

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

FRANCIS E. MACK,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 97-5222
	:	
v.	:	
	:	
WAL-MART STORES, INC.	:	
	:	
Defendant.	:	

OMNIBUS MEMORANDUM

BUCKWALTER, J.

February 9, 1999

Presently before the Court are three post-trial motions: (1) Defendant's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) or, in the alternative, for a new trial or remittitur pursuant to Fed. R. Civ. P. 59; (2) Plaintiff's Motion for Delay Damages; and (3) Defendant's Motion for Stay of Proceedings to Enforce a Judgment pursuant to Fed. R. Civ. 62.

For the reasons discussed below, Defendant's motion for judgment as a matter of law, a new trial, or remittitur is DENIED in its entirety. Furthermore, the judgment of \$765,000 will be MODIFIED to reflect additional delay damages in the amount of \$36,835.27 and Defendant's motion for a stay of the proceedings will be GRANTED.

I. BACKGROUND

Plaintiff Francis E. Mack filed this negligence action, alleging that he suffered aggravating back injuries when he slipped and fell on water and debris (napkins and a packaging strap) in Defendant Wal-Mart Stores, Inc.'s Whitehall location in Lehigh County at approximately 1:00 a.m. on December 6, 1996. A two-day jury trial on liability and damages ensued beginning on Thursday, October 22, 1998. Plaintiff presented six witnesses: four eyewitnesses to the accident and two Wal-Mart managers who were on duty at the time of the incident. Plaintiff also played the videotaped deposition of his orthopedic surgeon. Defendant presented two witnesses, both of whom were Wal-Mart employees present at the Whitehall store the night of the accident.

At the close of Defendant's case, the jury was dismissed for lunch, and Defendant moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), which this Court denied. See Trial Tr. Vol. 2 at 145 (attached as Exhibit 2 to Def.'s Mem.). After being charged, the jury deliberated for the remainder of the second day, continued the following Monday, and returned with a verdict on October 26, 1998 for Plaintiff in the amount of \$900,000, which was adjusted to \$765,000 to reflect Plaintiff's 15% comparative negligence. Judgment was entered for Plaintiff that same day.

II. JUDGMENT AS A MATTER OF LAW, NEW TRIAL, OR REMITTITUR

A. Judgment as a Matter of Law

Defendant moves for judgment as a matter of law in its favor on the ground that Plaintiff failed to adduce evidence establishing that Wal-Mart created the debris or had actual or

constructive notice of the debris. See Def.'s Mem. at 22-26. A careful review of the trial transcript, however, reveals otherwise.

A court may grant a motion for judgment as a matter of law if “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 that issue.” Fed. R. Civ. P. 50(a). A court may entertain a renewed motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b)

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 reasonably could find liability. In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version.

McDaniels v. Flick, 59 F.3d 446, 453 (3d Cir. 1995), cert. denied, 516 U.S. 1146 (1996).

The issue is whether Defendant had actual or constructive notice of the condition of its floor at the time of Plaintiff's accident. Under Pennsylvania law, an invitee, such as Plaintiff here, must establish that the defendant knew or reasonably should have known of the presence of the condition of the floor that allegedly caused the slip and fall, or that the defendant created that condition. See, e.g., Martino v. Great Atl. & Pac. Tea Co., 213 A.2d 608, 610 (Pa. 1965). That is, the defendant must have notice of a harmful condition before tort liability can be found. Where the evidence indicates that the condition of the floor is traceable to individuals other than for whom the defendant is accountable, the defendant is not liable absent other evidence which tends to prove that the defendant 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 defendant should have known about it. See Trial Tr. Vol. 2 at 204-05 (charging jury on elements of notice).

At trial, Plaintiff and two eyewitnesses testified that he had fallen on debris, including napkins and a plastic packaging strap, and what appeared to be a wet floor. See Trial Tr. Vol. 1 at 41, 46, 137, 207 (attached as Exhibit 1 to Def.'s Mem.). He "also testified and demonstrated via photograph that there were boxes in the area where he fell that had similar plastic packaging straps." See Pl.'s Mem. at 17-18 (citing Trial Tr. Vol. 1 at 100). One of the Wal-Mart managers that evening also "testified that many of the boxes have plastic straps around them . . . [and] that the store was open for business when Mr. Mack fell, during which time the trucks were being unloaded and merchandise was being moved to the floor and unpacked during this time." Id. at 18 (citing Trial Tr. Vol. 2 at 6-8, 11).

