

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

VERA KISS,	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 97-7090
v.	:	
	:	
KMART CORPORATION,	:	
Defendant.	:	
	:	

MEMORANDUM

Padova, J.

May , 2001

Before the Court are Plaintiff's Post Trial Motions and Defendant's Motion for Post Trial Relief. For reasons set forth below, the Court denies both Motions.

I. Background

Plaintiff Vera Kiss brought this action for negligence against Defendant Kmart Corporation, alleging injuries suffered when she slipped and fell in the entrance area of the Langhorne Kmart store on December 20, 1995. Plaintiff alleged that the weather on that date was snowy, and that a wet floor condition inside the entrance to the store caused her to fall and injure herself. At trial Plaintiff advanced as theories of liability that Defendant (1) created the dangerous condition by wet-mopping the floor, by improperly placing floor mats and caution cones, and by maintaining a floor surface that failed to comply with municipal and industry friction standards; (2) failed to remediate a dangerous wet floor condition of which it knew or should have known; and (3) failed to warn Plaintiff of the dangerous condition of which it knew or should have known. (Tr. 1-11-01 at 131-148.) Plaintiff alleged that as a result, she developed

reflex sympathetic dystrophy (“RSD”) in her right hand that has spread to her other extremities (Tr. 1-4-01 at 155, 157, 159, 164, 169, 181, 193), a condition that has left her completely disabled from working. (Tr. 1-3-01 at 161; Tr. 1-4-01 at 85-88, 183-84; Tr. 1-8-01 at 24-26.) The jury found Defendant to be fifty percent negligent, Plaintiff to be fifty percent comparatively negligent, and found damages of \$500,000. The Court entered judgment for Plaintiff of \$250,000.

II. Legal Standard

New Trial

A court may grant a new trial on all or part of the issues following a jury verdict “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.” Fed. R. Civ. P. 59(a). Commonly raised grounds include: prejudicial error of law; that the verdict is against the weight of the evidence; that the verdict is too large or too small; that there is newly discovered evidence; that conduct of counsel or the court has tainted the verdict; or that there has been misconduct affecting the jury. 11 Charles Alan Wright et al., Federal Practice and Procedure § 2805 (2d ed. 1995). The overriding principle is that a court has the power and duty to order a new trial to prevent injustice. Id. The standard that a district court is to apply when ruling on a motion for a new trial differs with the grounds asserted in support of the motion. Lind v. Schenley Industries Inc., 278 F.2d 79, 89 (3d Cir. 1960). The district court has broad discretion when the asserted ground for a new trial is a ruling on a matter that initially rested within the discretion of the court, such as an evidentiary ruling or jury instruction. Klein v. Hollings, 992 F.2d 1285, 1289-1290 (3d Cir. 1993); Lind, 278 F.2d at 90; Farra v. Stanley-Bostitch, Inc., 838 F. Supp. 1020, 1026 (E.D. Pa. 1993). Where the motion for a new trial is

based on an assertion of legal error, the court conducts a two-step analysis: First the court determines whether it erred at trial; second, the court determines “whether that error was so prejudicial that refusal to grant a new trial would be ‘inconsistent with substantial justice.’” Farra, 838 F. Supp. at 1026 (quoting Bhaya v. Westinghouse Elec. Corp., 709 F. Supp. 600, 601 (E.D. Pa. 1989) (quoting Fed. R. Civ. P. 61)). Where the asserted ground for a new trial is that the verdict is against the weight of the evidence, the district court has less discretion, and a new trial should be granted “only where a miscarriage of justice would result if the verdict were to stand.” Klein, 992 F.2d at 1290; see also Lind, 278 F.2d at 90; Farra, 838 F. Supp. at 1026. The latter, narrow standard is mandated by our jury system, for in such cases, the judge “in negating the jury’s verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury.” Lind, 278 F.2d at 90. Within the narrow band of discretion that a trial judge exercises when ruling upon a motion for a new trial on the ground that the verdict is against the weight of the evidence, a spectrum of deference exists. The court should “scrutinize[] more closely” a verdict that is the product of a trial that is “long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors.” Lind, 278 F.2d at 90. By contrast, the court must show more deference to the verdict in a case “deal[ing] with material which is familiar and simple, the evidence relating to ordinary commercial practices.” Id.

Judgment as a Matter of Law

Judgment as a matter of law is appropriate where “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” Fed. R. Civ. P. 50(a)(1). A motion for judgment as a matter of law “should be granted only if, viewing the

evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability.” Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993) (citing Wittekamp v. Gulf & Western Inc., 991 F.2d 1137, 1141 (3d Cir. 1993)). “[T]he court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury’s version.” Id. (citing Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 190 (3d Cir. 1992)). “Although judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability.” Id. (citing Walter v. Holiday Inns, Inc., 985 F.2d 1232, 1238 (3d Cir. 1993)). “The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.” Id. (quoting Patzig v. O’Neil, 577 F.2d 841, 846 (3d Cir. 1978)).

II. Plaintiff’s Post Trial Motions

Plaintiff is unclear as to the relief she seeks. Her Motion states that she “files the within Post Trial Motions seeking a new trial” (Pl. Mot. ¶ 6.) Plaintiff’s Memorandum of Law concludes with the statement that “Plaintiff is entitled to Judgement [sic] notwithstanding the verdict, or in the alternative, a new trial as to all issues in this case.” (Pl. Mem. at 38.¹) Although Plaintiff appears to seek judgment as a matter of law, such relief is not available, as Plaintiff prevailed in this action. See Fed. R. Civ. P. 50(a)(1).

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on

¹Plaintiff did not number the pages of her memorandum, which is incorporated within her Post Trial Motions. For purposes of referring to Plaintiff’s memorandum, the Court has numbered the pages of the document starting with page 1 at the first page of the Motion.

that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.”

Fed. R. Civ. P. 50(a)(1) (emphasis added). Nor is Plaintiff entitled to an upward judicial re-determination of damages. White v. Southeastern Pennsylvania Transportation Authority, No. CIV.A.89-6687, 1992 WL 41331, at *1 (E.D. Pa. Feb. 28, 1992) (“In Dimick v. Scheidt, 239 U.S. 474, 486-87 (1935), the Supreme Court held that in federal court additur unconstitutionally abridges the Seventh Amendment right to trial by jury in suits at common law.”); Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure, Civil 2d § 2816 (“A federal court may grant a new trial because of an inadequate verdict, but it may not increase the damages above those awarded by a jury, either directly or by use of an additur.”). The Court therefore construes Plaintiff’s Motion to seek relief in the form of a new trial on damages.

Plaintiff asserts numerous grounds for relief. The Court will address each in turn.

A. Plaintiff’s First Ground

Plaintiff argues that the verdict was against the weight of the evidence, contrary to law and shocked the conscience. Plaintiff argues that “[t]he jury’s failure to award a sufficient amount of money to compensate Plaintiff” for economic and physical losses and pain and suffering establishes that the jury failed to understand and apply the law to the facts, or based its decision on extraneous matters. (Pl. Mem. at 11.)

