

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARSHALL PAPPERT,

Appellant

v.

SILHOL BUILDERS SUPPLY CO. AND
SILHOL BUILDERS SUPPLY COMPANY OF
CHARLEROI INC.

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 162 WDA 2013

Appeal from the Judgment Entered December 21, 2012
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): CD 08-004922

BEFORE: PANELLA, J., ALLEN, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J.:

FILED JANUARY 13, 2014

Appellant, Marshall Pappert appeals from the judgment entered on December 21, 2012, in the Court of Common Pleas of Allegheny County following a jury verdict in favor of Appellee, Silhol Builders Supply Company. After careful review, we affirm.

This case has its nexus in an action commenced by Pappert against Silhol Builders Supply, the operator of a concrete construction plant directly across the street from Pappert's residence. A two-week long jury trial was held on September 17-26, 2012, after which the jury rendered a verdict in favor of Silhol Builders Supply, finding that its activities did not constitute a

* Retired Senior Judge assigned to the Superior Court.

nuisance, that they were not negligent and did not commit a trespass. Based upon its findings, the jury did not reach the issue of causation of harm or damages. Pappert filed a motion for post-trial relief on October 4, 2012, with corrected motions on October 5, 2012 and October 8, 2012. Pappert's motion failed to contain a designation of transcripts as required by Pennsylvania Rule of Civil Procedure 227.3. Pappert did not file a designation of partial record to be transmitted until October 10, 2012. Pappert merely requested that 108 pages, seven percent of the voluminous record, be transcribed. Following the denial of Pappert's post-trial motions, this appeal followed.

On appeal, Pappert raises the following issues for our review:

1. In a lengthy, complex case is it error to charge on general legal principles with no reference to the evidence and contentions of the parties, no assistance in applying the legal principles to the facts, nor any explanation of the circumstances under which a party can be held liable?
2. Is it error not to charge on punitive damages where the evidence clearly supports it and such charge would have the likely effect of clarifying an otherwise deficient charge?
3. Did the Court improperly exclude important relevant evidence of laboratory findings by failing to consider the complete lack of prejudice or surprise?
4. Was the introduction of irrelevant, prejudicial information, in direct and knowing contravention of the directive of the Trial Court sufficient to warrant the grant of a new trial?

Appellant's Brief, at 1.

We are constrained to find Pappert's first two issues raised herein on appeal, related to the trial court's charge to the jury, waived. In reviewing challenges to a jury instruction, we are guided by the following:

Our standard of review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error law which controlled the outcome of the case.

Error in a charge is sufficient ground for a new trial **if the charge as a whole** is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error. In reviewing a trial court's charge to the jury we must look to the charge in its entirety.

Gorman v. Costello, 929 A.2d 1209, 1212 (Pa. Super. 2007) (citation omitted) (emphasis added). "[I]t must appear that the erroneous instruction may have affected the jury's verdict. Consequently, the trial court has great discretion in forming jury instructions." **Meyer v. Union Railroad Company**, 865 A.2d 857, 862 (Pa. Super. 2004) (citations omitted).

We have held,

[i]t has long been the law in this Commonwealth that in order to preserve for appellate review an issue concerning the correctness of a trial court's charge to the jury, the complaining party must submit a specific point for charge or make a timely, specific objection to the charge as given.

Id., at 861 (citation and emphasis omitted).

Further, "[i]t is well-settled that this Court may only consider items which have been included in the certified record and those items which do

not appear of record do not exist for appellate purposes.” ***Stumpf v. Nye***, 950 A.2d 1032, 1041 (Pa. Super. 2008), ***appeal denied***, 599 Pa. 711, 962 A.2d 1198 (2008).

Here, Pappert failed to order the full transcript from the jury trial held on September 17-26, 2012. As such, the transcript, including the entirety of the contested jury charge, is missing from the certified record. “Our law is unequivocal that the responsibility rests upon the appellant to ensure that the record certified on appeal is complete in the sense that it contains all of the materials necessary for the reviewing court to perform its duty.” ***Commonwealth v. Preston***, 904 A.2d 1, 7 (Pa. Super. 2006) (en banc) (citation omitted), ***appeal denied***, 591 Pa. 663, 916 A.2d 632 (2006). Furthermore, “the Rules of Appellate Procedure require an appellant to order and pay for any transcript necessary to permit resolution of the issues raised on appeal.” ***Id.*** (citing Pa.R.A.P., Rule 1911(a), 42 PA.CON.S.TAT.ANN.).

