NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOY L. DIEHL AND STEVEN H. DIEHL, HER HUSBAND, Appellants v. J. DEAN GRIMES A/K/A DEAN GRIMES, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 679 WDA 2012

Appeal from the Judgment of April 4, 2012,
in the Court of Common Pleas of Bedford County,
Civil Division at No. 2008-00915

BEFORE: MUSMANNO, WECHT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: Filed: January 9, 2013

This is an appeal from a judgment entered in favor of Appellee and against Appellants. We affirm.

The background underlying this matter can be summarized in the following manner. Appellants filed a complaint against Appellee. Appellants contended that Appellant Joy Diehl slipped and fell on the sidewalk located on or adjacent to Appellee's property. Appellants alleged that Appellee failed to maintain the sidewalk as required by a local ordinance. The complaint contained a count sounding in negligence, naming Mrs. Diehl as the plaintiff, and a count sounding in loss of consortium, naming Appellant Steven Diehl as the plaintiff.

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*Retired Senior Judge assigned to the Superior Court.

Following a trial, a jury determined that both Mrs. Diehl and Appellee were negligent and that their negligence caused harm to Mrs. Diehl. However, because the jury attributed 30% of the causal negligence to Appellee and 70% of the causal negligence to Mrs. Diehl, a verdict was entered against Appellants and in favor of Appellee. Appellants filed a motion for post-trial relief; the trial court denied the motion. Judgment subsequently was entered, and this appeal followed.

In their brief to this Court, Appellants ask us to consider the following questions:

> A. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING [APPELLANTS'] MOTION FOR PARTIAL SUMMARY JUDGMENT ON [APPELLEE'S] CONDUCT CONSTITUTING NEGLIGENCE PER SE AND PERMITTING THE ISSUES OF DUTY AND BREACH TO BE CONSIDERED BY THE JURY[.]
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> B. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY ON THE ISSUE OF NEGLIGENCE PER SE, THEREBY WARRANTING A NEW TRIAL[.]
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> C. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO PERMIT [APPELLANTS] TO INTRODUCE THE BOROUGH'S LETTER TO [APPELLEE] FINDING HIM IN VIOLATION OF ITS SIDEWALK ORDINANCE, THEREBY WARRANTING A NEW TRIAL[.]
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> D. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO PERMIT [APPELLANTS] TO CALL DAVID DRASS AS ON CROSS-EXAM TO TESTIFY AS TO [APPELLEE'S] ADMISSION THAT DEFICIENCIES EXISTED IN THE SIDEWALK AT ISSUE, THEREBY WARRANTING A NEW TRIAL[.]
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> E. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY ON THE LAW SET FORTH IN GORMAN BY GORMA [sic] V. CITY OF PHILADELPHIA, THEREBY WARRANTING A NEW TRIAL[.]

Appellants' Brief at 5 (proposed answers omitted).

Prior to trial, Appellants filed a motion for partial summary judgment. According to Appellants' motion, Appellee's property is located in Bedford, Bedford Borough, Pennsylvania. Appellants maintained that, at the time of Mrs. Diehl's fall, Bedford Borough had an ordinance that required Appellee to maintain the sidewalk abutting his home. Appellants further maintained that, shortly after Mrs. Diehl's fall, Bedford Borough Manager John Montgomery sent Appellee a letter wherein Mr. Montgomery informed Appellee that his sidewalk violated Bedford Borough's sidewalk ordinance. Mr. Montgomery directed Appellee to reconstruct his sidewalk, which Appellee did.

Appellants averred, in relevant part, as follows:

> 16. No genuine issue of material fact exists that the sidewalk at issue . . . was in violation of the Borough's Sidewalk Ordinance; that such Ordinance was designed to protect pedestrians; that [Mrs. Diehl] was within the class of persons who the Ordinance was designed to protect; that such sidewalks lies [sic] on [Appellee's] property and/or his property abuts the same; and [Appellee] had a duty under the Ordinance to maintain such sidewalk for use by pedestrian [sic] in good repair and safe condition; and that he breached such duty by failing to do so.
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> 17. As such, [Appellee] was negligent per se in his violation(s) of the aforesaid Ordinance, and [Appellants] are entitled to judgment as a matter of law on this issue, **thereby establishing the elements of duty and breach of duty**.
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> 18. Based on the foregoing, [Appellants] respectfully request your Honorable Court to grant their Motion for Partial Summary Judgment and enter an Order determining that [Appellee] [sic] negligent per se and that the issue of [Appellee's] negligence – duty and breach of duty – be removed from the jury and [Appellee] be precluding [sic] from attempting to introduce

> evidence to the contrary, thereby leaving only the issues of [Mrs. Diehl's] comparative negligence, in any; causation; and damages for the jury to determine.

Appellants' Motion for Partial Summary Judgment, 11/30/11, at 3-4 (emphasis added).

The trial court denied Appellants' motion. Under their first appellate issue, Appellants contend that the court erred in this regard. They argue that Appellee's violation of the sidewalk ordinance erased any genuine issues of material fact as to whether Appellee had a duty to properly maintain his sidewalk and whether he breached that duty. Under their second issue, Appellants maintain that the trial court erred by denying their request that the jury be given an instruction on negligence *per se*. Next, Appellants posit that the trial court erred by refusing to allow them to present to the jury the letter sent from Bedford Borough to Appellee regarding his sidewalk's violation of the Borough's ordinance. In their penultimate issue, Appellants argue that the trial court abused its discretion by refusing to permit them to cross examine David Dravis with respect to Appellee's admission of the deficient nature of his sidewalk. Guided by this Court's decision in ***Gravlin v. Fredavid Builders and Developers***, 677 A.2d 1235 (Pa. Super. 1996), we find these issues and arguments to be moot.