Plaintiff argues that the testimony of her economic expert was credible and unrefuted, and the jury failed to award her “the full amount of economic loss caused by the 1995 accident.” (Pl. Mem. at 12.) Plaintiff points to testimony of her economic expert Anthony G. Verzilli, Ph.D. (“Verzilli”) that Plaintiff’s damages for past and future lost wages was in the range of \$706,993

to \$924,790. Plaintiff contends that Defendant presented no evidence that: (1) Plaintiff's work disability began at any time between 1993 and the date of the accident, December 20, 1995; (2) her work disability was in any way the result of the 1993 fall; or (3) the amount of economic loss projected by Dr. Verzilli was inaccurate, incorrect or overstated. (Pl. Mem. at 6.) Plaintiff ignores the possibility that the jury did not accept Verzilli's estimate of Plaintiff's lost wages. "A jury may accept or reject testimony, even though the testimony is uncontradicted or unrefuted." Governali v. American Tempering, Inc., No. CIV.A.85-7305, 1988 WL 3843, at *5 (E.D. Pa. Jan. 20, 1988). Notwithstanding that Defendant did not offer contradictory evidence, the jury was free to disbelieve Verzilli's predictions about the number of years Plaintiff would work and the compensation she would receive.² Furthermore, Plaintiff ignores the significance of the testimony of Defendants' medical experts, who opined that an earlier injury to Plaintiff's right hand in 1993 was the genesis of the condition from which she continues to suffer. (Tr. 1-10-01 at 93-95, 119-120, 122; Tr. 1-11-01 at 38-39, 50-52, 57.) This was sufficient evidence from which the jury could infer that Plaintiff was injured in 1993, and that Plaintiff's fall on Defendant's premises in 1995 aggravated that injury. Such findings would support a differentiation between losses attributable to the 1993 injury and to the 1995 injury.

Plaintiff argues that the compensation for Plaintiff's physical injury, pain and suffering and past and future medical expenses was inadequate. Plaintiff points to the opinion of her expert rehabilitative nurse, Mona Yudcoff ("Yudcoff"), that Plaintiff required \$3,998,670 to \$4,523,066 to compensate her for future medical expenses. Plaintiff argues that Defendant

²Verzilli's estimate was based on Plaintiff working until age 65 (Tr. 1-9-01 at 61, 77) and earning income within a range determined using \$9 per hour, her actual income in her last job as a billing clerk at Circuit City, and the salaries for billing clerks in the Philadelphia area. (Tr. 1-9-01 at 63-67.)

presented evidence rebutting only Yudcoff's opinion that Plaintiff requires full time attendant care, and no evidence to refute the remaining \$4,456,591 in items for future medical needs. Again Plaintiff fails to recognize that the jury may not have credited Yudcoff's opinion, may have determined that the items she included in her estimate of Plaintiff's future needs were not compensable, and that the jury may have apportioned losses to reflect injury caused by Plaintiff's accident in 1993. Plaintiff ignores Defendant's evidence disputing the nature and extent of her injury. Defendant's expert Richard H. Bennett M.D. ("Bennett") testified that Plaintiff upon physical examination did not exhibit physical signs of RSD (Tr. 1-10-01 at 91-93), and that he had "questions" about whether Plaintiff actually suffered from RSD. (Tr. 1-10-01 at 118-120.) Bennett also testified that Plaintiff did not have physical manifestations supporting her subjective complaints of problems extending to parts of her body beyond her right hand. (Tr. 1-10-01 at 92-102.) Defendant's expert Jack Bocher M.D. ("Bocher") was equivocal about whether Plaintiff had RSD. He testified that Plaintiff did "not fit classically into the picture of RSD," and that he was "not sure that she had RSD, per se," (Tr. 1-11-01 at 16.), then acknowledged on cross-examination that he was diagnosing RSD in Plaintiff (Tr. 1-11-01 at 49), and ultimately testified, "I'm not sure exactly what she has, but I know absolutely for sure that she has an abnormal pain syndrome." (Tr. 1-11-01 at 51.) Bocher testified that Plaintiff's restriction of motion in her left arm and legs was voluntary, and that besides the problems of her right hand and arm, she had "no other objective signs of abnormality in her left arm or right or left leg." (Tr. 1-11-01 at 38.)

Under the Lind standard, the question of damages in this case lies closer to "subject matter not lying within the ordinary knowledge of jurors" than subject matter that is "familiar and simple," as the question here involves medical evidence. Therefore, the Court, with deference to the role of the jury as factfinder, but with less deference than would be the case if

the question were within the daily experience of jurors, will examine the verdict as to damages to determine whether it presents a miscarriage of justice. The unrefuted evidence as to Plaintiff's medical and incidental expenses totaled \$165,435.82 (Pl. Ex. 33). In light of Defendant's evidence disputing the nature, extent and causation of Plaintiff's alleged injury, the Court cannot say that the jury's finding of \$500,000 in damages produces a miscarriage of justice. The jury could have concluded on the basis of Defendant's medical testimony that Plaintiff's injury was not wholly caused by her fall on Defendant's premises in 1995, but in part was caused by her prior injury in 1993. Furthermore, the jury could have concluded that Plaintiff's injury and disability were not as extensive as she claimed. The determinations as to causation, extent of injury and damages in this case were quintessential questions of fact that the jury was best suited to answer. The Court will not supplant the jury's determinations with its own by ordering a new trial. See White v. Southeastern Pennsylvania Transportation Authority, No. CIV.A.89-6687, 1992 WL 41331, at *1-2 (E.D. Pa. Feb. 28, 1992) (denying motion for new trial on damages on the ground that jury's verdict was "grossly inadequate" where the plaintiff had sustained a prior injury to the knee for which he sought damages against the defendant, and where the defendant presented testimony disputing the claimed injury to the knee).

B. Plaintiff's Second Ground

Plaintiff argues that the Court erred by admitting the testimony of Defendant's medical experts that Plaintiff's doctors were negligent in performing surgery upon her while she suffered from RSD because the opinions were not contained in Defendant's original medical reports, and were improperly contained in supplemental expert reports. (Pl. Mem. at 12-19.) The Court by Order of December 1, 2000, permitted Plaintiff to serve Defendant with supplemental expert reports in light of late-acquired evidence that Defendant had failed to produce in violation of the

Court's discovery Orders. The Order of December 1, 2000, permitted Defendant to file "rebuttal reports to said supplemental expert reports." Plaintiff argues that Defendant's expert's supplemental reports "were not submitted in rebuttal, but rather, were new expert reports containing new medical opinions" outside the scope of the Order of December 1, 2000. (Pl. Mem. at 18.) Therefore, Plaintiff argues, Defendant's expert's supplemental reports were "out of time," circumventing the scheduling Order in this case, and opinions improperly expressed therein should not have been admitted at trial. (Pl. Mem. at 18.) Plaintiff asserts error, for the same reasons, in the admission of testimony by Defendant's medical experts that Plaintiff would not need 24-hour attendant care in the future and that the claimed cost of such care was excessive. Plaintiff argues that the admission of this testimony not contained in the original expert reports was "unfair" and prejudicial in that she did not have time to obtain supplemental rebuttal reports from her experts, nor did she have opportunity to present testimony rebutting the new opinions. (Pl. Mem. at 18-19.)

Defendant argues, *inter alia*, that Plaintiff did not object to "many of the questions posed to" Defendant's medical experts and that Plaintiff thus "waived any right to object to such testimony in post trial motions." (Resp. at 13.) Plaintiff's Memorandum of Law asserts that she objected to the testimony of which she now complains. (Pl. Mem. at 18.) Neither party has identified portions of the trial record that establish whether Plaintiff did in fact object at trial. Plaintiff's Memorandum of Law asserts that one week prior to trial, Plaintiff objected to Defendant's experts' supplemental reports and testimony concerning the issues therein during a telephone conference with the Court. (Pl. Mem. at 18.) The Court notes that Plaintiff did complain that Defendant's supplemental expert reports were unrelated to Plaintiff's supplemental reports in a telephone conference eleven days before trial. The Court informed the parties that

the Court would not determine what was related or unrelated at the time of the conference.

