Tyre v Merritt Constr., Inc.
2015 NY Slip Op 32831(U)
November 19, 2015
Supreme Court, Greene County
Docket Number: 12-0636
Judge: Lisa M. Fisher
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STATE OF NEW YORK
SUPREME COURT GREENE COUNTY

ELIZABETH TYRE,
Plaintiff,

- against -

MERRITT CONSTRUCTION, INC.,
Defendant.

DECISION & ORDER

Index No.: 12-0636
RJI No.: 19-12-6623

PRESENT: HON. LISA M. FISHER:

APPEARANCES: Brendan F. Baynes, Esq.
Counsel for Plaintiff
The Baynes Law Firm, PLLC
130 Main Street
Ravena, New York 12143

Mark J. Dolan, Esq.
Counsel for Defendant, movant
Napierski, Vandenburg, Napierski & O'Connor, LLP
296 Washington Avenue Ext., Suite 3
Albany, New York 12203

FISHER, J.:

This matter involves a motor vehicle accident occurring on Monday, November 23, 2009, wherein Plaintiff drove her vehicle into a ditch excavated and controlled by Defendant. A bifurcated jury trial (liability only) began on April 13, 2015 and ultimately concluded on April 15, 2015, wherein the jury attributed 100% of the fault for the accident on Defendant.

Prior to trial, Plaintiff submitted a motion *in limine* seeking to preclude Defendant from offering into proof any evidence that Plaintiff may have smoked or been under the influence of marijuana the morning of the accident. The Court granted said motion in a six-page Decision and Order dated April 20, 2015.

The jury trial began as scheduled on April 13, 2015. The parties were to submit jury instructions and jury verdict sheets prior to trial, which they both timely completed. The Court and the parties continued to revise and edit the jury instructions and verdict sheets prior to summations. Before summations, the Court's notes indicate that both Plaintiff and Defendant's jury verdict sheets were different. The Court's notes further indicate that it preferred Plaintiff's jury verdict sheet over Defendant's. However, in a charge conference, Defendant's counsel raised

several issues—including clarity—which the Court ultimately agreed with. Over Plaintiff's objection in chambers, the Court accepted Defendant's jury verdict sheet. This was the jury verdict sheet which was submitted to the jury twice.

The special verdict sheet was two pages long and contained five questions. Each question was sequential in nature, meaning that the jury had to answer in the affirmative to continue to the next question; a negative answer ended the deliberations. This was expressed in bold print at the end of each question, which provided "[i]f your answer is 'Yes,' proceed to Question [next number]. If your answer is 'No,' proceed no further and report your verdict to the Court." (bold emphasis removed.) The last question asked the jury to assign a percentage of fault as to each party, then return the verdict sheet to the Court.

The jury's first verdict was inconsistent. The jury found Defendant was negligent (question 1) and a substantial factor in the accident (question 2), and that Plaintiff was also negligent (question 3) but not a substantial factor in the accident (question 4). Even though the bold print instructed the jury to report the verdict to the Court, the jury continued to question 5 and apportioned the fault as Defendant 90% and Plaintiff 10%. Thus, the jury found Plaintiff to not be a substantial factor in the accident but still 10% at fault.

The parties met in chambers and requested to have the Court reread two jury instructions before returning the jury to the deliberation room with a new jury verdict sheet. Plaintiff's counsel proposed a cautionary instruction to the jury that the verdict sheet, as completed, is inconsistent with respect to answers four and five. Defendant's counsel stated he did not have a problem with that, however he wanted the jury to go back with a blank verdict sheet for all of the questions. Defendant's counsel reasoned that "[t]he jury clearly, you known, they said [Plaintiff] was negligent and assessed her with ten percent but failed to consider that it was a substantial factor, and I think the only way we can resolve this is rereading the instructions and having them provided with a fresh new verdict sheet." Plaintiff's counsel objected to providing a new verdict sheet and believed it should only be for questions four and five. Over Plaintiff's objection, the Court found in Defendant's favor. Not once did either counsel request a re-trial in chambers.

The jury's second verdict was consistent. It similarly found Defendant negligent and a substantial factor, that Plaintiff was negligent but not a substantial factor, and the fifth question apportioning fault was left blank. Defendant's counsel polled the jury, whom all agreed that it was their true verdict.

