FLOYD H. KRINER, SR. and MARIAN KRINER, husband and wife, Plaintiffs vs. FOOD LION, INC., Defendant, Franklin County Branch, CIVIL ACTION- LAW A.D. 1995 - 459

Kriner v. Food Lion

1. A new trial should be granted when jury's verdict is so contrary to the evidence as to shock one's sense of justice.

2. Where the issue is whether the verdict is against the weight of the evidence, plaintiffs have not waived this claim by not objecting to the verdict at the time it was rendered.

3. Jury's verdict that defendant was negligent, but that this negligence was not a substantial factor in bringing about plaintiff's injuries, was not against the weight of the evidence because there was sufficient evidence to support these findings.

4. Because the evidence was sufficient to support the jury's verdict and because it required assessments of credibility, the court will not substitute its judgment for that of the jury.

5. A photograph may be admitted into evidence, even if there is a difference in the scene it depicts, if the difference is specifically pointed out and is capable of being clearly understood by the jury.

6. Photograph of scene of slip and fall was properly admitted where the authenticating witness pointed out that she may have moved the yellow warning cone an inch or two while mopping up the wet spot, and then put it back; change in the scene was pointed out and capable of being understood by the jury.

Jennifer C. Deitchman, Esquire, Attorney for Plaintiffs
William Douglas, Esquire, Attorney for Defendant

OPINION AND ORDER

Walker, P.J., November 21, 1997:

Factual and Procedural Background

This case commenced when plaintiff, Floyd Kriner, filed a complaint against Defendant Food Lion, Inc. He alleged that he had fallen in Food Lion's store # 994, located on Philadelphia Avenue in Chambersburg, Pennsylvania. Plaintiff asserted a cause of action for negligence, alleging that defendant had negligently allowed ice on a melon display to melt and drip on the floor. This caused a dangerous condition in the store, on which plaintiff slipped and fell. Plaintiff further alleged the existence of severe injuries, including a tear of the right rotator cuff. Plaintiff's wife, Marian Kriner, asserted a cause of action for loss of consortium. Defendant Food Lion, in its answer, denied all liability.

A jury trial was held on January 20, 1997. The jury, on a special jury interrogatory slip, found that Defendant Food Lion was negligent. However, in answering the second question on the verdict slip, the jury indicated that it did not find that defendant's negligence was a substantial factor in bringing about plaintiffs' harm. In accordance with the instructions on the verdict slip, the jury did not answer any of the subsequent questions and returned to the courtroom, with a verdict for the defendant.

On January 28, 1997, plaintiffs filed a motion for post-trial relief, asserting two grounds on which a new trial should be granted. First, plaintiffs argue that the jury's verdict, finding that defendant was negligent, but that this negligence was not a substantial factor in bringing about plaintiffs' harm, was inconsistent with the weight of the evidence introduced at trial. Plaintiffs' motion asserts that at trial, the jury heard testimony from Plaintiff Floyd Kriner's treating physician that his injuries were of a traumatic nature and caused by his fall in the Food Lion store. The jury also heard testimony that plaintiff did not have to seek medical treatment for his shoulder prior to his fall in Food Lion and that he experienced pain immediately after the fall. Plaintiffs argue that because this testimony had not been rebutted by defendant, the jury, in its verdict, must have "capriciously disregarded the testimony presented to it by Dr. Hussain and Floyd Kriner." *Plaintiff's post-trial brief*, at 2. Thus, plaintiffs argue, the verdict is against the weight of the evidence, and a new trial must be granted.

Secondly, plaintiffs assert that the court erroneously admitted defendant's exhibit no. 1, consisting of a photograph of the site of plaintiff's fall, because the person authenticating the photograph was not the one who took the picture, nor could she testify that the scene depicted in the photograph was in the same condition as at the time of plaintiff's fall.

Discussion

Issue #1: Is the verdict against the weight of the evidence?

The power to grant a new trial is inherent in the trial court. *Thompson v. City of Philadelphia*, 507 Pa. 592, 597, 493 A.2d 660 (1995). A new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice.