Another witness demonstrated through a photograph that employees were present by cash registers at the end of the aisle in which Plaintiff fell, see Trial Tr. Vol. 1 at 178-79, from which it is reasonable to infer that employees could see up the aisle and become aware of the debris. Plaintiff also presented four witnesses testifying as to the presence of a mop and bucket at the end of the aisle, see Trial Tr. Vol. 1 at 45, 140, 184, 207, from which it is reasonable to infer "that either someone failed to properly clean the floor or simply made it to the aisle but never cleaned it," Pl.'s Mem. at 18.

Viewing the evidence in the light most favorable to Plaintiff, and giving him the advantage of every fair and reasonable inference from the testimony presented at trial, there is sufficient evidence from which a jury reasonably could find that Plaintiff had fallen on debris put

on the floor by an employee of Defendant. Having thus established that Defendant had actual notice of the condition of the floor that caused the slip and fall, tort liability was properly found.

B. New Trial or Remittitur

Alternatively, Defendant moves for a new trial or remittitur pursuant to Fed. R. Civ. P. 59 because: (1) the Court improperly denied Defendant the right to a full and fair examination of Plaintiff concerning the cause of his failed business; (2) the Court's jury instructions on aggravation of pre-existing injuries was prejudicial error; (3) the jury's verdict was excessive and against the weight of the evidence; and (4) liability and damages are hopelessly intertwined with the issues of causation and the extent of Plaintiff's aggravation.

A new trial may be granted when there is legally sufficient evidence to support the verdict, thus foreclosing judgment as a matter of law, but the verdict is contrary to the great weight of the evidence; that is, "where 'a miscarriage of justice would result if the verdict were to stand.'" Olefins Trading, Inc. v. Han Yang Chem Corp., 9 F.3d 282, 289 (3d Cir. 1993) (quoting Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 211 (3d Cir. 1992)). Although the decision whether to grant a new trial "is confided almost entirely to the discretion of the district court," Blancha v. Raymark Indus., 972 F.2d 507, 512 (3d Cir. 1992), the trial court may not substitute its "judgment of the facts and the credibility of the witnesses for that of the jury," Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir.) (in banc), cert. denied, 364 U.S. 835 (1960). Additionally, a jury verdict may not be overturned as against the clear weight of the evidence unless "the verdict, on the record, cries out to be overturned or shocks our conscience." Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991). It is an insufficient basis to reverse a jury's award of damages simply because the court finds that an award is

extremely generous, or that the court would have found the damages to be considerably less. See Walters v. Mintec/Int'l, 758 F.2d 73, 80 (3d Cir. 1985).

When the basis of a motion for a new trial is an alleged error involving a matter within the sound discretion of the trial court, such as the court's evidentiary rulings or points of charge to the jury, the trial court has wide latitude in ruling on the motion. See Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 921-22 (3d Cir. 1986). The court must determine (1) whether an error was in fact made, and (2) whether the error was so prejudicial that a refusal to grant a new trial would be "inconsistent with substantial justice." Fed. R. Civ. P. 61. To constitute proper grounds for granting a new trial the error or defect must "affect the substantial rights of the parties." Id.

1. Right to Re-examine Plaintiff

Defendant contends that the Court improperly denied it the right to a full and fair examination of Plaintiff concerning the cause of his failed business. See Def.'s Mem. at 20-22. Because defense counsel did not properly object to this ruling, the Court declines to grant a new trial on this ground.

During Plaintiff's direct examination, defense counsel objected to Plaintiff's counsel's attempt to elicit testimony concerning any lost income from his failed business. Before the Court could formally rule on the objection, Plaintiff's counsel volunteered to move onto another topic. See Trial Tr. Vol. 1 at 73-74. He subsequently questioned Plaintiff on the non-economic aspects of the business, which included the following testimony:

MR. BAUER: Were you able after this accident at Wal-Mart to do your job at the ceramic business?

PLAINTIFF: No, not 100 percent.

Q: Okay, what aspects were you unable to do?

