

NEW YORK APPELLATE DIGEST

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IN THIS ISSUE

*Summaries of Selected Recent Appellate Decisions and Opinions Which Flesh Out the Recurring Appellate Issues Raised by (Civil) Motions to Set Aside a Verdict

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MOTIONS TO SET ASIDE A VERDICT (CIVIL)



FROM THE EDITOR

How should a motion the set aside a verdict based upon outside influence on a jury be handled?

When must a motion to set aside a verdict as inconsistent be made?

What happens if the jury keeps deliberating after finding the defendant's negligence did not cause the injury?

What should happen if a verdict is clearly a "compromise verdict?"

What should happen if the verdict sheet causes jury confusion?

What are the analytical criteria for a motion to set aside a verdict as against the weight of the evidence?

What are the analytical criteria for a motion to set aside a verdict as a matter of law?

When is the "no valid line of reasoning" test appropriate?

When is the "palpably irrational" test appropriate?

When is the "palpably wrong" test appropriate?

When is the "utterly irrational" test appropriate?

I am not sure the cases here give satisfactory answers to all these questions, but half the battle is knowing what the pertinent questions are.

This is the 7th Practice Pamphlet--a compilation of the summaries of New York State appellate decisions addressing the analysis of (civil) motions to set aside a verdict which were posted on the website www.newyorkappellatedigest.com 2015-2016.

To link to the summarized cases in a new tab, hold down the control key (ctrl) and click on the case name.

The Table of Contents (p.2) facilitates moving (by a single click) to each summary.

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MOTIONS TO SET ASIDE A VERDICT (CIVIL)

Case Summaries Illustrating How The Courts Deal With Motions Arguing The Verdict Is Fatally Flawed

MOTION TO SET ASIDE A VERDICT BASED UPON CLAIMS OF AN IMPROPER OUTSIDE INFLUENCE ON THE JURY

The Parties and All the Jurors Should Have Been Included in the Court's Investigation of One Juror's Allegation of an Improper Outside Influence Upon the Jury

The Fourth Department determined Supreme Court did not conduct an adequate investigation of alleged outside influence upon the jurors before granting plaintiff's motion to set aside the verdict. There was an allegation a person who worked for an insurance company which insured some of the defendants was "stalking" the jury during the trial:

It is well settled that the decision whether to grant a motion for a new trial pursuant to CPLR 4404 (a) is committed to the trial court's discretion and will not be disturbed absent an abuse of that discretion Here, we agree with defendants that the court abused its discretion in the manner in which it investigated and determined the issue whether there had been improper outside influence on the jury that "was such as would be likely . . . to influence the verdict" Shortly after the trial had concluded and the jury was discharged, the court received notice of an allegation from one juror that a person attending the trial had been "stalking" the impaneled jurors on lunch breaks and during other recess periods. The juror described the individual's behavior as "creepy." It was later learned that the individual was a representative of an insurance company monitoring the progress of the trial because it insured many of the defendants. As a result of the "stalking" allegation, the court conducted its own investigation and ultimately set aside the verdict, which had been entirely in defendants' favor, and ordered a new trial. We agree with defendants that the court abused its discretion in conducting an in camera interview of the complaining juror without notifying counsel, without seeking counsels' consent to that procedure ..., and without providing counsel with an opportunity to be heard or to participate, even in some restricted manner, in the interview of the juror Further, the court limited its investigation to one juror, and we conclude that the court abused its discretion in failing to conduct a more expanded investigation, including, at a minimum, conducting an interview of all of the jurors Lastly, the court abused its discretion in prohibiting counsel from contacting any jurors until after plaintiff's motion to set aside the verdict was decided. This unnecessary prohibition essentially precluded defendants from obtaining and submitting any meaningful opposition to plaintiff's motion, the practical result being that the granting of plaintiff's motion was a foregone conclusion. [Varano v Forba Holdings LLX 2015 NY Slip OP 01090, 4th Dept 2-6-15](#)

