (*Cygielman v New York*, 93 Misc 2d 232, 233 [Sup Ct, Queens County 1978]). The Town owes that duty to all.

Notwithstanding the peculiar circumstances of this case, the Court finds that plaintiff had presented a *prima facie* case of negligence, and that it cannot be said no rational jury could find for the plaintiff based on the evidence presented (*see Krakofsky*, 273 AD2d 277). Therefore, defendant's motion pursuant to CPLR 4401 is hereby **DENIED**.

CPLR R 4404 MOTION:

Defendant also moves for relief pursuant to CPLR 4404,[6] which provides in pertinent part:

> R 4404. Post-trial motion for judgment and new trial
>
> (a) Motion After Trial Where Jury Required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon 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 of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court

(CPLR 4404 [a]). Pursuant to CPLR 4404 (a), a court "may set aside a verdict or any judgment entered thereon 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 of a cause of action or separable issue where the verdict is contrary to the weight of the

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[6] Defendant, it is presumed, is moving pursuant to CPLR R 4404 (a) pertaining to trial by jury.

evidence, [or] in the interest of justice" (*see Morency v Horizon Transp. Servs., Inc.*, 139 AD3d 1021, 1022-1023 [2d Dept 2016]; *Lariviere v New York City Tr. Auth.*, 131 AD3d 1130 [2d Dept 2015]). A motion pursuant to CPLR 4404 (a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise (*see Russo v Levat*, 143 AD3d 966 [2d Dept 2014]; *Morency*, 139 AD3d at 1023; *Allen v Uh*, 82 AD3d 1025 [2d Dept 2011]; *Matter of De Lano*, 34 AD2d 1031 [3d Dept 1970], *affd* 28 NY2d 587 [1971]; *see also Rodriguez v City of New York*, 67 AD3d 884 [2d Dept 2009]). The trial court must decide whether substantial justice has been done, and must look to common sense, experience, and sense of fairness in arriving at a decision (*see Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376 [1976]; *Rocco v Ahmed*, 146 AD3d 836 [2d Dept 2017]; *Allen*, 82 AD3d at 1025).

The only testimony regarding the occurrence of the event is the retelling by the plaintiff who was never available to be deposed, was not capable of offering evidence at trial, and whose statements were never subject to cross-examination. This case is unique in that there are no other sources of information as to how this accident occurred, coupled with the fact that the plaintiff as the sole witness to the alleged occurrence became unavailable to render additional information by affidavit, deposition, or at trial.

It appears that the defendant now argues that the jury has been compelled to speculate in relation to the cause of the accident. Further, it is alleged that the jury has compelled the defendant-municipality to undertake the untenable and impossible duty as insurer of all instrumentalities within the Town. A street name sign pole is not a structure or device one would customarily encounter as a bridge or overpass, or an elevated platform or other structure under which there would be a reasonable expectation of vehicular or pedestrian traffic and vulnerability. Is it reasonable to presume that a vertical pole, merely by the forces of gravity, would fall in such a manner to pose a danger to passersby? The confluence of factors in this case cause this Court to conclude that the defendant could not reasonably foresee the events that allegedly transpired. However, given the unique circumstances herein, the Court is precluded from a proper analysis of reasonably foreseeable because we do not know *how* the accident occurred. How can this Court make that determination in the absence of any proof as to how the pole fell? That analysis, in conjunction with the plaintiff's expert's lack of sufficient basis to form an opinion, compels the Court to set aside this verdict and direct that judgment be entered in favor of the defendant.

MEDICAL EXPERTS' OPINIONS:

It is defendant's contention that the plaintiff's expert's opinions concerning head trauma as a cause of the development of multiple aneurysms are unsupported by the record and should have been excluded from consideration by the jury. The defendant's expert opined that trauma cannot be the mechanism of injury, and therefore cannot be the cause of a berry aneurysm. Two medical experts testified in this case. Experts with differing opinions are permitted to testify and it is for the jury to determine which of the experts and to what extent the jury accepts the testimony offered. Obviously, the testimony concerning brain injury and what may causes a brain aneurysm is admissible. Here, the experts had differing opinions. There is no legal justification for the preclusion of the plaintiff's medical expert. The plaintiff's medical expert opined that aneurysms can be caused by shearing forces as a result of head trauma in his testimony concerning this plaintiff. While his statement of this portion of the opinion was not particularly artfully worded, it was sufficient to set forth his opinion that this plaintiff suffered shearing force trauma that caused the aneurysms which were diagnosed and required surgery.

