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CPLR Art. 41: Verdicts Modified by Court Where Jury Failed To Render Verdicts Required by Its Own Findings

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in *Schwartz*. The *Mills* case should have been deemed controlling. As the Court of Appeals stated in *Molino v. County of Putnam*:[136]

> The statute which imputes to an absentee owner the negligence of his driver, for the purpose of imposing liability to an injured third party, does not impute contributory negligence to such an absentee owner in his action to recover his own damage.

There was no indication in *Schwartz* that *Mills* was overruled. It is apparent that the plaintiff-owner was entitled to litigate the defendants' responsibility for the property damage to his car. The plaintiff-owner's own negligence was not in issue in the first action, so there was no basis upon which he could be collaterally estopped in this action. Indeed, the plaintiff-owner should have been granted summary judgment, since the prior action established the defendants' negligence and since there was no basis for finding that the plaintiff-owner was contributorily negligent.

ARTICLE 41 — TRIAL BY A JURY

CPLR art. 41: Verdicts modified by court where jury failed to render verdicts required by its own findings.

Welborn v. DeLeonardis[137] joined three separate negligence actions based on the alleged negligent operation of two motor vehicles. In action one, plaintiff 1 (P1), a passenger in the car owned and operated by defendant 1 (D1), sued D1, D2, the lessor-owner of the other vehicle, and D3, its lessee-operator. By verdict, P1 recovered against D1. In action two, in which D1 sued D2 and D3, there was a hung jury. In action three, P3, a passenger in the vehicle owned by D2 and operated by D3, sued D1, D2, and D3. A verdict was returned in that action in favor of P3 against D2.

Thereafter, pursuant to CPLR 4404(a),[138] motions were made to set aside the jury's verdicts and for a new trial in actions one and three because of the inconsistency of the verdicts. P1 also moved for a directed verdict in action one against D2 and D3 because of the jury's finding of negligence in action three. In addition, D2 moved for judgment against D1 in action two on the basis of (1) the verdict rendered in action three, and (2) D1's motion for a new trial in actions one and three.

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[136] 29 N.Y.2d 44, 49, 272 N.E.2d 323, 325, 323 N.Y.S.2d 817, 821 (1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 374 (1971).

[137] 68 Misc. 2d 853, 328 N.Y.S.2d 132 (Sup. Ct. N.Y. County 1972).

[138] CPLR 4404(a) states that after a jury trial, a party or the court itself may move to set aside a verdict or order a new trial where (1) the interests of justice so dictate; (2) the verdict is contrary to the weight of the evidence; or (3) the jury cannot agree after deliberating for a reasonable time.

On the basis of its inherent power to apply principles of law to a jury's findings where the "jury just simply refuses to render the required verdict; so long as in so doing the Court does not . . . substitute findings of its own for those of the jury,"[139] the Supreme Court, New York County, amended the jury verdicts in actions one and three. In court-completed verdicts in actions one and three, P1 and P3 recovered against D1, D2 and D3 for the amounts the jury had previously awarded P1 and P3. All other motions, with the exception of D2's motion in action two to dismiss D1's complaint, were denied.[140]

At first glance, *Welborn* is a noteworthy example of judicial enterprise since the decision logically interprets the jury's findings of liability. It may be argued, however, that the court should have followed the usual practice of giving the jury a second opportunity to follow its instructions and thereby render the completed verdicts itself.[141]

CPLR 4104: The six-person jury.

This section, which had permitted a party demanding a jury trial in civil cases to specify a jury composed of twelve or six persons, has been repealed.[142] The new CPLR 4104 limits to six the number of persons who shall compose a jury in civil actions. In keeping with this change, CPLR 4105 has been amended to specify that the first six persons who are approved must constitute the jury. Similarly, under CPLR 4109, the number of peremptory challenges has been reduced from six to three, and, under CPLR 8020(c), the jury fee has been reduced.

Six-person juries will "result in a substantial saving of time and money to the state, to litigants, and to jurors and their employers, without any substantial reduction in the quality of justice."[143] In New York County, it will ease the currently acute problem of obtaining qualified jurors.

ARTICLE 44 — TRIAL MOTIONS

CPLR 4402: Mistrial motion must be made before verdict.

Failure by trial counsel to make a timely objection to the court's rulings precludes review of the issue on appeal unless the appellate

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[139] 68 Misc. 2d at 857, 328 N.Y.S.2d at 137.

[140] *Id.* at 858, 328 N.Y.S.2d at 138.

[141] *See* 4 WK&M ¶ 4404.22, *citing* Note, *Inconsistent Jury Verdicts in Civil Actions,* 37 NEB. L. REV. 596 (1956); *cf.* Jacquin v. Syracuse Auto Rental & Taxicab Corp., 263 N.Y. 53, 188 N.E. 154 (1933).

[142] L. 1972, ch. 185, at 402, eff. May 28, 1972.

[143] 4 WK&M ¶ 4104.06.