



Plaintiffs contend that they should be awarded judgment as a matter of law because there was "a sufficient evidentiary basis for a reasonable jury to find Defendant Louis Cicalese was negligent." Plaintiffs stand the law on its head. The question is whether when viewing the evidence in a light most favorable to defendant, a reasonable jury could have concluded that he was not negligent. The jury quite reasonably could have reached such a conclusion from the evidence presented.

A court may grant a new trial on the ground that the verdict was against the weight of the evidence only where the failure to do so would result in a miscarriage of justice. Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1352-53 (3d Cir. 1991); Johnson v. Goldstein, 864 F. Supp. 490, 492 (E.D. Pa. 1994). A court should be particularly reluctant to substitute its judgment for that of a jury on matters that do not involve complex factual determinations but rather subjects well within the understanding of a layperson. Klein v. Hollings, 992 F.2d 1285, 1290 (3d Cir. 1993).

If there were ever a case in which the questions submitted to a jury were well within the understanding of laypersons, this is it. Plaintiffs' claim was one of simple negligence. The evidence was concise and straightforward. The jury was perfectly capable of weighing that evidence and determining whether defendant was negligent. The jury's verdict was not against the weight of the evidence and did not remotely result in a miscarriage of justice.

Plaintiffs finally contend that defense counsel conveyed a "subliminal message" to the jury that Mr. Mayer "was negligent and/or assumed the risk" when counsel used the words "risk" and "choice" in her opening statement and told the jury in her closing argument to "apply your common sense." Plaintiffs are reaching. The purported "message" was sufficiently "subliminal" that it was apparently missed by plaintiffs' counsel who never lodged any objection during trial. Plaintiffs thus waived their right to challenge these statements. See Dunn v. Hovic, 1 F.3d 1371, 1377 (3d Cir. 1994); Murray v. Fairbanks Morse, 610 F.2d 149, 152 (3d Cir. 1979) (failure to object precludes party from seeking new trial on ground of impropriety of remarks by opposing counsel); Dunn v. Owens-Corning Fiberglass, 774 F. Supp. 929, 940 (D.V.I. 1991); Stainton v. Tarantino, 637 F. Supp. 1051, 1092 (E.D. Pa. 1986). Moreover, there is nothing improper in telling jurors they may apply their common sense or in discussing quite overtly the possibility that a plaintiff was himself negligent where, as here, contributory negligence was asserted as an affirmative defense.

Defense counsel's references to risks and choices were made in the context of discussing the concepts of negligence and contributory negligence. She stated that "[w]e have to take care of what we do" in view of the "dangers" and "risks" presented and when making "choices" there are times "we just don't exercise the caution we should." This is a fair explication of the concept of "ordinary care" and consistent with defendant's contention that

plaintiff would have avoided injury had he not positioned his legs in an unsafe manner. There was evidence that while common sense dictated persons engaging in this activity should lift their legs and that the other riders had done so, Mr. Mayer had allowed his legs to drag across the ground. Counsel could not know that the jury would agree with her contention that defendant was not negligent. There was nothing unusual or improper about her also discussing defendant's claim of contributory negligence.

Counsel also suggested that when accidents occur "sometimes it's just not anybody's fault." This is true. A jury reasonably could have found from the evidence that the outstretched leg of a person on a tube attached to a rope and sliding over snow could swing into a tree without any party being negligent.

Counsel's statement that the jurors should "apply your common sense" was made immediately after her argument that there was nothing to show defendant was driving negligently.

Plaintiffs suggest that "[t]he only proffered [sic] explanation for the jury's verdict is that it did not consider the law which it was given." To the contrary, as the court stated in denying plaintiffs' motion for a directed verdict, "a reasonable jury could certainly find that the defendant was not negligent." The court is confident that the jury well comprehended the evidence, the issues presented and the applicable principles of law, and reached a perfectly rational conclusion.

The jury's finding that defendant was not negligent was amply supported by the evidence. Defense counsel did not make improper comments in her opening statement or closing argument.

**ACCORDINGLY**, this            day of August, 1997, upon consideration of plaintiffs' Motion for Judgment as a Matter of Law (Doc. #28, Part 1) and alternative Motion for a New Trial (Doc. #28, Part 2), and defendant's response thereto, **IT IS HEREBY ORDERED** that said Motions are **DENIED**.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**