

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

JOHN S. PRUNTY and	:
CARLA A. PRUNTY, h/w	:
Plaintiffs	:
	: CIVIL ACTION
v.	:
	: 97-2642
DOYLESTOWN FLORABUNDA,	:
and GEORGE WETHERILL,	:
Defendants	:

M E M O R A N D U M

Broderick, J.

July 14, 1998

Presently before the Court is Plaintiffs John S. Prunty and Carla A. Prunty's motion for a new trial pursuant Rule 59 of the Federal Rules of Civil Procedure. Plaintiffs have not filed a transcript in connection with this Rule 59 motion, and have asked the Court to waive the requirement that a transcript be ordered and filed. Because Plaintiffs' motion is premised on two relatively straightforward issues, the Court will consider the motion despite Plaintiffs' failure to file a transcript. For the reasons which follow, the Court will deny Plaintiffs' motion.

BACKGROUND

Plaintiff John S. Prunty, along with his wife, Carla A. Prunty, initiated the instant negligence action in this Court, alleging jurisdiction on the basis of diversity of citizenship. 18 U.S.C. § 1332. In their complaint, Plaintiffs alleged that John Prunty, a flower delivery man, was injured on June 20, 1996

when he fell down a stairway after making a delivery to Doylestown Florabunda, a flower shop located in Doylestown, Pennsylvania. Plaintiffs named as Defendants George Wetherill, the owner of the premises where the stairway was located, David Zabrowski, the owner of Doylestown Florabunda, and Doylestown Florabunda, the occupier of the subject premises. At trial, Plaintiffs agreed to dismiss their claims against David Zabrowski, and proceeded only against George Wetherill and Doylestown Florabunda.

Plaintiffs alleged that the condition of the stairway from which John Prunty fell presented an unreasonable risk of harm to the Plaintiff in that the tread of the top stair was significantly wider than the tread of the other stairs. Plaintiffs alleged that this variation in the stairway's treads, coupled with the absence of handrail, caused Prunty to overstep the second stair and fall down the stairway. Plaintiffs alleged that Defendants, as the owners and occupiers of the premises, knew or should have known that the condition of the stairway presented an unreasonable risk of harm, and should have expected that Mr. Prunty would not have discovered the danger. Although Mr. Prunty had made deliveries to Doylestown Florabunda on numerous prior occasions, Plaintiffs claimed that Prunty had always completed his deliveries while standing at the base of the stairway and had never walked up or down the full flight of

stairs before his accident.

Trial in the instant action was bifurcated, and the issue of liability was to be tried first. At trial, Plaintiff called Norman Goldstein, an engineering consultant, to testify as an expert witness. Mr. Goldstein testified that, in his opinion, the condition of the stairway presented an unreasonable risk of harm. Mr. Goldstein further testified that the stairway was in violation of the Building Officials and Code Administrators ("BOCA") Building Code and the BOCA Maintenance Code in that the variation between the tread of the top stair and the tread of the other stairs exceeded the variation allowed by the BOCA Codes. In his testimony, Mr. Goldstein referred to specific provisions of the BOCA Codes. However, Plaintiffs did not move any Code provisions into evidence.

In their request for jury instructions, Plaintiffs requested that the Court give the jury the following instruction regarding Defendants' negligence:

If you find that the steps on the defendants premises did not comply with commonly accepted engineering and/or architectural standards which would relate to either the height or the width of the risers, than you must find that the defendants were negligent.  
Fisher v. Findlay, 319 Pa. Super. 214, 465 A.2d 1306 (1983).

The Court denied Plaintiffs' requested instruction.

The jury was given a Jury Verdict Sheet which asked the following questions:

Has Plaintiff John Prunty proved by a preponderance of the

evidence that Defendant Doylestown Florabunda was negligent and that its negligence was a proximate cause of John Prunty's fall on June 20, 1996?

...

Has Plaintiff John Prunty proved by a preponderance of the evidence that Defendant George Wetherill was negligent and that his negligence was a proximate cause of John Prunty's fall on June 20, 1996?

Following a brief deliberation, the jury answered "NO" as to both questions. Judgment was entered accordingly in favor of Defendants George Wetherill and Doylestown Florabunda, and against Plaintiffs John and Carla Prunty. Plaintiffs subsequently filed the instant motion for a new trial pursuant to Fed.R.Civ.P. 59(a).

PLAINTIFFS' MOTION PURSUANT TO FED.R.CIV.P. 59(a)

Under Fed.R.Civ.P. 59(a), a District Court may "grant a new trial if required to prevent injustice or to correct a verdict that was against the weight of the evidence." American Bearing Co., Inc. v. Litton Indus., 729 F.2d 943, 948 (3d Cir.), cert. denied, 469 U.S. 854 (1984).

