U.S. PUBLIC DEFENDER VACANCY

DISTRICT OF NEW JERSEY

Chief Judge Dolores K. Sloviter announces the appointment of a Search Committee to make recommendations to the United States Court of appeals for the Third Circuit concerning the appointment of the United States Public Defender for the District of New Jersey.

A federal public defender is appointed to a four year term pursuant to 18 United States Code § 3006A and compensation is currently set at $114,700 per annum. An applicant should have the following qualifications: (1) a member in good standing in the bar of each state in which admitted to practice; (2) a minimum of five years criminal practice experience, preferably with significant federal criminal law experience, which demonstrates an ability to provide zealous representation of consistently high quality to criminal defendants; (3) the ability to effectively administer the office; (4) a reputation for integrity; (5) a commitment to the representation of those unable to afford counsel. Qualified candidates will be considered equally representation of those unable to afford counsel. Qualified candidates will be considered equally and without regard to race, sex, religious affiliation or national origin.

Qualified persons wishing to be considered for appointment may obtain a copy of the application materials by contacting the following office:

Circuit Executive Office
Third Judicial Circuit
22409 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1721
Tel: 215-597-0718

Completed applications (submit an original plus 12 copies, including writing samples with each copy) should be received by the Circuit Executive Office at the above address, marked *Attention: Federal Public Defender Search Committee*, no later than Friday, November 15, 1996.

DORIS L. ECKSTINE, PLAINTIFF vs. JULIA AMBROSE, DEFENDANT, Franklin County Branch, Civil Action - Law No. A.D. 1995 - 229

Eckstine v. Ambrose

Evidence - Jury Instructions - Excessive Jury Verdict - New Trial - Remittitur

1. In deciding whether to grant a new trial based upon the improper admission of evidence, the court must determine whether prejudice or harm has ensued from the claimed error. The party moving for new trial must show specific prejudice.

2. Evidence is relevant if it tends to make a fact at issue more or less probable; however, evidence may be relevant even though a party is not required to prove the element of the case for which the evidence is offered.

3. Limited testimony concerning two prior attacks by defendant's dog was relevant evidence that was admissible because of the well-known common law "one-bite" rule.

4. A new trial will only be granted when jury instructions were fundamentally in error and might have been responsible for the verdict.

5. The court may request a jury to render its verdict by separately stating the items of damages.

6. A new trial should be ordered only if the verdict is so excessive and against the weight of evidence that it shocks the court's sense of justice.

7. Remittitur may be ordered only when the evidence indicates that the jury was influenced by partiality, prejudice, mistake or corruption.

8. When uncontroverted evidence indicated that plaintiff suffered injuries as a result of dog attack that have left her unable to walk for more than a few blocks, unable to enjoy family outings, and unable to attend church, the court cannot find that the jury award shocks its conscience.

Stephen D. Kulla, Esquire, Counsel for Plaintiff
Howard D. Kauffman, Esquire, Counsel for Defendant

OPINION AND ORDER

WALKER, J., October 4, 1996:

This matter is before the court of Defendant's Motion for New Trial or, in the Alternative, for Remittitur (originally) misstyled as Plaintiff's Motion). The case originated when the plaintiff filed a complaint on June 2, 1995 alleging she was attacked and knocked to the ground by defendant's Airedale while walking her dog near her home on September 25, 1993. The defendant filed a timely answer denying negligence.

Later, on October 16, 1995, the defendant filed an admission of liability. Defendant admitted that she was negligent in the care, custody and control of the dog, and that her negligence was a substantial factor in causing the plaintiff's injuries. Defendant further admitted that there was no comparative negligence on the part of the plaintiff.

Prior to trial, the defendant presented a motion in limine to the court seeking, *inter alia,* to exclude any testimony or evidence at trial relating to prior incidents of misconduct by the defendant's dog. Following the submission of memoranda of law and argument by both sides, the court denied the motion and issued an order which stated in part:

> 3. If defendant admits liability at trial, the court will permit the plaintiff to present testimony of eyewitnesses to prior incidents involving the dog, or investigating police officers, but such testimony will be sharply limited by the court to the existence of the incidents themselves, with no details as to injuries sustained.
>
> 4. In the alternative to paragraph 3 above, the court will give the following instruction:
>
> "Ladies and gentlemen of the jury, the dog belonging to the defendant was involved in several prior incidents where the dog was not restrained and attacked other dogs. I am informing you of these incidents so that you are aware that the rule, commonly called the 'one-bite rule' does not apply, and should not be considered in your deliberations."

Order, June 14, 1996.