Now, Defendant moves to set aside the jury's verdict and ordering a new trial on liability pursuant to CPLR R. 4404 (a), or in the alternative ordering a new trial based upon juror confusion pursuant to CPLR R. 4111 (c). Defendant makes three arguments in support of its contentions. First, Defendant argues that the Court erred in granting Plaintiff's motion *in limine* which precluded the defense from eliciting testimony at trial regarding Plaintiff's possible drug use on the day of the accident. Second, Defendant argues that the jury's finding that the negligence of Plaintiff was not a substantial cause of the accident is against the weight of credible evidence. Third, Defendant argues that juror confusion regarding the proximate cause charge, as evinced by the initial internally inconsistent special verdict sheet, which requires a new trial on liability.

Initially as Plaintiff pointed out, Defendant's papers do not contest the jury's findings that Defendant was negligent and a substantial factor in causing the accident. Rather, Defendant's papers focus on the jury's findings as it relates to Plaintiff as a substantial factor and her apportionment of fault. As such, this Court deems arguments relating to Defendant's negligence and causation as abandoned.

***Argument that the Court Erred in Granting Plaintiff's Motion* in Limine**

Defendant argues that the Court erred in granting Plaintiff's motion precluding Defendant from eliciting testimony regarding Plaintiff's possible use of marijuana in the hours before her accident. Defendant contends to this extent that Plaintiff's ability to observe and perceive the construction zone she entered on the day of the accident was "absolutely crucial" to the jury's determination as to whether Plaintiff's actions were a substantial factor in causing the accident.

Plaintiff opposes such arguments, first arguing that such application is improper under New York common law. Additionally, Plaintiff argues that, in the context of a CPLR R. 4404 motion, it is "impossible" for the Court to determine the weight or insufficiency of evidence that was never presented to the jury.

Procedurally, the Court agrees with Plaintiff that Defendant has improperly raised such issue in the context of a CPLR R. 4404 motion. It is well-held that "[a]lthough a pretrial order which limits the scope of the issues to be tried is appealable, an order which merely determines the admissibility of evidence, 'even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right or by permission." (*Ferrara v Kearney*, 285 AD2d 890, 890 [3d Dept 2001], quoting *Hargrave v Presher*, 221 AD2d 677, 678 [3d Dept 1995], quoting *Savarese v City of Hous. Auth.*, 172 AD2d 506, 509 [3d Dept 1991]; *see*

also Hurtado v Williams, 129 AD3d 1284, 1284–85 [3d Dept 2015]; *Lynch v Carlozzi*, 121 AD3d 1308, 1309 [3d Dept 2014]; *Bozzetti v Pohlmann*, 94 AD3d 1201, 532–33 [3d Dept 2012].) "Instead, 'appellate review should be deferred until after the trial[.]'" (*Ferrara*, 285 AD2d at 890–91, quoting *Hargrave*, 221 AD2d at 678.) As such, this branch of Defendant's motion procedurally fails.

However, the Court also finds that Defendant's motion also substantively fails. The Court notes that its Decision and Order dated April 10, 2015 is rather capacious for a motion *in limine* involving only one issue. The Court took considerable time in rendering such decision, which was six pages and cites to over 15 cases in support of its holding. However, Defendant's present motion skirts past many of the issues raised in the Court's Decision and Order, does not attempt to distinguish any of the issues and cases cited by the Court, and only repeats Defendant's quote and citation to *Simon v Indursky* (211 AD2d 404 [1st Dept 1995])—which the Court spent half a page distinguishing in its Decision and Order. As such, the Court adheres to its previous Decision and Order and incorporates it herein.

Specifically providing facts for appellate purposes, the Court notes that Plaintiff's deposition in question occurred on October 3, 2013, which was nearly four years after the accident. She testified that she socially smoked marijuana on occasion, usually on the weekend. She testified she had "no idea" when the last time she smoked marijuana was prior to her accident.[1] She was asked if she smoked marijuana on the morning of the accident, to which she testified "[n]o—I don't know. I doubt it but I don't know." Defense counsel pressed her by asking if it was "possible" that she could have, to which she responded "[i]t's probably unlikely but it's possible." Defendant's counsel again asked in a follow-up question that "you can't tell me when the last time was before the accident that you smoked marijuana with any certainty[]" and Plaintiff's response was "[n]o, I can't." Plaintiff also testified that when she smoked marijuana, it was on the weekends and with friends who gave it to her because she could not afford it.