Thompson, 507 Pa. at 598. It is the trial court's task to determine whether the preponderance of the evidence opposes the verdict, but the court must not invade the exclusive domain of the jury. *Thompson*, 507 Pa. at 600. Furthermore, when the court considers a motion for a new trial on the ground that the verdict was against the weight of the evidence, it must review all the evidence. *Farelli v. Marko*, 349 Pa. Super. 102, 105, 502 A.2d 1293 (1985). However, the reviewing court may not re-weigh the evidence and it may not grant a new trial merely because the jury could have drawn different conclusions or inferences. *Sudlun v. Shoemaker*, 421 Pa. Super. 353, 361, 617 A.2d 1330 (1992).

Where the issue is whether the jury's verdict was against the weight of the evidence, rather than an objection to the wording of the interrogatory, the plaintiff does not waive this claim by not objecting to the verdict at the time it was rendered. *Rozanc v. Urbany*, 444 Pa. Super. 645, 649-651, 664 A.2d 619 (1995). Therefore, plaintiffs did not waive their claim, and the issue is properly before this court.

In the underlying case, the jury determined that Defendant Food Lion was negligent, but found that defendant's negligence was not a substantial factor in bringing about the plaintiffs' harm. Complying with the instructions on the jury interrogatory, they returned to the courtroom after answering this question negatively, with a verdict for Defendant Food Lion. Plaintiffs, in their brief in support of their post-trial motion, argue that this verdict was against the weight of the evidence, because there "simply was no evidence that any factor other than the fall at Food Lion caused Mr. Kriner's rotator cuff tear." *Plaintiff's post trial brief*, at 4.

Plaintiffs cite a case of the Delaware County Court of Common Pleas where the court held the jury's verdict, which found that the defendant was negligent, but that his negligence was not a substantial factor in bringing about the plaintiff's harm, to be against the weight of the evidence. *Craft v. Hetherly*, No. 94-7176 (Del. Co. 1/27/97). In *Craft*, the plaintiff was traveling down a road at approximately 35 mph, when defendant's vehicle crossed into her lane to make a left turn. It was too late for plaintiff to stop, and she hit the defendant. *Craft*, at p. 1. At trial, there was no dispute that the plaintiff's injuries were a result of the accident. *Id.* The jury found the defendant to be negligent, but determined that his negligence was not

a substantial factor in bringing about harm to the plaintiff. *Id.* The expert witnesses disagreed only as to the extent of the injuries. The Delaware County Court found that under those circumstances, the only means by which the jury could have concluded that defendant's negligence was not a substantial factor in harming the plaintiff was if the expert medical testimony failed to link plaintiff's injuries to the accident. *Id*, at 3. The Delaware County Court held that because the medical testimony was "unrebutted and credible, and because the jury did not reach the issue of contributory negligence, it was error for the jury to conclude that Defendant's negligence was not a substantial factor in bringing about the harm to Plaintiff." *Id*, at 4. The trial court thus awarded a new trial.

Since the plaintiffs submitted their post-trial memo, in which they cite *Craft*, the Superior Court has had the opportunity to consider that decision on appeal. *Craft v. Hetherly*, __ A.2d. __, 1997 WL 559873 (Pa. Super. 1997). The Superior Court agreed with the Delaware County Court that the jury's determination that defendant's negligence was not a substantial factor "bears no rational relationship to the evidence adduced at trial." *Craft*, at *3. The court found that under the facts of this case, the defendant's negligent act of pulling his car into the oncoming lane of traffic in front of a vehicle only 40 to 50 feet away, was an "actual real factor" in causing the accident. *Id*, at *4. Therefore, the jury's conclusion to the contrary constituted a miscarriage of justice. *Id*, at *4.

Plaintiffs in the underlying case argue that this case is similar to *Craft*. Because Defendant Food Lion did not offer any evidence that the injuries were not caused by Mr. Kriner's fall at its store, plaintiffs argue that their evidence is uncontroverted, and thus that the jury's verdict is against the weight of the evidence.