Also prior to trial, defendant submitted a proposed jury verdict form which contained the following:

> 1. Enter the amount of compensation that you award to the plaintiff for her injuries.
>
> $_____

The jury verdict form ultimately used at trial contained three separate lines for compensation. The first line was for medical bills with the stipulated amount #209.84 supplied. The second line was for "pain and suffering in past and future", and the third line stated "ability to enjoy life's pleasures". Each line was followed by a dollar sign ($) and a blank space.

Trial was held on June 26, 1996. Plaintiff's counsel called Rex Alan Looney to the stand over the objection of the defendant. Looney was the Greencastle police officer who had investigated and filed a report concerning this incident. Officer Looney testified that Greencastle Police Department records contained reports of two prior similar attacks by defendant's dog. The previous attacks occurred on October 17, 1989 and on July 7, 1990. No other testimony was given by the officer concerning the earlier incidents. N.T. at 18 - 19.

The jury returned a verdict in favor of the plaintiff in the amount of #30,209.84. The award included $15,000 for pain and suffering and $15,000 for ability to enjoy life's pleasures in addition to the stipulated medical damages.

Defendant timely filed her Motion for New Trial or, in The Alternative, For Remittitur. Both sides supplied briefs on the issues and argument was heard on September 5, 1996. The court not disposes of the matter based upon the discussion that follows.

Discussion

Defendant requests that the court grant a new trial, or alternatively, grant remittitur. First, defendant alleges error in the admission of evidence concerning previous attacks by the defendant's dog. Second, defendant claims that the jury verdict form used by the court was improper and prejudicial, and potentially confused the jury and inflated the award. Finally, defendant asserts that the jury's verdict in favor of the plaintiff in the amount of $30,209.84 is against the weight of evidence, shocks the conscience, and should be overturned. For the reasons discussed below, the court denies the motion.

Standard of Review

In deciding whether to grant a new trial based upon the improper admission of evidence, the court must determine whether prejudice or harm to a party has ensued from the claimed error. "Admission of evidence even if erroneous is not a ground for new trial where no harm or prejudice has resulted." 10 Standard Pennsylvania Practice 2d §62:18 (1996). Furthermore, the party moving for a new trial must point out specific prejudice which has resulted from the alleged error. *Kolb v. Hess,* 227 Pa.Super. 603, 323 A.2d 217 (1974).

The standard for the court to use in deciding whether allegedly erroneous jury instructions should be the basis for granting a new trial is whether the instructions were fundamentally in error and might have been responsible for the verdict. A new trial will only be granted when the charge, read in its entirety and against the background of the evidence, was erroneous and might have caused prejudice. *Sedlitsky v. Pareso,* 425 Pa.Super. 327, 332, 625 A.2d 71, 74 (1993) (citations omitted).

the standard upon which to decide whether to grant a new trial based on a claim that the verdict is excessive was set forth recently in the case of *Krysmalski By Krysmalski v. Tarasovich,* 424 Pa.Super. 121, 622 A2d 298 (*en banc*), *alloc. den.*, 535 Pa. 675, 636 A.2d 634 (1993). A verdict is excessive and against the weight of evidence sufficiently to be grounds for a new trial only when it "shocks the court's sense of justice and makes a new trial imperative so that right may be given another opportunity to prevail." *Id.* at 146-47, 622 A.2d at 311-12. *See also Wasserman v. Fifth & Reed Hosp.*, 442 Pa.Super. 563, 660 A.2d 600 (1995). *Krysmalski* also fixes the gauge for the granting of remittitur on the same claim of excessiveness of the award. Remittitur may be ordered only when a verdict that is supported by the evidence indicates that the jury was influenced by partiality, prejudice, mistake or corruption. In addition, granting of either a new trial or remittitur is within the sound discretion of the trial court. *Id.*

In making its determination whether or not a verdict is excessive, the court should examine the factors set forth in the case of *Kemp v. Philadelphia Transp. Corp.*, 239 Pa.Super. 379,361 A.2d 362 (1976). The factors are: (1) the severity of the

injury; (2) whether plaintiff's injury is manifested by objective physical evidence or whether it is only revealed by the subjective testimony of the plaintiff; (3) whether the injury will affect the plaintiff permanently; (4) whether plaintiff can continue with his or her employment; (5) the size of the out-of-pocket expenses; and (6) the amount plaintiff demanded in the original complaint. *Id.*

Testimony Concerning Prior Attacks

after considering the briefs and arguments offered in support and opposition to defendant's motion in limine to preclude the introduction of evidence of prior similar incidents involving the defendant's dog, the court denied the motion and elected to allow extremely limited testimony about two reported attacks by the same dog on previous occasions. The court reached its decision because of concern that without that information, the jury would presume that the well-known "one-bite" rule applied.