A: The pouring end of it. What happened is from approximately January through July I would come down, maybe I'd make it down for maybe an hour, two hours and I'd have to go back upstairs. I couldn't, stand, sit or walk that long.

Q: And --

A: Up until my surgery in August and I haven't been back since August.

Q: Okay, so you have not worked at this business since August of 1997?

A: No, not at all.

Q: Okay and did Guy keep the business going?

A: Yes, he tried to keep it going.

Q: And is it still going on?

A: No, we just gave up the business October 16th, this past Friday.

Id. at 74-75. Plaintiff later testified that his parents have been financially supporting him ever since his business failed and he was rendered unable to work. See id. at 76.

Defendant sought to re-call Plaintiff to the stand at the close of its case-in-chief, but this Court denied that request. Believing that "Plaintiff wanted the jury to believe that his injury directly led to the failure of his ceramics business," Def.'s Mem. at 21, Defendant claims that it was entitled to cross-examine Plaintiff regarding the reasons for the failure of his ceramics

business. Specifically, Defendant claims that it indicated to the Court in a side-bar conference that Plaintiff's tax returns for the years leading up to the incident reflected a steady decline in the business. However, the Court has no independent recollection of such an offer of proof and, in any event, the record discloses only the following discussion:

THE COURT: Now what's the purpose of recalling Mr. Mack?

MR. WEINBERG: There's some information that I would like to add to the income, the lost income that he --

THE COURT: Well, I thought there was no -- there's no lawsuit on that point.

MR. WEINBERG: Didn't --

THE COURT: I'm not even going to charge the jury on that because you haven't given them any information on which I can have it.

MR. WEINBERG: Right. Okay.

Trial Tr. Vol. 2 at 144.

Therefore, as defense counsel failed to object properly on the record, let alone state with any specificity the grounds for any objection, the Court finds that no error was in fact made. Even assuming that defense counsel had properly presented an offer of proof at trial, the denial of the right to cross-examine Plaintiff on this discrete issue was not so prejudicial that a refusal to grant a new trial would be "inconsistent with substantial justice."

2. Jury Instructions on Aggravation of Pre-existing Injuries

Defendant next contends that the Court's jury instructions on aggravation of pre-existing injuries was prejudicial error. See Def.'s Mem. at 11-17. Here, once again, defense counsel's failure to object properly to the charge precludes a granting of a new trial.

In their pretrial memoranda, the parties presented their respective proposed charges regarding the aggravation of damages based on a prior existing condition. Upon considering these proposals, the Court ruled at the close of Defendant's case-in-chief that Plaintiff's charge would be adopted:

MR. BAUER: The only other one that I think is of any consequence on that, we've look at these, is the -- our last one on the aggravation of a preexisting condition. There's no medical testimony put on by the defendant of any --

THE COURT: No, I think your charge is correct there.

MR. BAUER: Yeah, okay.

MR. WEINBERG: Your Honor, I think the --

THE COURT: Now, I've already ruled on that, I'm giving him the aggravation prior existing condition here charged that the plaintiff has asked and the defendant has an objection, I'm not giving them one he's requested. All right. So that's it, gentlemen. I think that's about it. Is there anything else?

Trial Tr. Vol. 2 at 149-50. While the Court acknowledged defense counsel's objection to not having its charge granted and gave both counsel an opportunity to raise other issues for discussion, defense counsel notably did not pursue the aggravation of damages charge further. After the Court charged the jury, both counsel were again given an opportunity to request any "additions or corrections to the charge," *id.* at 212, but neither party raised an objection regarding the aggravation of damages charge.

Federal Rules of Civil Procedure 51 unequivocally states that "[n]o 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." Thus, as defense counsel failed to object before the jury retired to consider its verdict, no error was made. Even if defense counsel's earlier objection could be construed as the objection required under Rule 51, counsel neglected to place the grounds for the objection on the record.

3. Excessive Verdict

Defendant also attacks the amount of the jury's verdict as excessive and against the weight of the evidence. *See* Def.'s Mem. at 17-20. Under the unique facts and circumstances of this case, which included unrebutted medical testimony and extensive averments concerning Plaintiff's pain and suffering, the Court finds that the verdict neither "cries out to be overturned," nor does it "shock the conscience." Indeed, it cannot be said that the verdict is against the clear weight of the evidence and thus, neither a new trial nor a remittitur will be granted.