In *Craft*, as well as in several other cases where the trial court has granted a new trial on the ground that the verdict was against the weight of the evidence, the testimony was uncontradicted that the injures were caused by the defendant's negligence. For example, in *Rozanc v. Urbany*, the plaintiff had been struck by defendant while driving down an exit ramp. *Rozanc v. Urbany*, 444 Pa. Super. 645, 664 A.2d 645 (1995). The court found that the medical testimony of both plaintiff's and defendant's experts established that the plaintiff suffered from objective injuries caused by the accident, and that the

experts disagreed only as to the extent of the injuries. *Rozanc*, 444 Pa. Super. at 649. Similarly, in *Neison v. Hines*, the plaintiff also was a victim in an automobile accident, and the medical testimony of both plaintiff's and defendant's medical expert was again uncontroverted that the plaintiff sustained her injuries during the accident. *Neison v. Hines*, 539 Pa. Super. 516, 522, 653 A.2d 634 (1995). In all three cases, the court found that the jury's verdict that the defendant's negligence was not a substantial factor in bringing about the plaintiffs' harm was shocking to one's sense of justice, and granted a new trial.

In the underlying case, plaintiffs argue that here there also was such uncontroverted evidence, because Defendant Food Lion has not introduced any contrary evidence concerning the cause of Mr. Kriner's injury. *Plaintiff's post trial brief*, at 4. However, it is not the defendant's burden to prove that something other than the fall at Food Lion caused Mr. Kriner's injuries. Rather, it is the *plaintiffs'* burden to prove that a causal connection exists between defendant's conduct and plaintiff's injury. *Arcidiacono v. Timeless Towns of the Americas, Inc.*, 363 Pa. Super. 528, 534, 526 A.2d 804 (1987). The question here is whether the jury's verdict that such causal connection between Food Lion's negligence and Mr. Kriner's injuries did not exist is against the weight of the evidence. The court finds that it is not.

The jury, in its verdict, determined that Food Lion had engaged in some negligent conduct. There is sufficient evidence for this finding. The testimony of Alicia Grimm, the perishable food manager who was paged to the water melon display after Mr. Kriner reported his fall, established that there was a puddle of water on the ground underneath the display. (Notes of Trial Transcript, at 86). The evidence also showed that there was no mat underneath the watermelon display to prevent people from slipping, even though it was known that ice would sometimes spill down on the floor from the watermelon display and even though a mat was used to prevent slipping in another area of the perishable department. (N.T. 44-45; 88-89). Under these facts, there was a sufficient basis for the jury's determination that Food Lion had been negligent in allowing the melting ice to drip on the floor.

However, this does not mean that the jury's conclusion that Food Lion's negligence was not a substantial factor in causing Mr. Kriner's injuries was against the weight of the evidence. Based upon the evidence presented, the jury could have made several findings which permitted it to come to its verdict.

The court, in its jury instructions with respect to the "substantial factor" issue, gave the jury the following example:

> Suppose a man is driving a car with bald tires down the highway, and a child runs out, darts out between two cars. Now, it is very conceivable in that situation that a jury could find a defendant negligent for driving with bald tires. But were the bald tires a substantial factor in causing the injury of the child darting out between parked cars? The plaintiff must meet both the negligence and a substantial cause. N.T. 105-106.

The court's example illustrates that a defendant can be negligent for an act or omission, but not be the substantial cause of the plaintiff's harm. In the court's example, the child's darting out is the substantial factor in bringing about its injuries, not the fact that the defendant was driving with bald tires. This is so, because the child would have been injured anyway, even if the defendant had not been negligent in driving with bald tires. Similarly, in the underlying case, based on the evidence, the jury could have found that Mr. Kriner would have fallen anyway, even if Defendant Food Lion had not been negligent. A jury is entitled to make any reasonable inferences from the testimony. The testimony of Mr. and Mrs. Kriner showed that they split up upon entering the store to get certain items. It would have been reasonable for the jury to infer that the Kriners were in a hurry to get their shopping done. From this reasonable inference, the jury could have found that Mr. Kriner, in his hurry, would have fallen anyway, just like the child darting out between the cars.

It is also possible that the jury determined that Food Lion was negligent for not taking measures to prevent puddles underneath the watermelon display, but that it found that Mr. Kriner never fell in the store. As the court instructed the jury, the jury may believe all, part, or none of the witnesses' testimony. (N.T. 109). Because it is the jury's function to assess the credibility of the witnesses, the court will not substitute its own judgment for that of the jury as long as

sufficient evidence has been offered to support the verdict. *Kauffman v. City of Philadelphia*, 144 Pa. Cmwlth. 444, 450, 601 A.2d 910 (1992). Under the evidence presented, the jury could have found Mr. Kriner's testimony that he fell in a puddle of water to be incredible. Mr. Kriner testified that his back and side was wet and that there were skid marks on the floor where he had fallen. (N.T 9-10). However, Alicia Grimm, the perishable food manager who was called to the scene, testified that the puddle on the floor was only the size of a saucer, that there was a wet floor sign near the puddle, and that she did not see any track or slip marks to indicate that someone had stepped in the water and slipped. (N.T. 86; 90-91). Under this evidence, the jury could have found that Mr. Kriner's testimony that he had slipped on the water puddle was not credible, and disregarded it.