Plaintiffs argue that they are entitled to a new trial because the Court committed error when it denied Plaintiffs' requested jury instruction, and failed to instruct the jury that they could consider a violation of building codes and standards as evidence of Defendants' negligence. Additionally, Plaintiffs claim that they are entitled to a new trial because the jury's verdict was against the weight of the evidence.

Plaintiffs' Requested Jury Instruction

Plaintiffs claim that the Court committed error in denying Plaintiffs' request to give the jury the following instruction:

If you find that the steps on the defendants premises did not comply with commonly accepted engineering and/or architectural standards which would relate to either the height or the width of the risers, than you must find that the defendants were negligent.

In support of this requested instruction, Plaintiffs cited Fisher v. Findlay, 319 Pa. Super. 214, 465 A.2d 1306 (1983).

The Court properly denied Plaintiffs' request, as Plaintiffs' proposed instruction does not accurately state the relevant law. The law is well-settled that an owner or occupier of land is subject to liability for physical harm caused to his invitee only if (a) the owner or occupier knew or should have known of a condition on the premises which presented an unreasonable risk of harm to the invitee, (b) knew or should have known that the invitee would not discover or realize the danger of this condition, and (c) failed to exercise reasonable care to protect the invitee against that danger. Restatement (Second) of Torts § 343; See Beary v. Pennsylvania Elec. Co., 322 Pa. Super. 52, 469 A.2d 176, 179 (Pa. Super. 1983).

Under Plaintiffs' requested instruction, the jury would have been required to find Defendants' liable if they found that the stairway did not comply with commonly accepted engineering standards. The jury would not have been allowed to consider whether Defendants knew or should have known of the existence of

a condition which presented an unreasonable risk of harm. Furthermore, the jury would not have been allowed to consider whether Defendants should have expected that Plaintiff himself would not discover the danger. Plaintiffs' requested instruction is, in effect, a form of strict liability, requiring a finding of liability upon the finding of a condition which does not conform to commonly accepted engineering standards.

Plaintiffs' reliance on Fisher v. Findlay, 319 Pa. Super. 214, 465 A.2d 1306 (1983), in support of their requested instruction is misplaced. The court in Fisher did not hold that a jury must find an owner or occupier liable for negligence if the jury finds that there was a condition on the premises which violated accepted building or maintenance standards. In Fisher, the Pennsylvania Superior Court held that the trial court committed error in granting a compulsory non-suit against a plaintiff who fell down a stairway when the plaintiff (a) presented evidence that the stairway presented an unreasonable risk of harm in that the stairway did not conform to engineering and architecture standards, (b) presented undisputed evidence that defendants knew or should have known of this danger, and (c) presented evidence that defendants had reason to believe that plaintiff would not discover the danger. 319 Pa. Super. at 222-223, 465 A.2d at 1310. Accordingly, the Superior Court's opinion in Fisher is consistent with the well-settled law regarding the

duty which an owner or occupier of land owes to an invitee.

Fisher does not support Plaintiffs' proposed instruction.

Plaintiffs argue that, even if the Court did not commit error in denying their requested instruction, the Court committed error in failing to instruct the jury that they could consider the code violations as "some evidence of negligence." Plaintiffs raise this issue for the first time in their post-trial motion. At trial, Plaintiffs made no request that the Court instruct the jury that they could consider a failure to comply with the relevant building codes as evidence of negligence. Moreover, Plaintiffs made no objection when the Court delivered its charge to the jury without said instruction. Generally, courts have held that a party who has failed to object to jury instructions or to request a specific instruction at the underlying trial waives the right to subsequently request such an instruction in a post-trial motion. See, e.g., Philadelphia Fast Foods v. Popeye's Chicken, 647 F.Supp. 216, 228 (1986).

However, the Court wishes to make clear that its instructions clearly permitted the jury to consider the testimony concerning code violations. As noted above, the Court delivered the following instruction regarding negligence:

Negligence is the doing of some act which a reasonably prudent person would not do, or it is the failure to do something which a reasonably prudent person would do when prompted by consideration which would ordinarily regulate the conduct of human affairs. Negligence is, in other words, the failure to use

ordinary care under the circumstances in the management of one's person or property, or of agencies under one's control.

Ordinary care is a relative term, not an absolute one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence of the case. In this case, I instruct you that the owner/occupier of the premises where the stairs are located had a duty to exercise reasonable care to keep the stairway in a reasonably safe condition.

The burden is on the Plaintiff to prove by a preponderance of the evidence that the condition of the stairway where he fell presented an unreasonable risk of harm to him. The burden is also on the Plaintiff to prove by a preponderance of the evidence that the Defendants knew about this condition, or through the exercise of reasonable care, should have known about the condition. Additionally, the burden is on the Plaintiff to prove by a preponderance of the evidence that Defendants should have expected that the Plaintiff would not have discovered or realized the condition of the stairs or would have failed to protect himself against it.

