

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

FRANK GUGLIELMELLI

v.

WILLIAM & MARIE KIM LOSKIEWICTZ
and DAVID ROGERS

:
:
:
:
:
:
:
:
:

FEBRUARY TERM, 2000

NO. 996

Myrna Field, A.J.

April 2, 2002

OPINION OF THE COURT

Plaintiff, Frank Guglielmelli, appeals from the denial of his motion for post-trial relief following a defense verdict on May 10, 2001. For the reasons which follow, the motion was properly denied, and judgment for the defendants as entered on December 26, 2001, should be affirmed.

The background of this case is as follows. On February 17, 1998 plaintiff was an employee of the Sharswood School in Philadelphia. Sharswood is located in a residential neighborhood. It is separated from the neighboring residences by an alley. The defendants' yards are separated from the alley and each other by cinder block walls. On this date, plaintiff, accompanied by a student, went into the alley to search for a book bag which had allegedly been thrown over the schoolyard wall. Plaintiff did not see the bag in the alley, so he hoisted himself up onto one of the cinder block walls which collapsed under his weight, causing injuries to plaintiff's back. This suit was brought on the ground that the defendants were negligent in the maintenance of the cinder block wall.

A jury trial commenced in this matter on May 7, 2001. After four days of trial, the jury returned a unanimous verdict for the defense, finding that the plaintiff was a trespasser, and that his own negligent conduct was the sole cause of his injuries. Following the jury verdict, plaintiff timely filed his post trial motion seeking a new trial on five grounds: (1) the court erred in allowing the jury to decide the question of whether the plaintiff was a trespasser; (2) even if the question of trespasser status was proper for the jury, the court's instructions on that point were improper; (3) the court erred in permitting evidence of plaintiff's prior injuries; (4) the court erred in precluding the opinion testimony of plaintiff's treating physician; and (5) the jury sheet was confusing. On December 24, 2001, after the submission of briefs by the parties and oral argument thereon, plaintiff's motion was denied. His arguments will be discussed in turn.

When reviewing a jury's verdict, the evidence must be viewed in the light most favorable to the verdict winner. Boutte v. Seitchik, 719 A.2d 319 (Pa. Super. 1998). A jury's determination is not to be disturbed as long as there is sufficient evidence on the record to support it. Fannin v. Cratty, 331 Pa. Super. 326, 480 A.2d 1056 (1984).

The first two arguments raised by the plaintiff concern the issue of his status as a trespasser. Plaintiff's arguments on this issue are not persuasive. He asked the court to ignore Pennsylvania law and instead, to adopt that of other jurisdictions, some of which have discarded the distinctions between trespassers, licensees and invitees in cases of premises liability. While there may be intellectual appeal in the ways other jurisdictions handle similar facts, this court is obligated to follow current Pennsylvania case law, which still attributes liability to possessors of land for injuries thereon at different levels depending on the status of the party injured. Palange v. City of Philadelphia, et al, 433 Pa. Super. 373, 640 A.2d 1305 (1994).

Plaintiff first argues that question of whether he was a trespasser should not have been submitted to the jury. It is well-established that the determination of whether an individual is an invitee, licensee, or trespasser is one of fact for the jury. Palange, 433 Pa., at 377, 640 A.2d, at 1307. Only where the evidence is insufficient to support an issue is it appropriate for the court to remove the issue from the jury. Id. In this case the question was whether the plaintiff's actions placing himself on defendants' wall constituted "entering" their land. Since plaintiff brought suit against them, he must have believed they had some responsibility and control. Hence, the question was properly submitted.

Plaintiff next argues that even if the submission of the question to the jury was proper, the court's instruction on that issue was improper. In determining the adequacy of jury instructions, the charge must be viewed as a whole. A new trial is not warranted so long as the charge in its entirety adequately and accurately reflects the law. Von der Heide v. Commw., Dept. Of Transportation, 553 Pa. 120, 718 A.2d 286 (1998).

On the issue of whether the plaintiff was a trespasser, the jury was charged:

THE COURT: Trespassers are defined as a person who enters or remains upon land in possession of another without privilege to do so created by the possessor's consent or otherwise.

In Pennsylvania, trespassers may only recover for injuries sustained if the possessor was guilty of wanton or willful negligence or misconduct.

Notes of Testimony, May 10, 2001, at 100. This language is reflected in the applicable case law, Rossino v. Kovacs, et al, 553 Pa. 168, 718 A.2d 755 (1998), and in the Restatement of Torts (Second) § 329, as well. When viewed in its entirety, the charge accurately reflects prevailing law and was proper. Thus, it cannot be the basis for a new trial.

Plaintiff next argues that the court erred in admitting evidence of his prior injuries. This argument is without merit. A reversal based on an erroneous evidentiary ruling is warranted only where the ruling has caused actual prejudice. Aldrige v. Edmunds, 750 A.2d 292 (Pa. May 1, 2000). No such prejudice occurred. On direct examination plaintiff asserted that he had no preexisting back problems. Consequently, evidence of a prior injury was a proper area for cross-examination. Moreover, this evidence went only to the question of damages, which the jury never reached. Thus, any possible error would have been harmless. Similarly, plaintiff argues that the court improperly limited his physician's testimony. Although the court finds the limitations placed upon Dr. Honig's testimony were proper, since his testimony went only to the issue of damages, any error with regard to this evidence would have been harmless, as well.

Finally, plaintiff argues that he is entitled to a new trial because the jury sheet was too confusing. Initially, it should be noted that the only objection made at trial on this subject was as to the phrasing of questions two and four, pertaining to the recklessness of the defendants. These questions were included in the event that the plaintiff was found to be a trespasser, as discussed above. The jury was asked to determine if the defendants "acted willfully or recklessly."

Plaintiff's counsel stated:

MR. RUGGIERI: I think the jury may infer from the way the questions read that we had to prove some affirmative act in order to show negligence or recklessness. Even though your instructions will show it could be inaction, when they read this verdict sheet, that's what they're going to have in front of them

Notes of Testimony, May 10, 2001, at 6-7. To address this concern, the court instructed jury as follows:

THE COURT: Reckless conduct is intentional acting or failing to act in complete disregard of a risk of harm to others which is known or should have been known to be highly probable and with a conscious indifference to the consequences. Reckless conduct is also acting or failing to act when an existing danger is actually known and with an awareness that harm is reasonably certain to result.

And that is only important to you if you determine that the plaintiff was a trespasser; then that comes into play.

Notes of Testimony, May 10, 2001, at 118-19. The jury was further instructed that although the verdict sheet was long, each question was short and direct. Nonetheless, if they had any questions, they should let the court know. *Id.*, at 81. Two questions were subsequently sent out by the jury during deliberations before the unanimous verdict was reached. Consequently, we find that the verdict sheet was adequate, and that, except for the issue discussed above, all other issues regarding the verdict sheet were waived for failure to object at trial.

For all of the foregoing reasons, judgment as entered on December 26, 2001, was proper and should be affirmed.

By the Court:

Myrna Field, A.J.