NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

FRANCINE BIONDI, TRUSTEE AD LITEM/ ADMINISTRATRIX ON BEHALF OF THE ESTATE OF ROSANNE M. JABLANOFSKY, AND ALL OTHERS IN INTEREST AND FRANCINE BIONDI IN HER OWN RIGHT AND LISA HERBST, Appellants v. MOTORCYCLE SAFETY SERVICES, INC. AND MILLERSVILLE UNIVERSITY, PA TURNPIKE COMMISSION, COMMONWEALTH OF PENNSYLVANIA, STEPHEN F. YAVOR, MARK BRZOZOWSKI AND JAMES PALMER, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 618 EDA 2013

Appeal from the Judgment Entered April 1, 2013
In the Court of Common Pleas of Montgomery County
Civil Division at No(s): 2001-02691

BEFORE: BENDER, P.J.E., PANELLA, J., and LAZARUS, J.

MEMORANDUM BY BENDER, P.J.E. **FILED MARCH 28, 2014**

Francine Biondi, as trustee *ad litem* and administratrix of the Estate of Roseann M. Jablanofsky, and in her own right, and Lisa Herbst (collectively, Appellants) appeal from the judgment entered April 1, 2013,[1] following a

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[1] Appellants purport to appeal from an order denying their post-trial motions, signed December 21, 2012, and filed December 24, 2012. ***See*** Notice of Appeal, 01/21/2013. "Orders denying post-trial motions, however, are not appealable. Rather, it is the subsequent judgment that is the
(Footnote Continued Next Page)

jury verdict in favor of Appellees, Motorcycle Safety Services, Inc., Millersville University, Mark Brzozowski, and Stephen F. Yavor, in this wrongful death and survival action.[2] We affirm.

Roseann M. Jablanofsky died tragically in an accident that occurred while she was participating in a motorcycle safety training program in July 1998. Appellants filed an amended complaint in June 2001, alleging negligence and recklessness. Ultimately, a jury trial commenced in March 2011.

The evidence adduced at trial established that Mrs. Jablanofsky had little or no experience operating a motorcycle. She enrolled in a safety program, offered by Motorcycle Safety Services, Inc., in order to accompany her husband on motorcycle rides. Mr. Jablanofsky was an experienced rider. According to him, Mrs. Jablanofsky wanted to learn so that she would be able to control the motorcycle if something ever happened to him.

(Footnote Continued) ———————————

appealable order when a trial has occurred." ***Harvey v. Rouse Chamberlin, Ltd.***, 901 A.2d 523, 524 n.1 (Pa. Super. 2006) (quoting ***Cauthorn v. Owens Corning Fiberglas Corp.***, 840 A.2d 1028, 1030 n.1 (Pa. Super. 2004)). Judgment was not entered until April 1, 2013, thus Appellants' notice of appeal was filed prematurely. Nevertheless, we will address the appeal because judgment has been entered on the verdict. ***Id.*** (citing ***Mount Olivet Tabernacle Church v. Edwin L. Wiegand Div.***, 781 A.2d 1263, 1266 n.3 (Pa. Super. 2001)).

[2] Appellants withdrew their claims against the Pennsylvania Turnpike Commission, the Commonwealth of Pennsylvania, and James Palmer.

The safety program consisted of both classroom instruction and riding practice. The riding portion of the program was held in a parking lot adjacent to the Pennsylvania Turnpike. Prior to riding, Mrs. Jablanofsky signed a waiver of liability. The waiver provided in part:

> I fully understand and acknowledge that: (a) risks and dangers exist in my use of motorcycles and motorcycle equipment and my participation in the Motorcycle Rider Education Class activities; [and] (b) my participation in such activities and/or use of such equipment may result in injury or illness including, but not limited to bodily injury, disease, strains, fractures, partial and/or total paralysis, death or other ailments that could cause serious disability[.]