INCONSISTENT VERDICT

Proper Way to Handle an Inconsistent Verdict Explained

The Second Department explained the proper procedure when a verdict is inconsistent (either have the jury reconsider the verdict or order a new trial):

"When a jury's verdict is internally inconsistent, the trial court must direct either reconsideration by the jury or a new trial" Here, the jury's verdict was internally inconsistent, as the jury attributed 10% of the fault for the plaintiff's accident to both the plaintiff and [one of the two defendants], despite having found that their negligence was not a substantial factor in causing the accident The Supreme Court should have resolved the substantial juror confusion, as demonstrated by the internally inconsistent verdict, by either resubmitting the case to the jury for reconsideration or directing a new trial on the issue of liability (see CPLR 4111[c]...). [Kumar v PI Assoc LLC, 2015 NY Slip Op 00849, 2nd Dept 2-4-15](#)

Objections to a Verdict on the Ground of Inconsistency Must Be Made Before the Jury Is Discharged---Defense Verdict Was Against the Weight of the Evidence

The Second Department determined the defense verdict in a personal injury action was against the weight of the evidence, requiring a new trial. Of the three defendants, the jury found only one, Port Authority, negligent with respect to a door which came off its hinges, injuring the plaintiff. Because the only reasonable view of the evidence was that a defendant's negligence was the proximate cause of the injury, finding that the Port Authority was negligent, but that the negligence was not the proximate cause of plaintiff's injuries, was against the weight of the evidence. The court noted plaintiff's argument that the verdict was inconsistent as a matter of law was not preserved for appeal because objections to a verdict on the ground of inconsistency must be made before the jury is discharged:

"Objections to a verdict on the ground of inconsistency must be raised before the jury is discharged, at which time corrective action may be taken by resubmitting the matter to the jury"...

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 by any fair interpretation of the evidence "Whether 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" Where the only reasonable view of the evidence presented at trial was that a defendant's negligence was a proximate cause of the plaintiff's injuries, a verdict finding that the defendant's negligence was not a proximate cause of the plaintiff's injuries must be set aside as contrary to the weight of the evidence

Here, in light of the jury's finding that neither [of the other two defendants] was negligent, the jury's determination that the Port Authority was negligent but that its negligence was not a substantial factor in causing the subject accident was not supported by a fair interpretation of the evidence [Ahmed v Port Auth. of N.Y. & N.J., 2015 NY Slip Op 06485, 2nd Dept 8-12-15](#)

FAILURE TO AWARD DAMAGES FOR FUTURE PAIN AND SUFFERING DID NOT JUSTIFY SETTING ASIDE THE VERDICT HERE

The Second Department determined Supreme Court should not have granted plaintiff's motion to set aside the verdict based upon the jury's failure to award damages for future pain and suffering. The court explained the relevant analytical criteria:

In determining a motion pursuant to CPLR 4404(a) to set aside a verdict as against the weight of the evidence, the court must decide whether the evidence so preponderates in favor of the movant that the verdict could not have been reached upon any fair interpretation of the evidence Resolution of the motion does not involve a question of law, but rather requires a discretionary balancing of many factors Moreover, "[g]reat deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the opportunity to see and hear the witnesses" Thus, "[w]here the 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"

Contrary to the plaintiff's contention, the jury's failure to award damages for future pain and suffering was based upon a fair interpretation of the evidence presented at trial, with consideration given to the credibility of the witnesses and the drawing of reasonable inferences therefrom, and there was no basis in the record for the trial court to disturb the jury's resolution of credibility issues against the plaintiff [Raso v Jamdar, 2015 NY Slip Op 01934, 2nd Dept 3-11-15](#)

ONCE THE JURY DETERMINED DEFENDANT'S NEGLIGENCE WAS NOT A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S INJURIES ANY FURTHER DELIBERATIONS WERE SUPERFLUOUS--THE FACT THAT THE JURORS CONTINUED DELIBERATING AND MADE FINDINGS OF COMPARATIVE FAULT AND DAMAGES DOES NOT REQUIRE A NEW TRIAL

