Plazas v Sherlock
2022 NY Slip Op 30783(U)
March 18, 2022
Supreme Court, Putnam County
Docket Number: Index No. 501384/2019
Judge: Victor G. Grossman

SUPREME COURT – STATE OF NEW YORK
Present: HON. VICTOR G. GROSSMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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MAURICIO A. MOSSOS PLAZAS,

Plaintiff,

-against-

BRENNA MARIE SHERLOCK and
KEVIN G. SHERLOCK,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 501384/2019
Mot. Seq. No. 5

DECISION AND ORDER

The following papers numbered 1 to 6 were read on Plaintiff's motion for an order setting aside the jury's verdict on liability and damages and/or increasing the award of damages:

Notice of Motion – Affirmation / Exhibits – Affidavits (2) 1-4

Affirmation in Opposition 5

Reply Affirmation / Exhibits 6

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for personal injury arising out of a motor vehicle accident. Plaintiff's motion for partial summary judgment on liability was denied, and a bifurcated trial of liability and damages was held in October-November 2021. Upon the liability portion of the trial, the jury found that Plaintiff and Defendant were both negligent and that the negligence of each party was a proximate cause of the accident. The jury apportioned responsibility for the accident 50% to each party. Upon the damages portion of the trial, the jury awarded Plaintiff the sum of $53,625 for past pain and suffering, $53,625 for past loss of earnings, and Zero future damages.

Plaintiff moves pursuant to CPLR §4404(a) for an order setting aside the jury's verdict on liability and damages and/or increasing the award of damages. Plaintiff argues that:

- The Court erred in not directing a verdict in favor of Plaintiff on the issue of liability.
- There was an undisclosed relationship between the Court's law secretary's father and defense counsel that prevented Plaintiff from having a fair trial.
- Coercion and intimidation in the jury room deprived Plaintiff of a fair trial.
- The damages verdict was inconsistent and insufficient.

These points are addressed seriatim below.

LIABILITY

The accident occurred when defendant operator Brenna Marie Sherlock, in the process of turning left from Mahopac Avenue southbound onto Route 6 eastbound, struck the passenger side of a vehicle operated by plaintiff Mauricio Mossos Plazas who, proceeding on Route 6 westbound, was at a red stop light intending to turn left onto Mahopac Avenue. The evidence showed that Plaintiff's vehicle was stopped at the time impact occurred. Plaintiff's counsel acknowledges, however, that the evidence gave rise to a triable issue of fact whether Plaintiff violated Vehicle and Traffic Law §1111(d)(1), which provides in pertinent part:

> Traffic…facing a steady circular red signal…shall stop at a clearly marked stop line… before entering the intersection and shall remain standing until an indication to proceed is shown…

Although Plaintiff testified that he had been stopped in the left turn lane for a period of several seconds at the white stop line when he was struck by Defendant's vehicle, Defendant testified to the contrary that Plaintiff's vehicle extended approximately seven feet past the while line into the intersection when the accident occurred. Given the dimensions of Plaintiff's vehicle, Plaintiff's counsel acknowledges that the jury could reasonably have concluded that the front half of the

vehicle was protruding into the intersection (in violation of Section 1111[d]) while the back half was still in the left turn lane.

"A driver who enters an intersection against a red light in violation of Vehicle and Traffic Law §1111(d) is negligent as a matter of law." *White v. Adom Rental Transp., Inc.,* 150 AD3d 938, 939 (2d Dept. 2017). On the strength of *Murphy v. Epstein,* 72 AD3d 767 (2d Dept. 2010), Plaintiff claims that notwithstanding any negligence on his part in violating Section 1111(d), his conduct as a matter of law cannot have been a proximate cause of the accident, wherefore the Court should have directed a verdict in his favor on the issue of liability.

The Second Department's decision in *Murphy v. Epstein* is as follows:

