

M E M O R A N D U M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CIVIL TRIAL TERM PART 36

WASIUR RAHMAN and JAHANARA RAHMAN :
Plaintiff : BY: GAVRIN, J.
-against- :
CHARLES J. SMITH : DATE: November 29, 2005
Defendant : INDEX NO. 23495/03

This negligence action to recover damages for personal injuries arose from a motor vehicle accident between a vehicle owned and operated by the plaintiff, Wasiur Rahman, and a vehicle owned and operated by the defendant, Charles J. Smith. On July 14, 2005, a trial was commenced on the liability issues, solely. The jury rendered a verdict finding that the defendant was not negligent. Pursuant to CPLR 4404, the plaintiffs have moved to set aside this verdict and enter judgment in favor of the plaintiffs or, in the alternative, for a new trial. In addition to the contention that the verdict was contrary to the weight of the credible evidence, plaintiffs aver that the admission by defense counsel in his summation, "that there was liability on both sides", renders the verdict a nullity.

The accident involved in this lawsuit occurred on

September 19, 2003 at approximately 9:30 PM. The plaintiff's car was turning left onto Jewel Avenue from the exit ramp of the Van Wyck Expressway when it was struck by the defendant's vehicle which was traveling on Jewel Avenue. The two drivers differed in their testimony. There were sharp issues of fact, the primary one being the color of the traffic light controlling the intersection where the accident occurred, since both drivers testified that they entered the intersection with a green light.

It is an established principle of jurisprudence "that 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; accord, Teneriello v Travelers Cos., 264 AD2d 772, lv denied 94 NY2d 785). "A jury verdict should not be set aside as against the weight of the evidence unless the jury could not reach its verdict on any fair interpretation of the evidence (citations omitted)" (McDermott v Coffee Beanery Ltd., 9 AD3d 195, 205).

In the case at bar, the only witnesses to testify were the drivers of the vehicles involved in the accident. Despite the efforts of plaintiffs' attorney to impeach him, the jury found the defendant was not negligent. The jury was in the foremost position to assess witness credibility and great deference must be accorded to its determination (Teneriello v Travelers Cos., supra;

Salazar v Fisher, 147 AD2d 470, 472). As observed in Nicastro v Park (supra at 133):

Fact finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and "unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty" (citations omitted).

In the moving papers, the plaintiffs contend that the jury was precluded from finding that the defendant was not negligent since the defendant testified that he did not see the plaintiff's car until it was in the intersection in front of his car. It is undisputed that the jury was properly charged by the Court on the duty of a driver entering an intersection with a green light, including the requirement to still use reasonable care to avoid a collision with a vehicle entering the intersection against the light (see, Siegel v Sweeney, 266 AD2d 200). Further, the Court charged the jury on a driver's duty to observe that which was there to be seen, as set forth in PJI 2:77.1. Nevertheless, the jury found that the defendant's failure to observe plaintiff's car before it was in front of his car did not constitute negligence. This conclusion could have been reached on a fair interpretation of the evidence in this case (see, Crespo v

NYCHA, 222 AD2d 300; Yaver v Gofus, 156 AD2d 556). Therefore, it should not be disturbed (see, Faisal v Mayronne, 2005 NY Slip Op. 7658; Sideris v Town of Huntington, 240 AD2d 652).

Plaintiffs' contention that defense counsel's statement, "that there was liability on both sides", precluded the jury from finding the defendant was not negligent, is misplaced. Statements made by an attorney can be used as an admission against his or her client (see, Prince, Richardson on Evidence § 8-208, p. 518 [Farrell 11th ed]). When made in the context of a judicial proceeding, they may constitute judicial admissions which can be formal or informal concessions of fact (see, In Matter of Liquidation of Union Indemnity Ins. Co., 89 NY2d 94, 103).

"Formal judicial admissions take the place of evidence and are concessions, for the purposes of the litigation, of the truth of a fact alleged by an adversary (see Prince, Richardson on Evidence § 8-215 {Farrell 11th ed}). Informal judicial admissions are facts incidentally admitted during the trial. These are not conclusive, being merely evidence of the fact or facts admitted (see Prince, Richardson on Evidence § 8-219 [Farrell 11th ed])." (Wheeler v Citizens Telecommunications Co. (18 AD3d 1002, 1005.) Commonly encountered formal judicial admissions are statutory admissions, facts admitted by stipulation, and facts formally admitted in open court (Prince, Richardson on Evidence, § 8-215,

p 523 [Farrell 11th ed]). An informal judicial admission is usually found in statements made by a party as a witness, or contained in a deposition, a bill of particulars, or an affidavit (id. at § 8-219, p 529; see also, In Matter of Liquidation of Union Indemnity Ins. Co., supra).

Statements of fact in affirmations submitted on motions for summary judgment have been held to constitute binding judicial admissions (see, Vanriel v Weissman Real Estate, 283 AD2d 260; Walsh v Pyramid Co., 228 AD2d 259). Facts acknowledged in an opening statement may also constitute a judicial admission (see, dissenting opinion of Justice Goldstein in Guarracino v Central Hudson (274 AD2d 551)). However, arguments of counsel during opening and summation are not judicial admissions (see, Wheeler v Citizens Telecommunications Co., supra).

The statement made by defense counsel in this case, upon which the plaintiffs rely, was made during summation. The attorney told the jury, "I believe that you will find that there was liability on both sides" (Trial Transcript p. 66). This suggested a finding to the jury and was an argument of counsel and not a statement of fact that qualifies as a judicial admission. Moreover, the Court in its charge to the jury gave the following instruction with respect to the summations of counsel:

During the course of their summations,

plaintiff and defense counsel respectively have commented on the evidence and have suggested to you certain inferences and conclusions you might reasonably and logically draw from the evidence. The summations of counsel are, of course, not evidence. However, if the arguments of counsel strike you as reasonable and logical and supported by the evidence, you may, if you so conclude, adopt them. On the other hand, if you find such arguments to be unreasonable or illogical or unsupported by the evidence, you may reject them.

In the last analysis it is the function of the jury to draw their own inferences or conclusions from the evidence as you recollect and as you find such evidence credible and believable (Trial transcript p. 79).

No objection or exception was taken to this instruction. Therefore, the parties are bound by it and by the decision of the jury to reject defense counsel's argument that there was liability on both sides (see, Martin v Cohoes, 37 NY2d 162).

Accordingly, the plaintiffs' motion to set aside the verdict or grant a new trial is denied in its entirety.

Dated: November 29, 2003

J.S.C.