The testimony of the plaintiffs' medical expert, Dr. Hussain, did not mandate that the jury come to a different conclusion. Contrary to the situation in *Craft*, *Rozanc*, and *Neison*, *supra*, the evidence here was not uncontroverted that Mr. Kriner sustained his injuries during his fall at Food Lion. At trial, the deposition testimony of Dr. Hussain was read into evidence. (N.T., at 37-38). He had examined Mr. Kriner for the first time on June 14, 1995, six days after Mr. Kriner's fall at Food Lion. Dr. Hussain testified as follows with regards to the cause of Mr. Kriner's injury:

> Q: In your medical opinion, could the injury that you treated Mr. Kriner for, have been caused by falling onto a hard floor surface?
>
> A: Yes, it can be caused by a fall. When somebody's arm is outstretched, hand type thing, it can cause that type of problem.
>
> ...
>
> Q: Now, do you have any suspicion that this injury that Mr. Kriner had could have been caused by anything other than the fall he complained of when he first saw you?
>
> A: I think the fall definitely contributed to that, but he did have some degenerative changes in his AC joint, which is the acromial joint, as I mentioned. And that can cause impingement and give somebody a degenerative type tear. But his tear was so global that it didn't appear degenerative, it appeared to be traumatic in nature.

Notes of Transcript of Deposition of Dr. Hussain, at 26-27.

It is obvious that Dr. Hussain was not a witness to Mr. Kriner's fall at Food Lion. Dr. Hussain's knowledge that the injury was caused by a fall came from the information Mr. Kriner gave him at the time of the treatment. Dr. Hussain testified only that an injury like Mr. Kriner's can be caused by a fall, and that the tear appeared to be traumatic in nature. In *Kauffman*, *supra*, one of the physicians who testified that the plaintiff's injuries had been caused by the accident, admitted on cross-examination that his opinion as to the cause of the plaintiff's injuries was based on the history he received from the plaintiff. *Kauffman*, 144 Pa. Cmwlth. at 447. He could only state that the injury had been caused by a trauma. *Id.* The court did not agree with the plaintiff's argument that the jury had conclusive, uncontradicted evidence of what happened in the accident, and found that there was sufficient evidence to support the jury's verdict that the defendant's negligence had not been a substantial factor in causing the plaintiff's injuries. *Id*, at 449-450. As in *Kauffman*, the plaintiff's "uncontroverted evidence" consists only of the physician's testimony that the injury was caused by a trauma. Based on the evidence presented in the underlying case, the jury could have believed that it was not proven that Mr. Kriner sustained this injury in his fall at Food Lion. In addition, it is possible that the jury found the plaintiff to be a mere malingerer: as the judge instructed them, the jury could simply have rejected all or part of Dr. Hussain's testimony regarding the existence of Mr. Kriner's injuries. (N.T. at 109).

Under the evidence presented at trial, it was possible for the jury to find that Food Lion was negligent in allowing water to drip from the water melon display, but that this negligence was not a substantial factor in bringing about Mr. Kriner's injuries. The court will not engage in guessing or speculating about the exact basis for the jury's conclusion that defendant's negligence was not a substantial factor in bringing about the plaintiff's harm, because this is impossible to do in the absence of more detailed jury interrogatories. Because Mr. Kriner was the only person present at the time of his fall, credibility was an issue. The court will not substitute its judgment for that of the jury when the jury verdict is based on assessments of credibility. The court finds that there was sufficient evidence to provide a sufficient basis for the jury's conclusions. Therefore, the court hereby holds

that the jury's verdict was not against the weight of the evidence as to shock one's sense of justice.

Issue # 2: Was it erroneous to admit the photograph?

