Chwojdak v Schunk
2020 NY Slip Op 34544(U)
December 31, 2020
Supreme Court, Erie County
Docket Number: 813751-2015
Judge: Dennis E. Ward

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

GARY CHWOJDAK and
KAREN CHWOJDAK

Plaintiffs,

Index No. 813751-2015

vs.

MICHAEL D. SCHUNK

HON. DENNIS E. WARD, J.S.C.

Defendant

Francis M. Letro, Esq.
Carey C. Beyer, Esq., of counsel
Attorney for the Plaintiff

Kenney Shelton Liptak Nowak LLP
Nelson E. Schule, Jr., Esq.
Attorney for Defendant

DECISION & ORDER

Pending before the court is the plaintiff's motion to set a aside the verdict, or for judgment notwithstanding the verdict, or for a new trial, pursuant to CPLR 4401 & 4404.

Setting aside a verdict and granting judgment as a matter of law requires the court to find that there is no valid line of reasoning and permissible inferences that could lead rational persons to the conclusion reached by the jury. A finding of judgment as a matter of law resolves the question in the moving party's favor and eliminates the jury's role in evaluating the issue (*Cohen v. Hallmark Cards,* 45 NY2d 493, 498 [1985]).

Setting aside a verdict as against the weight of the evidence only results in a new trial. The standard for determining whether a verdict is against the weight of the evidence is " whether "'the evidence so preponderate[d] in favor of the [plaintiff] that [the

verdict] could not have been reached on any fair interpretation of the evidence"'" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]), *quoting Moffatt v Moffatt*, 86 AD2d 864, *affd*. 62 NY2d 875 [1984]).

"The discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution" (*Nicastro v Park*, 113 AD2d 129, 133 [2nd Dept. 1985]). Great deference must be given to the fact-finding function of the jury. *Id*. at 136.

The plaintiff argues for a new trial based on three claims of error. First, plaintiff argues that the court should not have charged the emergency doctrine, in light of plaintiff's admission that a whiteout was foreseeable and that he had experienced more than one of them on his way to the point where the accident occurred. Second, he asserts that Police Officer LaFalce should not have been allowed to testify as an expert witness, due to the absence of expert disclosure and the failure of the witness to conduct any actual accident reconstruction. Third, he argues that the evidence is against the weight of the evidence.

Charge on Emergency Doctrine

Turning first to the jury instruction on the emergency doctrine, this court was bound by the prior ruling of the Appellate Division, which had already found that the defendant demonstrated his entitlement to rely on such a charge in this case. (*See Chwojdak v. Schunk*, 164 AD3d 1630 [4th Dept. 2018]).

At trial, and on this motion, plaintiff argues that the jury charge on emergency

should not have been given because at trial the defendant admitted that the whiteout was foreseeable, inasmuch as the defendant had experienced whiteouts prior to the one that precipitated the collision.

However, this very same argument was argued to the Appellate Division and the same testimony was set forth in the defendant's deposition testimony included in the record on appeal to the Appellate Division. (*See* Docket #44, Record on Appeal, pp 445-446). The plaintiff's attorney quoted from the defendant's deposition and argued as follows: "The Defendant's actual testimony is clear. He experienced multiple whiteout conditions throughout his drive from work to the accident site." *Id.*, at p. 445, ¶5).

The defendant's deposition was quoted:

> A. There were times, prior to the accident, where I couldn't see the front of my hood.
> Q. And that was all the way along Clinton Street after you left?
> A. Off and on through Clinton Street up until the point the accident happened.

Id. at 445.

The plaintiff has thus already argued to the Appellate Division that this was not an appropriate case for a charge on the emergency doctrine, based on the defendant having experienced multiple whiteouts prior to the accident. Regardless of how this court views such testimony, the argument was rejected by the court ruling on plaintiff's summary judgment motion and by the Appellate Division, which stated: "Defendant thus raised an issue of fact whether he was confronted with a 'sudden and temporary whiteout constitut[ing] a qualifying emergency'" (*Chwojdak* at ___, *quoting Barnes v.*

Dellapenta, 111 AD3d 1287, 1288).

