Edbauer v Board of Educ. of N.Tonawanda City Sch. Dist.
1999 NY Slip Op 30001(U)
November 9, 1999
Supreme Court, Erie County
Docket Number: 1995-5436
Judge: Peter J. Notaro

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Decision of the Honorable Peter J. Notaro, J.S.C.,
Dated November 9, 1999.

State of New York
Supreme Court : County of Erie

MICHAEL EDBAUER
PLAINTIFF

vs. DECISION
INDEX NO. 1995-5436

BOARD OF EDUCATION OF NORTH TONAWANDA CITY SCHOOL DISTRICT, PINTO EQUIPMENT, INC. YOMAC ENTERPRISES, INC.

DEFENDANT

BOARD OF EDUCATION OF NORTH TONAWANDA CITY SCHOOL DISTRICT, PINTO EQUIPMENT, INC. YOMAC ENTERPRISES, INC.
DEFENDANT -THIRD PARTY PLAINTIFFS

vs. DECISION
INDEX NO. 1995-5436TP1

McPHERSON STEEL CORP.
THIRD PARTY DEFENDANT

McPHERSON STEEL CORP
FOURTH PARTY PLAINTIFFS

vs. DECISION
INDEX NO. 1995-5436TP6

EMPIRE BUILDING DIAGNOSTICS, INC.
FOURTH PARTY DEFENDANT

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Dated November 9, 1999.

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After an extraordinarily long trial, the jury rendered a verdict in favor of the PLAINTIFF in the approximate sum of $4,250,000.00. The PLAINTIFF has moved for post trial relief including a new trial on damages and/or a waiver of the application of CPLR article 50-B.

Let me dispose of the request for a waiver of Article 50-B first. The statute is clear that this can only be accomplished with the consent of all parties and the DEFENDANTS have not consented. Therefore the court has no power to order a waiver of 50-B. The motion for that relief is denied.

The PLAINTIFF's motion for a new trial is premised on alleged tainted jury deliberations, inadequacy of the verdict and references allegedly throughout the trial to the PLAINTIFF's worker's compensation benefits.

The concern over the references to worker's compensation benefits was taken care of by a curative charge by this court at the time of the objection by PLAINTIFF's counsel. The instruction at the time made it clear that any compensation benefits paid for medical expenses were to be repaid by the PLAINTIFF. In addition nothing contained in the extensive affidavits from the jurors indicates in any way that this was confusing or contributed to their deliberations on damages in this action.

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The remaining portion of PLAINTIFF's motion is supported by affidavits from the jurors expressing a concern over the adequacy of the verdict. The affidavits indicate that one of the jurors related that she had settled a personal injury action and had received her settlement in a lump sum. The apparent conclusion reached by the jurors was that the PLAINTIFF would receive the verdict in a lump sum. Having discovered that the PLAINTIFF would not receive it in a lump sum, subsequent to the rendering of their verdict, but instead would receive a portion of the award in an annuity, the jurors are now heard to claim that the verdict they rendered was inadequate and that they would have awarded a substantially larger sum.

The PLAINTIFF contends that the recitation of one jurors experiences constitutes an improper outside influence sufficient to warrant the granting of a new trial, relying on ***Fitzgibbons v. New York State University Construction Fund***, 177 A.D. 2d 1033(4th Dept., 1991) which held:

> "The verdict was tainted by an improper outside influence, viz., one juror's communications to the others about the benefits plaintiff would receive from workers' compensation. In informing the other jurors about the workers' compensation system and her experience with it, the juror injected "significant extra-record facts" into the deliberation process and thereby became an unsworn witness to "nonrecord evidence" (*see, People v. Legister*, 75 N.Y.2d 832, 833, 552 N.Y.S.2d 906, 552 N.E.2d 154; *Alford v. Sventek*, 53 N.Y.2d 743, 745, 439 N.Y.S.2d 339, 421 N.E.2d 831; *People v. Brown*, 48 N.Y.2d 388, 393, 423 N.Y.S.2d 461, 399 N.E.2d 51). Moreover, by persuading the other jurors that plaintiff "was eligible to have his medical bills paid and to receive other workers' compensation benefits for the rest of his life", the juror improperly introduced her own legal notions into the case, thereby leading the jurors to depart from the law set forth in the court's charge (*cf., Maslinski v. Brunswick Hosp. Center*, 118 A.D.2d 834, 500 N.Y.S.2d 318; *Long v. Payne*, 198 A.D. 667, 670-671, 190 N.Y.S. 803). Plaintiff sufficiently proved prejudice as a result of those communications (*see, Alford v. Sventek, supra*). According to the unrefuted

affidavits of two jurors, the jury awarded plaintiff "less for medical bills and other items of damages than [it] would have awarded" absent those communications.