The trial transcript appears to reflect an objection by Plaintiff's counsel to testimony by Defendant's medical expert Bennett on the grounds she raises here, although the transcript is unclear due to inaudible portions. (Tr. 1-10-01 at 53-55.) The Court declined to grant relief to Plaintiff because of the omnibus nature of the request, and instructed Plaintiff to object to specific testimony if she so desired. (Tr. 1-10-01 at 55.) Plaintiff did not object when Bennett testified concerning the surgeries on Plaintiff's right hand. (Tr. 1-10-01 at 64-65; 84-87; 89; 91.) Plaintiff objected to Bennett's testimony regarding Plaintiff's claim that she needs around-the-clock attendant care on the ground that it was outside Bennett's expertise. (Tr. 1-10-01 at 103.) Plaintiff did not object on the basis that the testimony was not contained within Bennett's expert report. Plaintiff's counsel herself elicited testimony from Bennett that surgery upon Plaintiff's hand would not have been an appropriate treatment of RSD. This testimony came during Plaintiff's counsel's cross examination of Bennett when she challenged his report questioning the diagnosis of RSD. (Tr. 1-10-01 at 106-114.) The thrust of Bennett's testimony was that the fact that Plaintiff's doctors performed surgery upon Plaintiff was evidence that they suspected that she suffered from other conditions in addition to RSD, because surgery would not have been an appropriate treatment for RSD. See Tr. 1-10-01 at 114 ("You don't treat RSD with surgery, so obviously he has other considerations in his mind, other than pure RSD, otherwise he never would have touched her with a knife.")

Plaintiff did not object to Defendant's expert Bocher's testimony on direct or re-direct examination regarding the surgeries to Plaintiff's hand. (Tr. 1-11-01 at 27-35; 51-52.) Bocher testified that "each successive operation produced an increasing loss of motion, because the surgeries initially were done without the proper postoperative care, and made her condition

worse.” (Tr. 1-11-01 at 34.) On cross examination, Plaintiff’s counsel herself sought Bocher’s testimony that the surgeries on Plaintiff’s hand had worsened her injury during questioning directed at whether Bocher believed Plaintiff had RSD, and when the onset occurred:

Q: Okay. And Doctor, you would agree with me that if you had RSD prior to the first surgery, the first surgery and all the surgeries would have made her worse?

A: Yes.

Q: Isn’t that correct? And that is, in fact what happened; isn’t that correct?

A: That’s exactly right.

Q: Okay. So are you diagnosing RSD related to the 1993?

A: Yes.

(Tr. 1-11-01 at 49.) Plaintiff objected to Bocher’s testimony regarding Plaintiff’s claim that she needs 24-hour attendant care on the basis of no foundation. (Tr. 1-11-01 at 39.) Thereafter Defense counsel laid a foundation, and Bocher opined that round-the-clock nursing was not reasonable or necessary at this time. (Tr. 1-11-01 at 40.) Plaintiff’s counsel did not object to the testimony on the basis that the opinion was not contained in Bocher’s original report.

“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context” Fed. R. Evid. 103(a). Plaintiff did not object at trial to the testimony of which she now complains; therefore, Plaintiff has waived the objection. Plaintiff’s pretrial objection described above is insufficient to preserve the issue. See American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324-25 (3d Cir. 1985). In that case, a party filed a written pretrial motion in limine, supported by citation to case law, seeking to exclude certain evidence; the court heard oral argument and made a definitive oral ruling denying the motion. Id. at 324-25. Thereafter, the party did not object at

trial when the evidence was offered. Id. at 324. The court held that the party had adequately preserved the issue for appeal, reasoning that “[u]nder these circumstances, requiring an objection when the evidence was introduced at trial would have been in the nature of a formal exception and, thus, unnecessary under [Federal] Rule [of Civil Procedure] 46.” Id. at 325. The instant case is distinguishable; Plaintiff made no written motion supported by citation to law, and more importantly, the Court expressly declined to rule. At trial the Court instructed Plaintiff that objection must be made to specific testimony. When Defendant offered the testimony, Plaintiff made no objection. Pursuant to Federal Rule of Evidence 103(a), Plaintiff cannot now assert the error. Moreover, Plaintiff herself participated in eliciting the testimony she challenges here.

Even if Plaintiff had objected at trial to the admission of testimony on the ground that it was not contained in an expert’s report, the objection is without basis in law. “Testimony of an expert on matters within the expert’s expertise but outside of the expert’s report is not only permissible at trial, but the exclusion of such testimony at trial may be reversible error. . . . An expert may testify beyond the scope of his report absent surprise or bad faith.” Fritz v. Consolidated Rail Corp., No. CIV.A.90-7530, 1992 WL 96285, at *3 (E.D. Pa. Apr. 23, 1992) (citing DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978)). This Court will employ the standard that the Court of Appeals for the Third Circuit uses to review a district court’s exclusion of testimony for failure to comply with pre-trial notice requirements: (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) bad faith or willfulness in failing to comply with the court’s order. Id. Additionally, the court should consider “the significance of the practical importance of

the evidence excluded.” DeMarines, 580 F.2d at 1202.

Plaintiff’s argument that she suffered prejudice by admission of testimony not contained in the experts’ original reports is unpersuasive. First, Plaintiff’s counsel herself elicited a portion of the testimony of which she now complains. Moreover, the testimony was clearly within the scope of the subject matter on which the experts opined and within their expertise. It is fundamental that any treatment of an alleged injury is within the scope of expert testimony regarding the injury. Therefore, the testimony of Defendant’s experts with respect to surgeries to Plaintiff’s injured hand and nursing care allegedly necessitated by the injury should have been no surprise, and consequently not prejudicial, to Plaintiff. The admission of the testimony did not disrupt the orderly and efficient trial of the case. Plaintiff has not claimed or demonstrated bad faith in Defendant. The significance of the testimony weighs against exclusion because the testimony may have aided the jury in its evaluation of the nature of Plaintiff’s injury. The Court concludes it did not err in admitting this testimony, a significant portion of which Plaintiff herself elicited.

C. Plaintiff’s Third Ground

Plaintiff asserts that the charge to the jury on damages was erroneous. She claims that the Court (1) erroneously refused three proposed points for charge or did not give them to the jury in the language requested by Plaintiff,³ and (2) erred by not providing a limiting instruction or a

³Plaintiff points to the following three proposed charges:

(1) Concurring Causes

There may be more than one substantial factor in bringing about the accident suffered by the Plaintiff. When negligent conduct of two or more persons contributes concurrently to an occurrence or incident, each of these persons is fully responsible for the harm suffered by the Plaintiff regardless of the relative extent to which each contributed to the harm. A cause is concurrent if it was operative at the moment of the incident, and acted with another cause as a substantial contributive factor in bringing about the harm.

(2) Concurring Causes - Either Alone Sufficient

Where the negligent conduct of a Defendant combines with other circumstances and other forces to cause the harm suffered by the Plaintiff, the Defendant is responsible for the harm suffered by the Plaintiff, the Defendant

charge to the jury that it could not reduce damages for the negligence of plaintiff's treating physicians in performing surgery on Plaintiff when she suffered from RSD. (Pl. Mem. at 20-23.)

Plaintiff waived all of these objections. At trial, following the charge to the jury, the Court at sidebar asked counsel if they wished to object to or request any additional instructions. Plaintiff did not raise the objections she asserts here. (Tr. 1-12-01 at 53-60.) Therefore, Plaintiff waived her right to raise these objections. Fed. R. Civ. P. 51 ('No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.'). An exception to Rule 51 exists "in rare instances, where the error is fundamental and results in a miscarriage of justice." Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 139 (3d Cir. 1973). See also Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir. 1975); Callwood v. Callwood, 233 F.2d 784, 788 (3d Cir. 1956); Lyles v. Allstate Ins. Co., No. CIV.A.00-628, 2000 WL 1868389, at *5 (E.D. Pa. Dec. 22, 2000); Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., No. CIV.A.95-1376, 1998 WL 721081, at *14 n.5 (E.D. Pa. Oct. 14, 1998).

No fundamental error exists in the Court's charge to the jury with respect to any of the proposed points for charge that Plaintiff recites here, and no miscarriage of justice has occurred. The three proposed points for charge to which Plaintiff points are inapplicable to the theory she

is responsible for the harm [sic] if his negligent conduct was a substantial contributive factor in bringing about the harm, even if the harm would have occurred without it.