4. Intertwining of Liability and Damages

Finally, Defendant contends that, because liability and damages are hopelessly intertwined with the issues of causation and the extent of Plaintiff's aggravation, a new trial should be granted on all issues. See Def.'s Mem. at 27. The Court finds this argument meritless.

The subject matter of this litigation is simple and within a layman's understanding. Specifically, the issues of negligence and its concomitant component of causation were presented to the jury in a straightforward manner. While liability and damages were contested by the parties, and admittedly, are intertwined as elements of Plaintiff's prima facie case, the jury's resolution of them did not involve complex factual determinations such that, according to Defendant, "prejudice permeated the entire verdict." Id. A new trial is unwarranted.

III. DELAY DAMAGES

Plaintiff also moves for additional delay damages pursuant to Pa. R. Civ. P. 238. That rule provides for the calculation of such damages from one year after the date Defendant was first served with original process. See Pa. R. Civ. P. 238(a)(2)(ii). The rule further provides that damages for delay shall be calculated at the rate equal to one percent above 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. See Pa. R. Civ. P. 238(a)(3).

Defendant was served with original process on April 24, 1997, and the \$765,000 verdict was rendered by the jury on October 26, 1998. This represents a total of 185 elapsed days. Additionally, Plaintiff proffers that one percent above the prime rate published in the first

edition of the Wall Street Journal for the year 1998 was 9.5%. Thus, the delay damages, calculated according to the following formula, amounts to:

$$(\$765,000 \times 9.5\%) \times (185 \text{ days} / 365 \text{ days}) = \$36,835.27.$$

Defendant has informed the Court of its intention not to oppose the motion inasmuch as it agrees that this amount has properly been calculated. Accordingly, the judgment in the amount of \$765,000 will be MODIFIED to reflect additional delay damages in the amount of \$36,835.27.

IV. STAY OF THE PROCEEDINGS

Finally, Defendant additionally moves pursuant to Fed. R. Civ. P. 62 for a stay of the proceedings to enforce the judgment pending the disposition of the post-trial motions and, if necessary, an appeal. Plaintiff has informed the Court of his intention not to oppose the motion inasmuch as Defendant has posted a supersedeas bond in an amount that will permit satisfaction of the judgment in full, together with costs, post-judgment interest, and delay damages.

Accordingly, the Court approves the supersedeas bond and Defendant's motion is GRANTED.

V. CONCLUSION

For the foregoing reasons, Defendant's motion for judgment as a matter of law, new trial, or remittitur is DENIED in its entirety. Furthermore, the judgment is MODIFIED to reflect additional delay damages and a stay of the proceedings to enforce the judgment is GRANTED. An appropriate order follows.

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

FRANCIS E. MACK,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 97-5222
	:	
v.	:	
	:	
WAL-MART STORES, INC.	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 9th day of February 1999, upon consideration of Defendant's Motion for Judgment Pursuant to Rule 50(b) and For New Trial or Remittitur Pursuant to Rule 59 (Docket No. 28), Plaintiff's response thereto (Docket No. 29), and Defendant's reply memorandum (Docket No. 30), it is hereby ORDERED that Defendant's motion is DENIED in its entirety, in accordance with the accompanying memorandum.

IT IS FURTHER ORDERED that, upon consideration of Plaintiff's Motion for Delay Damages (Docket No. 22) and Defendant having informed the Court of its intention not to oppose the motion, Plaintiff's motion is GRANTED. The judgment entered in favor of Plaintiff and against Defendant in the amount of \$765,000 is MODIFIED to reflect additional delay damages in the amount of \$36,835.27, so that the total award is \$801,835.27.

IT IS FURTHER ORDERED that, upon consideration of Defendant's Motion for Stay of Proceedings to Enforce a Judgment (Docket No. 27) and Plaintiff having informed the Court of his intention not to oppose the motion, Defendant's motion is GRANTED. The Court approves Defendant's supersedeas bond and a stay of the proceedings pending any appeal pursuant to Fed. R. Civ. P. 62 is now effective.

The Clerk of Court shall mark this case CLOSED.

BY THE COURT:

RONALD L. BUCKWALTER, J.