Trial Exhibit D-7 at 1; ***see also*** Notes of Testimony (N.T.), 03/23/2011 a.m., at 79; N.T., 03/23/2011 p.m., at 93, 97-98. The entire text of the waiver was admitted into evidence for the limited purpose of establishing that Mrs. Jablanofsky understood and accepted the risks associated with operating a motorcycle.[3] During his testimony, Mr. Jablanofsky testified that his wife signed and understood the waiver. N.T., 03/28/2011 a.m., at 44-50. In addition to the signed waiver, Appellees presented evidence that all

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[3] Prior to trial, Appellees sought summary judgment on the ground that the waiver signed by Mrs. Jablanofsky was valid and precluded a finding of liability against them. ***See*** Appellees' Motion for Summary Judgment. The trial court denied summary judgment. ***See*** Trial Court Order, 04/22/2004, at 1 (J. Branca). Thereafter, Appellants filed a motion *in limine* seeking to prevent Appellees from introducing the waiver into evidence. The trial court denied the motion *in limine*, concluding that the waiver was admissible and relevant to the issue of assumption of the risk. We note further that Appellants did not seek to preclude or redact that portion of the waiver addressing liability.

participants in the safety program were shown a video that warned of the risks associated with operating a motorcycle, and all participants were verbally warned. Testimony also established that Mrs. Jablanofsky's family expressed concerns for her safety. ***See, e.g.,*** N.T., 03/28/2011 a.m., at 69.

At some point during the riding class held on July 12, 1998, Mrs. Jablanofsky was "counseled out" of the class by its instructors, Mark Brzozowski and Stephen F. Yavor, who determined that she was too nervous to control properly the motorcycle. The instructors advised Mrs. Jablanofsky that she could return at a later date for further practice. This, she did. Mrs. Jablanofsky practiced again on July 23, 1998, without incident. However, on July 24, 1998, while practicing during a remedial class, Mrs. Jablanofsky was unable to maneuver her motorcycle through the safety course. She lost control of her motorcycle; failed to apply the brake properly; struck a guardrail beyond the safety course; and suffered serious injuries that resulted in her death.

Appellants presented testimony from motorcycle safety experts, suggesting that the presence of a guardrail near the safety course was inappropriate. According to Appellants' experts, impact with the guardrail was foreseeable and nearly certain to result in injury.

Appellees offered the testimony of Mr. Joseph Filippino, a civil engineer with over thirty years professional experience in highway design and maintenance, as an expert in guardrails. Over Appellants' objection, the trial

court recognized him as an expert for that purpose.[4] Mr. Filippino testified that the guardrail was present in order to prevent vehicles of any kind from falling into an adjacent ravine and that it met the relevant governmental and industry standards.

Following deliberations, the jury returned a verdict in favor of Appellees, finding no negligence.[5] Appellants filed post-trial motions, thereafter denied by the trial court. Appellants appealed and filed a court-ordered Rule 1925(b) statement. The trial court issued a responsive opinion.

Appellants seek a new trial on the following grounds: (1) the trial court erred in permitting Appellees to introduce into evidence the waiver signed by Mrs. Jablanofsky; (2) the trial court erred in charging the jury on the issue of assumption of the risk; (3) the trial court erred in permitting Appellees to introduce expert testimony regarding guardrail safety; and (4) the verdict

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[4] Appellants objected that Mr. Filippino was not an expert in motorcycle safety.

[5] The verdict slip presented a series of questions for the jury to answer. Question 1 asked whether defendants were negligent, and then proceeded to list each defendant. The jury answered "no" for each defendant. No other questions were answered.

was against the weight of the evidence. ***See*** Appellants' Brief at 4, 29, 46, 51, and 54.[6]

Our standard of review is well established:

> Trial courts have broad discretion to grant or deny a new trial. … Although all new trial orders are subject to appellate review, it is well-established law that, absent a clear abuse of discretion by the trial court, appellate courts must not interfere with the trial court's authority to grant or deny a new trial.
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> …
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> An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. A finding by an appellate court that it would have reached a different result than the trial court does not constitute a finding of an abuse of discretion.