> This action arises from an automobile accident which took place on the morning of October 14, 2008, at the intersection of Manhasset Street and Bellmore Avenue in Islip Terrace. Manhasset Street is a two-way roadway which runs east and west, while Bellmore Avenue is a two-way roadway which runs north and south. The plaintiff, who was traveling east on Manhasset Street, alleges that when she arrived at the intersection of Manhasset Street and Bellmore Avenue, she brought her vehicle to a complete stop about one foot in front of the stop sign governing eastbound traffic. **According to the plaintiff, she was at a complete standstill in the eastbound lane when her vehicle was struck head-on by the defendant's vehicle, which was turning left onto Manhasset Street in order to proceed west.** The defendant, who was traveling north on Bellmore Avenue before he began to execute his turn, claims that he never saw the plaintiff stop at the stop sign, and that at the point of impact, "the front of the plaintiff's vehicle was just beginning to enter onto the road surface of Bellmore Avenue."
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> The plaintiff made a prima facie showing of her entitlement to judgment as a matter of law on the issue of liability through the submission of her affidavit, which demonstrated that the **defendant violated Vehicle and Traffic Law §§ 1160(b) and 1163(a) by making a left turn from Bellmore Avenue into the eastbound lane of Manhasset Street**, and that this violation was the sole proximate cause of the accident. The plaintiff, who was **stopped at a stop sign in the eastbound lane** of a two-way roadway, **could not have been expected to anticipate that a driver executing a left turn in order to proceed west would turn directly into her lane, rather than the westbound lane, and hit her vehicle head-on** [cit.om.].
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> In opposition to the plaintiff's prima facie showing, the defendant failed to raise a triable issue of fact [cit.om.]. Although the defendant averred that the collision occurred as the front of the plaintiff's vehicle was "just beginning to enter onto the road surface of

> Bellmore Avenue," he did not deny that her vehicle was still at least partially in the eastbound lane of Manhasset Street at the point of impact, or that his vehicle struck her vehicle head-on. **Under these circumstances, the defendant's affidavit was insufficient to raise a triable issue of fact as to whether the plaintiff's alleged violations of Vehicle and Traffic Law §§ 1172(a) and 1142(a)[1] were a proximate cause of the accident.**

Murphy v. Epstein, supra, 72 AD3d at 768 (boldface emphasis added).

According to Plaintiff, *Murphy* stands for the general proposition that "a stopped vehicle's negligence cannot, as a matter of law, be a substantial factor in causing an accident." (Paris Aff. Par. 23) On this Court's reading, the Second Department in *Murphy* did not enunciate a generally applicable rule of proximate cause analysis but instead laid out the facts and circumstances of the case in detail and specifically confined its holding to those circumstances. *See, id.* Moreover, the circumstances of the case at bar, while superficially similar, are in material respects wholly distinguishable from those of *Murphy.*

The holding in *Murphy* rests on the fact that the defendant, attempting to turn left and proceed westbound on Manhasset Street, instead *turned into the wrong lane*, the eastbound lane, and *struck the plaintiff's vehicle head-on.* In those circumstances, as the Second Department concluded, it made little difference whether plaintiff was stopped at the stop sign on Manhasset Street or "just beginning to enter" Bellmore Avenue: in either case, the defendant would have barreled into the plaintiff's vehicle head-on.

Here, given the *configuration of the roadways* and the *point of impact* by Defendant's vehicle on Plaintiff's vehicle, there is in stark contrast with *Murphy* a manifest question of fact whether the Plaintiff's proceeding into the intersection against a red stop light in violation of VTL §1111(d) contributed to the occurrence of the accident and was a proximate cause thereof.

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[1] VTL 1172(a) and 1142(a) govern the obligations of motorists at stop signs, prescribing rules as to where motorists must stop and when they may proceed through the stop sign. VTL 1111(d) analogously governs the obligations of motorists at red stop lights.

Route 6 and Mahopac Avenue are not at right angles to each other; Route 6 crosses Mahopac Avenue at a sharp angle. Consequently, the left turn which defendant Sherlock was executing from Mahopac Avenue southbound onto Route 6 eastbound at the time of the accident was at an acute angle of about 50 degrees, not a right angle of 90 degrees. Given that configuration, there was an enhanced likelihood that a vehicle, like Plaintiff's here, proceeding from the turning lane of Route 6 westbound into the intersection might intersect the path of a vehicle, like Defendant's here, making that sharp 50 degree turn onto Route 6 eastbound. In that event, the front of Defendant's vehicle would impact the passenger side of Plaintiff's vehicle, which is precisely what happened here. But for the Plaintiff's negligence in entering the intersection in violation of VTL §1111(d), that impact need not have occurred at all, or so a reasonable jury could find.

Unlike in *Murphy v. Epstein, supra,* then, there was a triable issue of fact on proximate cause regardless of whether Plaintiff's vehicle was stopped when the accident occurred. Therefore, the Court properly denied Plaintiff's application for a directed verdict on liability.