The First Department determined a new trial was not necessary where the jury went on to assess comparative fault and damages after finding defendant's negligence was not a substantial factor in causing the plaintiff's injuries. The jury should have stopped deliberating at that point:

The verdict sheet in this personal injury action instructed the jurors to determine (1) whether defendant was negligent, and (2) if so, whether defendant's negligence was a substantial factor in causing plaintiff's injuries. The jurors found that defendant was negligent, but that his negligence was not a substantial factor in causing plaintiff's injury. The verdict sheet instructed that if the jurors answered the second question in the negative, they should cease deliberations and report their verdict. The jurors, however, continued deliberating and determined that plaintiff was also negligent; that plaintiff's negligence was a substantial factor in causing his own injury; that plaintiff was 95% at fault, and defendant was 5% at fault; and that plaintiff was entitled to \$200,000 in damages.

This case is controlled by *Pavlou v City of New York* (21 AD3d 74 [1st Dept 2005], *aff'd* 8 NY3d 961 [2007]), a Labor Law case in which the plaintiff was injured due to a damaged crane hoist. In *Pavlou*, the jurors determined that the City (the owner of the construction site) was negligent under the Industrial Code, but that its negligence was not a substantial factor in causing the plaintiff's injury. The jury also found that the crane manufacturer was not negligent (*id.* at 75). The verdict sheet instructed that upon making these findings, the jurors were to stop deliberations. The *Pavlou* jury, however, went on to find the third-party defendant-employer negligent for operating a damaged crane; the jury then apportioned the employer's degree of fault and fixed the amount of damages (*id.* at 81). This Court held that the plaintiff was not entitled to a new trial as against the City, stating, "[T]he jury should not have apportioned [the employer's] liability . . . or fixed the amount of damages, once it determined that the violation of the Industrial Code was not a proximate cause and that the crane manufacturer was not negligent. The fact that

the jury attempted such an award was a superfluous act that does not require a new trial" (id. at 76). The Court of Appeals affirmed (8 NY3d 961 [2007]).

The same reasoning as in Pavlou applies here. Once the jurors determined that defendant's negligence was not a substantial factor or proximate cause (see PJI 2:70, Proximate Cause — In General; see also PJI 2:36) of plaintiff's injuries, they should not have attempted to assess plaintiff's own negligence and to fix damages. That they did so was a superfluous act that [*2]does not require a new trial. [Alcantara v Knight, 2014 NY Slip OP 09030, 1st Dept 12-30-14](#)

"IMPERMISSIBLE COMPROMISE VERDICT" PROPERLY SET ASIDE

Severity of Injuries Compared With the Absence of a Damages Award for Past and Future Economic and Non-Economic Loss Indicates an "Impermissible Compromise Verdict" Was Reached---New Trial on Liability and Damages Properly Ordered

The First Department determined the trial court had properly set aside the verdict because it represented an impermissible compromise. Despite serious permanent brain and spinal cord injuries, the jury awarded no damages for past or future economic or non-economic loss. Plaintiff, a restaurant patron, was injured falling down a dangerous stairwell after opening a door which was usually locked. Plaintiff sued both the landlord and the tenant restaurant. In addition to the "impermissible compromise verdict" finding, the First Department noted that the danger posed by the stairwell supported a finding of liability re: both the landlord and the tenant. With respect to the "impermissible compromise verdict," the court wrote:

...[W]e ... believe the trial court correctly set aside that verdict and ordered a new trial. The failure of the jury to award damages beyond reimbursement of medical expenses, despite the severity and permanency of plaintiff's injuries, supported the trial court's conclusion that the jury rendered an impermissible compromise verdict In cases involving seriously injured plaintiffs, where issues of liability are sharply contested, and the damages awarded are inexplicably low, the verdict is most likely the product of a jury compromise The crux of the prohibited trade off is that, "in addition to finding plaintiff partially responsible for the accident, the jury also compromised on liability and damages by finding the total amount for plaintiff's injuries much too low" * * *

