

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNA BANKS,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
MILLAR ELEVATOR SERVICES	:	
COMPANY,	:	
Defendant.	:	NO. 98-997

**MEMORANDUM & ORDER**

**J.M. KELLY, J.**

**MARCH , 2000**

A jury trial was held in this matter from July 27 through August 4, 1999. The jury found that Plaintiff, Anna Banks, did not prove that Defendant, Millar Elevator Services (“Millar”), was negligent in its maintenance of the door operating mechanism of the elevator in which Banks claimed she was injured. Banks now moves for a new trial, claiming that the Court erred in not allowing Banks’ expert, Richard Kennedy, to read excerpts of a report concerning maintenance of the elevators at Cooper Hospital and that the Court improperly instructed the jury concerning the doctrine of res ipsa loquitur.

**FACTUAL BACKGROUND**

Banks was a respiratory therapist at Cooper Hospital. While wheeling a patient on a gurney into an elevator, Banks claims that the elevator door suddenly closed on her arm. There was uncontradicted evidence at trial that Banks suffered severe injuries to her arm which prevent her from working as a respiratory therapist. There was, however, a clear conflict in the evidence as to whether the accident on the elevator ever occurred or if it was the source of the injuries to Banks’s arm. Millar had a contract with Cooper Hospital to provide some of the maintenance for

the elevator.

### **LEGAL STANDARD**

The purpose of a motion for a new trial, pursuant to Federal Rule of Civil Procedure 59, is to allow the court to reevaluate the basis for an earlier decision. Tevelson v. Life & Health Ins. Co., 643 F. Supp. 779, 782 (E.D. Pa. 1986), aff'd, 817 F.2d 753 (3d Cir. 1987). Because granting a motion for a new trial acts to overturn a jury verdict, the court will not set aside the jury's verdict unless "manifest injustice will result if the verdict is allowed to stand." Emigh v. Consolidated Rail Corp., 710 F. Supp. 608, 609 (W.D. Pa. 1989). To grant a motion for a new trial, the court must find "that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." Nebel v. Avichal Ent., Inc., 704 F. Supp. 570, 574 (D.N.J. 1989). Therefore, a new trial may be granted even where judgment as a matter of law is inappropriate. Roebuck v. Drexel University, 852 F.2d 715, 735-36 (3d Cir. 1988).

Even if the Court erred in its rulings at trial, a new trial will not be ordered where the errors constitute harmless error. See Barker v. Deere & Co., 60 F.3d 158, 164 (3d Cir. 1995). Trial errors are considered harmless when "it is highly probable that the error did not affect the outcome of the case." Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 53 (3d Cir. 1989). "Unless a substantial right of the party is affected," a non-constitutional error in a civil case is harmless. Linkstrom v. Golden T. Farms, 883 F.2d 269, 269 (3d Cir. 1989).

### **THE ZIPF REPORT**

Banks asserts that the Court erred by not allowing her elevator expert, Richard Kennedy,

to read from and discuss details of a “Maintenance Evaluation” performed by Zipf Associates, Inc. (the “Zipf Report”). The Zipf Report was prepared for Cooper Hospital following the incident in which Banks claims she was injured. The Court ruled that, as presented, the Zipf Report was hearsay. Banks argues that even if the Zipf Report is hearsay, it can be read into evidence under Federal Rule of Evidence 703. Banks also argues that the Zipf Report is admissible as an admission by Millar.

In essence, Banks would like to have the Zipf Report in evidence without the testimony of any proponent as to the veracity of such. Federal Rule of Evidence 703 provides that:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 703 allows Kennedy to rely upon the Zipf Report in arriving at his opinion. It is not a substitute vehicle for the admission of otherwise inadmissible evidence. A review of the transcript reveals that Kennedy relied upon the Zipf Report, that he stated he relied upon the Zipf Report and that he identified the Zipf Report as the basis of his opinion that Millar did not provide the service that it was required to provide under contract and industry standards. This is what Rule 703 allows. Anything more would be admitting an out of court statement to prove the truth of the matter asserted. If Banks wanted to present the Zipf Report into evidence, she could have presented someone who could be cross examined concerning the report.

Banks also suggests that the Zipf Report is not hearsay because it constitutes an admission by Millar. Whether or not this is true, there is no indication in the record that the report could be admitted through Kennedy. In fact, the transcripts attached by Banks to her

Memorandum of Law demonstrate that Millar representatives were impeached through the Zipf Report. Because the Court was not asked to admit the Zipf Report through a proper proponent, it cannot be said that the Court erred in denying its admission.

### **RES IPSA LOQUITUR**

Banks argues that the Court's instructions may have mislead the jury as to the concept of res ipsa loquitor. The transcript reveals that the Court's instructions fairly set forth the elements of res ipsa loquitor under New Jersey law to the jury. Banks further argues that the Court should have instructed the jury that the instrumentality involved was the elevator door system. While this was undoubtedly Banks' theory of the case, there was evidence presented that other parts of the elevator or other systems may have been responsible for the door closing on Banks' arm. Accordingly, the Court did not in refusing to limit the jury's consideration to the elevator door system as requested by Banks.

### **HARMLESS ERROR**

Even if the Court committed the errors asserted by Banks, viewing the trial in its totality, those errors would have been harmless. Kennedy was able to testify to the substance of the Zipf Report and Banks was able to refer to the Zipf Report for the purpose of cross examination. Accordingly, the jury was aware of the existence and the substance of the Zipf Report. Further, even if the jury had been instructed that they should only consider the elevator door system, there still existed evidence that reasons other than Millar's maintenance could have caused the door to shut on Banks' arm. Finally, the jury heard the testimony of Robert Felice ("Felice"), a nurse who was on the elevator with Banks and the only other living witness to the accident. Felice testified that the elevator ride was uneventful and that he did not notice Banks' arm being pinned

in the elevator door. Millar forcefully argued that the accident did not happen as asserted by Banks and Felice's testimony stands as an independent basis for the jury's decision. Therefore, any error in denying admission of the Zipf Report or in instructions regarding *res ipsa loquitur* was harmless.

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**ORDER**

AND NOW, this      day of March, 2000, upon consideration of the Motion for a New Trial of Plaintiff, Anna Banks (Doc. No. 54), the Response thereto of Defendant, Millar Elevator Services Company, and the Supplemental Memoranda of Law filed by the parties, it is ORDERED that the Motion is DENIED. Judgment is ENTERED in favor of Millar Elevator Services Company and against Anna Banks.

BY THE COURT:

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JAMES McGIRR KELLY, J.