(3) Susceptible Plaintiff

Members of the jury, if an individual has an underlying condition, which makes her more susceptible to injury than the average person, this does not effect [sic] the responsibility of the person who causes additional damage to the same area of the body. Where a Defendant causes bodily injury, he is responsible for the totality of that injury regardless of any underlying condition, which makes the injured person more prone to injury. (Pl. Mem. at 20-21.)

asserts here, namely, that the jury improperly speculated as to a “superseding cause, which relieved the Defendant of responsibility for the totality of the harm caused to Plaintiff as a result of the negligence of the Defendant, Kmart.” (Pl. Mem. at 22.) The law as to concurring causes and a plaintiff’s susceptibility are inapplicable to the issue of superseding cause. Furthermore, Plaintiff is incorrect in asserting that the Court refused to instruct the jury on the susceptibility of a plaintiff.⁴ A litigant is not entitled to the specific language of her proposed charge. Douglas v. Owens, 50 F.3d 1226, 1233 (3d Cir. 1995.)

Plaintiff asserts error in the omission of a jury instruction as to superseding causation; however, Plaintiff never requested such an instruction. Plaintiff’s counsel had three opportunities to request specific charges: in her written pretrial submission to the Court; during the pre-charge conference; and following the Court’s charge to the jury. Plaintiff never requested a charge on superseding causation. Pursuant to Rule 51, she cannot now assert the omission of such an instruction as error. Furthermore, Plaintiff’s argument is based on speculation as to determinations underlying the jury’s verdict and fails to show a fundamental error or miscarriage of justice. (Pl. Mem. at 21-23.) Nothing in the verdict or verdict form supports Plaintiff’s argument that the verdict “clearly reflects” an apportionment of damages between harm caused

⁴The Court provided the following instruction regarding susceptible plaintiffs:

[I]n cases where the personal injuries caused by a negligent person, if any, aggravate an existing infirmity or disease, and result in a prolonging, or aggravation of the injury, and a corresponding increase in damages, then the law certainly provides that the plaintiff may recover compensation for such added or increased damages that came as a result of the aggravation of the condition.

In the law we say that a defendant must take their victim as she finds them [sic]. The negligent party is subject to liability for harm to another, although a physical condition of that person not known to the negligent party makes the injury greater than would have ordinarily been foreseen if the problem were resolved.

(Tr. 1-12-01 at 32-33.)

by Defendant and harm caused by Plaintiff's treating physicians.⁵ (Pl. Mem. at 22.) Nothing in the verdict or verdict form suggests that the jury "failed to charge the Defendant with the totality of the injury." (Pl. Mem. at 21.) The jury found damages to amount to \$500,000. Plaintiff's assertion that this amount reflects that the jury assigned fault to Plaintiff's treating physicians is mere speculation, unsupported by the verdict form.

D. Plaintiff's Fourth Ground

Plaintiff makes four loosely related arguments based on the admission into evidence of a floor mat and yellow caution cones. (Def. Ex. 1; Def. Ex. 2A and B.) Plaintiff asserts that (1) the Court erred by admitting into evidence floor mats and caution cones similar to those used at the site and time of Plaintiff's injury because Defendant previously denied the existence of such items in response to Plaintiff's discovery requests notwithstanding an Order by this Court compelling Defendant to produce such items; (2) the Court erred by admitting into evidence floor mats and caution cones purporting to be similar to those used at the site and time of Plaintiff's injury "in the absence of testimony establishing that the mats and cones were substantially similar in size, composition, and quality as those used on the date of the accident, or based on the testimony of Lee Sharp as to his impression of the similarity of the mats and cones to those which he viewed on the video tape of this accident"; (3) the Court erred by permitting Defendant to "circumvent the sanction order in this case" by providing witnesses with copies of the videotape depicting Plaintiff's fall in contravention of the Court's Order and "without disclosing such action to the plaintiff at the time of such communication with potential trial witnesses"; and

⁵The verdict form, in Question 6, asked, "What amount of damages, if any, do you assess?" The jury answered, "\$500,000." Question 5 asked, "Taking the combined negligence that was a substantial factor in bringing about the plaintiff's harm as 100%, what percentage of that causal negligence was attributable to the defendant and what percentage was attributable to the plaintiff?" The jury answered that the percentage attributable to Defendant was "50%" and the percentage attributable to Plaintiff was "50%."

(4) the Court's Order imposing sanctions upon Defendant and Defense Counsel for violations of the Court's Orders regarding discovery and the Court's enforcement of the Order "was not sufficient to redress the harm and prejudice" to Plaintiff.

Plaintiff argues that Defendant's failure to provide Plaintiff with "prototypes of the mats or cones" violated the Court's Orders of December 29, 1999; January 13, 2000; April 18, 2000; and April 27, 2000. The interrogatories and requests for production that Plaintiff quotes in her Motion do not expressly ask for "prototypes," but rather seek information about the floor covering used at the time of Plaintiff's injury. The only request that could be construed to comprise "prototypes" is Plaintiff's request for "any other pertinent tangible . . . evidence you either have in your possession or control or have the ability to access, identify or obtain pertaining to the above described floor coverings or mats." (Pl. Mem. at 30.) Plaintiff argues it was "complete error" for the Court to admit the mats and cones in the face of Defendant's alleged violation of the Court's Orders. (Pl. Mem. at 31.) The United States Court of Appeals for the Third Circuit has stated that "the exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 719 (3d Cir. 1997) (quoting Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 905 (3d Cir. 1977)). Four factors the district court should consider are: (1) the prejudice or surprise of the party against whom the excluded evidence would have been admitted; (2) the ability of the party to cure that prejudice; (3) the extent to which allowing the evidence would disrupt the orderly and efficient trial of the case or other cases in the court; and (4) bad faith or wilfulness in failing to comply with a court order or discovery obligation." Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 148 (3d Cir. 2000) (citing Konstantopoulos, 112 F.3d at

719). The court must also consider the importance of the excluded testimony. Konstantopoulos, 112 F.3d at 719 (quoting Meyers, 559 F.2d at 904).

Without determining whether Defendant's failure to disclose or produce the similar mats and cones during discovery violated the Court's Orders to provide discovery, the Court observes that Plaintiff suffered no prejudice thereby. The videotape depicting Plaintiff's fall showed the appearance of the actual mats and cones. Plaintiff acknowledges that in response to her interrogatory seeking information regarding floor coverings, Defendant referred her to Mr. Carpet, the entity that periodically cleaned and replaced the mats, as the appropriate source of information concerning "the exact material composition of the matts [sic]." (Pl. Mem. At 29.) Defendant's pretrial memorandum listed as exhibits "[y]ellow caution cones used at Langhorne store" and "[r]ectangular carpeted mats used at Langhorne store." (Def. Pretrial Mem.) Plaintiff therefore had sufficient information with which to prepare for trial with respect to floor coverings and warning cones, and can claim no surprise or prejudice. Plaintiff argues that she and her expert witness testified that the mats used at the time of her injury were not substantially similar to that admitted into evidence at trial, that the actual cones were smaller, and that the exemplar mat was "newer and made of stiffer and more water resistant material." (Pl. Mem. at 32.) Jurors had sufficient evidence to evaluate the degree of similarity between the mats and cones they saw on the videotape and those admitted into evidence at trial, and to assign any probative value they deemed appropriate to the exemplar mat and cones. Those determinations were for the jury to make. The determination that the mat and cones were sufficiently similar to be relevant was supported by the testimony of Lee Sharp. (Tr. 1-3-01 at 51-56.) Therefore, admission of the mat and cones was proper.