Since the extensiveness of plaintiff's injuries cannot be reconciled with the absence of a damages award, the verdict reached by the jury was likely the outgrowth of a compromise, and a retrial is required Contrary to the alternate argument that any retrial should at most be limited to damages, we simply cannot know whether the compromise entailed the issue of liability, attribution of fault, the calculating of damages, or any combination thereof. ... When there is a strong likelihood that the jury verdict resulted from some type of a trade off, retrial on all issues is mandated [Nakasato v 331 W 51st Corp, 2015 NY Slip Op 00619, 1st Dept 1-26-15](#)

MOTION FOR A JUDGMENT AS A MATTER OF LAW (CPLR 4404) SHOULD NOT HAVE BEEN GRANTED---PARTY OPPOSING MOTION MUST BE AFFORDED EVERY FAVORABLE INFERENCE FROM THE FACTS AND THE FACTS MUST BE CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE NONMOVANT

\$6.8 Million Verdict Against the Doctors Based Upon a Delay in Diagnosing Cancer Should Not Have Been Set Aside

The Second Department determined Supreme Court properly dismissed the complaint against the hospital in a medical malpractice case, but improperly set aside the \$6.8 million verdict against the doctors. Plaintiff alleged the doctors caused a 13-month delay in the diagnosis of cancer, which required her to have extensive surgery and reduced her chance of survival. The suit against the hospital was based upon respondeat superior. The Second Department determined there was sufficient evidence to support plaintiff's allegations and, therefore, the verdict against the doctors should stand. "...[T]here was a valid line of reasoning and permissible inferences from which the jury could have rationally concluded that the physician defendants departed from good and accepted medical practice, and that the delay in diagnosing the injured plaintiff's cancer proximately caused her to have a worsened prognosis or decreased 10-year survival rate:"

"A motion for judgment as a matter of law pursuant to CPLR . . . 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party" "In considering such a motion, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" [Luna v Spadafora, 2015 NY Slip Op 03134, 2nd Dept 4-15-15](#)

JURY'S FINDING DEFENDANT WAS NEGLIGENT BUT THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT DID NOT CONSTITUTE AN INCONSISTENT VERDICT---CRITERIA FOR A "WEIGHT OF THE EVIDENCE" REVIEW OF A MOTION TO SET ASIDE THE VERDICT ON THAT GROUND DESCRIBED

Jury Verdict Finding Defendant's Negligence Was Not the Proximate Cause of the Accident Should Not Have Been Set Aside---Criteria for Setting Aside a Verdict As Against the Weight of the Evidence Explained

The Fourth Department determined the trial court should not have set aside a verdict on the ground that it was against the weight of the evidence. Plaintiff, a pedestrian, had been struck by a car driven by defendant. The jury concluded the driver was negligent but the driver's negligence was not the proximate cause of the accident:

"A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" "A jury finding that a party was negligent but that such negligence was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' "

... . Where, however, "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"

Here, the jury could have reasonably found from the evidence that plaintiff was not crossing the street in the crosswalk; that it was a dark, rainy evening; and that plaintiff emerged in defendant's lane of travel from between stopped vehicles. The jury could also reasonably have found that, although defendant was negligent in, for example, the manner in which she approached the intersection before turning left, such negligence was not a proximate cause of the collision with plaintiff after she made the turn. Thus, "the finding of proximate cause did not inevitably flow from the finding of culpable conduct," and the verdict therefore is not against the weight of the evidence [Amorosi v Hubbard, 2015 NY Slip Op 00110, 4th Dept 1-2-15](#)

JURY'S FINDING DEFENDANT WAS NEGLIGENT BUT THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT WAS NOT "LOGICALLY IMPOSSIBLE TO RECONCILE"

Motion to Set Aside Verdict Properly Denied---The Jury Determined Defendant's Negligence Was Not the Proximate Cause of the Accident---Analytical Criteria Explained