The transcript of the trial and particularly the jury charge as a whole is essential to our review of Pappert’s first two issues. As Pappert failed to order the transcript, he is not entitled to relief on those issues. ***Preston*** (“When the appellant or cross-appellant fails to conform to the requirements of Rule 1911, any claims that cannot be resolved in the absence of the necessary transcript or transcripts must be deemed waived for the purpose of appellate review.”).

In his last two issues, Pappert challenges the trial court’s ruling on admissibility of evidence.

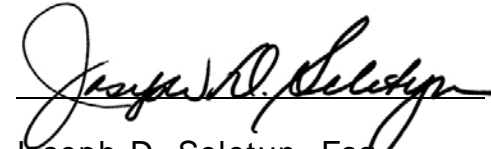
The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. Thus, our standard of review is very narrow... To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.

McManamon v. Washko, 906 A.2d 1259, 1268 (Pa. Super. 2006) (internal citations omitted), **appeal denied**, 591 Pa. 736, 921 A.2d 497 (2007).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Robert J. Colville, we conclude Pappert's issues with respect to the admissibility of evidence merit no relief. The trial court's reasoning is sound and its opinion fully discusses and properly disposes of those claims. Accordingly, we affirm on the basis of the trial court's comprehensive opinion. **See** Trial Court Opinion, 3/11/13, at 1-7.

Judgment affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/13/2014

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARSHALL PAPPERT,

Plaintiff,

v.

SILHOL BUILDERS SUPPLY CO. and

SILHOL BUILDERS SUPPLY

COMPANY OF CHARLEROI, INC.,

Defendants.

CIVIL DIVISION

No.: GD08-004922

OPINION

Robert J. Colville

March 11, 2013

This appeal arises following a two week jury trial and resultant verdict in favor of Defendants as to all of Plaintiff's claims. Plaintiff brought claims sounding in nuisance, negligence, and trespass, specifically asserting that the Defendant's operation of a concrete production plant located directly across the street from the Plaintiff's home created noise, dust and fumes that were released from the plant and caused to surround and penetrate the Plaintiff's home. In particular, Plaintiff asserted that recently increased volumes of concrete-making utilizing antiquated equipment and techniques on the Defendants' property, and the operation of large diesel trucks necessary for the transport and delivery of the concrete and supplies to and from the plant immediately adjacent to the plant constituted the tortious conduct.

Plaintiff and several neighbors testified that the plant routinely created loud and obnoxious noises during the concrete manufacturing process, that the plant failed to mitigate the release of concrete dust and other particulate dust that was released from the plant operations during the concrete manufacturing process and that the operation of the diesel trucks from the

early hours of the morning until late at night interfered with the Plaintiff's reasonable and peaceful use of his property. Plaintiff additionally offered significant testimony regarding his claimed physical injuries and loss of the use of the peaceful use of his property that are not particularly germane to the issues on appeal, inasmuch as the jury's verdict found in favor of the Defendant as to liability on all causes of action. In this regard, the jury did not reach the question of damages.

Defendants presented a different picture, including testimony of the Defendant's principal suggesting that neither the noise, dust or diesel fumes emitted from the plant's operation were significant or unreasonable. In addition, Defendant offered testimony suggesting that the concrete plant operations have been consistent in both quantity and quality for many years including decades prior to the Plaintiff's ownership of his home.

Following the jury's verdict, Plaintiff filed timely post-trial motions, and subsequently a timely Concise Statement of Matters Complained of on Appeal.¹

Plaintiff sets forth six substantive matters complained of on appeal, wherein he asserts that this court erred, including:

1. The failure of the trial court to give a full and proper charge to the jury on the concept of nuisance, both in its initial charge and when asked by the jury for clarification.
2. The refusal to allow the testimony of or test results of Ronald Olexa regarding testing of dust samples.
3. The failure to grant a new trial based upon the pattern of misconduct by defense counsel in questioning of witnesses Richard Teodori and Marshall Pappert and in closing argument.
4. The failure to charge on punitive damages.