UNDISCLOSED RELATIONSHIP

At the time of this litigation, the Court's principal law secretary was the daughter of retired Justice George D. Marlow, who for a certain period enjoyed an "of counsel" relationship with McCabe & Mack LLP, attorneys for the Defendant. In consequence of that relationship, the Court's law secretary was insulated from matters involving McCabe & Mack LLP and took no part whatsoever in assisting the Court on this case. In addition, the Court secured an ethical opinion from the competent authority concerning its obligations in light of that relationship. Opinion 21-18, issued January 28, 2021, states:

> The inquiring judge's law clerk's first-degree relative was until recently of counsel to a local law firm, and thus the judge has been insulating the law clerk from the law firm's matters. Toward the end of 2020, the law clerk's relative retired from the law firm, and will not receive any further compensation from the firm. The law clerk's relative will

nonetheless remain on the law firm's letterhead and website. The inquiring judge asks if the law clerk may now participate in matters involving the law firm.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act to promote public confidence in the judiciary's integrity and impartiality (*see* NYCRR 100.2[A]). Therefore, a judge must not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment (*see* 22 NYCRR 100.2[B]) and must disqualify in a proceeding where the judge's impartiality might reasonably be questioned (*see* 22 NYCRR 100.3[E][1]) and in other specific circumstances required by rule or law (*see generally id.*; Judiciary Law §14).

It appears that the law clerk's relative has terminated their former business and financial relationship with the law firm and will no longer receive compensation from the firm as of the date of their retirement. We further understand that, if the law firm chooses to list retired attorneys on its letterhead or website, it must also state their dates of service with the firm (*see* 22 NYCRR 1200, Rule 7.5[b][4]). This requirement will surely minimize the risk of any reasonable public misperception that the law clerk's relative has on-going relationship with the law firm.

Clearly, the law clerk's relative is not "likely [to] benefit economically from any fees" earned by the law firm in matters where the law firm was retained after the relative's departure from the firm (Opinion 11-99). Thus, we see no need for the judge to continue to insulate the law clerk from new matters involving the relative's former law firm (*cf.* Opinion 13-26 [declining to impose an insulation requirement for the law clerk's former attorneys, once the representation is concluded]). The judge also need not make any disclosure in such matters.

To avoid any possible appearance of impropriety, however, the judge should continue to insulate the law clerk from older matters involving the law firm, *i.e.*, matters where the judge knows the law firm was retained during the law clerk's relative's association with the firm (*see* Opinions 13-104; 13-26; 11-99).

The Court has complied in all respects with the dictates of Opinion 21-18. Nevertheless, Plaintiff contends that the Court should have disclosed his law secretary's father's relationship with Defendant's counsel, that having failed to do so the Court should have recused itself in this matter, and that Plaintiff was deprived of a fair trial because a bias allegedly arising out of that relationship affected the result of the trial.

There was in this matter no statutory ground for the Court's disqualification by reason of interest or consanguinity. *See,* Judiciary Law §14. "[I]n the absence of statutory grounds

the decision upon recusal motion is a matter normally entrusted to the trial judge's personal conscience (*People v. Smith,* 63 NY2d 41, 68…)." *Schrager v. New York University,* 227 AD2d 189, 190-191 (1st Dept. 1996). "[B]ias or prejudice unconnected with a statutory 'interest' in the controversy can constitute grounds for concluding that a trial judge abused his discretion by failing to disqualify himself where the record reveals that his bias affected the result of the trial (*see, Johnson v. Hornblass,* 93 AD2d 732…)." *Schrager, supra,* 227 AD2d at 191.

Plaintiff contends that the Court's bias in favor of Defendant's counsel was evident, first, in its denial of Plaintiff's motions for summary judgment and a directed verdict on liability, and second, in its questioning at trial of Plaintiff's expert witnesses. The propriety of this Court's determinations denying Plaintiff judgment as a matter of law on the issue of liability has already been demonstrated hereinabove (*see,* pp. 2-5).

As for the Court's questioning of Plaintiff's experts, the applicable standard was articulated by the Second Department in *Porcelli v. Northern Westchester Hospital Center,* 110 AD3d 703 (2d Dept. 2013):

> "[A]ll litigants, regardless of the merits of their case, are entitled to a fair trial" [cit.om.]. A trial justice plays a "vital role in clarifying confusing testimony and facilitating the orderly and expeditious progress of the trial," but that "power is one that should be exercised sparingly" (*People v Yut Wai Tom,* 53 NY2d at 57). Accordingly, a trial justice may not "'so far inject himself into the proceedings that the jury could not review the case in the calm and untrammeled spirit necessary to effect justice'" (*Schaffer v Kurpis,* 177 AD2d 379, 380 [1991], quoting *Kamen Soap Prods. Co. v Prusansky & Prusansky,* 11 AD2d 676, 676 [1960]).
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> A trial justice must maintain an atmosphere of impartiality…a trial justice should "'at all times maintain an impartial attitude and exercise a high degree of patience and forbearance'" (*Salzano v City of New York,* 22 AD2d 656, 657 [1964], quoting *Buckley v 2570 Broadway Corp.,* 12 AD2d 473, 473 [1960]).