In finding the plaintiff's motion to set aside the verdict as contrary to the weight of the evidence was properly denied, the Second Department explained how to analyze the jury's conclusion the defendant's negligence was not the proximate cause of the accident:

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 by any fair interpretation of the evidence "A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" "[W]here there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view" [Moffett-Knox v Anthony's Windows on the Lake, Inc., 2015 NY Slip Op 01929, 2nd Dept 3-11-15](#)

JURY'S FINDING NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE---MOTION TO SET ASIDE THE VERDICT PROPERLY DENIED

Criteria for Setting Aside a Verdict as Against the Weight of the Evidence Explained

The Second Department determined plaintiff's motion to set aside the defense verdict as against the weight of the evidence was properly denied. Plaintiff, a bicyclist, was injured when he struck the open door of defendant's (Roche's) vehicle. Defendant testified the door was ajar, not fully open:

"A jury verdict should be set aside as contrary to the weight of the evidence only if the jury could not have reached the verdict by any fair interpretation of the evidence A jury's finding that a party was at fault but that such fault

was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause [W]here there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view... . However, where a jury verdict with respect to negligence and proximate causation is irreconcilably inconsistent, because the only reasonable view of the evidence is that a defendant's negligence was a proximate cause of the plaintiff's injuries, that verdict must be set aside as contrary to the weight of the evidence In this case, it was within the jury's province to credit Roche's testimony that she did not open her car door into the plaintiff's path. The jury reasonably could have concluded that Roche was negligent in some other respect—such as the positioning of her car or her act of leaving the door "slightly ajar"—but that, despite such negligence, the plaintiff should have been able to avoid the collision and, thus, his conduct was the sole proximate cause of the accident." [quotations omitted] [Membreno v Roche, 2015 NY Slip Op 04102, 2nd Dept 5-13-15](#)

JURY'S FINDING THAT THE DEFENDANT WAS NEGLIGENT BUT THAT THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT WAS AGAINST THE WEIGHT OF THE EVIDENCE---MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED

Motion to Set Aside Verdict Should Have Been Granted

The Third Department determined Supreme Court should have granted plaintiff's motion to set aside the verdict. Plaintiff was injured when her bicycle struck a recessed manhole cover. Defendant construction company had placed barrels in the roadway to create a pedestrian walkway. The placement of barrels served to direct users of the walkway toward the recessed manhole. The jury found the placement of the barrels negligent but further found that negligence was not the proximate cause of the accident. The verdict was against the weight of the evidence because the only reason the placement of the barrels would be deemed negligent is that the barrels diverted traffic toward the recessed manhole:

"A jury's finding that a party was at fault but that [such] fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" Further, we view the evidence in the light most favorable to the nonmoving party, defendant, and afford deference to the jury's credibility determinations A "plaintiff's own conduct may be a superceding cause which severs the causal connection between [the] defendant's negligence and the injury [when] a plaintiff's negligence [is] more than mere contributory negligence, which would be relevant in apportioning culpable conduct"

* * * The only theory presented at trial as to why such placement was negligent, as indicated in the jury instructions, was that it diverted traffic toward a dangerous recessed manhole cover. Given that the uncontested evidence was that plaintiff was diverted in just such a manner, no fair interpretation of the evidence "would support the conclusion that [plaintiff's] conduct was so extraordinary or unforeseeable as to make it unreasonable to hold defendant[] responsible for the resulting damages" Therefore, Supreme Court erred in denying plaintiff's motion to set aside the verdict. [Durrans v Harrison & Burrowes Bridge Constructors, Inc., 2015 NY Slip Op 03896, 3rd Dept 5-7-15](#)

NEGLIGENCE AND PROXIMATE CAUSE INEXTRICABLY INTERWOVEN---VERDICT PROPERLY SET ASIDE

Negligence and Proximate Cause Inextricably Interwoven---Verdict Finding that Defendant Was Negligent but Such Negligence Was Not the Proximate Cause of Plaintiff's Injury Properly Set Aside as Against the Weight of the Evidence