¹ I note that there has been a fair amount of disagreement between the parties with respect to whether certain issues have been adequately preserved, on both sides of the case, as a result of both parties' failure to either designate or counter-designate various portions of the trial transcript during the post-trial proceedings. Several motions and corrected motions, objections, responses to objections, designations and subsequent designations have been filed of record. I have tried throughout the course of the post-trial proceedings to indicate that the question of whether an issue has been adequately preserved for appellate review is a question principally directed to the appellate court. It is my intention now, as it has been throughout the entire course of the post-trial proceedings to address each of the substantive issues raised, whether the appellate court ultimately concludes they have been adequately preserved or not.

5. Limiting Plaintiff's closing argument to 60 minutes when more time was requested and necessary.
6. The quashing of the subpoena to the records custodian of A & H Equipment Company.

With respect to the Plaintiff's contentions the Court improperly charged the jury on the subject of nuisance, I am unable to agree with the Plaintiff's contention that the jury charge, as delivered, was deficient. While it is agreed that the law of nuisance is not a subject easily communicated to a jury, the instructions in this case, as delivered, adequately conveyed the necessary elements of the cause of action. While more might always be said to a jury with respect to the fine details of a cause of action, the instruction, as delivered, was adequate. Additionally, to the extent Plaintiff asserts that the jury charge, as delivered, was inadequate in that it did not express those details that the Plaintiff now asserts are fundamental to the law of nuisance (as expressed on pages 6 through 9 of their brief in support of post-trial motions), a request for instructions such as those now proffered by Plaintiff were never made prior to the delivery of jury instructions at trial. Moreover, no material element of the instructions, as now proffered, was requested and/or refused at trial.

Next, Plaintiff asserts that the Court erred in refusing to allow the testimony of Ronald Olexa, or results regarding Mr. Olexa's testing of dust samples. This testimony was properly excluded at trial. First, Mr. Olexa was not identified in the Plaintiff's pre-trial statement as a witness. Plaintiff's contention that a general reference to records custodians or representatives of generic governmental offices is not adequate pursuant to local rule. Second, Mr. Olexa did not author an expert report. Third, and importantly, Mr. Olexa was not called by the Plaintiff within the Plaintiff's case in chief. Plaintiff's attempt to admit Exhibit 224 (the Olexa test report), independently of Mr. Olexa, (through the testimony of another witness), is improper because even if admitted under the business record exception to the hearsay rule, such an exception

would not extend to the expert opinions contained within that business record. Finally, even if improperly excluded, the evidence is cumulative. Both sides called experts to address the issue of the chemical composition of dust found within the Plaintiff's home. Both sides had ample opportunity to present their own position and challenge the opposing party's experts and findings. For these reasons, the testimony of Mr. Olexa and Exhibit 224 were properly excluded at trial.

Next, Plaintiff asserts that this Court erred by failing to grant a new trial based upon the pattern of misconduct by defense counsel in questioning of witnesses Richard Teodori and Marshall Pappert and in closing argument. Specifically, Plaintiff appears to be referring to defense counsel's unfortunate repeated references to the Plaintiff's prior involvement in litigation. Plaintiff was previously involved in two prior instances of litigation involving claims of permanent disability as a result of an electrocution injury, and injuries as a result of a dog bite.

Interestingly, Defendants point out that in the Plaintiff's own prior litigation involving his dog bite case, this nearly identical issue was raised in post-trial motions seeking a new trial based upon the assertion that reference to the prior electrocution litigation had a prejudicial effect. In that case, the Superior Court rejected the Plaintiff's claim of prejudice holding:

Put simply, the jury was made aware of the fact that, in two distinct legal proceedings, appellees have claimed that two separate and unfortunate incidents left Mr. Pappert permanently disabled and unable to work. This evidence was probative of appellee's credibility; it directly called into question Mr. Pappert's new claims of permanent disability and inability to work.

Pappert v. Snyder, 211 WDA 2008, Page 13, Superior Court Opinion dated March 24, 2009. In the instant matter, notwithstanding the Superior Court's ruling in Mr. Pappert's prior dog bite case, I ordered, in an abundance of caution, that while references to prior injuries were certainly relevant to his current claims of injury, references to prior litigation was not, in my judgment,

directly probative or relevant to his current claims of injury. Accordingly, I directed counsel to not refer to the prior "litigation" but rather constrain their references to Mr. Pappert's prior injuries. For the most part, this directive was followed. Unfortunately, Plaintiff's counsel is correct in noting that on two specific occasions Defendants' counsel herself referenced prior litigation. In the first incident, Defense counsel was cross-examining the Plaintiff and stated:

And now, in your lawsuit against Carnegie Supply Company, this is when you were electrocuted...

