NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

FRANCIS O. POBEE, Appellee v. JOSHUA COLLINS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1390 MDA 2012

Appeal from the Order Entered July 2, 2012
In the Court of Common Pleas of York County
Civil Division at No(s): 2009-SU-002334-01

BEFORE: BOWES, GANTMAN and OLSON, JJ.

MEMORANDUM BY OLSON, J.: Filed: April 15, 2013

Appellant, Joshua Collins, appeals from the order entered on July 2, 2012, by the Court of Common Pleas of York County. The order challenged on appeal granted the motion for post-trial relief in the form of a new trial filed by Appellee, Francis O. Pobee. We affirm.

The trial court summarized the relevant factual and procedural background of this matter as follows:

> This case arises from a motor vehicle accident that occurred on November 29, 2007 on Carlisle Road in Dover Township, York County, Pennsylvania. [Appellee] was a back-seat passenger in a vehicle driven by Jose Delgado. Mr. Delgado stopped his vehicle due to deer crossing the roadway. While Delgado's vehicle was stopped, [Appellant's] vehicle rear ended Delgado's. [Appellee] was taken by ambulance to the hospital for evaluation due to complaints of back pain at the scene of the accident.
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> [Appellee] filed a Complaint on May 12, 2009 seeking damages for the injuries he suffered as a result of the car

> accident.[] [Appellant] filed a Praecipe to Join Additional Defendant Jose Delgado, the driver of the vehicle in which [Appellee] was a passenger, on June 25, 2009. [Appellant] answered the Complaint on July 2, 2009 and filed a Complaint to join Jose Delgado on December 10, 2009.
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> On August 12, 2011, Additional Defendant Jose Delgado filed a Motion for Summary Judgment. Responses were filed and the matter was assigned to the Honorable John Thompson for one-judge disposition. Judge Thompson granted Additional Defendant's Motion by Order dated October 7, 2011. Following a pre-trial conference, the matter was scheduled to be tried during the May 2012 trial term.
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> A jury trial began on May 16, 2012. The parties stipulated that [Appellant] was negligent and that his negligence was a factual cause in bringing about some harm to [Appellee]. The verdict slip asked the jury to determine the amount of money damages to be awarded to [Appellee]. The amount of past lost wages was stipulated to by the parties in the amount of $2,407.45 and was included on the verdict slip. Three categories of damages were included on the verdict slip: 1) Past Lost Earnings; 2) Past and Future Pain and Suffering; and 3) Past and Future Lost [sic] of Enjoyment of Life. The jury returned a verdict on May 17, 2012 only awarding [Appellee] the amount of past lost earnings stipulated to by the parties, $2,407.45. The jury filled in zero dollars for pain and suffering and loss of enjoyment of life.
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> [Appellee] filed a timely Motion for Post-Trial Relief on May 24, 2012 seeking a new trial limited to the issue of [Appellee's] damages. [Appellant] filed a response and argument was held on June 28, 2012.

Trial Court Opinion, 7/2/2012, at 1-3.

On July 2, 2012, the trial court issued an opinion and order granting Appellee's motion for post-trial relief. Specifically, the trial court granted

Appellee a new trial on the award of non-economic damages. This timely appeal followed.[1]

Appellant presents one issue for appeal:

> Whether the trial court abused its discretion in ordering a new trial on non-economic damages.

Appellant's Brief at 1.

In the sole question he raises on appeal, Appellant alleges that the trial court erred in awarding Appellee a new trial on non-economic damages. Our standard of review that governs such claims is well-settled:

> It is well settled that the grant of a new trial is a matter within the discretion of the trial court. ***Kiser v. Schulte***, 648 A.2d 1, 3 (Pa. 1994). A trial court may only grant a new trial when the jury's verdict is so contrary to the evidence that it "shocks one's sense of justice." ***Neison v. Hines***, 653 A.2d 634, 636 (Pa. 1995). In reviewing an order to grant a new trial, the standard of review is limited to whether the trial court abused its discretion. ***Kiser***, 648 A.2d at 4. 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. ***Harman v. Borah***, 756 A.2d 1116, 1122 (Pa. 2000).

Monschein v. Phifer, 771 A.2d 18, 20 (Pa. Super. 2001) (parallel citations omitted).

Our prior cases have addressed the issue presently before us. In ***Zeigler v. Detweiler***, 835 A.2d 764 (Pa. Super. 2003) an *en banc* panel of this Court considered a defense challenge to an order that granted the

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[1] The requirements of Pennsylvania Rule of Appellate Procedure 1925 have been satisfied in this matter.

plaintiff a new trial. There, the plaintiff filed an action to recover damages for injuries she alleged she sustained in an automobile accident. The jury returned a verdict for the plaintiff on the issue of negligence and found that the defendant's negligence caused the plaintiff's injuries. The jury therefore awarded damages to cover the plaintiff's medical expenses but made no award for pain and suffering. The trial court subsequently granted the plaintiff's request for a new trial on damages. In affirming the trial court's order directing a new trial on damages, we concluded: "If the record adequately supports the trial court's reasons and factual basis, an appellate court may not conclude the court abused its discretion." ***Id.*** at 767.