Like this case, ***Gravlin*** involved a slip and fall, as well as an issue of comparative negligence. The appellant filed a complaint against the appellee. The jury found the parties equally liable for the appellant's injury. The appellant raised several issues on appeal. This Court described the appellant's first two issues, in relevant part, as follows:

[The a]ppellant's first two claims are closely interrelated. He argues initially that he is entitled to a new trial because the trial court refused a proposed charge to the jury and denied admission of certain evidence concerning [the] appellee's failure to obtain a city permit for the sewer cover device over which [the] appellant fell. . . .

Appellant's second issue advances the theory that the jury should have been instructed on negligence per se because of [the] appellee's violations of the Clean Streams Act, 35 P.S. § 691.1 *et seq.*, and certain City of Philadelphia ordinances in using the wrong silt strainer cover for the sewer inlet. He claims that once having found negligence per se, the jury is foreclosed from considering comparative negligence. Hence, the lack of an instruction on negligence per se mandates a new trial.

Negligence per se has been defined as conduct that may be treated as negligence without further argument or proof as to the particular surrounding circumstances. However,

> Violation of a statute, although negligence per se, does not constitute a ground for imposing liability unless it can be shown to be substantial factor in causing the injury. Whether a party's conduct has been a substantial factor in causing injury to another is ordinarily a question of fact for the jury, and may be removed from the jury's consideration only where it is so clear that reasonable minds cannot differ on the issue.

Further, it is well settled that there must be a direct connection between the harm meant to be prevented by the statute, and the injury complained of.[FN3] Even assuming that the ordinances and statute referred to were directed toward preventing the harm appellant suffered, and they are concerned with environmental degradation not personal injury, there is nothing, even about a finding of negligence per se, which removes the comparative negligence issue from the jury's consideration.

> FN3. ***Jinks v. Currie***, 324 Pa. 532, 188 A. 356 (1936), notes that violation of a municipal ordinance is not negligence per se, but is evidence of negligence.

The Comparative Negligence Statute, 42 Pa.C.S.A. § 7102 reads in pertinent part as follows:

> **(a) General Rule.**-In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff . . . where such negligence was not greater than the causal negligence of the defendant . . . against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.
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> Just as the connection must be made between [the] appellee's conduct and any ensuing injury, [the] appellant's conduct too must be scrutinized. Consideration of [the] appellant's own responsibility for the accident would not have been removed by the finding of liability per se on [the] appellee's part.
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> This case is, as the trial court observes, a slip and fall, posing the question of whether [the] appellee breached a duty of care owed to [the] appellant. The jury found that it had done so. Nevertheless, [the] appellant's first two issues are aimed at designating a source for the assignment of liability. However, because [the] appellee was found by the jury to be negligent, [the] appellant's claims resolve themselves into complaints that he should not have been found partially responsible for his injury, and/or that the award was not large enough. **There is thus no necessity or utility in pursuing the liability argument, since the fact of liability having been resolved in [the] appellant's favor renders moot any discussion of blame.**

Gravlin, 677 A.2d at 1238-39 (citations omitted and emphasis added).

Here, Appellants' first four issues are aimed at bolstering their claims that Appellee had a duty to Mrs. Diehl and that he breached that duty. However, the jury found that Appellee had a duty to Mrs. Diehl and that he breached that duty. Consequently, any questions regarding whether Appellee had a duty or breached a duty in this case are moot.

Under their last issue, Appellants contend that the trial court erred by refusing to instruct the jury as follows:

> "[T]he exercise of care according to the circumstances does not require that a person walking along the sidewalk . . . should keep his vision glued to the sidewalk immediately in from of his toes; he must look where he is going and the duty is upon him to exercise reasonable care to avoid collision with others whose right to use the sidewalk is equal to his own." Gorman and Gorman v. Phila., 82 Pa. Super 136, 139 (1923)

Appellants' Proposed Points for Charge, 02/01/12, at ¶17. The trial court refused to give this specific instruction to the jury, finding that its general instruction would cover the substance of the proposed charge.

> Under Pennsylvania law, our standard of review when considering the adequacy of jury instructions in a civil case is to determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. It is only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue that error in a charge will be found to be a sufficient basis for the award of a new trial.
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> Further, a trial judge has wide latitude in his or her choice of language when charging a jury, provided always that the court fully and adequately conveys the applicable law.

Smith v. Morrison, 47 A.3d 131, 134-35 (Pa. Super. 2012) (citations and quotation marks omitted).

The proposed jury instruction quoted above speaks to Mrs. Diehl's duty of care. As to this duty, the court instructed the jury as follows:

> [Mrs. Diehl's] duty to exercise reasonable and ordinary care involves not only the duty to look but also the duty to perceive risks and dangers that an ordinary prudent person exercising

> ordinary care would have perceived under the circumstances. A pedestrian who falls on a sidewalk during daylight must show conditions exterior to herself or himself which prevented that individual from seeing the danger or excused failure to notice it.

N.T., 02/02/12, at 11-12.

When we consider this portion of the court's instruction, as well as the remainder of the court's charge to the jury, we conclude that, in refusing Appellants' proposed jury instruction, the court did not clearly abuse its discretion or commit an error of law controlling the outcome of the case. In short, the court properly utilized its choice of language in adequately explaining to the jury Mrs. Diehl's duty in this case. For these reasons, we affirm the judgment.

Judgment affirmed.