The plaintiff-student was sexually assaulted at school. The jury found the school was negligent in its supervision of its students, but that the negligence was not the proximate cause of plaintiff's injury. The Second Department determined the verdict was properly set aside as against the weight of the evidence. The issues of negligence and proximate cause were inextricably interwoven, such that finding the negligence was not the proximate cause of injury was against the weight of the evidence:

"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 by any fair interpretation of the evidence" "A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause"

Under the circumstances of this case, the issues of negligence and proximate cause were inextricably interwoven, such that the jury's finding that the defendants were negligent, but that their negligence was not a substantial factor in causing the infant plaintiff's injuries, was contrary to the weight of the evidence [Victoria H. v Board of Educ. of City of N.Y., 2015 NY Slip Op 05156, 2nd Dept 6-17-15](#)

OBJECTIONS TO VERDICT AS INCONSISTENT MUST BE MADE BEFORE JURY IS DISCHARGED; WHERE THE ONLY REASONABLE VIEW OF THE EVIDENCE WAS THAT A DEFENDANT'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE INJURY, DEFENSE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE.

Objections to a Verdict on the Ground of Inconsistency Must Be Made Before the Jury Is Discharged---Defense Verdict Was Against the Weight of the Evidence

The Second Department determined the defense verdict in a personal injury action was against the weight of the evidence, requiring a new trial. Of the three defendants, the jury found only one, Port Authority, negligent with respect to a door which came off its hinges, injuring the plaintiff. Because the only reasonable view of the evidence was that a defendant's negligence was the proximate cause of the injury, finding that the Port Authority was negligent, but that the negligence was not the proximate cause of plaintiff's injuries, was against the weight of the evidence. The court noted plaintiff's argument that the verdict was inconsistent as a matter of law was not preserved for appeal because objections to a verdict on the ground of inconsistency must be made before the jury is discharged:

"Objections to a verdict on the ground of inconsistency must be raised before the jury is discharged, at which time corrective action may be taken by resubmitting the matter to the jury"... .

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 by any fair interpretation of the evidence "Whether 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" Where the only reasonable view of the evidence presented at trial was that a defendant's negligence was a proximate cause of the plaintiff's injuries, a verdict finding that the defendant's negligence was not a proximate cause of the plaintiff's injuries must be set aside as contrary to the weight of the evidence

Here, in light of the jury's finding that neither [of the other two defendants] was negligent, the jury's determination that the Port Authority was negligent but that its negligence was not a substantial factor in causing the subject accident was not supported by a fair interpretation of the evidence [Ahmed v Port Auth. of N.Y. & N.J., 2015 NY Slip Op 06485, 2nd Dept 8-12-15](#)

JURY CONFUSION, STEMMING FROM THE WORDING OF THE SPECIAL VERDICT SHEET, MANDATED A NEW TRIAL

The First Department, in three, two-justice concurring opinions, determined plaintiff's motion to set aside the jury verdict should have granted on "jury confusion" grounds. Plaintiff had a kidney removed for his father's transplant procedure. A "knot pusher device" was left inside plaintiff, and he underwent a second surgery to remove it. The jury, based on the special verdict sheet, indicated leaving the "knot pusher device" inside plaintiff was not the proximate cause of his injury, but the jury sent out a note stating the plaintiff should be awarded \$50,000 for having to undergo the second procedure:

An examination of the record reveals that the special verdict sheet was "unclear and confusing" ..., because it did not provide for an award of damages caused by the need to undergo a second surgery. The confusing and ambiguous wording of the verdict sheet caused the jurors to experience substantial confusion in reaching their verdict While "[t]he ambiguity had been brought to the attention of the trial Justice before the jury was discharged and could have been corrected or at least clarified at that time" ..., the court did not do so and a new trial ... is required to prevent a miscarriage of justice. [Srikishun v Edye, 2016 NY Slip Op 00315, 1st Dept 1-19-16](#)