Huber v. Etkin, 58 A.3d 772, 776 (Pa. Super. 2012) (quoting ***Harman ex rel. Harman v. Borah***, 756 A.2d 1116, 1121–23 (Pa. 2000)).

Appellants contend that the trial court erred in permitting Appellees to introduce into evidence the waiver signed by Mrs. Jablanofsky. Appellants

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[6] We have edited the questions presented by Appellants for ease of analysis. We caution Appellants that their brief does not conform to Pennsylvania Rules of Appellate Procedure. Appellants failed to divide the Argument section of their brief into "as many parts as there are questions to be argued[,]" as required by Rule 2119(a). Appellants purport to raise eight questions for our consideration yet divide their argument into four sections. Further, Appellants' brief does not provide a concise summary of their arguments. ***See*** Rule 2118. We note that "when defects in a brief impede our ability to conduct meaningful appellate review, we may dismiss the appeal entirely or find certain issues to be waived." ***In re R.D.***, 44 A.3d 657, 674 (Pa. Super. 2012). Nevertheless, we will address the questions presented.

raise numerous arguments in support of this contention. According to Appellants, the waiver is invalid, unenforceable, and inadmissible because it (1) violates public policy; (2) is a contract of adhesion; (3) is ambiguous and overly broad; (4) fails to release all of the named defendants from liability; (5) fails to reference specific risks or dangers to be found on the premises of the safety class; and (6) does not apply to the date on which Mrs. Jablanofsky died. We need not address these arguments, as Appellants misconstrue the basis of the trial court's ruling on the admissibility of the waiver.

As noted, *supra*, the trial court found the waiver admissible for the limited purpose of establishing that Mrs. Jablanofsky understood and accepted the risks associated with operating a motorcycle. The trial court explained its decision, as follows:

> As far as [Appellants'] motion to preclude any evidence of the waiver, it is denied. It is only going to be admitted for purposes of – evidentiary of what her intent was as far as assumption of the risk.
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> …
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> This is not a waiver as far as liability goes. Judge Branca decided it wasn't. It wasn't dispositive on that issue. It is not being introduced for that issue.

N.T., 03/21/2011 a.m., at 3, 8; ***see also*** Trial Court Rule 1925(a) Opinion, 04/30/2013, at 4 ("[T]he waiver was probative as to Decedent's state of mind with respect to the potential hazards involved in the motorcycle safety course, which went to the assumption of the risk.").

Appellants did not challenge the relevance of the waiver for this purpose. Indeed, Appellants introduced portions of the waiver in their presentation of the evidence. ***See*** N.T, 03/23/2011 a.m., at 79. Relevant evidence is admissible, unless prohibited by law. ***See*** Pa.R.E. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ***Commonwealth v. Flamer***, 53 A.3d 82, 88 n.5 (Pa. Super. 2012) (citing Pa.R.E. 401). In light of the unfortunate facts that Mrs. Jablanofsky is deceased and unable to testify, we conclude, as did the trial court, that the waiver was relevant to whether Mrs. Jablanovsky appreciated and assumed the risks inherent to operating a motorcycle. Thus, it was admissible.

Appellants also contend that the trial court erred in charging the jury on the issue of assumption of the risk.[7] According to Appellants, the charge was inappropriate because (1) assumption of the risk is solely a question of law, not fact, and therefore, should not have been submitted to the jury; and (2) a general awareness of the risk of injury is insufficient, and no evidence established that Mrs. Jablanofsky appreciated the specific danger posed by the guardrail.

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[7] We note that it is not clear whether the jury ever reached this question. The verdict slip merely documents the jury's determination that Appellees were not negligent. It offers no insight into the jury's deliberative process.

At trial, Appellants objected to an instruction on assumption of the risk on the ground that, purportedly, no evidence supported a finding that Mrs. Jablanofsky accepted the specific risk of injury posed by the guardrail. ***See*** N.T., 03/25/2011 a.m., at 38-44. This is also the ground raised in Appellants' post-trial motion. Now, for the first time on appeal, Appellants also claim that it was improper to charge the jury on assumption of the risk because it is a question of law to be determined solely by the trial court. Appellants failed to preserve this issue. Accordingly, we decline to address it. ***See Majorsky v. Douglas***, 58 A.3d 1250, 1266 (Pa. Super. 2012) (quoting ***Siegfried v. Borough of Wilson***, 695 A.2d 892, 894 (Pa. Cmwlth. 1997) ("The appellate court may *sua sponte* refuse to address an issue raised on appeal that was not raised and preserved below[.]")).

Appellants also renew their argument that no evidence supported a finding that Mrs. Jablanofsky appreciated the specific danger posed by the guardrail. Their argument rests upon two assertions. First, Appellants maintain that the text of the waiver fails to memorialize an understanding of any specific danger. Second, Appellants assert that the testimony of Mr. Yavor established that the risk of injury posed by the guardrail could not be anticipated by a motorcycle expert. Thus, according to Appellants, if an expert could not appreciate this specific risk of injury, then a jury should not

be permitted to consider whether a novice, such as Mrs. Jablanovsky, could understand and voluntarily assume this risk.[8]

Assumption of the risk is an affirmative defense. ***See Reott v. Asia Trend, Inc.***, 55 A.3d 1088, 1095 (Pa. 2012) (citing Pa.R.Civ.P. 1030(b)); ***see also*** RESTATEMENT (SECOND) OF TORTS, § 496G.

> Voluntary assumption of the risk involves a subjective awareness of the risk inherent in an activity and a willingness to accept it. A plaintiff has voluntarily assumed the risk where he fully understands it and voluntarily chooses to encounter it. For a danger to be known it must not only be known to exist, but it must also be recognized as being dangerous. A plaintiff's knowledge and understanding of the risk, of course, may be shown by circumstantial evidence. *However, whether the plaintiff knows of the existence of the risk, or whether he understands and appreciates its magnitude ... is a question of fact, usually to be determined by the jury under proper instructions from the court.* The court may itself determine the issue only where reasonable men could not differ as to the conclusion.

Mucowski v. Clark, 590 A.2d 348, 350 (Pa. Super. 1991) (internal quotations and citations omitted) (emphasis added); ***see also Berman v. Radnor Rolls, Inc.***, 542 A.2d 525, 533 (1988).

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[8] Appellants cite the testimony of instructor Mr. Yavor:

> [Attorney Moore:] In your wildest dream or imagination … did you ever anticipate that somebody … would strike that guardrail and die?
>
> [Mr. Yavor:] No, sir.

N.T., 03/24/2011 a.m., at 54.

Appellants' argument is not persuasive. To the extent the jury may consider circumstantial evidence, Mr. Yavor's testimony is relevant to whether Mrs. Jablanofsky appreciated and assumed the risk of operating a motorcycle, but in our view, it is not conclusive, nor does it foreclose the question from being submitted to the jury. ***Mucowski***, 590 A.2d at 350. Further, Appellees presented substantial documentary and testimonial evidence in support of their assertion that Mrs. Jablanofsky did appreciate and assume the risk of operating a motorcycle. For example, the signed waiver expressly notes the risk of death; Mrs. Jablanofsky was counseled out of her class by her instructors for safety reasons attributed to her apparent nervousness; and family members expressed their concern for her safety. Nevertheless, Mrs. Jablanofsky persisted in her efforts to learn how to operate a motorcycle. This evidence was sufficient to establish a question of fact, properly submitted to the jury. ***Id.***

In their third question presented, Appellants contend that the trial court improperly permitted Appellees to introduce expert testimony from Mr. Filippino because he had no expertise in motorcycle safety and his purported expertise in guardrails merely confused the relevant issues before the jury. We disagree.

> [I]n the context of legal proceedings, if a witness has any reasonable pretension to specialized knowledge on the relevant subject, he may be offered as an expert witness, and the weight to be given his testimony is for the trier of fact to determine.