The fact that Sharp may have had no independent recollection of the nature of the mats or

cones prior to viewing the videotape is irrelevant. The Court's Order of November 22, 2000, prohibited Defendant from "using or offering as evidence the Videotape" Showing the videotape to witnesses before trial did not constitute using it as evidence. At trial, Plaintiff's counsel elected to question Sharp about the videotape (Tr. 1-3-01 at 50), thereby using the videotape as evidence, as the Court's Order of November 22, 2000, permitted.

Plaintiff argues that Defendant's conduct in showing the videotape to Sharp before trial "forced" Plaintiff into using the videotape as evidence at trial, triggering Defendant's consequent right to use the videotape as evidence pursuant to the Order of November 22, 2000. This argument warrants only the observation that Plaintiff was at liberty to use or not to use the videotape pursuant to said Order. Furthermore, Plaintiff was at liberty to use the sanctions as evidence.

E. Plaintiff's Fifth Ground

Plaintiff argues that the Court erroneously charged the jury as to liability. Plaintiff points to four proposed points for charge and asserts error in the Court's refusal to provide them.⁶

⁶Plaintiff points to the following four requested instructions:

(1) Creation of Dangerous Condition

"I instruct you that notice of the dangerous condition is not required if you find that the Defendant, Kmart Corporation or its employees or agents, created the dangerous condition by their own conduct in failing to properly maintain the area or inspect the area where Plaintiff fell."

(2) Recurrent Condition

"A landlord without inspection should expect to anticipate that when it is snowing persons entering a building will track in snow and slush and that some mopping procedure is necessary from time to time to keep a smooth tile floor in a reasonably safe condition for business visitors."

(3) Business Premises Open to Public

"Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precaution against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection."

(4) No Duty-Business Visitor

Plaintiff's counsel at trial objected only to the asserted failure of the Court to give the first and fourth proposed instructions. Therefore, Plaintiff waived objection with respect to the second and third proposed instructions. Fed. R. Civ. P. 51. Plaintiff's assertion of error with respect to the first proposed instruction is unfounded. "A party is entitled to a jury instruction that accurately and fairly sets forth the current status of the law." Douglas v. Owens, 50 F.3d 1226, 1233 (3d Cir. 1995). "No litigant has a right to a jury instruction of its choice, or precisely in the manner and words of its own preference." Id. (citing Heller Int'l Corp. v. Sharp, 974 F.2d 850, 860 (7th Cir. 1992)). The Court's charge to the jury included a reading of Section 343 of the Restatement (Second) of Torts, which states the law of Pennsylvania as to the duty of a land owner or possessor to invitees. (Tr. 1-12-01 at 25.) See Ferencz v. Milie, 535 A.2d 59, 64 (Pa. 1987); Mills v. Sears, Roebuck & Co., No. CIV.A.97-3282, 1998 WL 229571, at *2 (E.D. Pa. Apr. 28, 1998). The Court's charge to the jury further instructed that Defendant would be liable for negligence if it affirmatively created a dangerous condition, and differentiated this theory of liability from negligent omission to remediate a dangerous condition, an alternative theory that required a finding that Defendant knew or should have known of the dangerous condition.⁷ The

"I instruct you that a business visitor, such as the Plaintiff, is not required to actively inspect the premises to discover defects on or about the Defendant's property. Vera Kiss has the right to presume that the Defendant would use reasonable and ordinary care to protect her from injury in maintaining their property."
(Pl. Mem. at 34-35.)

⁷The Court charged the jury, in relevant part, as follows:

[Y]ou may have three distinct inquiries to conduct to determine whether K-Mart breached the duty, was negligent; that is, breached a duty or duties with respect to the plaintiff in this case.

And those inquiries are as follows: number one, the inquiry of whether K-Mart exercised reasonable care to maintain the premises in a reasonably safe condition for the purposes of its patrons, such as Miss Kiss, or, on the other hand, whether K-Mart, in fact, negligently created a dangerous condition, if any, by the manner in which it placed its mats and maintained its floors.

This theory of negligence alleges that K-Mart took affirmative action that was negligent, in that a reasonably careful store would not have taken such action under the circumstances, as you may find in this case in front of you.

Secondly, whether K-Mart exercised reasonable care to maintain the premises in a reasonably safe condition for the purposes of its patrons, such as Miss Kiss, or, on the other hand, whether K-Mart negligently

Court's instruction adequately covered the law of Pennsylvania with respect to when a plaintiff must establish that the defendant had notice of a dangerous condition.

In construing [Section 343] of the Restatement [Second of Torts], Pennsylvania courts have uniformly held that if the harmful transitory condition is traceable to the possessor or his agent's acts (that is, a condition created by the possessor or those under his authority), then the plaintiff need not prove any notice in order to hold the possessor accountable for the resulting harm. . . . Where, however, the evidence indicates that the transitory condition is traceable to persons other than those for whom the owner is, strictly speaking, ordinarily accountable, the jury may not consider the owner's ultimate liability in the absence of other evidence which tends to prove that the owner had actual notice of the condition or that the condition existed for such a length of time that in the exercise of reasonable care the owner should have known of it.

Moultrey v. Great A & P Tea Co., 422 A.2d 593, 596 (Pa. Super. Ct. 1980). See also Schwartz v. Warwick-Philadelphia Corp., 226 A.2d 484, 487 (Pa. 1967); Penn v. Isaly Dairy Co., 198 A.2d 322, 324 (Pa. 1964) (citing Finney v. G.C. Murphy Co., 178 A.2d 719 (Pa. 1962)); Hayden v. City of Philadelphia, 112 A.2d 812, 813 (Pa. 1955); Myers v. Penn Traffic Co., 606 A.2d 926, 929 (Pa. Super. Ct. 1992) (quoting Moultrey, *supra*). The Court's charge provided the law applicable to the various theories of liability that Plaintiff advanced, namely, that (1) Defendant created the hazardous condition by wet-mopping, by inadequate placement of mats and cones,

permitted a dangerous wet condition, if any, to remain on the floor of the entrance to the store, despite K-Mart knowing, or in the exercise of reasonable care, should have known [sic] that there was a dangerous condition.

Now, this second theory of negligence alleges that K-Mart failed to take action that a reasonably careful store would have taken under the circumstances as you may find them to be. But the second theory depends upon your finding that K-Mart either knew, or should have known, of a dangerous condition, if any.

The third inquiry, whether K-Mart exercised reasonable care to warn Miss Kiss of a dangerous condition that it knew or should have known existed and gave notice. And the third inquiry, you must find, and you must determine, whether K-Mart knew or should have known of the existence of a dangerous condition and then whether or not K-Mart exercised reasonable care. Reasonable care being that degree of care which an ordinarily prudent store would have exercised and used under like circumstances.

These inquires, if you find that they are appropriate under all the evidence, and, again, remember I told you, I don't know where you're going to be on the facts. You may determine facts which do not make these inquiries appropriate, or relevant, or material. But these inquiries, if you find they're appropriate, must be considered only in the light of all of the principles of law that I have just given to you. Any one of these three inquiries may result in negligence on the part of K-Mart.

(Tr. 1-12-01 at 26-27.)

and by maintaining a floor surface that failed to comply with municipal and industry friction standards (Tr. 1-3-01 at 80-89, 105-06, 109-11, 115); (2) that Defendant failed to remediate a wet, slippery condition caused by customers tracking in snow and water (Tr. 1-3-01 at 16-17, 31, 43, 114-115; 126-28 170, 172); and (3) that Defendant failed to give reasonable warning of a dangerous condition. (Tr. 1-3-01 at 111, 128, 168, 179.) Furthermore, Plaintiff can claim no prejudice with respect to this request for charge because the jury's finding of negligence in Defendant implies that the jury found that Defendant owed Plaintiff a duty and breached it.