The jury was free to accept or reject any portion of either medical expert's opinions as they saw fit. "It is for the trier of the facts to make determinations as to the credibility of the witnesses (*see Weber v State of New York*, 107 AD2d 929, 931), and the jury is free to accept or reject the opinions of expert witnesses (*see Felt v Olson*, 74 AD2d 722, 723, *affd* 51 NY2d 977)" (*Delay v Rhinehart*, 176 AD2d 1211, 1211 [4th Dept 1991]).

PLAINTIFF'S ENGINEER:

The plaintiffs' engineer's testimony was speculative. He never examined the pole in question. The only thing available to him was the description of the pole and its condition as testified to by the plaintiff's mother. Although he claims to have examined other similar poles in the area that in and of itself is insufficient for the purpose of making his conclusions. Even where an expert examines photographs of a particular defect the existence of rust alone is insufficient to place the defendant on notice.

To establish constructive notice, the plaintiffs relied on the presence of rust on the drain cover. The plaintiffs'

> expert, who examined the photographs but never visited the site, testified that periodic inspections should have revealed that the drain cover was rusted and it should have been replaced many years before it loosened up. He testified that the type of drain cover depicted in the photographs was of a "snug fit" which did not screw in. According to the expert, such a drain cover is a tight fit if it is not rusted.
>
> However, there is no evidence that rust would have alerted a layman that the drain cover was loose. If a defect could not have been discovered by a layman, even by inspection, it is considered a latent defect (*see Marquart v Yeshiva Machezikel Torah D'Chasidel Belz of N.Y.*, 53 AD2d 688, 690, 385 NYS2d 319; *see also Ivancic v Olmstead*, 66 NY2d 349, 351, 497 NYS2d 326, 488 NE2d 72).
>
> Accordingly, the plaintiffs failed to establish that the presence of rust alone was sufficient to give the defendants constructive notice of the defect (*see Mingone v Ardsley Union Free School Dist.*, 215 AD2d 463, 626 NYS2d 264; *Ferris v County of Suffolk*, 174 AD2d 70, 579 NYS2d 436)

(*Rapino v City of N.Y.*, 299 AD2d 470, 471 [2d Dept 2002]).

There is no evidence whatsoever in this record as to the condition of the pole with sufficient particularity to provide an explanation for the alleged occurrence. The pole was never secured by either party, nor is there any evidence in this record of the fate or disposition of the pole after the occurrence. There is no scientific or other evidence in this record as to the condition of this particular pole with sufficient particularity to form the basis of an opinion as to its structural integrity at the time of the alleged occurrence.

The Court is aware that the Town has the authority and duty to install and maintain traffic control devices when and as required under the provisions of the Town Code, and to maintain such traffic control devices as may be deemed necessary for the purpose of regulating, warning or guiding traffic under the

Vehicle and Traffic Law (*see* Town Code of the Town of Islip §§ 41-5 [B] [5]; TC1-3). There were some discrepancies as to what comprised traffic control devices and whether or not an informational street name sign was such a device. The sum and substance of plaintiff's expert's testimony was that if representatives of the Town had made regular inspections they would have noticed the deterioration of the poles. The plaintiff's theory is that failing to inspect the pole created an unsafe condition. Plaintiff's expert's testimony was that this was a lengthy, progressive, and degenerative process occurring over a significant amount of time. There was testimony that the defendant COUNTY OF SUFFOLK, unlike the Town, had a custom and practice of inspecting street signs over which the County had jurisdiction. The plaintiff's implication was that such inspections were the appropriate professional standard and custom, and that the Town was negligent in not undertaking periodic inspections similar to those performed by the County.

Regardless of any such contention, it is speculation upon this record for there is a complete absence of any evidence as to a close or careful inspection of the pole either before or after the event in question sufficient to resolve the issue of notice or causation. As a result, this record is insufficient as a matter of law for the purpose of imposing liability upon the Town. It is abject speculation as to the quantum and character of the rust and deterioration of the pole in question – the actual instrumentality of the injury – even accepting the plaintiff's unchallenged retelling of the pole falling and hitting her on the head. The plaintiff might argue that the plaintiff's mother's testimony at trial and at the deposition if accepted as true would provide sufficient proof in that regard; as a matter of law, it simply does not. That testimony does not supply a sufficient basis for the plaintiff's expert's opinion, nor can it serve as sufficient proof for the jury to come to a conclusion by any rational process.

THE ADMISSION OF PLAINTIFF'S MEDICAL EXPERT'S OPINION:

Defendant's only assertion of error by the Court is the contention that plaintiff's medical expert's testimony should not have been admitted. The Court disagrees.

