NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MABLE JONES, Appellant v. SMITH & WOLLENSKY, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2007 EDA 2012

Appeal from the Judgment Entered June 8, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): March Term, 2008 No. 05072

BEFORE: STEVENS, P.J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY STEVENS, P.J. **FILED JULY 29, 2013**

This is an appeal from the judgment entered by the Court of Common Pleas of Philadelphia County in Appellant's slip-and-fall case against Appellee restaurant. Awarded just over $3,000 in medical expenses after a jury found the restaurant liable but Appellant 49% contributorily negligent, Appellant charges error with the court's refusal to set aside or modify the verdict on the strength of her trial testimony, to which the jury failed to give appropriate credit. Because an appellate court lacks authority to disturb a fact-finder's credibility determinations in this regard, however, we affirm.

The trial court provides an apt recitation of facts and procedural history as follows:

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* Retired Senior Judge assigned to the Superior Court.

This is a premises liability case that was initiated by Plaintiff, Mable Jones, against Defendant, restaurant, Smith and Wollensky, by Complainant dated April 7, 2008. Plaintiff alleged that she sustained severe brain injuries due to an alleged fall on water on the floor of the restaurant. Plaintiff, who is a neuroradiologist, was unable to secure any independent expert testimony to confirm her claimed brain injuries, nor was she able to produce any definitive radiological diagnostic tests to show her alleged injuries were as severe as she claimed they were at trial. Because Plaintiff is a medical professional, the trial court allowed Plaintiff latitude at the trial to testify as an expert on her own behalf. The jury, however, did not find Plaintiff's expert or lay testimony on her own behalf to be credible, and found her injuries to be minimal. The jury also found that Plaintiff contributed by her own negligence to the minor injuries she was found to have sustained at the time of her fall.

The jury trial was commenced in this civil matter [] on November 7, 2011 before the Honorable Esther R. Sylvester, S.J. On November 8, 2011, the jury rendered a verdict in favor of the Plaintiff, Mable Jones, against the Defendant, Smith and Wollensky, in the amount of $6,675.00, reduced by a finding of 49% contributory negligence on the part of the Plaintiff.

Defendant filed a Post Trial Motion to mold the verdict, which the court granted in accordance with the jury's verdict, and molded the verdict to $3,404.25 on June 8, 2012. Plaintiff filed Post Trial Motions for a New Trial, or in the alternative, Additur. After reviewing the briefs submitted by both parties, and after oral argumentation all the issues, the court denied Plaintiff's Post Trial Motions and entered judgment, on June 8, 2012, in accord with the jury's verdict. On June 29, 2012, Plaintiff filed an appeal with the Superior Court. Plaintiff's appeal should be denied for the reasons set forth herein.

The facts adduced at trial were as follows. The Plaintiff testified that on the eve of February 6, 2008, she had a 5:00 p.m appointment for a facial at the Rittenhouse Hotel. N.T.. [11/7/11] at 29. She went up to the spa on the third floor and had her treatment. N.T. at 29. She had a dinner reservation at Defendant restaurant, Smith & Wollensky, which is located inside the hotel. N.T. at 30. Around 6:10, Plaintiff started to walk into Defendant's restaurant when she fell. N.T. at 31. She did not see anything on the floor. N.T. at 31. She slipped on water

because her pants were wet and dirty from the water. N.T. at 32. Her right shoulder hit chairs and a table, which were located on her right side and the back of her head hit the floor. N.T. at 32. She experienced pain and discomfort especially in her shoulder, right knee, and back of her head. n.T. at 32. She testified that her headache was close to the worst she ever had. N.T. at 33. The bellman helped her up and gave her a seat at the bar. N.T. at 33. One of Defendant's floor managers, A. Bitting, saw Plaintiff when she fell. N.T. at 81. He states that nothing was on the floor. N.T. at 82. The Plaintiff testified that after her fall, she and her daughter cancelled dinner, walked around, ate dinner at Rouge, and then she drove home. N.T. at 34, 35.

Prior to the commencement of trial, the Defendant filed a Motion *in Limine* to preclude the Plaintiff from presenting testimony about cognitive impairment without a medical expert witness. N.T. at 12. [The trial] court ruled in Plaintiff's favor when it permitted the Plaintiff to establish causation without the necessity of calling a medical expert. N.T. at 12.