Although Plaintiff waived objection with respect to the second proposed point for charge, the Court observes that Plaintiff's assertion of error here is illogical. One of Plaintiff's theories of negligence in this case was that by wet-mopping the floor, Defendant created a dangerous condition. (Tr. 1-3-01 at 105-06, 111.) Now Plaintiff complains that the Court refused to give a charge that during snowy weather, "some mopping procedure is necessary." Plaintiff could only have benefitted from the Court's refusal to give this charge as requested by Plaintiff. Furthermore, the Court adequately charged as to the duty of a possessor of land to maintain its premises in a condition reasonably safe for business visitors.

Plaintiff's counsel in the pre-charge conference asked the Court to give the third proposed point for charge, concerning the duty of a possessor of land with respect to dangerous conditions created by third persons. (Tr. 1-11-01 at 124.) Following the Court's charge to the jury, Plaintiff made no objection that the Court had failed to instruct the jury on the law as to dangers created by third persons. Therefore, this objection is waived. Even if it were not, the assertion of error is unfounded. The Court's charge to the jury adequately instructed the jury as to the duty of a possessor of land to discover dangerous conditions and to take reasonable care to protect

invitees.⁸ Plaintiff's argument is that Defendant had a duty with respect to slippery conditions created by customers tracking snow and water into the store. The jury's finding of negligence in Defendant clearly indicates that the jury found Defendant owed a duty to Plaintiff and breached it. Plaintiff can assert no prejudice with respect to the Court's decision not to charge the jury in the precise language Plaintiff proposed.

With respect to the fourth proposed charge to which Plaintiff points, the Court adequately charged the jury as to the law regarding a business visitor's right to rely on the possessor of land making the premises safe.⁹ Plaintiff is entitled to a charge that states the status of the law, but not to the precise language of her proposed charge.

F. Plaintiff's Sixth Ground

Plaintiff asserts that the Court erred by excluding evidence of prior similar occurrences and subsequent remedial measures. The Court granted Defendant's Motion in Limine to

⁸The Court charged the jury as follows: "A possessor of land is also required to inspect its premises, to discover dangerous conditions, and under certain circumstances, which we'll discuss shortly, to give adequate warning to its patrons of dangerous conditions that may exist." (Tr. 1-12-01 at 23.)

The Court further instructed the jury: "[A] possessor of land is liable for harm caused to invitees by a condition on the land, if the possessor does three things: First, actually knows, or by the exercise of reasonable care would discover the condition, and does or should recognize that that condition involves an unreasonable risk of harm" (Tr. 1-12-01 at 25.)

The Court further instructed the jury, [Y]ou may have three distinct inquiries to conduct to determine whether K-Mart breached the duty, was negligent . . . Secondly, whether K-Mart exercised reasonable care to maintain the premises in a reasonably safe condition for the purposes of its patrons, such as Miss Kiss, or, on the other hand, whether K-Mart negligently permitted a dangerous wet condition, if any, to remain on the floor of the entrance to the store, despite K-Mart knowing, or in the exercise of reasonable care, should have known [sic] that there was such a dangerous condition. . . . The third inquiry, whether K-Mart exercised reasonable care to warn Miss Kiss of a dangerous condition that it knew or should have known existed and gave notice. (Tr. 1-12-01 at 26.)

⁹The court charged the jury: "Now, business visitors or invitees, patrons, Miss Kiss, was entitled to rely on K-Mart's performance of its duty. Pennsylvania law provides that when an invitee or business visitor enters land or premises, she does so upon an implied representation or assurance that the land has been prepared, and made ready, and safe for her reception. She is, therefore, entitled to expect that the possessor will exercise reasonable care to make the land safe for her entry, or for her use, for the purposes of the invitation." (Tr. 1-12-01 at 23-24.)

Preclude Evidence of Subsequent Remedial Measures “given that Defendant does not contest ownership or control of the Langhorne Kmart store.” (Ord. Of May 24, 2000.) Plaintiff’s counsel asked the Court to reconsider the Order granting the Motion in Limine at trial (Tr. 1-3-01 at 220), but Plaintiff thereafter did not seek to introduce evidence of subsequent remedial measures, nor did she make an offer of proof.¹⁰ In her Motion, Plaintiff asserts error but points to no proffered evidence that should have been admitted. Plaintiff can claim no prejudice if she points to no proffered evidence that the Court excluded.

The Court denied Defendant’s Motion in Limine to Preclude Evidence of Prior Accidents at the Langhorne Kmart Store “subject to a limiting instruction regarding the purpose of the evidence.” (Ord. of May 24, 2000.) At trial Plaintiff sought to introduce evidence of prior slip and fall injuries at the entrance to the Kmart Langhorne store involving a wet floor condition. (Tr. 1-4-01 at 237-38.) Plaintiff’s counsel stated that the purpose of the evidence was to show notice that a wet floor was a hazardous condition. (Tr. 1-4-01 at 237-38.) “In Pennsylvania, in some circumstances where the cause of the accident or the defective or dangerous condition is unknown or disputed, evidence of the occurrence of similar accidents is admissible, in the sound discretion of the trial judge, for the purpose of establishing . . . the imputation of notice to the owner of the place where they occurred” DiFrischia v. New York Central Railroad Co., 307 F.2d 473, 476 (3d Cir. 1962). Defendant objected to the evidence on the grounds of relevance

¹⁰Plaintiff’s argument here is disingenuous, as Plaintiff’s counsel during the pre-charge conference acknowledged that she was unable to offer evidence of subsequent remedial measures at trial because Defendant had offered no evidence opening the door to such evidence. (See Tr. 1-11-01 at 126-27.) Plaintiff’s counsel sought to preclude defense counsel from repeating at closing the argument he allegedly made in his opening statement that Defendant had done all it could do to maintain a safe premises. Plaintiff’s counsel argued, “[I]f he had produced evidence of that, then subsequent remedial measures would have been – would have come in to impeach him on that issue, so I don’t think that he should be talking about that on closing . . .” (Tr. 1-11-01 at 126.) When asked by the Court what subsequent remedial measures Plaintiff offered in the case, Plaintiff’s counsel responded, “But my understanding is there was no evidence that K-Mart did all that they could do. If that would have [sic] been the case, then I would have had the right to impeach based on subsequent remedial measures.” (Tr. 1-11-01 at 127.)

and prejudice. (Tr. 1-4-01 at 242.) The Court ultimately precluded the testimony of Samuel Stocchi (“Stocchi”) because Plaintiff’s offer of proof lacked evidence for a foundation that the composition of the floor at the time of Stocchi’s fall was similar to the composition of the floor at the time of Plaintiff’s injury. (Tr. 1-9-01 at 44-49, 96-100.)

Plaintiff’s argument in her Memorandum of Law in support of her Motion suffers from the same failing that served as the basis of the Court’s ruling at trial: Plaintiff fails to point to any proof offered at trial that the composition of the floor in the Langhorne Kmart store at the time of the incident involving Stocchi was similar to the composition of the floor at the time of Plaintiff’s fall. The Court at trial instructed Plaintiff, “[I]n order for me to consider admitting this in evidence, I’ve got to make a judgment as to whether or not there will be sufficient proof that the circumstances were similar with respect to that floor.” (Tr. 1-9-01 at 46.) The Court instructed Plaintiff’s counsel at least six times during trial that the Court needed an offer of proof, and Plaintiff failed to offer such proof. (Tr. 1-9-01 at 44-49, 96-100.) Plaintiff’s counsel stated, “I think there’s a stipulation. I think I sent a request for admissions and asked whether this was the floor.” (Tr. 1-4-01 at 47.) The Court instructed Plaintiff’s counsel: “Well, you’re going to have to show me that.” (Tr. 1-4-01 at 48.) Plaintiff’s counsel replied, “Okay.” (Tr. 1-4-01 at 48.) Plaintiff’s counsel never offered the purported admission. In her Memorandum of Law, Plaintiff argues that “Defendant had already admitted in its responses to Requests for Admissions that the floor was the same floor with the exception of the fact that carpet had been placed over the floor surface following this accident . . .” (Pl. Mem. at 36.) Once again Plaintiff makes this argument without providing the purported Requests For Admissions and response. Aside from the fact that a post-trial offer of proof would not cure Plaintiff’s failure to make a required offer of proof at trial, the argument in Plaintiff’s Memorandum of Law demonstrates

that Plaintiff's counsel utterly failed to understand that her own argument does not constitute evidence. Plaintiff states in her Memorandum of Law that she "relies on the facts and legal arguments presented within the body of Plaintiff's response to Defendant's Motion in Limine and adds to that, the following comments." (Pl. Mem. at 36.) Again, Plaintiff's counsel is offering her argument, but points to no evidence that could have supported a determination by the Court. Nothing in Plaintiff's instant Motion and accompanying Memorandum of Law demonstrates that the Court erred by excluding evidence of past accidents or subsequent remedial measures at the Langhorne Kmart store.

