

COURTNEY KELLER VS. SEARS, ROEBUCK AND CO., C.P. Franklin County Branch, Civil Action - Lawm No. A.D. 1996-354

*Keller v. Sears*

*evidence of prior drug use in claim for loss of earning capacity - bifurcation of trial - prior inconsistent statements*

1. Personal injury case - plaintiff makes claim for loss of earning capacity due to injury.
2. Evidence of a plaintiff's chronic drug and alcohol abuse has been held admissible where plaintiff was claiming damages for permanent injuries because such evidence was relevant to plaintiff's life expectancy; prejudice to plaintiff outweighs its probative value.
3. This court finds evidence of prior drug and alcohol abuse, if recurring or long-standing, relevant to a claim for loss of earning capacity because such abuse has an effect on plaintiff's ability to hold a job.
4. Because evidence of prior drug use is highly prejudicial to plaintiff, the liability and damages portions are bifurcated; evidence of drug use may be used at damages stage only.
5. Extrinsic evidence of prior inconsistent statement of witness is admissible for impeachment purposes only.
6. Prior inconsistent statement may not be admitted substantively where it does not constitute a hearsay exception. No hearsay exception exists on basis of coconspirator's statement where there is no independent evidence to establish a conspiracy other than the statement sought to be admitted.
7. Upon admission of prior inconsistent statement, evidence of prior consistent statement may be introduced; unlike Federal Rules of Evidence, Pennsylvania Rules permit such statements to be admitted for rehabilitation purposes only.
8. Defendant cannot introduce evidence of liability of a non-party where it did not timely join that person as an additional defendant.

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*Mike Adams, Esquire, Thomas J. Finucane, Esquire, Attorneys for Defendant*

**OPINION AND ORDER**

WALKER, P.J., April 2, 1999:

**Factual and Procedural Background**

This case involves injuries sustained by Plaintiff Courtney Keller as a result of an electrical shock from a dryer. Lucinda Freeman had purchased this dryer from Defendant Sears, Roebuck and Co. ("Sears") who installed the dryer in her house. On or about March 20, 1996, both Ms. Freeman and plaintiff, who was living with Ms. Freeman at that time, were injured by an electrical shock when they came into contact with the dryer.

On August 27, 1996, plaintiff filed a complaint against Sears alleging negligent installation of the dryer by Sears. On the same date, Ms. Freeman also commenced a suit against Sears docketed at A.D. 1996-353. Sears removed the suit by Ms. Freeman to federal court. This court refused a later request by Sears to join Ms. Freeman as an additional defendant in the underlying case. (Opinion of September 30, 1997). Subsequently, the action brought by Ms. Freeman was settled.

On September 21, 1998, a preliminary pre-trial conference was held in which several discovery issues were resolved. (See opinion dated November 16, 1998). On February 5, 1999, a pre trial conference was held where four additional pre-trial issues were raised. By its pre-trial order of February 11, 1999, this court ordered the parties to submit letters on the issues, which are the subject of the opinion below.

**Discussion**

**I. Admissibility of Evidence of Plaintiff's Prior Drug Use**

Defendant wishes to introduce evidence of plaintiff's prior drug and alcohol abuse. Plaintiff has conceded that he has been fired from two jobs because of failed drug tests. Plaintiff furthermore underwent voluntary drug treatment at Roxbury Drug and Alcohol Treatment Facility from January 14, 1996, to February 13, 1996. Defendant argues that this evidence is relevant because plaintiff is seeking damages for lost earning capacity as a result of his alleged permanent injury. Defendant

argues that plaintiff's history of drug abuse mitigates his damages for lost earning capacity because it shows that plaintiff's drug use caused him to have difficulty holding on to a job. Plaintiff opposes the introduction of evidence of prior drug abuse on the basis that such evidence is irrelevant. Plaintiff points out that while he has had a drug problem in the past, he has held steady employment as a truck driver since December 8, 1994. Furthermore, plaintiff has undergone voluntary drug treatment with knowledge of his employer, who welcomed him back after the completion of the treatment. Additionally, plaintiff argues that the introduction of such evidence would be highly prejudicial.