[1] Defendant attempts to paint this as Plaintiff isavoiding answering the question, however the Court observes Plaintiff's deposition occurred almost four years after the accident and the Court believes this was a reasonable response given the temporal delay from the accident to the deposition. Contrary to Defendant's contentions, a review of Plaintiff's deposition testimony revealed anything but avoidance in responding to the questions posed by Defendant's counsel.

Both parties submitted slightly different accident reports from the Catskill Police Department, which was on scene and conducted an investigation. Neither of the MV-104A forms proffered to the Court indicated Plaintiff exhibited any impairment at the time of the accident. As to the "Apparent Contributing Factors" on the MV-104A form, police and investigators did not fill in any codes for "Alcohol Impairment" or "Drugs (Illegal)." Nor did either MV-104A form indicate Plaintiff was under the influence or suspected of being under the influence of any substance in any description of the accident.

The Court found that, other than Plaintiff's deposition testimony—which the Court observed Plaintiff being openly honest and Defendant's counsel was pressing the issue—there was no corroborating information to possibly indicate that Plaintiff was impaired by marijuana at the time of the accident. Plaintiff, who is 63-years-of-age at the time of the accident, testified she did not know and did not believe she did smoke before the accident. She testified that she would smoke on the weekends with friends and the subject accident occurred on Monday and she was not with any friends. The police investigation failed to contribute alcohol or illegal drug use as a possible cause to the accident.

Thus, even though the Court found that the issue of whether she possibly smoked marijuana to be relevant (*see People v Alvino*, 71 NY2d 233, 241 [1987] [citations omitted]; *People v Primo*, 96 NY2d 351, 355 [2001]; *People v Scarola*, 71 NY2d 769, 777 [1988]), all relevant evidence is not admissible, and the prejudicial value here far exceeded its probative value. (*Scarola*, 71 NY2d at 777; *see Primo*, 96 NY2d at 355; *Alvino*, 71 NY2d at 241; *see also People v Acevedo*, 40 NY2d 701, 704-05 [1976]; *People v Ventimiglia*, 52 NY2d 350, 359 [1981].) This inquiry "rests upon the trial court's discretionary balancing of probative value and unfair prejudice." (*People v Leeson*, 12 NY3d 823, 826–27 [2009].) In fact, the Court of Appeals' decision in the seminal case of *People v Mateo*, 2 NY3d 383, 439 (2004), held that the determination of admissibility of evidence as to a party's prior bad acts required a two-part inquiry: First requiring the proponent of the evidence to establish relevancy of the evidence, then second "the court must weigh the probative worth of the evidence against its potential for undue prejudice resulting to the defendant." (*Mateo*, 2 NY3d at 439.) Here, Defendant's attempt to bring up Plaintiff's marijuana use which is absolutely uncorroborated is nothing more than an attempt to frame her in an unfavorable light in front of the jury—to a point, a vilification. In the Court's discretion and based on the lack of uncorroborated evidence, the Court precluded Defendant's counsel from doing this.

As it again relates to Defendant's quotation and citation of *Simon v Indursky* (211 AD2d 404, 405 [1st Dept 1995]), for the proposition that "a witness may be cross-examined with respect to specific immoral, vicious or criminal acts which have a bearing on the witness's credibility[,]" the Court again notes that this case is distinguishable. While *Simon* is from the First Department and only persuasive authority, the quote is actually from the Court of Appeals in *Badr v Hogan*, 75 NY2d 629 (1990), which is binding authority. In *Badr*, the Court of Appeals continued its reasoning by stating "[w]hile the nature and extent of such cross-examination is *discretionary* with the trial court, the inquiry must have some tendency to show moral turpitude to be *relevant on the credibility issue*." (*Badr*, 75 NY2d at 634 [citations omitted; emphasis added].)

First, the Court notes that Defendant's underlying motion contains arguments inapposite to itself. Defendant's papers first condemn marijuana use as an immoral act and a vice, but then de-criminalize it in a second argument claiming the jury should hear it because it "is a mere class-'B' misdemeanor, not a major offense. In fact, simply possession of a small amount . . . is not even a crime; it is a violation." Second, the quoted language in *Simon* is used to attack a witness' credibility, whereas here it is very clear from Defendant's motion that he is trying to admit it for causation. Thus, Defendant is misusing *Simon's* intended purpose that the inquiry must have some tendency to show moral turpitude which is relevant to a credibility issue, but Defendant is not offering this evidence to be used for credibility but rather causation. Third and finally, the nature of the examination is in the discretion of the trial court.