Plaintiff's Motion for Post-Trial Relief Paragraph 65. In the second incident, counsel referenced prior litigation within the context of closing argument when she stated:

There is an electrocution injury where Mr. Pappert claimed he was totally disabled. Claims he recovered and was trying to go back to work as a plumbing inspector. Then had the dog bite case. But for the dog bite case, he would have gone back to work as a plumbing inspector. He is totally disabled from the dog bite case, and in this case, is claiming he recovered from the dog bite case.

Plaintiff's Post-Trial Motion Paragraph 72. Finally, Plaintiff notes that during defense counsel's direct examination of Defendants' principal, Teodori, the witness stated:

He used the fax extensively during the case with the electrocution. He then again used the fax machine extensively with the dog bite suit.

Plaintiff's Post-Trial Motion Paragraph 70. As stated above, my order enjoining reference to prior "litigation" was made only in an abundance of caution, and in light of the authorities cited by Defendants from Plaintiff's own prior litigation, that injunction constituted a, perhaps, unnecessary constraint on Defendant's case. It remains, however that it is plainly unfortunate that defense counsel failed to comply with the Court's directive. While I am cognizant of Plaintiff's counsel's suspicion that defense counsel's conduct was intentional, I am far from able to definitively conclude that such is the case. Whether intentional or not, however, the relevant test, for our purposes here, remains whether prohibited references to prior litigation (in one form

or another) caused such a prejudicial effect upon the jury's deliberation that a new trial would be warranted. Within the context of this two-week trial, that was, frankly, filled with multiple highly contentious moments, animated testimony, strong emotions, and numerous appeals to the sympathies and sentimentalities of the jury on both sides of the case, I conclude that it can hardly be said that these references, while, again, unfortunate, so prejudiced the jury's deliberations as to warrant a new trial.

Next, Plaintiff asserts that the Court erred in failing to charge the jury on punitive damages. This argument is without merit. Inasmuch as the jury's verdict found in favor of the Defendant as to liability, the question of what damages, if any, were warranted and/or whether the jury should have been charged on punitive damages in particular simply cannot be the basis for a finding of reversible error.

Next, Plaintiff asserts that the Court erred in limiting Plaintiff's closing argument to 60 minutes when Plaintiff now asserts that more time was requested and necessary. The question of what amount of time counsel will be permitted to present closing argument is a matter that is wholly within the sound discretion of the trial judge. Frankly, I have not yet tried a case where counsel should not be able to close in 60 minutes or less and/or where their clients are not best served by their delivering a closing within 60 minutes or less. I do not mean to be dismissive of or unsympathetic to the challenges confronting all trial counsel as they try to pull together all of the loose ends of a two week trial and present a cogent summary or encapsulation of all of the testimony and evidence that was presented during the trial. But the purpose of a closing is not to restate all of the trial testimony, but rather to provide final guidance to the jury with respect to how they might utilize that evidence in their deliberations. In this instance, 60 minutes was more than adequate.

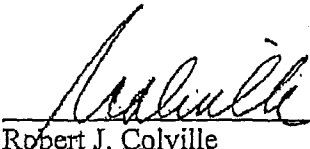
Finally, Plaintiff asserts that this Court erred in quashing the subpoena issued to the records custodian of A & H Equipment Company. Two days prior to the close of trial, Plaintiff served A & H Equipment Company with a subpoena demanding that the company produce four and a half year's worth of records and appear at trial less than 24 hours later. The following morning, September 26, 2012, counsel for A & H presented a motion to quash the subpoena stating:

Plaintiff's counsel has requested confirmation as to the number of times petitioners performed work on behalf of Silhol. Said documentation is not readily available and would require substantial time and effort to determine if said records are still available and/or to locate.

Additionally, a representative of A & H was not available to attend trial. In response to this motion to quash, I solicited a very brief argument from counsel. I ultimately concluded that quite arguably this testimony was more properly presented within the Plaintiff's case in chief, but the documents could not be adequately authenticated or testified to by or on behalf of a witness from A & H within the time constraints permitted on the last day of trial testimony. Finally, Plaintiff had identified neither A & H Equipment Company nor any representative as a potential witness at trial. For all of the above reasons, this Court was well within its discretion to quash the subpoena.

For the reasons set forth above, this Court's denial of the Motion for Post-Trial Relief should be affirmed.

BY THE COURT:

 J.
Robert J. Colville