IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph McQueen	:	
	:	
v.	:	No. 1523 C.D. 2014
	:	Argued: February 9, 2015
Temple University Hospital, Temple University Hospital, Inc.	:	
	:	
Appeal of: Temple University Hospital, Inc.	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: March 26, 2015

Temple University Hospital (Temple) appeals an order of the Philadelphia County Court of Common Pleas (trial court) that denied its post-trial motion after a jury held it liable for damages in the amount of $350,330 in a personal injury action. Discerning no merit to Temple's challenges to various jury instructions, evidentiary rulings and to the amount of the jury verdict, the trial court denied Temple's post-trial motion without hearing oral argument. We affirm.

On April 25, 2011, Joseph McQueen, who was on his way to an appointment at Temple University Hospital, tripped and fell on the sidewalk in front of the hospital. McQueen proceeded to his appointments, where his doctor instructed him to go to the hospital's emergency room. McQueen did so but did not stay because there appeared to be a long wait. Instead, he went to the

emergency room at Episcopal Hospital, where he was diagnosed with an ankle sprain. McQueen underwent several weeks of physical therapy for the ankle injury, and for pain in his left wrist, neck and lower back.

Initially, McQueen did not believe his neck pain to be serious. Because he still had pain in September 2011, his primary care physician ordered an MRI and an electromyogram. These tests revealed a disc herniation that was affecting the function of McQueen's spinal cord. Dr. Christian Fras, McQueen's medical expert, testified that a spinal herniation occurring in April, when McQueen fell, would not immediately manifest itself but would have worsened over time. Dr. Fras testified that McQueen would likely need spinal surgery in the future to prevent further injury; however, the surgery would not entirely relieve McQueen's neck pain.

On May 11, 2012, McQueen filed suit against Temple and the City of Philadelphia for damages arising from his personal injury caused by his fall on the sidewalk. In June 2013, the City was dropped by stipulation. After a three-day trial in October of 2013, the jury found in favor of McQueen and awarded him $350,330 in damages. Temple filed post-trial motions seeking judgment n.o.v., a new trial or *remittitur* of the judgment. The trial court denied post-trial relief, and Temple appealed to this Court.[1]

[1] Temple initially filed its appeal with the Superior Court, which transferred the case to this Court on July 18, 2014. McQueen filed an unsuccessful motion for reconsideration. Both McQueen and Temple then filed a joint motion with this Court requesting transfer of the case back to the Superior Court. On September 19, 2014, this Court denied the motion *per curiam*.

On appeal,[2] Temple raises several issues for this Court's review. First, Temple argues that the trial court erred in evidentiary rulings regarding Temple's repair to the sidewalk, its effort to cross-examine McQueen and allowing testimony on McQueen's future harm. Second, Temple contends that the trial court erred in refusing to use its proposed jury instructions, which more accurately reflected the relevant and material governing law. Third, Temple argues that a new trial or *remittitur* is required because the jury's award was excessive. Finally, Temple argues that the trial court erred in refusing to grant oral argument on its post-trial motion.

Evidentiary Issues

We consider, first, Temple's challenge to the trial court's evidentiary rulings in three areas. Temple argues that the trial court erred by limiting Temple's cross-examination of McQueen; permitting McQueen's medical expert to testify about McQueen's future need for spinal surgery; and admitting evidence that Temple repaired the defective sidewalk.

Beginning with the cross-examination issue, counsel for Temple attempted to ask McQueen the following question at trial:

> Q. On the photographs that your lawyer has shown up on the screen, it's been stipulated that those photos were taken sometime in May when your lawyer went out there. But isn't it

[2] The standard of review of a trial court's denial of a litigant's motion for a judgment notwithstanding the verdict is whether the trial court abused its discretion or committed an error of law. *Morewood Point Community Association v. Port Authority of Allegheny County*, 993 A.2d 323, 327 n.2 (Pa. Cmwlth. 2010). In conducting this review, the reviewing court must consider the evidence in the light most favorable to the verdict winner. *Id.* In reviewing a trial court's denial of a motion for new trial, our review determines whether the trial court palpably and clearly abused its discretion or committed an error of law. *Irey v. Department of Transportation*, 72 A.3d 762, 770 n.8 (Pa. Cmwlth. 2013).

> true that what you told us, you told us that you and your lawyer went out and took those photographs the very same day of the incident, isn't that what you told us when you gave the deposition?