The Superior Court has upheld the admission of a plaintiff's chronic drug and alcohol abuse where plaintiff was claiming damages for permanent injuries. *Kraus v. Taylor*, 710 A.2d 1142 (Pa. Super. 1998). Plaintiff's claim for damages required the jury to evaluate plaintiff's life expectancy. *Kraus*, at 1143-1144. The lower court found evidence of plaintiff's chronic drug and alcohol abuse relevant because it strongly suggested that plaintiff's life expectancy deviated from the average. *Id.*, at 1144. The trial court acknowledged that evidence of prior drug and alcohol abuse is highly prejudicial; however, the court found that this was outweighed by the fact that the evidence was also highly probative of plaintiff's life expectancy. *Id.*, at 1144. The Superior Court, noting that the admissibility of evidence is a matter which lies solely in the discretion of the trial court, upheld the admission of the prior drug and alcohol abuse. *Id.*, at 1143.

Plaintiff in the underlying case has cited a case handed down by the Commonwealth Court, holding that evidence of plaintiff's cirrhosis of the liver (carrying the implication of alcoholism) was not relevant to life expectancy and highly prejudicial to plaintiff, and thus not admissible. *Labrador v. City of Philadelphia*, 134 Pa. Cmwlth. 427, 578 A.2d 634 (1990). The Superior Court in *Kraus* has acknowledged the existence of *Labrador* and its holding, but it pointed out that the decisions of the Commonwealth Court are not binding on the Superior Court. *Kraus*, at 1144. Furthermore, the Superior Court found *Labrador* to be inapposite, because the Commonwealth Court merely reviewed the lower court's exclusion of the evidence for abuse of

discretion and found no such abuse. The Superior Court noted that this does not mean that the Commonwealth Court would have reached the same decision if it had exercised its own discretion. *Kraus*, at 1144

In the underlying case, the same argument could apply. The Superior Court in *Kraus*, like the Commonwealth Court, upheld the lower court's admission of the evidence of drug use on an "abuse of discretion" standard which did not mean that the Superior Court would have come to the same conclusion if it had exercised its own discretion. However, this court finds the reasoning in *Kraus* to be persuasive and hereby adopts it. This court finds that evidence of prior alcohol and drug abuse, if recurring or long-standing, is relevant to a claim for loss of earning capacity. If plaintiff had experienced a single episode of drug abuse, received treatment for it, and completely recovered, such evidence would probably not be relevant to his future earning capacity. However, where a person returns to drug abuse on several occasions, it has an effect on his ability to hold a job, and this court feels that such evidence is relevant to a claim for loss of earning capacity. See also *Musgrave v. Novak*, 379 Pa. 184, 185, 108 A.2d 808 (1954) (evidence of plaintiff's periodic intoxication relevant to refute his claim for loss of earnings).

In the underlying case, plaintiff has lost two jobs due to drug use. His latest employment had lasted only for one year and three months (with a five week period of unemployment due to his inpatient care at Roxbury) at the time of the incident, which is not sufficient to show that plaintiff had overcome his difficulty in keeping his job as a result of his drug problem. In addition, this court has been informed that plaintiff recently again resorted to drug abuse by taking an overdose of muscle relaxants which rendered him comatose for a period of time. This court feels that it had to consider this new drug abuse by plaintiff because it is relevant to show his continuing abuse. Because this court finds that the evidence of plaintiff's prior continuing drug abuse is relevant to a claim for loss of earning capacity, it is admissible at trial.

## 2. Bifurcation of Trial

Plaintiff has requested this court to bifurcate the liability and the damages portions of the trial. Plaintiff argues it will serve efficiency because the liability stage of the trial is expected to last only one day, while the damages stage will last approximately four days. Plaintiff furthermore argues that bifurcation is especially appropriate if evidence of plaintiff's drug abuse is admitted in order to avoid prejudice to plaintiff. Defendant objects to bifurcation because it argues that the issues of liability and damages are inextricably interwoven. Defendant intends to introduce medical and electrical expert testimony to show that it was not possible for plaintiff to have been shocked as severely as he alleges. Such evidence would tend to show that plaintiff's version of how the incident occurred is not truthful.