To illustrate why the court believes the jury may have been misled by its members' interpretation of the "one-bite" rule, the court offers this brief history of the rule. The law in Pennsylvania for many years placed the burden of proof of prior knowledge by the owner of a dog's vicious propensities on the plaintiff. *Snyder v. Milton Auto Parts, Inc.*, 285 Pa.Super. 559, 428 A.2d 186 (1981). No matter how innocent the victim may be or how serious the injury sustained, the owner of a dog is not responsible for the consequences of the dog's bite if he has no reason to know the viciousness or dangerous propensities of the dog beforehand. *Freeman v. Terzya et al.*, 229 Pa.Super. 255, 256, 323 A.2d 186, 187 (1974) (quoting *Andrews v. Smith,* 324 Pa. 455 (1936)). This holds true even if the owner violates Pennsylvania's Dog Law.

> [T]hat act does not purport to change or affect in any way the rule that an owner's liability for the vicious acts of his dog cannot be predicated upon ownership alone, but it must be based also on an owner's knowledge of his dog's viciousness and his failure then to take proper steps to prevent that viciousness displaying itself to the hurt of human beings.

Id.

In 1982, the Pennsylvania Superior Court overruled *Freeman v. Terzya, supra.* In *Miller v. Hurst,* 302 Pa. Super. 235, 448 A.2d 614 (1982) (*en banc),* the court held that a violation of the law requiring the owner or keeper of a dog to maintain control of the dog at all times constituted negligence per se. [1]

In that case, a six-year-old boy was bitten by a German Shepherd which the defendant-owner, Elvin Hurst, allowed to roam the neighborhood unrestrained. As a result of the incident, Hurst was cited for violating the Dog Law. At trial the plaintiff failed to produce any evidence that the dog had ever before shown vicious propensities or bitten anyone. The trial court relied on *Freeman v. Terzya, supra,* and entered a nonsuit, holding that the plaintiff had failed to show a cause of action.

On appeal, the Superior Court reversed. It held that the requirements of the statute set the standard for determining whether the defendant has complied with the common law duty to maintain ordinary care. However, the court refused to impose absolute liability on an owner, finding that liability does not lie unless the violation is a substantial factor in causing the plaintiff's injuries.

Therefore, even without knowledge of an animal's dangerous propensities, the owner will be found negligent if he violated the Dog Law and the violation proximately caused the injuries suffered. This ruling in effect abrogated the common law "one-bite" rule, which required an owner to restrain a dog only after it had exhibited vicious tendencies.

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[1] The law in effect at that time is essentially the same as 3 P.S. § 459-305 (1995) which provides:

> It shall be unlawful for the owner or keeper of any dog to fail to keep at all times such dog either: (1) confined within the premises of the owner; (2) firmly secured by means of a collar and chain or other device so that it cannot stray beyond the premises on which it is secured; or (3) under the reasonable control of some person, or when engaged in lawful hunting, exhibition or field training.

Although the *Miller* ruling appeared to set a clear standard for determining liability after a violation of the Dog Law, the courts have experienced difficulty in leaving the "one-bite" rule behind.

In *Comm. v. Figley,* the Commonwealth Court affirmed a trial court's decision that held that a dog who bit a child who was holding a piece of chicken near her face, but which had never before shown any aggressive behavior, could not be declared a dangerous dog under another section of the Pennsylvania Dog Law. *Comm. v. Figley,* 663 A.2d 873 (Pa. Commw. 1995) *alloc. granted,* 674 A.2d 1076 (1996). The law in question allows any person who has been attacked by a dog to file a complaint charging the owner with harboring a dangerous dog.

The dog will be declared dangerous by the district justice if the dog has attacked or inflicted severe injury on a person or domestic animal without provocation. 3 P.S. § 459-502-A (1995). The court in *Figley* found that for a dog to be declared dangerous under the statute, it first must be shown that the dog had previously exhibited a propensity to attack.

In a dissenting opinion, Judge Pellegrini argued that the clear intent of the Dog Law was to provide an alternative to the common law "one-bite" rule. "These laws ... reduce the burden placed upon injured parties to that they need no longer fulfill the common-law requirement of pleading and proving that an animal owner either knew or should have known of the animal's propensity to injure people." *Id.* at 876 (Pellegrini, J., dissenting). He stated that the majority's opinion acted to readopt the common-law rule which had been overruled in *Miller v. Hurst, supra.*

The court offers this summary of the current state of the law in Pennsylvania not as a thorough analysis, but merely to show how deeply the common law "one-bite" rule is ingrained in the minds of people. Even though the rule has been overruled by the courts in *Miller* and by the Legislature through the Dog Law, there still exists a reluctance by the courts to let the rule expire. Therefore, this court decided that the testimony which allowed the jury to determine that the "one-bite" rule did not apply to this case was relevant.