The Plaintiff testified that two days after her fall in Defendant's restaurant, she visited the emergency room at Holy Redeemer Hospital (Plaintiff's Exhibit 1, N.T. at 39). The emergency room record gives the history of present illness as: slip & fall, struck head, negative loss of consciousness; presents confused to time; oriented to persons and events and a weak left grip. N.T. at 38.

Plaintiff remained in the emergency room for 8 hours. N.T. at 40. The diagnoses was head injury with concussion, unknown loss of consciousness N.T. at 40. The CT scan of the brain was negative. N.T. at 59. The record shows no fractures of the neck. N.T. at 59. The record does not mention Plaintiff's right knee. N.T. at 60.

Other than the single visit to the emergency room, there were no treatments or visits to doctors. The Plaintiff is a neuroradiologist. N.T. at 26. Her specialty is diagnostic but, it's focused on brain and the central nervous system, meaning the spinal cord and nerves that emanate from it. N.T. at 26, 27. The Plaintiff relied upon herself to establish causation, prognosis, and diagnosis.

Plaintiff testified about problems with her memory[:]

Q: In addition to your headaches, have you had any problems with your memory?

A: Yes.

Q: Can you explain to the jury what that has been?

A: It started out as little things, like forgetting where I parked my car, repeatedly going from the front of my house to the back, and not remembering why I did it. I started to make notes to myself to do things, like turn off the alarm, because at one point I was sitting out on the patio and the police appeared because the alarm people called in and said we got a call from your alarm company saying that someone was trying to –

Q: Did the police have to come because you didn't put the code in correctly or didn't remember to put the code in?

A: Right.

[N.T. at 43.]

Plaintiff testified about problems in teaching[:]

Q: Tell us what you did prior to February 08, what your teaching responsibilities were?

A: I teach residents, and I explained earlier what a residency is. That's a doctor who has completed medical school and an internship and is working to become a specialist in a certain discipline, in this case, radiology, so I teach those doctors.

Q: After this incident, did you have problems performing that task?

A: Only to the extent that I couldn't remember what we had actually gone over, so I would make notes with each of the findings to that I could be certain to include all of them in our reports.

[N.T. at 44.]

> Then Plaintiff opined "that there is a very high risk of not being able to care for herself" N.T. at 48. The Plaintiff never mentioned in her direct examination that she was examined by Dr. Steve Mandel, M.D. at the request of Plaintiff's first attorney on June 19, 2009. Dr. Mandel examined the Plaintiff specifically to determine whether the Plaintiff had any cognitive impairment. N.T. at 5, 62, 63, 64.
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> On cross examination, the Plaintiff admitted that she sought a neurological opinion from Dr. Mandel. N.T. at 62. The Plaintiff also admitted that Dr. Mandel's opinion directly contradicts the Plaintiff's own self-serving testimony about her cognitive problems[:]
>
> Q: Okay. Was it correct that he indicated he could not state whether or not there was any serious impairment or any percentage or impairment; is that correct?
>
> A: Yes.
>
> Q: That was my questions. And then he indicated that in regards to your ability to perform the physical activities required of your job or any cognitive inability to perform the essential duties of your occupation, there was no reason, at that point in time, that he believed you were impaired from performing your job and meeting all your responsibilities; is that accurate?
>
> A: Yes.

[N.T. at 62, 63, and 64.]

The Plaintiff testified that she worked for Temple University as an independent contractor. She worked there for three years. N.T. at 28. However, her position was eliminated. N.T. at 28. The record does not indicate when she was terminated. Plaintiff presented no evidence of lost wages by way of documentation from her employer. There was only testimony from the Plaintiff that she billed Temple for thirty five hours at $175.00 an hour which was for one week's salary.

Trial Court Opinion, dated December 6, 2012, at 1-5.

Appellant presents the following questions for our review:

> **I. [WAS] THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE[?]**
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> **II. [DID] THE COURT ERR[] IN FAILING TO CHARGE THE JURY REGARDING THE IMPAIRMENT OF FUTURE EARNING CAPACITY?**
>
> **III. [DID] THE COURT ERR[] IN FAILING TO GRANT PLAINTIFF'S MOTION FOR ADDITUR AS THE JURY'S VERDICT WAS INADEQUATE?**

Brief for Appellant at 4.

