

Wilds v Ware

2020 NY Slip Op 31022(U)

April 16, 2020

Supreme Court, Nassau County

Docket Number: 605613/2017

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
STEPHANIE WILDS,

Plaintiff,

-against-

MORRIS WARE, JR. and TOWN OF HEMPSTEAD,

Defendants.

-----X

**IAS Part 12
Index No. 605613/2017
Mot. Seq. No. 002**

DECISION AND ORDER

On January 23, 2020, after lengthy deliberations over the course of two days, the jury in this personal injury action found that the defendants were not liable to the plaintiff. Indeed, the jury came to this conclusion three separate times, utilizing three different verdict sheets, only the last of which was pronounced and recorded. The jurors were then polled and they confirmed that this was their verdict and that they understood that, as a result, the plaintiff was not going to recover any money. Nonetheless, plaintiff now moves to set aside the verdict pursuant to CPLR §4404(a) on the grounds of jury confusion. For the reasons set forth below, the motion is denied.

BACKGROUND

In June 2016, the plaintiff and defendant Morris Ware, Jr., an employee of the Town of Hempstead, got into a motor vehicle accident at an intersection in Hempstead, New York. Ware was driving a Town vehicle. Plaintiff alleged serious injuries as a result of the crash.

On January 22, 2020, the liability portion of the trial commenced. The plaintiff, Ware and Ware’s passenger testified. Plaintiff and Ware inconsistently testified that the light was in their favor at the time of the accident. Various photographs of the intersection and of one of the vehicles were entered into evidence. Following closing arguments, the court charged the jury and their deliberations commenced, utilizing an agreed-upon verdict sheet containing standard interrogatories for a motor-vehicle-accident liability trial. The deliberations continued for approximately 1 1/2 hours with no verdict being reached before the trial adjourned for the day.

The next day, the jury continued to deliberate for over 2 hours before sending a note to the court that it had reached a verdict. The verdict sheet reflected that the jury had found

that Ware was negligent but that his negligence was not a substantial factor in causing the accident. But the jury did not follow the verdict sheet's directions and proceeded to answer the remaining questions relating to plaintiff's negligence. It found that plaintiff was also negligent and her negligence was a substantial factor in causing the accident—and apportioned fault between the parties (60% plaintiff, 40% Ware).

Because the court reviewed the verdict before it was published and saw that the jury did not follow its directions it did not publish the jury's verdict. Instead, the court explained to the parties the failure of the jury to follow instructions and, with the parties' express consent, gave the jury a new verdict sheet and explained to the jury the importance of following the instructions contained thereon.

Thereafter, following two notes from the jury with questions concerning the point of impact of the vehicles and whether the drivers wore glasses, the court was notified that the jury had completed the second verdict sheet. Plaintiff's counsel then requested that the court inquire as to the jurors' intent when announcing the verdict. Because plaintiff's counsel agreed that it was not feasible to inquire of every juror what their intent was, he agreed that it would be appropriate for the court to explain the ramifications of the verdict to the jury. "Explaining the significance is fair enough for me, Judge," he stated.

The second verdict sheet reflected that the jury once again found that Ware was negligent but that his negligence was not a substantial factor in causing the accident. But before the verdict could be pronounced and recorded, it was brought to the court's attention that the jury had a question "concerning percentages." It was further reported that notwithstanding the jury's completion of the verdict sheet and its transmittal to the court for inspection to ensure that directions were followed, the jury expressed that it did not have a verdict.

As a result, after consulting with counsel and getting their consent, the court instructed the jury on the record that they must first determine whether defendant was at fault before they proceeded to consider the fault of the plaintiff and apportion fault, if applicable. The court explained that there was no reason to consider an apportionment of fault if the jury found that the defendant was not at fault. The court informed the jury that it would read back to it the "substantial factor" charge if it expressed its desire for the court to do so. The jury was given a third verdict sheet and re-commenced its deliberations.

The court then asked counsel if they wanted to see the first two verdict sheets and made them available. For the first time, plaintiff's counsel expressed an "exception as to how this is being handled." He then requested a mistrial because "the jury is clearly, [woefully] confused." Defense counsel moved for the court to enter judgment for defendants based on the verdict sheets. Both applications were denied. Counsel for plaintiff also requested that the court read back to the jury the charges relating to "substantial factor" and directions on how to complete the verdict sheet. Because the court had just charged the jury concerning the procedures for filling out the verdict sheet and expressly offered to re-read the "substantial factor" charge to them upon their request, the court declined to do so.

Thereafter, the jury returned a verdict in favor of the defendants, finding that Ware was not negligent. The jury was then polled. But before they were polled the court explained to the jury the following:

Ladies and gentlemen, I'm just going to ask each of you to [confirm] that this is your verdict.

I also just want to confirm because you guys sort of went back and forth with the verdict sheets that you understand the significance of the verdict so that there is no issue in that regard.