Furthermore, as noted by Plaintiff, in the context of a CPLR R. 4404 motion it is not possible for the Court to assess whether the verdict is contrary to the weight of the evidence when such evidence was not presented to the jury.

Therefore, the branch of Defendant's motion as it relates to the motion *in limine* is denied, in its entirety.

Argument that Jury's Finding that the Negligence of Plaintiff was Not a Substantial Cause of the Accident is Against the Weight of Credible Evidence

Defendant argues that the jury's verdict was against the weight of the evidence in that the evidence is so preponderated in favor of Defendant that such verdict could not have been reached on any fair interpretation of the evidence and there is no reasonable view of the evidence to support the jury's verdict. This is premised on the fact that the initial jury verdict found Plaintiff to not be a substantial factor of the accident but determined that she was 10% at fault.

Post-trial motions for judgment and a new trial are governed by CPLR R. 4404. Subdivision (a) relates to motions after trial where jury required, and provides the following:

> 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 R. 4404 [a].)

Essentially, CPLR R. 4404 (a) provides that after a verdict is rendered, the court can set it aside and either 1) grant judgment to whichever part is entitled to it as a matter of law, or 2) order a new trial on the ground that the verdict is "contrary to the weight of the evidence." Here, Defendant is only relying on the second clause, as it argues "[t]he jury's determination was clearly contrary to the weight of evidence, and as such, and in the interest of justice, the Court should set aside the jury's verdict and order a new trial on liability." Accordingly, the Court does not apply the first clause to direct a verdict and only examines such application as against the weight of the evidence.

Where "'there is simply no valid line of reasoning and permissible inference which could possible lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial,' a verdict may be set aside as unsupported by legally sufficient evidence." (*Longtin v Miller*, 2015 WL 6740485, at *1 [3d Dept, Nov. 5, 2015], quoting *Cohen v Hallmark Cards. Inc.*, 45 NY2d 493, 499 [1978].) "[T]he question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors." (*Cohen*, 45 NY2d at 499.) "If legally sufficient evidence is found to support a verdict, it may nevertheless be set aside as against the weight of the evidence if 'the evidence so preponderate[d] in favor of the [defendant] that [the verdict] could not have been reached on any fair interpretation of the evidence[.]'" (*Longtin*, 2015 WL 6740485, at *1, quoting *Lolik v Big V Supermarkets. Inc.*, 86 NY2d 744, 746 [1995] [other citations omitted]; *see also Grassi v Ulrich*, 87 NY2d 954, 956 [1996].)

"The determination whether to grant a new trial is discretionary and 'is vested in the trial court predicated on the assumption that the [j]udge who presides at trial is in the best position to evaluate errors therein[.]'" (*Ernst v Khuri*, 88 AD3d 1137, 1138–39 [3d Dept 2011], quoting *Zimmer v Chemung County Performing Arts*, 130 AD2d 857, 858 [3d Dept 1987] [other citations and quotations omitted].) "The Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and 'must look to [her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision.'" (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 381–82 [1976].)

Here, it cannot be said that the jury verdict is against the weight of the evidence. To the extent that Defendant argues the first verdict demonstrates the jury found Plaintiff 10% at fault but on the second verdict found she was not a fault, thus "[c]learly the jurors believed plaintiff had some culpability for the accident, otherwise they would not have assigned 10% of the fault to her actions[.]" is without merit. Defendant's counsel was the one who devised the solution to have the jury reinstructed on two charges and, over Plaintiff's objection, start with a fresh jury verdict sheet—that is, the Defendant's jury verdict sheet. When in chambers discussing how to proceed, Defendant did not request a new trial on the record, but rather this solution. Thus, the Court cannot agree that the jury "clearly" found Plaintiff has some culpability in the initial verdict.

From the Court's review of the evidence elicited at trial, it cannot be said that such evidence is so preponderated in favor of Defendant that the verdict could not have been reached on any fair interpretation of the evidence. Michael McGrath, Superintendent of the Village of Catskill Department of Public Works, testified that the Village relied on Defendant to do whatever was necessary to comply with the Manual for Uniform Traffic Control (hereinafter "MUTC"). More specifically, he testified that "[t]he contractor [Defendant] was responsible for all road detours, things of that nature, safety of the job site." This was included in the Village's contract with Defendant, which required "[a]ll open trenches in highway right-of-way shall be barricaded." Further, the contract required "[t]here shall be conspicuously displayed bright red flags not less than 24 by 24 attached to such barricades . . . ." Additionally, "[f]lagmen shall be employed and on duty at all times during the process of the work so as to direct traffic . . . ." However, Mr. McGrath testified that the job site involved an open excavation in the highway right-of-way and there was no a barricade in front of the open excavation. Thus, there were also no 24 by 24 bright

red flags attached to such barricade. He also testified there was no closed road sign, drums, and no flagman in front of the open excavation on the street where the accident occurred.