In challenging the jury's denial of pain and suffering damages, the court's refusal to instruct on future earning capacity, and the court's denial of her post-trial motion for additur, Appellant predicates each issue on the argument that her unrebutted testimony regarding headaches and memory loss was to be believed. *See* Brief for Appellant, pp. 7-8. It is well-settled, however, that we may not disturb a verdict on credibility grounds where there is record support for a jury's credibility determination:

> The Court is not warranted in setting aside, reducing, or modifying verdicts for personal injuries unless unfairness, mistake, partiality, prejudice, or corruption is shown, or the damages appear to be grossly exorbitant. The verdict must be clearly and immoderately excessive to justify the granting of a new trial. The amount must not only be greater than that which the Court would have awarded, but so excessive as to offend the conscience and judgment of the Court.
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> [Where] [i]t would appear that the jury simply disbelieved evidence of damages in excess of what it awarded[,] [i]t is not for any reviewing court to dictate what evidence a jury must believe.

Catalano v Bujak, 537 Pa. 155, 161-162, 642 A.2d 448, 451 (1994) (upholding jury verdict awarding medical and incidental expenses but denying pain and suffering damages in tort case stemming from arrest of plaintiff through alleged excessive force as within province of jury's credibility determination function).

In the case *sub judice*, there was competent evidentiary support for the jury to disbelieve Appellant's claim of severe headaches and cognitive impairment. Specifically, the jury heard conflicting expert testimony regarding both the severity of Appellant's injuries and the consequences thereof, with Appellant, herself, serving as the only expert supporting her position that she continued to suffer physical and cognitive impairment. On cross-examination, she admitted that a neurologist hired by her own attorney rendered the expert medical opinion based on normal clinical examination, X-rays, and CT imaging that there was no apparent reason she should experience impairment related to her fall. N.T. at 64. Additionally bearing on the issue was evidence that Appellant sought no immediate medical care after her fall but, instead, walked to another restaurant and had dinner and drinks and drove herself home; thereafter reported for work as scheduled; and failed to substantiate her lost work days through documentation showing missed time.

Appellant has predicated all three of her questions presented on the argument that her testimony regarding her fall-related impairment was, despite a verdict to the contrary, credible. Specifically, on issues one and three we discern no error below as the jury acted within its province to determine credibility of witnesses and assess damages accordingly, and did so supported by competent evidence of record.

As for Appellant's second question challenging the court's failure to charge the jury on loss of future earnings over her objection, we note the following standard guides our review:

> In reviewing a jury charge, we are to determine "whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case." ***Commonwealth v. Brown***, 911 A.2d 576, 582–83 (Pa. Super. 2006). In so doing, we must view the charge as a whole, recognizing that the trial court is free to use its own form of expression in creating the charge. ***Commonwealth v. Hamilton***, 766 A.2d 874, 878 (Pa. Super. 2001). "[Our] key inquiry is whether the instruction on a particular issue adequately, accurately and clearly presents the law to the jury, and is sufficient to guide the jury in its deliberations." ***Id***. It is well-settled that "the trial court has wide discretion in fashioning jury instructions. The trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the appellant was prejudiced by that refusal." ***Brown***, 911 A.2d at 583.

Commonwealth v. Scott, ---A.3d ----, 2013 WL 3340412 at *2 (Pa. Super. filed July 02, 2013).

As in her other two issues, the crux of Appellant's argument challenging the omitted jury instruction is that the jury could have believed that her injuries precluded her ability to earn in the future:

> [T]he court erred in not allowing the jury to be charged on future lost earnings and loss of earning capacity since the Plaintiff testified that she had ongoing confusion and memory problems. The jury could have concluded that this would have impacted her ability to work in the future.

Brief for Appellant at 8.

In limiting damages to reimbursement for medical expenses incurred immediately after the accident while rejecting pain and suffering damages altogether, however, the jury specifically discredited Appellant's testimony that she sustained long-term injuries. On this record, therefore, Appellant cannot possibly establish that the omitted jury charge prevented the jury from concluding that her injuries impaired her ability to earn income in the future. Failing to demonstrate that prejudice flowed from the omission of the jury charge, therefore, Appellant may obtain no relief from this claim.

For the foregoing reasons, therefore, we affirm judgment.

Judgment Entered.

Prothonotary

Date: 7/29/2013