In light of the Appellate court decision, which is the law of the case and binding on this court, there was no legal basis to deny defendant an instruction on the emergency doctrine.

Testimony of Officer LaFalce

Prior to trial, the plaintiff made a motion *in limine* to preclude all portions of a police accident report and the related testimony of the police officer, regarding the cause of the accident. The basis for the motion was that the conclusions in the report as to "cause" of the accident were based primarily on the hearsay account of the two drivers. Additionally, it was also argued that the officer had not been identified as an expert witness in advance of trial.

By way of compromise, the witness was called to give *voir dire* testimony prior to ruling on the motion. During the *voir dire*, the officer admitted that he did no independent investigation, apart from taking pictures and personally observing the presence of snow and ice on the roadway.

During the *voir dire* testimony, the officer stated that he assessed factors that contributed to causing the rear-end accident. He decided not to issue tickets. He noted in his report that visibility was limited due to the weather; however this conclusion was based solely on the statement from defendant, Mr. Schunk, and no other evidence.

The motion *in limine* was granted in part, such that the jury was precluded from hearing that one of the contributing causes of the accident was the whiteout, of which the officer had no personal knowledge. The Officer was, however, deemed qualified as

an expert.

On cross-examination at trial, the officer was asked whether he could have, based on the facts, chosen to issue tickets to defendant for driving unreasonably for the conditions or following too closely. He answered those questions in the affirmative. He further admitted that he decided not to issue traffic tickets to defendant as a matter of discretion. The jury was thus afforded the opportunity to determine that the Officer did not rule out driving too fast for the conditions as a potential factor in causing the accident. The court therefore discerns no error with regard to the testimony of Officer LaFalce.

Weight of the Evidence

During the course of the trial, the defendant, Mr. Schunk, acknowledged that he may have been traveling too fast for the road conditions. As noted, he had admitted observing whiteout conditions from his window at work between 7 a.m. and 11 a.m. and further admitted experiencing whiteout conditions more than once between the time he left work and the accident. However, the jury could find that these conditions were of brief duration and thus did not prevent the final whiteout from establishing a sudden and unanticipated emergency

Shortly before the accident, the defendant arrived at an area where there were no buildings and thus open area. Defendant knew there was a car ahead of him, and he tried to coast to a stop. Just before the crash, he saw the red stop light and saw plaintiff's tail lights. At that point, he hit his brakes but he skidded and hit plaintiff's vehicle square on.

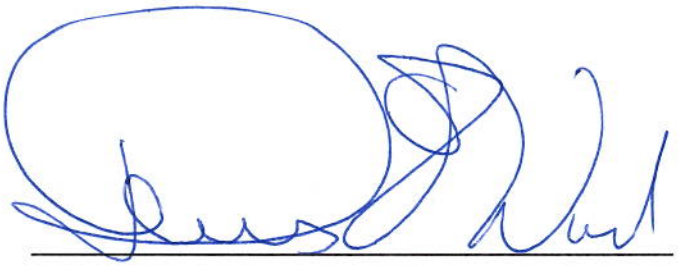
The jury ultimately found that this was a sudden emergency, not of the defendant's own making, and that he had acted reasonably under the circumstances. While the defendant recognized at trial that he may have been going too fast for the conditions, in light of the degree of the impending whiteout, the jury apparently felt that the defendant had acted reasonably in light of the sudden and unanticipated event that he experienced.

"'Where 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 ... and the trial court should not set aside [the] verdict unless it is palpably irrational or wrong'" (*Tozan v. Engert*, 188 AD3d 1659 [4th Dept. 2020], *quoting Lesio v. Attardi*, 121 AD3d 1527, 1528 [4th Dept. 2014]).

The court cannot say that the jury's interpretation of the facts, in light of the emergency charge, was either "palpably irrational" or "palpably wrong" (*McMillian v. Burden*, 136 AD3d 1342 [4th Dept. 2016]). Accordingly, it is hereby

ORDERED, that the motion to set aside the verdict and order a new trial is, in all respects, DENIED.

DATED: December 31, 2020



Dennis E. Ward, J.S.C.
HON. DENNIS E. WARD, J.S.C.