In this matter, however, Appellant argues that the trial court abused its discretion in ordering a new trial on economic damages, because, according to Appellant, while the parties stipulated that Appellant's negligence caused the car accident involving Appellee, the jury was entitled to determine that Appellee did not endure any pain and suffering as a result of the accident. In support of his argument, Appellant relies primarily on the Pennsylvania Supreme Court's decision in ***Davis v. Mullen***, 773 A.2d 754 (Pa. 2001).

In ***Davis***, the driver of a truck claimed to have been injured when his vehicle was struck by the defendant's car. ***Id.*** at 765. In that matter, the jury awarded the plaintiff compensation for his medical expenses as well as for some property damages, but did not award him any damages for pain

and suffering. ***Id.*** at 766. Following the verdict, the plaintiff filed a motion for post-trial relief in the form of a new trial on damages, which the trial court denied. ***Id.*** This Court reversed the trial court's order, finding that the trial court abused its discretion in refusing the plaintiff a new trial on damages. ***Id.*** On appeal, the Supreme Court reversed our Court's opinion granting the plaintiff a new trial. ***Id.*** at 770. Within that opinion, the Supreme Court explained that:

> A jury's award of medical expenses without compensation for pain and suffering should not be disturbed where the trial court had a reasonable basis to believe that: (1) the jury did not believe the plaintiff suffered and pain and suffering, or (2) that a preexisting condition or injury was the sole cause of the alleged pain and suffering.

Id. at 767.

Reliant upon the above quoted language, Appellant in this matter interprets the jury's verdict of zero dollars for pain and suffering and loss of enjoyment of life as a determination that, like in ***Davis***, despite the accident, Appellee did not endure any compensable pain and suffering. Appellant's Brief at 4-8. The facts of this matter, however, are distinguishable from ***Davis***.

Specifically, in ***Davis*** the Supreme Court determined that a new trial was not warranted since the plaintiff had not sought treatment until 20 days after the accident, stopped treatment after 20 visits to his chiropractor, took no pain medication for his injuries, missed no work, and sought no further therapy. ***Davis***, 773 A.2d at 770. Additionally, and significantly, Davis had

been involved in three prior motor vehicle accidents and the only medical testimony presented, his chiropractor, could not say with certainty if Davis's injury was related to the accident at issue or from a previous accident. ***Id.*** Consequently, the plausibility of Davis's claims was deemed questionable and the Supreme Court determined that no new trial was warranted. ***Id.***

Attempting to equate this matter to ***Davis***, Appellant acknowledges that after the accident Appellee was given a back brace to wear for two and a half months, but emphasizes that while wearing that brace, Appellee was not in pain. ***Id.*** at 4-7. Appellant also argues that, based upon testimony from his medical expert, the jury was entitled to determine that Appellee's pain was a result of a pre-existing condition, and not the accident. ***Id.*** at 7-8. Therefore, Appellant argues that the trial court abused its discretion in ordering a new trial on non-economic damages. ***Id.*** at 4-8.

Appellant, however, misconstrues the evidence presented and disregards uncontroverted evidence presented to the jury and relied upon by the trial court. Specifically, though Appellee testified that he did not suffer pain while wearing the back brace for nearly three months, both medical experts agreed that the accident caused Appellee pain, which necessitated the use of the brace. Therefore, the record does not support Appellant's statement that Appellee did not feel pain. Appellee had a method to treat the pain – use of the back brace – but all agree that he endured pain. Furthermore, Appellant wholly disregards Appellee's loss of enjoyment of life

due to the need to wear the brace. Consequently, unlike in ***Davis***, the fact that Appellee suffered some pain and loss of enjoyment of life was uncontroverted in this matter.

Additionally, Appellant's claim that Appellee's pre-existing condition may have caused his pain, not the accident, is entirely unsupported by the record. Specifically, Appellant's expert testified that Appellee may have had a pre-existing abnormality that was sprained in the accident. Significantly, however, Appellant's expert does not dispute that the accident caused Appellee's pain. In ***Davis***, the plaintiff's doctor could not definitively say what caused the plaintiff's pain – the most recent or a previous accident. In this matter, causation is uncontroverted. Consequently, ***Davis*** is distinguishable.

Ultimately, the trial court in this matter reasoned that:

> [b]ecause the evidence presented to the jury in this case was uncontradicted that [Appellee] suffered some pain from the injury to his back, be it a sprain on top of an abnormality or a fracture; and, that he suffered some loss of enjoyment of life due at the very least, to the necessity of wearing the back brace for at least two months, we find that the verdict of the jury was contrary to the weight of the evidence and does shock one's sense of justice. Accordingly, we find that [Appellee] is entitled to a new trial on the award of non-economic damages.

Trial Court Opinion, 7/2/2012, at 6.

The record supports the trial court's reasoning and its factual basis for concluding that it was unreasonable for the jury to believe that Appellee did not experience pain and suffering. The court detailed specific grounds for

finding the jury's award to be inappropriate. Because there is ample support in the record for the trial court's ruling, we conclude that the trial court did not abuse its discretion in ordering a new trial on the issue of damages.[2]

Order affirmed. Case remanded for a new trial. Jurisdiction relinquished.

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[2] Within his brief, Appellant also argues that, in the event that we affirm the trial court's order granting Appellee a new trial, the new trial on non-economic damages should be limited to consideration of only the conceded injuries. Appellant's Brief at 8-11. Appellant, however, failed to identify that issue within his Rule 1925 concise statement, and therefore waived our consideration of the issue on appeal. ***See*** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the [concise s]tatement…are waived.")