G. Conclusions as to Plaintiff's Grounds

Having concluded that the Court did not err with respect to the challenged jury instructions and admission or exclusion of evidence, and that the verdict was not against the weight of the evidence, the Court denies Plaintiff's Motion for a new trial.

III. Defendant's Motion for Post Trial Relief

Before the Court is Defendant's Motion for Post Trial Relief requesting "judgment notwithstanding the verdict under Federal Rule of Civil Procedure 50(b)." Plaintiff has failed to file any response. Defendant asserts three grounds; the Court will address each in turn.

A. Defendant's First Ground

Defendant argues that Plaintiff failed to establish a prima facie case of negligence because Plaintiff failed to prove that Defendant had notice of the dangerous condition on its premises. (Def. Mot. ¶¶ 30-35; Def. Mem. at 6.¹¹) Defendant argues that "[t]he condition at issue as described by plaintiff is a pool of dirty water in the form of tracks and footprints," and that

¹¹Defendant did not number the pages of its Brief in Support of Motion for Post Trial Relief ("Def. Mem."); therefore the Court has numbered the pages in sequence beginning with 1 on the first page.

“Plaintiff presents no evidence from which to infer that such condition had been on the floor long enough for Kmart to have known about the condition.” (Def. Mem. at 6.) First, Defendant’s argument is based on the faulty premise that a pool of dirty water was the only theory of a dangerous condition at issue in this case. Plaintiff’s expert opined that Defendant’s practices for maintaining the floor at the entrance to the Langhorne store at the time of Plaintiff’s injury “created a hazardous condition that was unnecessary and resulted in this incident.” (Tr. 1-3-01 at 115.) Plaintiff’s expert opined that by wet-mopping the tile floor, Defendant created a “film of water” on the floor. (Tr. 1-3-01 at 105-06.) Under this theory, Defendant affirmatively created the dangerous condition, and Plaintiff need not have proved that Defendant had constructive notice of the condition because Defendant’s employees had actual notice of their own alleged negligent acts, which were within the scope of their employment. Schwartz v. Warwick-Philadelphia Corp., 226 A.2d 484, 487 (Pa. 1967). Second, Plaintiff offered ample evidence from which the jury could infer that Defendant had actual or constructive notice of a slippery condition in the entrance area to the store, whether the jury concluded that Defendant created the condition or failed to remediate it or warn of it. The videotape showed a Kmart employee mopping at the entrance area to the store. (Pl. Ex. 8.) The videotape also showed several patrons entering the store and slipping on the floor. (Id.) This evidence supported a finding that the person mopping, and therefore Kmart, had knowledge or should have known that the floor was slippery. Therefore Defendant has failed to show there was insufficient evidence supporting the jury’s finding of liability in Defendant.

B. Defendant’s Second Ground

Defendant argues that “the accident was caused solely by the negligence of plaintiff alone.” (Def. Mot. ¶ 36.) Defendant points to Plaintiff’s acknowledgment that she did not look at

the floor before she fell, that she did not attempt to wipe snow from her boots, and that the water on the floor was obvious to her after the fall. From these facts Defendant asserts the non sequitur that “the only negligence attributable to the accident in this case [sic] is the negligence of plaintiff Vera Kiss herself.” (Def. Mem. at 7.) These facts support the jury’s finding of Plaintiff’s negligence, but do not preclude Defendant’s negligence. Defendant argues that these facts “demonstrate[] that the condition is not one which Kmart would believe that the plaintiff would not be in a position to observe.” (Def. Mem. at 7.) This argument is unavailing because it is predicated on an erroneous standard. A possessor of land is subject to liability for physical harm caused to invitees by a condition on the land if, inter alia, he “should expect that they will not discover or realize the danger, or will fail to protect themselves against it.” Restatement (Second) of Torts § 343(b) (1965) (emphasis added). The video evidence before the jury of the scene at the entrance to the Kmart Langhorne store showed that shoppers were entering the store without looking at the floor. (Pl. Ex. 8.) This evidence supported the inference that a shopper in the ordinary course of Defendant’s business might enter the store without looking at the floor and would fail to protect herself from a slippery condition. For the same reason, Defendant’s argument that “[t]hese facts further demonstrate that the condition at issue was both open and obvious such that there was no duty on the part of Kmart to warn,” (Def. Mem. at 7), must fail. See Restatement (Second) of Torts § 343A(1) (1965) (“A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.”) (emphasis added); Carrender v. Fitterer, 469 A.2d 120, 123 (Pa. 1983); Jones v. Three Rivers Management Corp., 394 A.2d 546, 552 (Pa. 1978). Therefore, the Court rejects Defendant’s argument that the evidence supports only a finding of negligence in

Plaintiff.

C. Defendant's Third Ground

Defendant argues that Plaintiff failed to establish that Kmart's actions were unreasonable. (Def. Mot. at ¶ 41.) In support of this argument, Defendant points to the continuous mopping and monitoring of the entrance area and a changing of a floor mat prior to the accident. (Def. Mot. ¶ 42; Def. Mem. at 7.) Defendant's argument is not persuasive. Plaintiff presented abundant evidence on the basis of which the jury could have found that Defendant failed to exercise reasonable care to provide a reasonably safe premises for invitees. Plaintiff's expert opined that Defendant's practices with respect to maintaining the floor in the entrance area to the Langhorne store "created a hazardous condition that was unnecessary and resulted in this incident." (Tr. 1-3-01 at 115.) Plaintiff's expert testified that wet-mopping the tile floor created a hazardous condition, rather than eliminating one. (Tr. 1-3-01 at 105-06, 111.) Plaintiff's expert opined that Defendant should have used a dry mop following wet-mopping. (Tr. 1-3-01 at 111.) Plaintiff's expert testified that Defendant on the date of Plaintiff's injury failed to follow its policies and procedures for replacing wet mats with dry mats by securing the area, dry-mopping the floor and placing a dry replacement mat. (Tr. 1-3-01 at 113-14.) Plaintiff's expert opined that Defendant should have placed more mats on the floor and placed them so they abutted and did not leave tile floor exposed. (Tr. 1-3-01 at 111.) Plaintiff's expert opined that Defendant's practices failed to comply with municipal code and industry standards. (Tr. 1-3-01 at 110-11.) Plaintiff's expert testified that the friction coefficient of the floor in wet conditions failed to meet municipal code and industry standards. (Tr. 1-3-01 at 80-89.) Plaintiff's expert testified that warning cones should have been arrayed across the entrance way. (Tr. 1-3-01 at 109, 111.) Plaintiff's expert opined that Defendant, if it had insufficient dry replacement mats, should have

pulled a wet-dry vacuum off its sales shelf and vacuumed moisture out of the wet mats at the entrance to the store. (Tr. 1-3-01 at 111-12.) Viewing the evidence in the light most favorable to Plaintiff, as the Court must on a motion for judgment as a matter of law, the Court finds ample evidence supporting a determination that Defendant took insufficient precautionary measures and was negligent.