Pa.R.C.P. 213 provides that the court, "in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial . . . of any issues." The Pennsylvania Supreme Court has cautioned that there is a hazard that evidence relevant to both issues may be offered only at half of the trial, which "necessitates the determination that the issues of liability and damages are totally independent prior to bifurcation." *Stevenson v. General Motors Corp.*, 513 Pa. 411, 422, 521 A.2d 413 (1987). This court found above that evidence of plaintiff's prior drug abuse is relevant to his claim for loss of earning capacity, and that it will therefore be admissible at trial. The evidence, however, is relevant only to the damages portion of the trial. This court finds that the liability and damages portion must be bifurcated to avoid prejudice to plaintiff because the admission of evidence of prior drug abuse is highly prejudicial to plaintiff. See *Kraus*, 710 A.2d at 1144.

This court was not convinced by defendant's argument that the issues are so interwoven that they cannot be bifurcated. Defendant will be permitted to introduce evidence through its medical and electrical experts regarding the nature of defendant's injuries in so far as it is relevant to rebut plaintiff's version of how the incident occurred. Such evidence of plaintiff's injuries is closely related to the liability stage. However, any evidence regarding plaintiff's damages as far as it concerns his wage loss, loss of earning capacity, and his prior drug use are related solely

to damages and are separate issues which need not be addressed at the liability stage. There is no reason to require that evidence of plaintiff's prior drug use is admitted at the liability stage of the trial other than to attempt to prejudice plaintiff at that stage. Thus, this court finds that the liability and damages portion of the trial can be bifurcated and that such bifurcation is required to avoid prejudice to plaintiff.

### 3. Admissibility of Prior Inconsistent Statement by Lucinda Freeman

Defendant seeks to introduce a statement allegedly made by Lucinda Freeman that the incident occurred when plaintiff was "messing with the dryer." Apparently, Ms. Freeman made this statement to her ex-husband, Carol Freeman. Their daughter Tammy overheard this conversation. Defendant intends to call Carol and/or Tammy Freeman to testify as to Ms. Freeman's prior inconsistent statement regarding the occurrence of the dryer incident.

The statement allegedly made by Ms. Freeman can be viewed as a prior inconsistent statement. It obviously is inconsistent with Ms. Freeman's later testimony that the incident occurred when plaintiff and she were attempting to use the dryer in a regular manner and then got shocked. Pursuant to Pa.R.E. 613(b), extrinsic evidence of a prior inconsistent statement of a witness is admissible if, during the examination of the witness,

(1) the statement, if written, is shown to, or if not written, its contents are disclosed to, the witness;

(2) the witness is given an opportunity to explain or deny the making of the statement; and

(3) the opposite party is given an opportunity to question the witness.

Provided these requirements are complied with, defendant may call Carol and/or Tammy Freeman to testify regarding Ms. Freeman's prior inconsistent statement. However, such evidence may be used only for impeachment purposes and not substantively unless the statement constitutes an exception to the hearsay rule. *See* Comment to Pa.R.E. 613. Defendant has argued that the evidence may also be used substantively because it constitutes a hearsay exception pursuant to Pa.R.E. 803(25). This rule provides for admissibility of a statement offered against a party which is made by "a coconspirator of a party during the course and in furtherance of a conspiracy." Pa.R.E. 803(25)(E). Defendant argues that plaintiff and Ms. Freeman conspired to defraud Sears and that Ms. Freeman's statement was made as a coconspirator of plaintiff. This argument fails. Pa.R.E. 803(25) requires that the existence of the conspiracy and participation of the declarant and the party therein must be established by evidence in addition to the statement sought to be introduced. Defendant has not provided this court with any other independent evidence to show that such conspiracy existed nor has defendant plead any claims of conspiracy or fraud in its answer to the complaint. Thus, evidence of Ms. Freeman's prior inconsistent statement may be admitted for impeachment purposes only, and not substantively. This court will instruct the jury regarding the impeachment purpose of the evidence.