The defendant admitted liability in this case. Therefore the question of her negligence was not an issue of the case to be tried. Generally, evidence is relevant if it tends to make a fact at issue more or less probable. Leonard Packel and Anne B. Poulin, *Pennsylvania Evidence,* § 401 (1987).

However, evidence may be relevant even though a party is not required to prove the element of the case for which the evidence is offered. In *Taylor v. Celotex Corp.*, 393 Pa.Super. 566, 574 A.2d 1084 (1990), a plaintiff brought an action in strict liability and negligence against an asbestos manufacturer for failure to warn. In such cases, the defendant is presumed to know of the dangerous nature of the product, and a plaintiff is not required to prove knowledge by the defendant. Over defense objections, the plaintiff offered the testimony of an expert who gave her opinion as to when the defendants should have been aware of the dangers of asbestos. On appeal, the Superior Court held that the testimony, although not necessary to prove the plaintiff's claim of strict liability, was nevertheless relevant to that claim as well as to the claim of negligence.

This court believed and still believes that the fact that this was not the dog's first attack is relevant evidence in this matter. Without the limited testimony that was offered, the jury most likely would have presumed that the dog had never previously exhibited vicious tendencies. Furthermore, there would have been nothing to prevent defense counsel from pointing out to the jury during closing argument that no evidence had been submitted showing that the dog had ever been involved in similar incidents.

The testimony that was admitted was extremely limited in nature. The officer was permitted only to testify that there had been two previous reports concerning the same dog. The jury head nothing about the extent and nature of the incidents.

It is axiomatic that evidence that is relevant may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. However, in this case the court firmly believes that the probative value of the evidence substantially outweighs any prejudice to the defendant. Moreover, a new trial will not be granted unless the defendant can

show that harm or prejudice has resulted from the erroneous admission of evidence. It is incumbent on the defendant to assert the specific prejudice in her motion for a new trial. *Kolb v. Hess, supra.* No specific prejudice has been brought to the court's attention from the alleged error. Defendant's motion for a new trial based on the admission of evidence of prior similar incidents is denied.

Jury Verdict Form

Defendant's next argument is that the court erred in rejecting the defendant's proffered single line jury verdict form and substituting a form containing three individual lines for the jury to complete. The form which the court utilized contained lines for medical bills, for pain and suffering, and for loss of ability to enjoy life's pleasures.

Defendant argues that the jury award was inflated by reason of this categorization of the damages. She asserts that she was prejudiced by the use of the form and is therefore entitled to a new trial or remittitur. The court disagrees.

Again, defendant has not asserted how the alleged error has prejudiced her case. It is well settled that a new trial will be granted only when the entire charge, read against the background of the evidence was in error. *Sedlitsky v. Pareso, supra. See also, Beechwood Commons Condominium Ass'n v. Beechwood Commons Associates, Ltd.*, 397 Pa. Super. 217, 580 A.2d 1 (1990). The defendant does not maintain that any other error was made in charging the jury.

The courts of Pennsylvania have not recently spoken on the propriety of stating items of damages separately on the jury verdict form. However, in 1927, the Pennsylvania Supreme Court stated:

> Though a jury is not bound to state the items of damages in its verdict, and, under some circumstances, the court may disregard such items when set forth, yet there are many instances in which it is not only proper to have such a statement but also where the court may request the jury to render

its verdict in that form, that is, to find a general verdict accompanied by specific findings of fact.

Mitchell v. Randal, 288 Pa. 518, 137 A. 171 (1927).

The court cannot find, and the defendant does not point the court toward, any authority indicating that the court erred in submitting a verdict form to the jury which separately states the items of damages. Further, the defendant does not allege in what manner the use of this form caused prejudice to her. She alleges no other error in the charge. Therefore, the court denies the defendant's motion for a new trial on the basis of an improper jury verdict form.

Excessive Jury Award

The defendant's final basis for requesting a new trial or remittitur is that the jury award of $30,209.84 shocks the conscience, is against the weight of the evidence, is excessive, bears no reasonable relation to the plaintiff's injuries and is a failure of justice. Again, the court disagrees.