Defendant's representative, Charles Merritt, testified that he did not have any signs for the traveling public to tell them they could not make a right or left-hand turn in or out of the construction taper on the roadway. During Mr. Merritt's examination before trial, he averred there was a closed road sign and he gave a specific description of the size and its position, however based on the photographic evidence which later came out in disclosure, that sign was never actually present and Mr. Merritt admitted his mistake during trial. He testified that there was no barricade, no construction drums, and no flagmen at the intersection where the accident occurred. Further, he testified that the contract required type three barricades to be used in the event of an excavation, which he did not use in front of the open excavation where the accident occurred.

Mr. Merritt also testified that he had no training or familiarity with the MUTC. Plaintiff contends his engineering expert testified the MUTC is premised upon placing motorists on alert for traffic pattern changes and heightened danger due to road construction, and was required by the contract to be followed during this construction project. While Plaintiff is quick to point out that Defendant conveniently omitted any transcripts from Plaintiff's experts from its moving papers, nothing foreclosed Plaintiff from attaching them to her opposition papers. Plaintiff erroneously defers to the Court's recollection of the testimony, which the Court believes it cannot accurately recall. As such, even though Mr. Merritt testified he had no training or familiarity with the MUTC, the Court did not afford this any weight in rendering this decision as it is without consequence since the Court cannot recall—without any of the expert transcripts—what was testified to by the experts.

Given the testimony above and the other testimony annexed to Defendant's moving papers, the Court finds the evidence is not so preponderated in favor of Defendant that the verdict could not have been reached on any fair interpretation of the evidence. Even though the jury found Plaintiff negligent for driving into the excavation ditch, the evidence presented that there was a lack of required safety apparatuses supports the jury's finding that Plaintiff was not a substantial factor in causing the accident. Therefore, this branch of Defendant's motion is denied in its entirety.

Argument that Juror Confusion Regarding the Proximate Cause Charge, as Evidenced by the Initial Internally Inconsistent Special Verdict Sheet, Requires a New Trial on Liability

Defendant relies on CPLR R. 4111 (c) and argues that the jury's initial inconsistent verdict requires the Court to set a new trial on liability. Defendant contends this is because the jury's answers to the interrogatories on the first verdict sheet are internally inconsistent, finding her not a substantial factor but allotting her 10% at fault. Defendant cites to several cases in support of this position.

First, the Court again notes that the jury verdict sheet was Defendant's sheet, and the solution to the initial inconsistent verdict was Defendant's solution—both objected to by Plaintiff. Defendant did not request a new trial in chambers regarding the inconsistent verdict. Any drafting confusion is Defendant's own doing.

Second, Defendant's own moving papers acknowledge that the Court is limited to two options under CPLR R. 4111 (c); having the jury reconsider its answers and verdict or ordering a new trial. (*See* CPLR R. 4111 [c] "When the answers are inconsistent with each other and one or more is inconsistent with the general verdict, the court shall require the jury to further consider its answers and verdict or it shall order a new trial."].)[2] In fact, Defendant even goes so far to say that this proposition is "well settled." (*Scarsella v Harjes*, 234 AD2d 874 [3d Dept 1996]; *Sluzar v Nationwide Mut. Ins. Co.*, 223 AD2d 875 [3d Dept 1996].) Here, the Court properly reinstructed and had the jury reconsider its answers and the verdict pursuant to CPLR R. 4111 (c). This resolution was premised on Defendant's proposal in chambers to reinstruct and have the jury reconsider the *entire* verdict—not just the inconsistent portions—over Plaintiff's objection.