Freed v. Geisinger Med. Ctr., 971 A.2d 1202, 1210 (Pa. 2009); ***see also*** Pa.R.E. 702. Here, Appellees established that Mr. Filippino was a civil engineer with more than thirty years of professional experience in highway design and maintenance. His experience qualified him as an expert in the use of guardrails. This expertise is the purpose for which Appellees offered his testimony, and it is the purpose for which the trial court admitted his testimony. Mr. Filippino testified that his expertise was applicable to the proper use of guardrails in parking lots.[9] In accordance with his expertise, Appellees solicited Mr. Filippino's expert testimony concerning the purpose and condition of the guardrail that injured Mrs. Jablanofsky and caused her death. Thus, Appellants' suggestion that Mr. Filippino's testimony was irrelevant or confusing to the jury strains credulity. The relative weight to be given his testimony was for the jury to determine. ***Freed***, 971 A.2d at 1210.

Finally, Appellants seek a new trial based on the weight of the evidence, boldly claiming that Appellees admitted negligence.[10] However, Appellants do not provide this Court with the relevant standard governing our review, nor do they develop an argument or offer any authority in support of their requested relief. Rather, Appellants merely provide a

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[9] Appellants did not dispute this claim.

[10] In this regard, Appellants again cite to excerpts from Mr. Yavor's testimony.

summary of their evidence. Thus, we deem this claim waived. ***See J.J. DeLuca Co., Inc. v. Toll Naval Assocs.***, 56 A.3d 402, 411 (Pa. Super. 2012) (citing Pa.R.A.P. 2119(a)); ***see also Commonwealth v. Beshore***, 916 A.2d 1128, 1140 (Pa. Super. 2007) ("We shall not develop an argument for [the appellant.]").

> Absent waiver, our review of Appellants' claim is limited.
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> > The general rule in this Commonwealth is that a weight of the evidence claim is primarily addressed to the discretion of the judge who actually presided at trial. There is, of course, some tension between the power of trial courts to overturn jury verdicts premised upon weight claims, and the bedrock principle that questions of credibility are exclusively for the fact-finder. Accordingly, the authority of the trial judge to upset a verdict premised upon a weight claim is narrowly circumscribed. A trial judge cannot grant a new trial because of a mere conflict in testimony or because the trial judge on the same facts would have arrived at a different conclusion. Instead, a new trial should be granted only in truly extraordinary circumstances, *i.e.*, when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

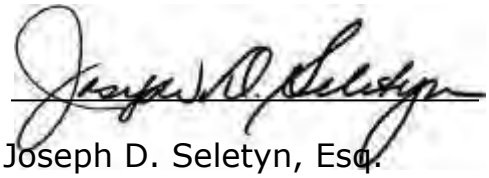
Armbruster v. Horowitz, 813 A.2d 698, 702-703 (Pa. 2002) (internal quotations and citations omitted). Although "an appellate court may review whether the trial court abused its discretion in deciding a weight claim, its role is not to consider the underlying question in the first instance." ***Id.*** Moreover, the Pennsylvania Supreme Court has emphasized that the decision of the trial court regarding an appellant's request for a new trial based upon the weight of the evidence is "one of the least assailable" decisions of the trial court. ***Id.***

We have reviewed the entire record and conclude that Appellants' contention is without merit. As noted by the trial court, Mr. Yavor's testimony does not suggest an admission of negligence. ***See*** Trial Court Rule 1925(a) Opinion at 8-9. Further, more generally, our review has uncovered no truly extraordinary circumstances such as would justify a new trial in this case, and the jury's verdict does not "shock one's sense of justice." ***Armbruster***, 813 A.2d at 703.

For the above stated reasons, we conclude that Appellants' assertions of trial court error are without merit. Moreover, the jury's verdict does not shock one's sense of justice. Accordingly, we discern no abuse of the court's discretion in denying Appellants' motion for a new trial.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/28/2014