Porcelli, supra, 110 AD3d at 706.

Thus, a court is not only authorized but expected to play a role in clarifying confusing testimony provided that it does so sparingly and refrains from injecting itself unduly into the proceedings, maintains an impartial attitude and exercises patience and forbearance such that the jury may review the case in a "calm and untrammeled spirit." The Court has reviewed the instances of questioning cited by Plaintiff's counsel and finds them to be well within the proper exercise of the Court's authority. In the Court's considered view, the testimony in question required clarification in order that the jury might properly evaluate the evidence; the Court pursued that clarification in a mild-mannered fashion and without in any way impugning the witness's credibility; indeed, in certain instances, the effect if not the purpose of the Court's questioning was to draw attention to a point in Plaintiff's favor; given those circumstances, the Court's perceiving no reason to question or clarify the defense expert's medical testimony would not naturally have been construed by the jury as indicating a lack of impartiality or a bias on the Court's part in Defendant's favor.

The case authority cited by Plaintiff serves only to confirm that nothing in the conduct of trial herein deprived Plaintiff of a fair trial. By way of contrast with the case at bar:

- In *Harding v. Noble Taxi Corp.*, 182 AD2d 365 (1st Dept. 1992), the court advised the jury at length as to its reasons for dismissing a particular cause of action, leaving the jury with the impression that it favored the defendant's position and had invalidated the opinions of the plaintiff's experts. *See id.*, at 371.
- In *Porcelli v. Northern Westchester Hospital Center, supra,* the record reflected a conflict between the court and the plaintiff's attorney at all phases of the trial, and often in the presence of the jury. "The trial justice demonstrated a propensity to interrupt, patronize, and admonish the plaintiff's counsel, and gave the plaintiff's counsel significantly less

leeway with regard to examination and cross-examination of witnesses than that which was afforded the defendants' counsel." The appellate court proceeded in a lengthy paragraph to detail numerous instances of such conduct on the part of the trial court, the cumulative effect of which, the Court held, deprived the plaintiff of a fair trial. *See, id.,* 110 AD3d at 706-707.

- In *Kelly v. Metropolitan Ins. & Annuity Co.,* 82 AD3d 16 (2d Dept. 2011), the trial court improperly interfered with the testimony of the plaintiff's liability expert by interrupting, commenting several times that there was no Code violation, openly criticizing and expressing dislike for the expert, limiting her testimony on the subject of the defendants' negligence, leaving the jury with the erroneous impression that there could be no liability in the absence of a Code violation and refusing to charge that the absence of a Code violation was not tantamount to the absence of negligence. In a lengthy opinion the appellate court detailed the extremely prejudicial treatment of plaintiff's expert by the trial court in the presence of the jury. The Court also observed that the prejudice was compounded by the admission over objection of inadmissible evidence of the infant plaintiff's parents' negligent supervision. *See, id.,* 82 AD3d at 20-24.
- Finally, in *Taromina v. Presbyterian Hospital,* 242 AD2d 505 (1st Dept. 1997), the defendants were prejudiced by the erroneous preclusion of proof as to the divisibility of the injury and denial of a requested charge on apportionment of liability. The prejudice was compounded by the trial court's shepherding plaintiff's counsel through the proceedings -- by examining witnesses, eliciting evidence critical to plaintiff's case, and prompting key objections – and by making repeated disparaging comments to and about defense counsel in front of the jury. *See, id.,* at 505-506.

By way of contrast this caselaw illustrates Plaintiff's utter failure to show that anything in this Court's efforts to clarify testimony his expert witnesses reflects the operation of a purported bias affecting the result of trial herein.