Defendant asserts that a berry aneurysm cannot be induced by trauma. Defendant argues that plaintiff has not contradicted that assertion by competent medical testimony. Plaintiff chose to rely upon the record as

developed on her direct case, relying upon the testimony of her medical expert in that regard. The question of which expert to believe rested within the purview of the jury. A missing witness charge was requested by defendant and given concerning the non-production of Dr. Chalif, the surgeon who performed the plaintiff's initial clip procedure and the second surgery for the clip readjustment. Whether or not a berry aneurysm can be induced by trauma or is congenital in nature in this case was for the jury to determine based upon the totality of both medical experts' opinions as accepted or rejected by the jury (*see Matter of W.O.R.C. Realty Corp. v Board of Assessors*, 100 AD3d 75 [2d Dept 2012]).

PLAINTIFF'S ATTORNEY'S ALLEGED IMPROPER CONDUCT:

Defendant alleges that the plaintiff's counsel had gone beyond acceptable bounds of permissible comment during the course of his summation. Defendant contends that the content and tenor of counsel's closing argument was prejudicial and so colored the proceeding as to have deprived the defendant of an opportunity to have the jury fairly and impartially deliberate and consider their verdict. Defendant argues that plaintiff's counsel's comments during summation concerning whether or not this pole's collapse was foreseeable versus reasonably foreseeable was so egregious as to require a new trial.

> We are mindful that a counsel's objection to improper conduct, but failure to timely move for a mistrial before a jury returns a verdict, renders the error unpreserved and "may limit appellate review" (*Rivera v Bronx-Lebanon Hosp. Ctr.*, 70 AD2d 794, 796, 417 NYS2d 79 [1st Dept 1979]). However, pursuant to CPLR 4404 (a), the court, upon the motion of any party or on its own initiative, may set aside a verdict "in the interest of justice." This "is predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein" (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 381, 348 NE2d 571, 384 NYS2d 115 [1976]). In this regard, the trial court must decide, based on "common sense, experience and sense of fairness," whether "it is likely that the verdict has been affected" by the alleged misconduct (*id.*; 4 Weinstein-Korn-Miller, NY Civ Prac, par 4404.11)

(*Smith v Rudolph*, 151 AD3d 58, 62-63 [2d Dept 2017]).

Even where counsel fails to timely object, the trial court, in its discretion, may consider the apparently unpreserved issue in the determination of a CPLR 4404 motion:

> Some of the challenged conduct was certainly improper, and we do not condone it (*see Cherisol v Resnik*, 85 AD3d 705, 706, 924 NYS2d 847 [2011]). Nonetheless, viewing defense counsel's conduct in the context of the entire trial, we conclude that it was not pervasive or prejudicial, or so inflammatory as to deprive the plaintiffs of a fair trial (*see Coma v City of New York*, 97 AD3d 715, 716, 949 NYS2d 98 [2012]; *Jun Suk Seo v Walsh*, 82 AD3d 710, 710, 918 NYS2d 146 [2011]; *Bianco v Flushing Hosp. Med. Ctr.*, 79 AD3d 777, 779, 912 NYS2d 433 [2010]; *cf. Grasso v Koslowe*, 38 AD3d 599, 599, 830 NYS2d 671 [2007])

(*Lariviere v New York City Tr. Auth.*, 131 AD3d 1130, 1132 [2d Dept 2015]). Under the totality of the circumstances herein, the Court finds that the verdict was not so affected by plaintiff's counsel's statements as to require a new trial on this ground.

The issue of causation had been previously addressed in this case. In the context of the pre-trial summary judgment motion, the issue of causation was addressed to the extent that the IAS judge then-assigned concluded that the quantum of proof would be for the jury to determine as a question of fact:

> Moreover, as to the first [cause] of action, plaintiffs have raised issues of fact as to the issue of the Town's liability for the street name sign post, requiring denial of summary judgment. The law does not require that plaintiffs' proof positively exclude every other possible cause of the accident but defendant's negligence (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744, 490 NE2d 1221, 500 NYS2d 95 [1986]; *see Gayle v City of New York*, 92 NY2d 936, 937, 703 NE2d 758, 680 NYS2d 900 [1998]; *Bardi v City of New York*, 293 AD2d 505, 505-506, 739 NYS2d 747 [2d Dept 2002]). "Rather, [the plaintiff's] proof must render those other causes sufficiently 'remote' or 'technical' to enable the jury to

> reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744, 490 NE2d 1221, 500 NYS2d 95 [1986]; *see Gayle v City of New York*, 92 NY2d 936, 937, 703 NE2d 758, 680 NYS2d 900 [1998]; *Figueroa v City of New York*, 5 AD3d 432, 433, 773 NYS2d 66 [2d Dept 2004]; *Michel v Gressier*, 298 AD2d 507, 508, 748 NYS2d 512 [2d Dept 2002]; *Bardi v City of New York*, *supra*). "A plaintiff need only prove that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other agency" (*Gayle v City of New York*, 92 NY2d 936, 937, 703 NE2d 758, 680 NYS2d 900 [1998]; *see Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 3 NYS3d 103 [2d Dept 2015]; *Uttaro v Staten Is. Univ. Hosp.*, 77 AD3d 916, 917, 910 NYS2d 134 [2d Dept 2010]; *Nigri v City of New York*, 294 AD2d 477, 478, 742 NYS2d 371 [2d Dept 2002])

(*McNeill v Town of Islip*, 2015 NY Slip Op 31264[U], at *11 [Sup Ct, Suffolk County, Martin, J.]).

ISSUE OF ACTUAL NOTICE:

Defendant argues that plaintiff conceded at trial that the Town did not receive actual notice as to this pole, and that the Town did not create the allegedly hazardous condition. The issue of actual notice was also addressed by the IAS Justice in the prior Order determining the summary judgment motions:

> Contrary to the position taken by the Town, plaintiffs were not required to prove prior written notice of defect of the alleged condition. It is well established that traffic signs do not fall within the the ambit of prior written notice statutes, including that of the Town (*see Doremus v Incorporated Village of Lynbrook*, 18 NY2d 362, 222 NE2d 376, 275 NYS2d 505 [1966]; *Craig v Town of Richmond*, 122 AD3d 1429, 997 NYS2d 566 [4th Dept 2014]; *Sicignano v Town of Islip*, 41 AD3d 830, 838

NYS2d 655 [2d Dept 2007]; *Herrera v Moran*, 272 AD2d 374, 707 NYS2d 217 [2d Dept 2000])

(*McNeill v Town of Islip*, 2015 NY Slip Op 31264[U], at *9).

In general, a denial of a motion for summary judgment is *res judicata* of nothing except that summary judgment was not warranted (*see Delgado v City of New York*, 144 AD3d 46 [1st Dept 2016]). It is the trial record that controls for the purpose of the instant CPLR 4404 motion. However, the prior denial of the defendant's summary judgment motion concerning the absence of prior written notice is law of the case and not reviewable by this Court as a court of concurrent jurisdiction. It is of no moment that this Court may differ with the conclusion reached by the IAS Justice with respect to whether the written notice requirement under the Town Code applies to street name sign poles.[7] The issue may nevertheless be addressed upon appeal. "In any event, even if the plaintiffs were correct in arguing that the order denying the defendant's prior motion for summary judgment constituted the law of the case, [the appellate division] is not bound by that doctrine and may consider the motion on its merits" (*Meekins v Town of Riverhead*, 20 AD3d 399, 400 [2d Dept 2005]; *see Mosher-Simons v County of Allegany*, 99 NY2d 214 [2002]; *Latture v Smith*, 304 AD2d 534 [2d Dept 2003]).

CONCLUSION:

Wherefore, the Town's motion seeking an Order of this Court setting aside the jury verdict in favor of the plaintiff and directing that judgment be entered in favor of the Town as a matter of law, is hereby **GRANTED**, pursuant to

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[7] Notably, Section 47A-3 (A) of the Islip Town Code provides that no civil action shall be maintained against the Town of Islip or any of its employees for damages or injuries to persons or property sustained by reason of any highway, street, bridge, culvert, sidewalk, crosswalk, highway or street marking, traffic sign, signal or device, tree, tree limb *or other property* owned or maintained by the Town of Islip being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, out of repair, unsafe, dangerous or obstructed condition of such highway, street, bridge, culvert, sidewalk, crosswalk, highway or street marking, traffic sign, signal or device, tree, tree limb, *or other property* was actually given to the Town Clerk or Commissioner of Public Works and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger, obstruction or condition complained of (Town Code of the Town of Islip § 47A-3 [A] [emphasis supplied]). Although not dispositive at this juncture, this Court is of the opinion that the street name sign pole at issue in this matter falls within the catchall phrase "other property" owned or maintained by the Town.

CPLR 4404 (a), for the reasons set forth hereinabove. The Town's alternative requests for relief seeking an Order setting aside the jury verdict in favor of the plaintiff as contrary to the weight of the evidence or in the interest of justice and setting the matter down for a new trial, are rendered moot as a result of the granting of the motion to set aside the verdict as a matter of law.

The foregoing constitutes the decision and Order of the Court.

Dated: June 11, 2018

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION **____ NON-FINAL DISPOSITION**