The conduct of the juror in the ***Fitzgibbons*** case, informing the other jurors about the workers' compensation system and by persuading the other jurors that plaintiff was eligible to have his medical bills paid and to receive other workers' compensation benefits for the rest of his life, constituted more than a mere recitation of a jurors own experiences with the personal injury system. In this case the juror did not injected "significant extra-record facts" into the deliberation process. The other cases cited by PLAINTIFF also contain significantly more than a juror bringing relatively common experiences into the jurors deliberations. The bringing in of an outside medical dictionary for the purpose of ascertaining their own definition of malpractice, ***Maslinski v. Brunswick Hospital Center***, 118 A.D.2d 834 (2nd Dept., 1986), an attorney-juror wrongly instructing the jurors on the law, ***22 Jones street Associates v. Keebler-Beretta,*** 177 Misc. 2d 600 (1999), constitutes information that went to the heart of the case and created a substantial risk of prejudice. The affidavits in this case cannot be said to raise an issue that went to the heart of the case. Jurors will not be heard to impeach their own verdict unless there is a substantial risk of prejudice to the party moving against the verdict.

> "A general rule in New York is that jurors may not be heard to impeach the verdict of their own jury. This means that they can't, with affidavits or testimony or in any other way, adduce anything that would tend to overturn the verdict once it's been delivered. The primary intent of this rule is to keep sacrosanct the processes and deliberations of the jury and to insulate the verdict from later revelations of what went on in the jury room." New York Practice, 2nd Edition, David D. Siegel, p. 605.

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PLAINTIFF would have this court inject itself into the hearts and minds of the jurors and review their findings of damages without a substantial showing of juror misconduct. Jurors bring into the jury room their life experiemnces and share them with the other jurors. Barring a showing that there has been an overreaching by a juror or a misdirection of law by a juror with sufficient appearance of authoritativeness by that juror, the verdict cannot be impeached. There is not sufficient cause here to warrant a hearing requiring the jurors to share with the court the heart of their deliberations.

The only remaining issue is the motion for a new trial on the sole grounds that the verdict is inadaquate. The traditonal standard for a trial court to deal with this motion is whether the verdict "shocks the conscience" of the court. The traditional standard for trial court review has been modified by ***Prunty v. YMCA of Lockport, Inc.***, 616 N.Y.S.2d 117, 206 A.D.2d 911(N.Y.A.D. 4 Dept. 1994) which said

> "At least two of the Departments of the Appellate Division have ruled that a trial court may overturn a jury's award of damages in a negligence action where it "deviates materially from what would be reasonable compensation" (CPLR 5501[c]; *see, Cochetti v. Gralow,* 192 A.D.2d 974, 975, 597 N.Y.S.2d 234 [3d Dept.]; *Wendell v. Supermarkets Gen. Corp.*, 189 A.D.2d 1063, 592 N.Y.S.2d 895 [3d Dept.]; *Shurgan v. Tedesco,* 179 A.D.2d 805, 578 N.Y.S.2d 658 [2d Dept.]; *see also,* Siegel, Supp. Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR C5501:10, 1994 Pocket Part, at 4-5), and we now adopt the same rule."

The Appellate Division cautioned , however, that "Although the court should exercise its discretion over damage awards sparingly (*Shurgan v. Tedesco, supra,* at 806, 578 N.Y.S.2d 658), it is accorded considerable latitude in that regard (*see, Staiano v. Cronk,* 51 A.D.2d 649, 378 N.Y.S.2d 542)." The awards for lost wages, for medical expenses and for household services have a substantial basis in the evidence and do constitute reasonable compensation. I am troubled, however, by the award for past and future pain and suffering. The DEFENDANT's own Independent Medical Examining doctor, Dr. Lynch,

made it clear that the injuries suffered by the PLAINTIFF were permanent and pervasive. His report was so troubling to the defense that, according to Dr. Lynch, the defense attempted to persuade Dr. Lynch to modify his findings on several occasions. According to Dr. Lynch, the PLAINTIFF has no likelihood of ever recovering from the trauma. However, I cannot conclude that the award of $161,765.00 for past pain and suffering and the award of $1.488,255.00 for future pain and suffering "deviates materially" from what would be adequate compensation. As a result the PLAINTIFF's motion for a new trial is denied.

This court granted Summary Judgement to the PLAINTIFF against the DEFENDANTS Board of Education, Yomac and Pinto. The court further determined that indemnification for the Board of Education from the DEFENDANTS, other than McPherson, needed to be resolved at trial. That trial is yet to take place. To that extent, any attempt by Yomac to end its continuing liability to the PLAINTIFF and the Board of Education (for indemnification) cannot be limited by the tender of its insurance policy. The liability to the PLAINTIFF is not severable and the CPLR limitations on the PLAINTIFF settling with one of several tortfeasor under these circumstances act as a bar to one DEFENDANT attempting what Yomac has suggested. Yomac has exposure significantly greater than the tender to the PLAINTIFF and may have that additional exposure to the Board of Education and other DEFENDANTS. The motion to pay into court is denied.

Submit Order accordingly.

Hon. Peter J. Notaro
Justice of the Supreme Court

DATED: November 9, 1999
Buffalo, New York