Plaintiffs argue that it was erroneous for the court to admit into evidence a photograph of the scene of Mr. Kriner's fall in the store because it was not established that the scene depicted was in the same condition as it was at the time of Mr. Kriner's fall.

The photograph in question, marked as 'defendant's exhibit no. 1,' depicts the section of the produce department where Mr. Kriner fell. (N.T. 89-90). The picture furthermore shows the presence of a yellow cone, warning of a wet floor, near the watermelon table. (N.T. 90). Defendant Food Lion introduced the photograph through its witness, Alicia Grimm, the perishable food manager. She testified that the picture was taken of the area where Mr. Kriner had said he fell. To the question by defense counsel whether the photograph fairly and accurately depicted the area where Mr. Kriner fell on the date in question, she answered "yes." (N.T. 90). She further testified that she might have moved the yellow warning cone an inch or two while mopping up the water spot, and then moved it back. (N.T. 91-92). In answering questions from plaintiffs' counsel, she testified that she had not taken the picture herself, but she thought that Jill Griffin, the customer service manager, had taken it after Mr. Kriner had slipped and notified the store. (N.T. 92). She also testified that she saw Jill Griffin go get the camera, but that she did not see her take the picture. (N.T. 92). On the basis of this testimony, plaintiffs argue that admission of the photograph was erroneous, because it has not been established that the scene was in the same condition as at the time of Mr. Kriner's fall, since the location of the cone had not been established.

It is within the trial court's discretion whether to admit photographs into evidence. *Aiello v. SEPTA*, __ Pa. __, 687 A.2d 399, 403 (1996). A photograph may be authenticated either by the photographer, or by a witness with sufficient knowledge who testifies that the photograph is a fair and accurate representation of the relevant scene at the time in question. *Aiello*, at 403. If there is a difference or change in the scene between the scene as it was at the time of the incident and the scene as depicted in the photograph, that difference or change must be specifically pointed out to the jury and

must be readily capable of being clearly understood and appreciated by the jury. *Id*, citing *Semet v. Andorra Nurseries*, 421 Pa. 484, 219 A.2d 357 (1966).

In *Aiello*, the plaintiff had fallen from the steps in a Philadelphia subway station, and sued Southeastern Pennsylvania Transportation Authority ("SEPTA"). Plaintiff sought to introduce pictures of the steps from which he had fallen. SEPTA argued that admission of those pictures would be prejudicial, because they did not accurately depict the steps at the time of the fall. *Aiello*, at 403. Plaintiff testified at trial that the photos accurately depicted the scene of the accident, except that there were three steel plates on the steps on the day that he fell, which were not present in the pictures, including the defective steel plate which caused him to fall *Id*. Because plaintiff was able to identify the date that the pictures were taken, to identify and describe the steps on which he fell and to testify that the steel plates had been removed, he could properly authenticate the photos, and they were thus properly admitted. *Id*.

Similarly, in the underlying case, the witness, Alicia Grimm, could properly authenticate the photographs. She was familiar with the scene in the store, and she stated that the pictures accurately depicted that scene. She testified that she was paged to the scene where Mr. Kriner fell before she took her lunch break at noon. (N.T. 83-84). Mr Kriner testified that he picked up his wife from work at 11.00 a.m. and then went to the store. (N.T. 6). Thus, Alicia Grimm had observed the scene of the fall within one hour after the fall occurred and was able to describe what it looked like. She also testified that she saw the customer service manager get the camera to go take the picture on the same day Mr. Kriner had fallen. (N.T. 92) She furthermore testified that the picture was taken after she mopped up the wet spot on the floor and that she might have moved the yellow warning cone an inch or two while mopping up the water, and then put it back. (N.T. 91). The slight movement of the yellow cone is a much slighter change of the scene than the removal of the steel plates from the steps in *Aiello*, one of which caused the plaintiff to fall. Additionally, this slight difference was specifically pointed out by the authenticating witness during her testimony, and it constitutes a change which is clearly capable of being understood and appreciated by the jury. Therefore, this court finds that the photograph was

properly authenticated, and thus was not erroneously admitted into evidence.

ORDER OF COURT

November 21, 1997, the court, having found that the jury's verdict was not against the weight of the evidence and that the photograph depicting the scene of the fall was properly admitted at trial, denies plaintiffs' post-trial motion to grant a new trial.