THE ELEMENTS OF A LACK-OF-INFORMED-CONSENT CAUSE OF ACTION WERE NOT ACCURATELY STATED IN THE JURY INSTRUCTIONS AND VERDICT SHEET; MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED

The Second Department reversed Supreme Court, in the interest of justice, because the jury instructions and verdict sheet did not accurately state the elements of malpractice based upon a lack of informed consent. Plaintiff's motion to set aside the verdict should have been granted. The elements of a "lack of informed consent" cause of action were explained:

"[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" "The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury"" To state it in other terms, the causal connection between a doctor's failure to perform his [or her] duty to inform and a patient's right to recover exists only when it

can be shown objectively that a reasonably prudent person would have decided against the procedures actually performed. Once that causal connection has been established, the cause of action in negligent malpractice for failure to inform has been made out and a jury may properly proceed to consider plaintiff's damages' " ...
. [Figueroa-Burgos v Bieniewicz, 2016 NY Slip Op 00329, 2nd Dept 1-20-16](#)

JURY'S INTERPRETATION OF EVIDENCE WAS NOT "PALPABLY IRRATIONAL" OR "PALPABLY WRONG," MOTION TO SET ASIDE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiffs' motions to set aside the verdict as against the weight of the evidence should not have been granted. The issue was whether plaintiffs established "serious injury" in a car accident. The Fourth Department explained the criteria for setting aside a jury verdict:

It is well established that "[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence' " "Although [t]hat determination is addressed to the sound discretion of the trial court, . . . if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" Furthermore, "it is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses"

Here, we conclude that the court erred in setting aside the jury's verdict inasmuch as the jury was entitled to credit the testimony of defendant's witnesses and reject the testimony of plaintiffs' witnesses Even assuming, arguendo, that plaintiffs established a prima facie case of serious injury, we nevertheless conclude that the jury was entitled to reject the opinions of plaintiffs' physicians The jury's interpretation of the evidence was not "palpably irrational" " ... , or "palpably wrong" " ... , and the court therefore erred in granting plaintiffs' motions. [McMillian v Burden, 2016 NY Slip Op 00851, 4th Dept 2-5-16](#)

NO "VALID LINE OF REASONING" WHICH SUPPORTED VERDICT

The Second Department determined the motion to set aside the jury verdict finding plaintiff was entitled to a broker's commission for the sale of defendant's property should have been granted. The court explained the relevant criteria:

To prevail on a cause of action to recover a commission, the broker must establish (1) that it is duly licensed, (2) that it had a contract, express or implied, with the party to be charged with paying the commission, and (3) that it was the procuring cause of the sale "[T]he duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue" To establish that a broker was the procuring cause of a transaction, the broker must establish that there was "a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation" Where, as here, the broker is not involved in the negotiations leading up to the completion of the deal, the broker must establish that it "created an amicable atmosphere in which negotiations proceeded or that [it] generated a chain of circumstances that proximately led to the sale" * * *

Here, there was no valid line of reasoning which could have led to the conclusion that the plaintiff was the procuring cause of the sale. [Douglas Elliman, LLC v Silver, 2016 NY Slip Op 00675, 2nd Dept 2-3-16](#)

CRITERIA FOR SETTING ASIDE A VERDICT AS A MATTER OF LAW AND AS AGAINST THE WEIGHT OF THE EVIDENCE EXPLAINED

The Second Department determined defendants' motions to set aside the verdict in this Labor Law 200/common law negligence action were properly denied. The court explained the level of supervision required to hold gas station subtenants liable for a forklift injury, and the criteria for setting aside a verdict:

"To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have the authority to exercise supervision and control over the work" "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when [the] defendant bears the responsibility for the manner in which the work [was] performed" "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" "If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law"