The Court thus instructed the jury to consider any and all evidence which it found relevant in determining whether Plaintiff proved by a preponderance of the evidence that Defendants were negligent in connection with the subject stairway. The Court permitted Plaintiffs to raise the issue of code violations in their closing argument, and Plaintiffs' counsel did raise the issue. Accordingly, there was no need for the Court to specifically instruct the jury that they could or should consider evidence of BOCA code violations as evidence of Defendants' negligence. The instructions which the Court delivered to the jury were more than adequate.

Plaintiffs' Claim that the Verdict Was Against the Great Weight of the Evidence

Plaintiffs also claim that they are entitled to a new trial on the grounds that the verdict in favor of Defendants was against the great weight of the evidence presented at trial. In considering a motion for a new trial based on a claim that the verdict was against the weight of the evidence, the Judge "is free to weigh the evidence for himself," and, accordingly, "is not required to take the view of the evidence most favorable to the verdict-winner." 11 Wright, et al, Federal Practice & Procedure, Civ.2d § 2806 (1995). However, "[t]he mere fact that the evidence is in conflict is not enough to set aside the verdict," and "the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." Id.

In the instant case, the Court has determined that the jury's verdict was in accord with the great weight of the evidence. Plaintiffs had the burden to prove by a preponderance of the evidence that the stairway from which Plaintiff fell presented an unreasonable risk of harm, and that Defendants knew or should have known of this danger. Additionally, Plaintiffs had the burden to prove by a preponderance of the evidence that Defendants knew or should have known that Plaintiff would not discover the danger or would fail to protect himself against it.

Plaintiff did not present sufficient evidence for the jury to find that Defendants knew or should have known that the stairway presented an unreasonable risk of harm. Both George Wetherill and David Zabrowski testified that they did not believe the stairway presented an unreasonable risk of harm, and did not believe that the stairway was likely to cause an accident. Moreover, Barry Lehr, another delivery man who delivered flowers to Doylestown Florabunda, testified that he had used the subject stairway on many occasions without incident. Mr. Lehr testified that, in his opinion, the stairway did not present an unreasonable risk of harm. Accordingly, Plaintiff failed to prove by a preponderance of the evidence that Defendants knew or negligently failed to discover a condition in the stairway which presented an unreasonable risk of harm.

Although Plaintiff called Norman Goldstein to testify to his opinion that the stairway did present an unreasonable risk of harm, defense counsel's cross-examination of Mr. Goldstein cast considerable doubt on his testimony. Under cross-examination, Mr. Goldstein admitted that he had not reviewed all of the evidence in the instant case, including Plaintiff's deposition testimony. Furthermore, Mr. Goldstein admitted that he had been paid a substantial fee to testify in the instant action and had testified in several similar legal actions involving falls from stairways. Additionally, Mr. Goldstein admitted that his report

in the instant case included several "boilerplate" statements which he had used in other expert reports prepared in connection with other actions.

Moreover, assuming for the purpose of this motion that Defendants knew or should have known about a condition in the stairway which presented an unreasonable risk of harm, Plaintiffs did not present sufficient evidence that Defendants should have expected that Plaintiff himself would not discover the danger of said condition. The undisputed evidence at trial revealed that Plaintiff had seen the subject stairway on several occasions, and had often delivered flowers while standing at the base of the stairway. Although Mr. Prunty testified that he had never walked up or down the full flight of stairs before the time of his accident, his testimony was directly contradicted by the testimony of David Zabrowski, the owner of Doylestown Florabunda. Mr. Zabrowski testified that, before the date of Plaintiff's accident, Plaintiff had walked up and down the full flight of stairs on several occasions when he had come into the store to use the telephone or get a drink of water. Accordingly, there was ample evidence that Defendants could have reasonably expected Plaintiff himself to discover any condition in the stairway which presented an unreasonable risk of harm.

#### CONCLUSION

For the reasons stated above, the Court will deny Plaintiffs' post-trial motion for a new trial pursuant to Fed.R.Civ.P. 59. As stated above, the Court properly denied Plaintiff's requested instruction. Additionally, the great weight of the evidence presented at trial supported the jury's finding in favor of Defendants. Accordingly, the Court will deny Plaintiff's motion.

An appropriate Order follows.

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<b>CARLA PRUNTY, h/w</b>	<b>:</b>	
<b>Plaintiffs</b>	<b>:</b>	
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<b>and GEORGE WETHERILL,</b>	<b>:</b>	
<b>Defendants</b>	<b>:</b>	

**O R D E R**

**AND NOW,** this 14th day of July, 1998; upon consideration of Plaintiffs' post-trial motion for a new trial pursuant to Fed.R.Civ.P. 59 and Defendants' responses thereto; and for the reasons set forth in the Court's accompanying memorandum;

**IT IS ORDERED:** Plaintiff's post-trial motion for a new trial pursuant to Fed.R.Civ.P. 59 is **DENIED.**

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**RAYMOND J. BRODERICK, J.**