JURY INTIMIDATION

"[A]bsent exceptional circumstances a juror's testimony on affidavit may not be used to attack a jury verdict (*see, Kaufman v. Eli Lilly & Co.,* 65 NY2d 449, 460…; *People v. De Lucia,* 20 NY2d 275…). A long time ago, the Supreme Court concluded that posttrial challenges of such a nature 'would***make what was intended to be a private deliberation, the constant subject of public investigation – to the destruction of all frankness and freedom of discussion and conference; (*McDonald v. Pless,* 238 US 264, 267…). Although the rule against impeachment can cause an unjust result at times, it is necessary to prevent 'the posttrial harassing of jurors' and the 'chaos' which would result from the instability of verdicts (*see, People v. De Lucia, supra,* 20 NY2d at p. 278…)." *Russo v. Jess R. Rifkin, DDS, PC,* 113 AD2d 570, 574-575 (2d Dept. 1985). *See also, Porter v. Milhorat,* 26 AD3d 424 (2d Dept. 2006) ("Jurors may not impeach their own verdict"); *Careccia v. Enstrom,* 212 AD2d 658, 659 (2d Dept. 1995); *Hoffman v. Domenico Bus Service, Inc.,* 183 AD2d 807, 808 (2d Dept. 1992) ("use of [juror] affidavits for the purpose of exploring the deliberative processes of the jury and impeaching its verdict is patently improper").

There are a few narrowly circumscribed exceptions to the rule against impeaching jury verdicts. These include:

- Ministerial error in reporting a verdict. *See, Porter v. Milhorat, supra; Smith v. Field,* 302 AD2d 585, 586 (2d Dept. 2003); *Russo v. Jess R. Rifkin, DDS, PC, supra.*
- Substantial confusion among the jurors in reaching a verdict. *See, Porter v. Milhorat, supra.*

- Conduct putting the jury in possession of evidence not introduced at trial. *See, Garcia v. Brooklyn Hospital,* 270 AD2d 386, 387 (2d Dept. 2000).

Here, however, Plaintiff seeks to impeach the jury's verdict by means of juror affidavits purporting to show that one or two of their fellow jurors acted in an overbearing fashion in the jury room and thereby succeed in imposing their will on the others. This is a patently improper attempt to intrude on the jury's deliberative process, which falls within none of the exceptions to the rule against impeaching jury verdicts by juror affidavit.

THE AWARD OF DAMAGES

"A jury verdict on the issue of damages may be set aside 'as against the weight of the evidence only if the evidence on that issue so preponderated in favor of the plaintiff that the jury could not have reached its determination on any fair interpretation of the evidence." *Chung v. Shaw,* 175 AD3d 1237, 1239 (2d Dept. 2019). Plaintiff attacks the jury's damages verdict on two grounds.

First, Plaintiff complains that the verdict is inconsistent in that the jury, purportedly, found that Plaintiff had as a result of the accident sustained a "*permanent* consequential limitation of use of a body organ or member," yet awarded him no future damages. The factual premise for Plaintiff's argument is incorrect. In fact, the jury determined that Plaintiff had **not** sustained a *permanent* consequential limitation of use of a body organ or member. The jury found only that Plaintiff had sustained a "significant limitation of use of a body function or system," concerning which it had been explicitly charged, in accordance with PJI 2:88F, that "[i]t is not necessary for you to find that…the limitation of use is permanent." Contrary to Plaintiff's assertion, then, there was no finding of permanency and hence no inconsistency in the jury's determination not to award future damages.

Second, Plaintiff complains that the award of damages deviates materially from what would be reasonable compensation for his double level cervical fusion. *See, e.g., Rojas v. Brabant,* 192 AD3d 934, 935-936 (2d Dept. 2021). However, it was Defendants' contention at trial that Plaintiff's alleged cervical injury was not causally related to the subject motor vehicle accident. Defendants' contention in this regarded was supported by evidence including (1) the low-impact nature of the collision, reflected in the absence of any significant damage to the parties' vehicles, (2) the absence of any complaint of neck pain upon Plaintiff's initial hospital visit, (3) Plaintiff's prompt return to work after the accident, and (4) medical evidence including the testimony of Defendants' expert physician. Hence, it cannot be said that the trial evidence on this point so preponderated in favor of the Plaintiff that the jury could not have reached its determination on any fair interpretation of the evidence. *See, Chung v. Shaw, supra; Cromas v. Kosher Plaza Supermarket, Inc.,* 300 AD2d 273, 274 (2d Dept. 2002).

It is therefore

ORDERED, that Plaintiff's motion for an order setting aside the jury's verdict on liability and damages and/or increasing the award of damages is denied.

The foregoing constitutes the decision and order of the Court.

Dated: March 18, 2022 ENTER
Carmel, New York

HON. VICTOR G. GROSSMAN, J.S.C.