D. Conclusion as to Defendant's Grounds

Defendant has failed to persuade the Court that, viewing the evidence in the light most favorable to Plaintiff, there was insufficient evidence from which the jury could reasonably find liability in Defendant. Therefore, Defendant's Motion for judgment as a matter of law is denied.

An appropriate Order follows.

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

VERA KISS,

Plaintiff,

v.

KMART CORPORATION,

Defendant.

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:

CIVIL ACTION
NO. 97-7090

ORDER

AND NOW, this day of May, 2001, upon consideration of Plaintiff's Post Trial Motions (Doc. No. 155), Defendant's Response thereto (Doc. No. 162), and Defendant's Motion for Post Trial Relief (Doc. No. 157), **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion is **DENIED**; and
2. Defendant's Motion is **DENIED**.

BY THE COURT:

John R. Padova, J.

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

VERA KISS,

Plaintiff,

v.

KMART CORPORATION,

Defendant.

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:
:
:
:

CIVIL ACTION
NO. 97-7090

ORDER

AND NOW, this day of May, 2001, upon consideration of Defendant's Request for Oral Argument (Doc. No. 160), **IT IS HEREBY ORDERED** that Defendant's Request is **DENIED**.

BY THE COURT:

John R. Padova, J.

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

VERA KISS,	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 97-7090
v.	:	
	:	
KMART CORPORATION,	:	
Defendant.	:	
	:	

ORDER

AND NOW, this day of May, 2001, upon consideration of Plaintiff’s Petition for Delay Damages Pursuant to Pa. R. Civ. P. 238 (Doc. No. 156) and Defendant’s response thereto (Doc. No. 158), **IT IS HEREBY ORDERED** that Plaintiff’s Petition is **GRANTED IN PART** and **DENIED IN PART**The judgment of \$250,000 in this action is amended to reflect the addition of delay damages in the amount of \$28,353.99 for a total judgment of \$278,353.99 in favor of Plaintiff and against Defendant.¹²

¹²The jury in this matter rendered a verdict in favor of Plaintiff, finding damages in the amount of \$500,000, and assigning to Plaintiff fifty percent comparative negligence. Accordingly the Court entered judgment for Plaintiff in the amount of \$250,000. Plaintiff now seeks delay damages in the amount of \$73,600. Defendant challenges Plaintiff’s Petition on numerous grounds.

Plaintiff ignores the plain language of the rule by arguing that she is entitled to delay damages “from December 4, 1997, the date of service of the complaint in this matter.” (Petition (“Pet.”) ¶ 8.) Pennsylvania Rule of Civil Procedure 238 provides for delay damages “in an action commenced on or after August 1, 1989, from a date one year after the date original process was first served” Pa. R. Civ. P. 238(a)(2)(ii). Therefore, the earliest date upon which delay damages could have accrued in this action was December 4, 1998. Delay damages did not begin to accrue on that date, however, because this action on that date was in civil suspense on Plaintiff’s request. Rule 238 excludes delay damages for any time period “during which the plaintiff caused delay of the trial.” Pa. R. Civ. P. 238(b)(2). On Plaintiff’s motion, the Court on April 9, 1998, placed this matter into civil suspense. On Plaintiff’s motion, the Court restored this matter to the active docket on October 29, 1999. Therefore, delay damages did not begin to

accrue until October 29, 1999.

Defendant argues that delay damages should be excluded from May 1, 2000, to May 30, 2000, for delay caused by Plaintiff. (Response (“Resp.”) ¶ 8.) Defendant argues that the case was listed for the May, 2000, trial pool, and the court rescheduled the trial to May 30, 2000, to accommodate Plaintiff’s counsel’s vacation. (Resp. ¶ 8.) Defendant is correct that Plaintiff’s counsel’s request warrants an exclusion from delay damages; however, Defendant errs with respect to the period of exclusion. The court rescheduled the trial from May 23, 2000, to May 30, 2000. Therefore, the Court will exclude the seven days from May 23, 2000, to May 30, 2000, from the period for which Plaintiff is entitled to delay damages.

Defendant seeks to exclude from the accrual period of delay damages the period from May 22, 2000, through the entry of verdict on January 17, 2001, on the basis of a settlement offer. (Resp. ¶ 4.) Rule 238 excludes from the period of time for which delay damages shall be calculated any period “after which the defendant has made a written offer of . . . a structured settlement underwritten by a financially responsible entity, and continued that offer in effect for at least ninety days or until commencement of trial, whichever first occurs, which offer was not accepted and the plaintiff did not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of . . . the actual cost of the structured settlement plus any cash payment to the plaintiff.” Pa. R. Civ. P. 238(b)(1). Defendant asserts that on May 22, 2000, it made a written settlement offer of a structured settlement, the present value of which Defendant asserts was approximately \$750,000. (Resp. ¶ 4.) Defendant asserts that Plaintiff rejected the offer within minutes and maintained a settlement demand of \$7.5 million until trial, “and expressly indicated that there would be no negotiation off of that figure at any time prior to trial.” (Resp. ¶ 4.) Defendant argues that delay damages should not be allowed after May 22, 2000, but cites no authority in support of its position. Such an exclusion would be contrary to the plain language of the rule, which provides exclusion only where a settlement offer remains open for ninety days or until the commencement of trial. Neither is the case here. See Sonlin v. Abington Mem’l Hosp., 748 A.2d 213, 216 (Pa. Super. Ct. 2000) (“[A] settlement proposal must contain a clause expressly validating the offer for 90 days or until time of trial.”). See also Schrock v. Albert Einstein Med. Ctr., Daroff Div., 562 A.2d 875, 876 (Pa. Super. Ct. 1989) (rejecting defendant’s argument that because the plaintiff’s settlement demands were unreasonable, serious attempts to settle the case were thwarted, and stating that a plaintiff’s conduct affects delay damages “only where his or her conduct ‘caused the delay of trial.’”) (emphasis omitted).

Defendant correctly argues that the date of the jury verdict was January 17, 2001, and not January 18, 2001, as Plaintiff asserts. Therefore, Plaintiff’s Petition for delay damages accruing on January 18, 2001, is denied.

Defendant correctly argues that the applicable interest rate for the year 2000 is 9.5 percent, and not 10.0 percent as Plaintiff asserts. “Damages for delay shall be calculated at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus one percent, not compounded.” Pa. R. Civ. P. 238(a)(3). The Addendum to Explanatory Comment to Rule 238 establishes that the prime rate for 1999 is 7.75 percent, and that the prime rate for 2000 is 8.5 percent. Therefore, the rate at which delay damages are calculated for 1999 is 8.75 percent, and the rate at which delay damages are calculated for 2000 is 9.5 percent. Plaintiff and Defendant agree that the rate at

BY THE COURT:

John R. Padova, J.

which delay damages are calculated for 2001 is 10.5 percent. Pet. ¶ 11; Resp. ¶ 11.

Pursuant to the foregoing discussion, delay damages in this matter are calculated as follows: For 1999: \$250,000 multiplied by 8.75 percent, multiplied by 64 days delayed, divided by 365 days. For 2000: \$250,000 multiplied by 9.5 percent, multiplied by 359 days delayed, divided by 366 days. For 2001: \$250,000 multiplied by 10.5 percent, multiplied by 17 days delayed, divided by 365 days. The total delay damages are \$28,353.99.

Period	Number of Days	Interest Rate	Delay Damages Amount
Oct. 29, 1999, to Dec. 31, 1999	64 of 365	8.75%	3,835.62
Jan. 1, 2000, to May 23, 2000, and May 30, 2000, to Dec. 31, 2000	359 of 366	9.5%	23,295.77
Jan. 1, 2001, to Jan. 17, 2001	17 of 365	10.5%	1,222.60
			Total: \$28,353.99