... "To be awarded judgment as a matter of law pursuant to CPLR 4401, a defendant must show that there is no rational process by which the jury could find for the plaintiff against the moving defendant" In considering a motion for judgment as a matter of law, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" "In making this determination, a court must not engage in a weighing of the evidence, nor may it direct a verdict where the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question"

"[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 by any fair interpretation of the evidence" "Whether 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" The apportionment of fault among the parties is generally an issue of fact for the jury ... , and the jury's apportionment of fault should not be set aside unless it could not have been reached based upon a fair interpretation of the evidence [Hernandez v Pappco Holding Co., Ltd., 2016 NY Slip Op 01295, 2nd Dept 2-24-16](#)

APPELLATE DIVISION APPLIED THE WRONG TEST TO A MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW; APPLYING THE CORRECT TEST, THE JURY VERDICT WAS NOT "UTTERLY IRRATIONAL" AND SHOULD NOT HAVE BEEN SET ASIDE

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined the Appellate Division used the wrong test when it reversed a civil assault verdict and ordered a new trial. The central issue was whether defendant was the initial aggressor. In the first trial, the jury found that the defendant had acted in self-defense. The plaintiff moved to set aside the verdict as a matter of law and, alternatively, to set aside the verdict as against the weight of the evidence. The trial court denied the motion. The Appellate Division, applying a weight of the evidence test, reversed and held " 'no fair interpretation of the evidence' supported 'the verdict finding that defendant acted in self-defense' inasmuch as it was predicated upon 'a conclusion that defendant was not the initial aggressor in the encounter' ." Based on the Appellate Division's ruling, at the second trial, the defendant was deemed the initial aggressor as a matter of law and the jury found for the plaintiff. The Court of Appeals held that the test the Appellate Division should have applied on its review of the first trial was the "utterly irrational (matter of law)" test, not the "weight of the evidence" test. Applying the correct test, the Court of Appeals found that the jury's conclusion the defendant acted in self-defense was not "utterly irrational." Therefore

the Appellate Division should not have set aside defendant's verdict and then precluded him from presenting the "initial aggressor/self-defense" question to the jury in the second trial:

The question before us is whether the Appellate Division's legal conclusion in its 2012 order was reached under the proper test. When the Appellate Division reviews a jury determination, it may either examine the facts to determine whether the weight of the evidence comports with the verdict, or the court may determine that the evidence presented was insufficient as a matter of law, rendering the verdict utterly irrational Defendant argues that the Appellate Division erred by setting aside the jury verdict in his favor and improperly determining as a matter of law that a justification defense was unavailable to him, without finding the verdict to be utterly irrational. We agree. * * *

In its 2012 order, although the Appellate Division examined the facts and determined that "the jury's conclusion that defendant was not the first to threaten the immediate use of physical force [wa]s unreachable on any fair interpretation of the evidence" (98 AD3d 830) — ostensibly a weight of the evidence review — the effect of that order was to hold as a matter of law that defendant was the initial aggressor to whom the defense of justification was not available — a determination that could only be reached by concluding that the verdict was "utterly irrational." Yet, the Appellate Division did not use the utterly irrational test. The Appellate Division's error in not applying the proper test resulted in defendant being improperly precluded from raising a justification defense on the retrial. Defendant should have been afforded a new trial on all the issues in the case, including consideration of his justification defense by the jury. Despite this error, reversal is only required if we find that the jury verdict was not utterly irrational.

Because determining whether a jury verdict was utterly irrational involves a pure question of law, this Court may look at the trial evidence and make that determination We must consider the jury charge as to initial aggressor and self-defense that was given during the first trial because the instruction, submitted without objection, is the law of the case Based on that instruction, ... we hold that the jury's determination that defendant acted in self-defense was not utterly irrational. * * *

Accordingly, the order appealed from and the ... Appellate Division order insofar as brought up for review should be reversed, with costs, and the matter remitted to Supreme Court for a new trial in accordance with the opinion herein. [Killon v Parrotta, 2016 NY Slip Op 07048, CtApp 10-27-16](#)