Upon admission of Ms. Freeman's prior *inconsistent* statement, plaintiff is seeking to introduce evidence of prior *consistent* statements Ms. Freeman allegedly made to Lori Freeman (her ex-daughter-in-law who was married to Ms. Freeman's son) and Leo Porter, Lori Freeman's boyfriend. Plaintiff seeks to call Lori Freeman and/or Leo Porter to establish that she told them previously that the incident occurred when using the dryer in a normal manner. Pa.R.E. 613(c) provides that such evidence of prior consistent statements is admissible if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge that the witness made a prior inconsistent statement which the witness has explained or denied, and the consistent statement supports the witness' explanation or denial. The comment provides that, unlike the Federal Rules of

Evidence, the Pennsylvania Rule requires that the prior consistent statement is admissible for rehabilitation purposes only, and not as substantive evidence. Plaintiff is thus permitted to introduce evidence of Ms. Freeman's prior consistent statements upon introduction of her prior inconsistent statements by defendant. This court will instruct the jury as to the rehabilitation purpose of the evidence.

#### 4. Admissibility of Plaintiff's Statement Regarding Whether Ms. Freeman "set him up"

Defendant seeks to introduce evidence of Lori Freeman and her boyfriend, Leo Porter, of plaintiff's statements made in conversations with them wondering if Lucinda Freeman had the capability of "setting him up" or "doing this to him" by not warning him of the dryer's defect. It appears from the deposition testimony of Lori Freeman and Leo Porter that these statements were made by plaintiff in response to Lori Freeman's characterization of Lucinda Freeman as "manipulative" and other statements regarding what type of person Lucinda Freeman was. *See* N.T. of Leo Porter, at 19-21.

This court finds that the statements by plaintiff are completely irrelevant to the underlying case. The issue relating to Sears' liability is whether it hooked up the dryer correctly and whether this caused plaintiff to be shocked. If so, Sears will be liable for the injuries incurred by plaintiff. If defendant had wanted to make Lucinda Freeman partially responsible for the injury incurred by plaintiff because she did not warn him, then defendant should have joined her as an additional defendant. As stated in this court's previous opinion dated September 30, 1997, defendant filed a late petition to join Lucinda Freeman as an additional defendant. This court found that defendant did not show sufficient cause to permit such late joinder and denied the request for the joinder. Defendant cannot now be permitted to bring in Lucinda Freeman through the backdoor when, through its own fault, Ms. Freeman was not timely joined as an additional defendant. Thus, this court finds plaintiff's statements to Lori Freeman and Leo Porter regarding whether Lucinda Freeman may have "set him up" to be irrelevant and therefore inadmissible.

## ORDER OF COURT

April 2, 1999, after consideration of the letters submitted by counsel on the issues raised at the pre-trial conference, this court enters the following order:

1. Evidence of plaintiff's prior drug and alcohol abuse is admissible at trial because it is relevant to plaintiff's claim for loss of earning capacity.

2. The liability and damages portions of the trial are bifurcated. Defendant is permitted to introduce evidence at the liability stage regarding plaintiff's medical condition as far as it is relevant to refute plaintiff's version of how the incident occurred; any evidence regarding wage loss, loss of earning capacity, and plaintiff's prior drug use must be submitted at the damages stage of the trial.

3. Extrinsic evidence of Lucinda Freeman's prior inconsistent statement regarding how the dryer incident occurred is admissible for impeachment purposes only. Upon introduction of the prior inconsistent statement, plaintiff may then introduce extrinsic evidence of Lucinda Freeman's prior consistent statements. Such evidence is admissible for rehabilitation purposes only. This court will instruct the jury on the impeachment and rehabilitation purposes of the evidence.

4. Plaintiff's statements to Lori Freeman and Leo Porter regarding whether Lucinda Freeman may have "set him up" are irrelevant and therefore inadmissible.

## MODERN MYTHS

**MYTH #1: The disease of alcoholism is caused by drinking alcohol.**

**MYTH #2: Alcoholism is caused by stress.**

**MYTH #3: Alcoholism is the symptom of an underlying psychological disorder.**

**MYTH #4: Alcoholics must drink to excess on a daily basis.**

**MYTH #5: Alcoholism is cured by not drinking.**

### **Alcoholism is:**

**a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with drug/alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial.**

**There is no cure for alcoholism; however, with proper treatment the disease can be placed in remission.**

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