So as a result—and by doing this, I don't want you to misconstrue my question to you or the reason why I'm [doing] this. Your verdict is your verdict and the Court is satisfied with that. I just want to make sure you understand that as a result of the verdict that the plaintiff is not going to recover any money. If that's your verdict, that's perfectly okay. I want to make sure everyone understands that. I am going to ask you if indeed that is your verdict. If you say yes, that also tells me that you understand that."

Each juror then individually confirmed that this was their verdict.¹

LEGAL ANALYSIS

A trial court has the authority pursuant to CPLR 4404(a) to set aside a jury's verdict if it is the product of substantial confusion to prevent a miscarriage of justice. See *Roberts v. County of Westchester*, 278 A.D.2d 216 (2d Dept. 2000); *Pache v. Boehm*, 60 A.D.2d 867 (2d Dept. 1978). Such confusion may be evidenced by answers to interrogatories on a verdict sheet that are inconsistent. When faced with such a circumstance the trial court

¹ One juror dissented and expressed her dissent.

should direct reconsideration by the jury or order a new trial. *D'Annunzio v. Ore*, 119 A.D.3d 512 (2d Dept. 2014).

Here, the first verdict sheet was inconsistent because the jury apportioned liability to Ware even though it found that his negligence was not a substantial factor in causing the accident. As a result, the court acted properly in not accepting the verdict and directing the jury to reconsider its verdict by closely following the verdict sheet's directions. It would have been better practice for the court to do so on the record while repeating to the jury that it need not consider plaintiff's liability unless it found the defendant liable. But neither party objected to the procedure employed as reflected in the record.

The court was then informed, and the parties believed, that the jury had reached a verdict as reflected on a second verdict sheet. Although the second verdict sheet reflected that the jury had once again determined that Ware was not liable for the accident, the court properly did not announce or record the verdict since the jury alerted the court that it had a question and did not believe that it had reached a final verdict.

The court then formally instructed the jury as to the proper procedures concerning apportioning fault between the parties and when that is necessary. Again, this was done with the consent of the parties. The court further volunteered to the jurors that it would re-read to them the court's charge concerning "substantial factor" upon request.

After the jury was sent back to continue its deliberations the court volunteered to disclose and did disclose the results of the first two verdict sheets. Only then did plaintiff's counsel object to the procedures being followed and request a mistrial.

There is no question that the third verdict sheet—the only one pronounced and recorded in open court—was internally consistent. A verdict is not valid and final until it is pronounced and recorded in open court. *Kitenberg v. Gulmatico*, 143 A.D.3d 947 (2d Dept. 2016). The court may therefore disregard the prior verdict sheets. To the extent that they are examined as potential evidence of jury confusion, all three verdict sheets consistently found that Ware was not liable to the plaintiff. Although the absence of liability reflected on the third verdict sheet was based on the jury's finding that Ware was not negligent—rather than negligent but his negligence was not the proximate cause of the accident—this does not evidence confusion. "[U]nder the circumstances of this case, there is no reason to believe that the jury remained confused...[but rather] exercised its right to substantively alter its

original verdict so as to conform to its real intention.” *Sabarese v. Board of Ed. Of the Tuxedo Union Free School Dist.*, 151 A.D.3d 776, 778 (2d Dept. 2017).

Finally, lest there be any doubt, the court made clear to the jury the significance of their verdict before the jury was polled, and that the verdict meant that the defendant would prevail and that the plaintiff would receive no compensation. This is precisely the relief plaintiff’s counsel requested before he learned of the adverse results of the first two verdict sheets.

The court would be inclined to grant plaintiff’s motion if there was a likely or even realistic possibility that the defendants prevailed because of jury confusion. But three times the jury determined that Ware was not liable, either because he was not negligent or because his negligence was not a substantial factor in causing the accident. The jury understood—because they were told before they were polled and the verdict became final—that as a result of their verdict the plaintiff was going to lose and not recover any money. Therefore, it is not rational to conclude that the jury was confused when it found for defendants.

Torres v. City of New York, 179 A.D.3d 732 (2d Dept. 2020), does not dictate another result. In that case, the Second Department determined that substantial jury confusion required a new trial because the record reflected that the final verdict was “unreliable.” In contrast to the facts here, the trial court in *Torres* provided no further instructions to the jury concerning the concept of comparative fault even though the jury in *Torres* reached the issue improperly. And the Second Department found that the trial court should have reinstructed the jury concerning the meaning of “substantial factor” since its prior charge “incompletely convey[ed] the germane legal principles to be applied” and was the subject of a prior objection. *Id.* at 734. Here, there was no objection to the proximate cause charge and the court expressly offered to re-read the charge to the jury at their request. And there is no evidence that the jury was confused about the meaning of “substantial factor.”

For these reasons, plaintiff's motion is denied. Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: April 16, 2020
Sea Cliff, New York

ENTER:



LEONARD D. STEINMAN, J.S.C.

ENTERED

Apr 20 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE