SHORT FORM ORDER INDEX NO.: 01666-2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

Motion Date: 2/20/20
Motion Adjourn Date: 05/14/20
Motion Seq #: 007 - Mot D

x

PATRICIA GUTE and RICHARD GUTE,

Plaintiffs,

-against-

GREASE KLEENERS, INC., ROBERT A. FLYNN

Defendants.

x

PLAINTIFF'S ATTORNEY:
APPELL & PARRINELLI, ESQS.
BY: JOHN J. APPELL, ESQ.
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DEFENDANT'S ATTORNEY:
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Read on this motion by Plaintiff seeking relief pursuant to CPLR §§ 4401 and 4404(a) to set aside the jury verdict the Affirmation of John J. Appell Esq. and exhibits; the Affirmation of Shawn P. O'Shaughnessy Esq. and exhibits, and the Reply Affirmation of John J. Appell; it is

ORDERED that the motion is determined as outlined below

BACKGROUND

This action arises from a three vehicle motor vehicle accident which occurred on December 8, 2014 on Patchogue-Holbrook Road in Suffolk County NY. Patchogue-Holbrook Road in the area where the collisions occurred is a four-lane limited access, north/south roadway, with a median separating the north and south bound lanes of travel. Plaintiff Patricia Gute was operating her Infiniti northbound at sometime after 5 PM in the evening, when the Romano vehicle, which was traveling southbound, on the other side of Patchogue-Holbrook Road, crossed the median, entered her lane of travel and collided head-on with her. Robert Flynn operated a Ford Econoline van, owned by his employer Grease Kleeners, in the same direction as the Gute vehicle, approximately 1-2 car lengths behind. Immediately after the collision occurred between the Romano and Gute vehicles, the Flynn vehicle also collided with the Gute vehicle.

PROCEDURAL HISTORY

Plaintiff moved for summary judgment on liability as to Romano and Flynn. Supreme Court

(Mayer, J) decided both motions denying summary judgment as to both defendants. The plaintiff appealed from that order. The Appellate Division Second Department, in a decision dated March 6, 2019, affirmed the decision of the trial court (170 AD3d 676).

Prior to the liability trial of this matter, the plaintiff settled with defendant Romano. Additionally, before the liability phase of the trial began, plaintiff and the remaining defendant Flynn, executed a stipulation that provided *inter alia,* : "It is agreed by the attorneys for the plaintiff and Mr. Flynn that we will try liability only and that in the event that plaintiff gets a verdict for one (1) percent or greater against Mr. Flynn that Mr. Flynn will offer up through his insurance companies, the total amount of the insurance coverage which is available". The stipulation went on to say that the carriers had agreed to be so bound. Though damages were not before this jury, counsel for both parties confirmed that the extent of plaintiff's injuries were a significant factor in the calculation of the terms of the stipulation.

A jury was empaneled and the trial proceeded over three days, October 23-25, 2019. During the trial, all three vehicle operators, plaintiff Patricia Gute, defendants Christopher Romano and Robert Flynn testified.

SUMMARY OF THE ARGUMENTS

Next plaintiff argues that the verdict must be set aside because defendant Flynn's testimony established that his conduct constituted a violation of one or more provisions of the Vehicle and Traffic Law (hereinafter VTL") and that these unexcused violations of the VTL constitute negligence per se and cannot be disregarded by the jury.

In this Court's charge to the jury, the Court charged New York Pattern Jury Instructions (hereinafter"PJI") sections: 2:82(a) premised on VTL 1129(a) as to defendant Flynn.

> The charge was modified slightly to fit the fact pattern of this case. Specifically, the Court charged :The failure to obey VTL 1129(a) constitutes negligence. If you find that the defendant failed to comply with that law because he followed another vehicle more closely than was reasonable and prudent under the circumstances, including the speed of the vehicles, the traffic conditions, the condition of the highway, you must find that Mr. Flynn was negligent". The court charged PJI 2:77.1 as well as PJI 2:26 as to each of the respective vehicle operators stating that each of the operators assert that the other failed to comply with VTL 1180(a) speed not reasonable and prudent, and VTL 1146(a) failure to exercise due care. The Court also charged PJI 2:71 Proximate Cause -Concurrent causes.

The Court did not charge the emergency doctrine, *see* ***Caristo v. Sanzone***, 96 NY2d at 174, 726 NYS2d 334) and defense counsel did not take exception to the lack of that charge.

At trial, defendant Flynn contradicted his deposition testimony, and admitted that on the day of the accident, he was following one car length behind the plaintiff as he accelerated up a hill, traveling on at least one "real worn front tire", on a wet roadway with some snow and ice present, after passing a warning sign that stated "Bridge Ices Before Roadway". Further in his testimony, Flynn stated in response to the question, Q: "Do you think it was safe under those conditions with those warnings at that speed to be only one car length behind Patty Gute's car just before the accident occurred, do you think that was safe, Mr. Flynn?" A: "No".

When the jury returned after deliberations, they answered only the first interrogatory: "Was the defendant Robert Flynn negligent?" and answering that question, no.

This determination, plaintiff argues, is against the weight of the evidence and requires that the verdict be set aside, and that there be a new trial on liability, or in the alternative that this requires the court to direct verdict in favor of the plaintiff.

In opposition, defendant argues that even if the emergency doctrine was not charged, the jury inferred the doctrine based on the facts of the accident, and found no negligence as to Flynn because he should not be held to the same standard of care as a driver presented with a non-emergency situation. Therefore, defendant argues the jury verdict should not be disturbed.

Defendant's counsel also argues that Flynn gave testimony that the tires and brakes on his vehicle were in good working order, although that was contradicted on cross examination when he was shown photographs of the left front tire taken on the evening of the accident which he acknowledged were "worn, real worn". Defendant's counsel further argues from Flynn's testimony that he indicated at one point, that the time between cross-over to impact was "just seconds" and that it was "just so quick." But again, this was contradicted by additional cross examination testimony that it may have been as much as fifteen seconds between crossover to impact. Importantly, that last cross examination elicited the response from defendant that had he been aware of the hazard sign, aware of the road condition and that the second collision would not have happened.

Essentially, defendant's counsel argues the jury determined that the crossover furnished the condition for the second collision, and this determination should not be disturbed. He cites ***Papadakis v. H M Kelly Inc.*** 97 AD3d 731 and ***Wechter v. Kelner*** 40 AD3d 747 for this proposition. These cases are factually distinct from the matter at bar. ***Papdakis*** involved a summary judgment motion, and ***Wechter*** involved a parked (non-moving) vehicle. Defense counsel's affirmation is silent on the admitted violation(s) of the VTL.

STANDARD OF REVIEW

CPLR 4404(a) provides, in relevant part, that: "[a]fter 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" (CPLR 4404[a]). The Court of Appeals has recognized that the setting aside of a jury verdict as a matter of law and the setting aside of a jury verdict as contrary to the weight of the evidence involve two inquiries and two different standards (*see* ***Cohen v. Hallmark Cards***, 45 NY2d 493, 498, 410 NYS2d 282). For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, it must find that there is "simply no valid line of reasoning and permissible inferences which could possibly lead ... to the conclusion reached by the jury on the basis of the evidence presented at trial" *(id.* at 499, 410 NYS2d 282).

However, "[w]hether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors" (*see* ***Scalogna v. Osipov***, 117 AD3d 934, 935, 987 NYS2d 395). " 'When a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view' " (***Scalogna v. Osipov,*** 117 AD3d at 935, 987 NYS2d 395, *quoting* ***Handwerker v. Dominick L. Cervi, Inc.,*** 57 AD3d 615, 616, 869 NYS2d 201). "A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict on any fair interpretation of the evidence" (***Costa v. Lopez,*** 120 AD3d 607, 607, 990 NYS2d 878; *see* ***Echeverria v. MTA Long Is. Bus Auth.,*** 100 AD3d 588, 589, 953 NYS2d 288). Thus, rationality is the touchstone for legal sufficiency, while fair interpretation is the criterion for weight of the evidence *(see* ***Nicastro v. Park,*** 113 AD2d 129, 135, 495 NYS2d 184). Where a court makes a finding that a jury verdict is not supported by sufficient evidence, it "leads to a directed verdict terminating the action without resubmission of the case to a jury" (*id.* at 132, 495 NYS2d 184). Where a court finds that a jury verdict is against the weight of the evidence, it grants a new trial (*see id.*).

The eminent Justice Leon Lazer in ***Nicastro*** *supra* described the choice this court faces thus:

> "Although at first glance the fair interpretation phraseology might seem to reduce the weight of the evidence question to one of law, this merely serves to illustrate the danger of relying upon set phrases rather than underlying principles. Catechistic use of the terminology cannot transform an intrinsically discretionary judicial function into the more constrained approach appropriate to the resolution of a question as a matter of law. It is well settled that a motion to set aside a verdict as contrary to the weight of the evidence invokes the court's discretion, and resolution of such a motion involves an application of that professional judgment gleaned from the Judge's background and experience as a student, practitioner and Judge *(see,* ***Mann v. Hunt***, supra., at p 141; Siegel, NY Prac § 406; 4 Weinstein-Korn-Miller, NY Civ Prac ¶ 4404.09). The significance of the fair interpretation standard is that it provides a strong cautionary note by stressing to the court that the overturning of the jury's resolution of a sharply disputed factual issue may be an abuse of discretion if there is any way to conclude that the verdict is a fair reflection of the evidence.
>
> It is significant, however, that the mere fact that some testimony in the record has created a factual issue does not deprive the Trial Judge of the power to

intervene in an appropriate case (*see, e.g.*, ***Lion v. St. John's Queens Hosp.***, 86 AD2d 863; ***Allen v. Woods Mgt. Co.***, 86 AD2d 530; *compare*, ***Calla v. Becker***, 100 AD2d 950, with ***Weber v. City of New York***, 101 AD2d 757, *affd* 63 NY2d 886). To require the complete absence of factual issues as a condition precedent to setting aside a jury verdict would indeed transform the question into one of law and would ignore the distinction between setting aside a verdict because of insufficiency and doing so because it is against the weight of the evidence. In comparing the two standards in the context of a plaintiff's verdict, [we stated in ***O'Boyle v. Avis Rent-A-Car Sys.*** *(supra., at* p 439)] that "[r]ationality, then, is the touchstone for legal sufficiency, while fair interpretation is the criterion for weight of the evidence". Although the language of the two inquiries, viewed out of context and without regard for conceptual distinctions, is not dissimilar, there is a real difference between a finding that no rational jury could reach a particular resolution and a finding that a jury could not have reached its conclusions on any fair interpretation of the evidence (*see*, ***Cohen v. Hallmark Cards,*** 45 NY2d 493, 498-499, *supra.*; ***O'Boyle v. Avis Rent-A-Car Sys***. supra., at p 439). Were this not so and if an absence of bona fide factual issues were required, a court would never be justified in setting aside a defendant's verdict as being against the weight of the evidence and ordering a new trial, for in each such case the proper remedy would be entry of judgment notwithstanding the verdict. Indeed, it is the existence of a factual issue which justifies the granting of a new trial rather than a directed verdict *(see*, ***Cohen v. Hallmark Cards***, *supra.*, at p 499; ***Middleton v. Whitridge,*** 213 NY 499, 507-508).

It is, perhaps, the adjective "fair" which differentiates the two ideas most aptly although the concept is as elusive as the standard it is used to illuminate. Webster's Third New International Dictionary (815) defines "fair" as "characterized by honesty and justice: free from fraud, injustice, prejudice, or favoritism". In a further comment, the same lexicographers distinguish "fair" from synonyms such as "just", "equitable", "impartial", "unbiased" and others by describing "fair" as the most general of the terms and implying "a disposition in a person or group to achieve a fitting and right balance of claims *** or *** a quality or result in an action befitting such a disposition". "Fair" is thus a broad and multifaceted concept that at various times may include definitions adopted by courts in other jurisdictions which have resorted to synonyms such as just, equitable, evenhanded, honest, impartial, reasonable, upright and free from suspicion of bias (*see*, Black's Law Dictionary [4th ed]; 35 CJS, Fair, at 597).

However the particular Judge faced with deciding the motion to set aside might view the word "fair" if that were the sole ingredient of the fair interpretation formula, the fact remains that this is not the only ingredient.

> That respect which is to be accorded the jury's determination must enter into the decision as well. Combining these two factors, the rubric that a defendant's verdict in a tort case can only be overturned if a jury could not have reached it "by any fair interpretation of the evidence" simply restates the guiding principle that in reviewing the whole trial to ascertain whether the conclusion was a fair reflection of the evidence, great deference must be given to the fact-finding function of the jury. While this approach clearly tilts the scales in favor of a verdict's survival, it leaves the court with a breadth of discretion which obviously varies with the facts and events in each case (*see* ***Nicastro v. Park*** 113 AD 2d 129 at 134).

DISCUSSION

Taking as a starting point the phrase, "any way to determine that the verdict is a fair reflection of the evidence," this court concludes that the verdict is not a fair reflection of all the evidence in this case. Having personally listened to all the testimony as it was given, and having reviewed all the testimony and exhibits for the purpose of determining the instant motion leads to the inescapable conclusion that the jury ignored the evidence of defendant Flynn's negligence. Stated 0differently, it is clearly against the weight of the evidence for the jury to have determined, as it did, that defendant Flynn was free from all fault for the second collision. It was improper for the jury to give no weight to the admitted violations of the VTL, any one of which could have formed the basis for a finding of liability.

Having heard and reviewed the testimony and having reviewed the photographic evidence which clearly shows that on the evening of the accident, the defendant was operating a vehicle with almost no tread remaining on a tire necessary to steer the vehicle, this court finds that the most glaring omission was the un-refuted testimony by defendant Flynn that he knew he was following the Gute vehicle too closely for the traffic and weather conditions then and there existing. For the jury to have resolved this testimony in favor of the defendant and to have decided that he was completely free from any liability for the second collision was error. This manifestly was not a fair interpretation of the evidence presented at trial, particularly when the meaning of fair includes, free from injustice, prejudice or favoritism.

That said however, there is clearly insufficient evidence to set aside the verdict and direct verdict for the plaintiff. Therefore the verdict must be set aside and a new trial had on the issue of Flynn's liability.

CONCLUSION

Accordingly, for all the foregoing reasons the motion of plaintiff seeking relief under CPLR 4404(a) is **granted** to the extent that the verdict shall be set aside and a new trial on the issue of liability shall be had, and is otherwise **denied**; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that plaintiff's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry via certified mail return receipt requested on defendant's counsel forthwith.

The foregoing constitutes the decision and order of this Court.

Dated: July 6, 2020
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**