A verdict is excessive and against the weight of evidence sufficiently to be grounds for a new trial only when it shocks the court's sense of justice and makes a new trial imperative so that right may be given another opportunity to prevail. *Krysmalski By Krysmalski v. Tarasovich, supra.* It is the duty of the court to enforce the jury's verdict unless the circumstances cry out for judicial interference. *Prather v. H-K Corp.*, 282 Pa. Super. 556, 423 A.2d 385 (1980).

The court begins its analysis of whether the award in the instant case is excessive by examining the six factors of *Kemp v. Philadelphia Transp. Corp., supra.* The first factor required by *Kemp* is the severity of the injury. Testimony was offered by the plaintiff, Mrs. Eckstine, regarding the injuries that she suffered. She described the incident and her treatment at the hospital. She also testified about her visits to the chiropractor, Dr. Barvinchack, and the treatments he provided. She testified that she was not showing any improvement, so she decided not to return for more sessions with Dr. Barvinchack. Plaintiff's daughter, daughter-in-law, and a neighbor also testified about

their observations concerning the signs of pain she exhibited and how it affected the plaintiff's daily activities. The only contradictory testimony offered by the defendant was the deposition of Dr. Barvinchack in which he testified that the plaintiff had stopped coming for her treatments after six visits, and that he assumed that she was cured.

The second *Kemp* factor to be considered is whether the plaintiff's injury is manifested by objective physical evidence or whether it is revealed only by the subjective testimony of the plaintiff. Here, there is testimony from Dr. Barvinchack that the plaintiff suffered a cervical sprain and a strain of the right gluteus medius muscle. The only other testimony offered indicates that the plaintiff suffers nearly constant physical pain as a direct result of the attack. Her daughter and daughter-in-law described having to help her to the bathroom and in and out of bed. Her neighbor testified about her observations of how Mrs. Eckstine carries herself when she walks. All of the witnesses testified about how the plaintiff's activities have been sharply curtailed since the time of the incident. No contradictory testimony was offered by the defendant.

the third consideration for the court is whether the injury will affect the plaintiff permanently. The incident occurred approximately two years ago, and there was uncontroverted testimony that prior to the incident the plaintiff walked between two and five miles every day. Now she is able to walk only a block or two at a time. Walking was important to the plaintiff not only as a pleasurable outdoor activity. It had been medically prescribed as part of the recovery process from heart bypass surgery. Testimony was also offered that the plaintiff is no longer able to enjoy vacations and shopping excursions with her family because of the pain. In addition she is no longer able to attend church. While it is not certain that these limitations will be permanent, two years of living with these limitations is a considerable time for a woman who is 75 years of age. It does not appear likely that she will be able to return to the level of physical activity that she previously achieved.

Fourth, the court considers whether the plaintiff can continue with her employment. Mrs. Eckstine is retired and was so at the

time of the incident. However, because of her injuries she has had to maintain the services of a housekeeper. The housekeeper had been employed by the plaintiff before this injury, but there was testimony that the housekeeper's services were no longer needed and she was planning to dismiss her in the near future.

The fifth factor under the *Kemp* analysis is the size of the out-of-pocket expenses. Here the stipulated amount of the medical bills was $209.84.

The sixth and final factor set forth in *Kemp* is the amount the plaintiff demanded in the original complaint. The court notes that the Pennsylvania Rules of Civil Procedure prohibit a plaintiff who is seeking unliquidated damages from demanding any specific sum. Pa.R.C.P. 1021(b). A plaintiff in a case such as this may only state whether or not the claim exceeds the jurisdictional amount requiring arbitration. Pa.R.C.P. 1021(c). Therefore, Mrs. Eckstine was prohibited from demanding a specific amount of damages, but did claim an amount in excess of $25,000, which is the jurisdictional amount in this judicial district.

Based upon an examination of the above factors as well as an examination of the briefs and arguments, the court cannot decree that the jury award shocks it's conscience. The jury was the trier of fact. It was their duty to listen to the testimony and appraise the credibility of the witnesses. The court finds no reason to believe that the jury was influenced by partiality, prejudice, mistake or corruption. The uncontroverted testimony was such that the jury could reasonably find that the plaintiff was entitled to recover not only the stipulated amount of medical bills, but also significant sums for pain and suffering and for the loss of the ability to enjoy life's pleasures. Therefore, the defendant's motion for new trial, or in the alternative, remittitur because the jury's award shocks the conscience is denied.

Conclusion

the court, finding that the admission of evidence of prior similar incidents was not in error, that the jury verdict form used was proper, and that the jury award was not excessive, denies the defendant's motion for new trial or, in the alternative remittitur.

ORDER OF COURT

October 4, 1996, defendant's motion for new trial or, in the alternative, remittitur is denied.