Third, Defendant's reliance on *McElroy v Yousuf* (268 AD2d 733, 735 [3d Dept 2000]) for the proposition that if the jury was "substantially confused by the verdict sheet" a new trial is required, is misplaced. In *McElroy*, the Third Department did not actually find the jury was "substantially confused" by the jury verdict sheet's directions. After reviewing the jury verdict

[2] The Court notes that it believes this is the wrong section of law, as CPLR R. 4111 (c) only applies to general verdicts accompanied by answers to interrogatories. The verdict here was a special verdict. The distinction between a general and special verdict are contained in subdivision (a), which provides that a general verdict requires the jury to render the final judgment whereas a special verdict has the jury answer certain questions to make findings of fact for the court to review and issue a final judgment. This is further elaborated in subdivision (b). The verdict sheet here did not have the jury render a final judgment as it would in a general verdict. Rather, the verdict had the jury answer questions as to findings of fact for the Court to issue a judgment. Defendant even labeled the jury verdict sheet as a "special verdict." However, the distinction between a general verdict and a special verdict has been blurred by the bench and the bar, and the Court declines to use this as a procedural mechanism for grounds denying Defendant's motion.

sheet directions in *McElroy*, the Court finds it was significantly more complex than here because it was bifurcated, contained subdivisions to questions, and combined multiple questions to direct where for the jury should go to answer the next question.[3] Thus, if the Appellate Division did not find substantial confusion in the directions in *McElroy*, then the Court here cannot where the instructions simply directed the jury to go to the next question if they answer "yes" or report to the Court if they answer "no." Again, the instructions written on the jury verdict sheet were Defendant's own, as the Court rejected Plaintiff's entire jury verdict sheet.

Fourth, Defendant's reliance on *Palmer v Walters*, (29 AD3d 552 [2d Dept 2006]) is not only misplaced, but dispositive against Defendant's position. Defendant cites *Palmer* for the proposition that "[e]ven after reconsideration by the jury, 'a trial court has discretion to set aside a verdict which is clearly the product of substantial confusion among the jurors.'" (*Palmer*, 29 AD3d at 553.) The facts of jury verdict in *Palmer* are very similar to the facts here. The plaintiff was a passenger in defendant Walter's vehicle. Defendant Romanelli struck defendant Walter's vehicle, and plaintiff was injured. The jury found defendant Romanelli was negligent and he was a substantial factor in causing the accident and, that defendant Walter was negligent and not a substantial factor in causing the accident, however found defendant Romanelli 67% at fault and defendant Walter 33% at fault. Like here, the first verdict was internally inconsistent and the trial court directed the jury to reconsider its answers and return a second verdict. The second verdict was identical to the first verdict, except that the question asking if defendant Walter's negligence was a substantial factor was answered in the affirmative.

Defendant Walter moved pursuant to CPLR R. 4404 and 4111 (c) to set aside the verdict on the issue of liability, and the trial court declared a mistrial and directed a new trial due to the second verdict's changed question five answer. On appeal, the Appellate Division *reversed* the trial court and found that it "improvidently exercised its discretion in declaring a mistrial, and instead should have accepted the jury's second verdict." (*Palmer*, 29 AD3d at 553.)

[3] The jury verdict sheet direction at issue in *McElroy* was the following: "If you have answered 'no' to each of the above questions 1a through 1e or to question 2, proceed to question 4; if you have answered yes to any of the questions 1a through 1e *and* question 2, proceed to question 3."

Here, the facts surrounding the jury verdict are identical except, instead of changing the fourth question to "yes" like in *Palmer*, the jury here changed the fifth question to blanks. Therefore, since the Appellate Division reversed the trial court in *Palmer* for doing exactly what Defendant is asking this Court to do, this Court denies Defendant's motion pursuant to CPLR R. 4404 and 4111 (c).

Fifth and finally, Defendant's argument that the Court erred in reading the jury instructions out of order is without merit. There is no legal obligation to read the jury instructions in a particular sequence. The jury was not sent to deliberate without hearing all of the jury instructions the attorneys requested. But most importantly, this reading equally effected both Plaintiff and Defendant as the jury was asked to answer if Defendant was a substantial factor then if Plaintiff was a substantial factor. Thus, any advantage or disadvantage affected Plaintiff and Defendant equally and, in the Court's opinion, disadvantaged Plaintiff more since Plaintiff has the burden of proof and presented her entire case premised on the reading of the jury instructions.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED that Defendant's motion is **DENIED**, in its entirety, and all other relief requested therein is denied in its entirety.

This constitutes the Decision and Order of the Court. Please note that a copy of this Decision and Order along with the original motion papers are being filed by Chambers with the County Clerk. The original Decision and Order is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: November 19, 2015
Catskill, New York

ENTER:

HON. LISA M. FISHER
SUPREME COURT JUSTICE