Reproduced Record (R.R.) at 801a-02a. Counsel for McQueen objected, arguing that the question misrepresented McQueen's deposition testimony. At the deposition, McQueen initially stated that he and his attorney returned to the scene of the accident on the day of his fall to take photographs. *Id.* at 803a-04a. However, he immediately corrected himself, stating that this was not accurate. *Id.* at 806a. The parties stipulated that the photographs were taken a month after the accident. Counsel for Temple acknowledged at trial that the stipulation was agreed to "because [the photos] couldn't possibly have been done on the same day because [of] the chronology he had given as to what happened. He certainly didn't have a lawyer that day." *Id.* at 805a.

In light of McQueen's immediate correction of his deposition statement and the parties' stipulation that the pictures were taken a month after the accident, the trial court did not err in sustaining the objection to Temple's cross-examination question. The Pennsylvania Rules of Evidence state as follows:

> The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

PA. R.E. 403. The cross-examination question apparently sought to challenge McQueen's credibility or his motives. However, the desired effect would not have been achieved because McQueen acknowledged his error immediately upon

making the statement at his deposition. In any case, the trial court's ruling is consistent with PA. R.E. 403.

Temple also challenged the testimony of Dr. Fras, McQueen's medical expert, who testified about McQueen's need for surgery. Temple argues that because McQueen did not introduce evidence of complaints of pain at the time of trial there could be no persistent injury in the future. Temple also contends that Dr. Fras's testimony about McQueen's need for future surgery was too speculative and the trial court erred in permitting it.

As has been explained,

> [i]n order for a jury to be permitted to consider the future continuation of a disability as an element of damages, it is necessary that there be competent testimony of the likelihood that the disability will persist into the future.

Baccare v. Mennella, 369 A.2d 806, 807 (Pa. Super. 1976). The evidence must be sufficient to allow the jury to infer reasonably "what the probable future consequences of the injury will be and award damages accordingly." *Id.* The medical expert need not predict with certainty how the injury will develop but, rather, must offer "definite evidence of the degree of probability that the impairment will persist for some period." *Id.*

In the present case, Dr. Fras testified that McQueen suffered spinal damage as a result of the fall. Dr. Fras based this opinion on McQueen's present generalized weakness and unsteady gait, not pain. He disagreed with Temple's expert that McQueen's spinal injury was caused by an automobile accident that took place after his fall on the sidewalk. Dr. Fras noted that McQueen began to complain of spinal pain months before the auto accident. Supplemental Reproduced Record (S.R.R.) at 190b. Dr. Fras opined that

> [t]he most obvious and pressing issue is that based on the totality of the information, I think Mr. McQueen needs surgery on his neck, on his cervical spine. . . . And it is my opinion that his condition and the need for surgery is related to directly the injury [at Temple].

S.R.R. 69b. Dr. Fras concluded that McQueen needed neck surgery in order to prevent "progressive neurologic decline." *Id.* at 71b.

Dr. Fras's testimony was sufficient to establish that McQueen's cervical spine condition was causally related to his fall at Temple and that McQueen needed spinal fusion surgery to prevent continued deterioration. Dr. Fras's opinion, presented with a reasonable degree of medical certainty, was sufficient to support the jury's finding that McQueen was entitled to future medical expenses. Although Temple presented contrary medical evidence, the jury chose to believe Dr. Fras's testimony. The trial court did not err in allowing Dr. Fras to opine on causation and the need for future surgery.

The final evidentiary ruling challenged by Temple was the trial court's decision to permit McQueen to question Temple's Facilities Manager about the sidewalk where McQueen fell. Specifically, counsel for McQueen asked:

> Q.-- am I correct that the first time your department became aware of [the alleged defect in the sidewalk] was in July of 2011, sir?

R.R. 849a. Temple is correct that evidence of a post-injury repair is generally inadmissible to prove negligence. PA. R.E. 407.[3] However, McQueen's question

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[3] Rule 407 states:

> When measures are taken by a party that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible against that party to prove:

(continued . . .)

had nothing to do with Temple's repair to the sidewalk. Rather, it related to notice of the defect. The trial court did not err in permitting the question.

Jury Instructions

Temple argues that the trial court erred by refusing to use its suggested jury instructions, which it contends were grounded in the record evidence and reflected the governing law. Specifically, Temple asked the trial court to instruct the jury that it could consider McQueen's evidence in determining whether he was contributorily negligent by not keeping his eyes on the sidewalk. Temple also proposed a jury instruction on Temple's duty to McQueen as an invitee. The trial court found that Temple did not preserve its objection to the jury instructions. McQueen concedes that Temple did preserve its objection to one jury instruction but argues that its objection to the jury instructions lack merit.

The purpose of jury instructions is to clarify the legal principles at issue. *Chicchi v. Southeastern Pennsylvania Transportation Authority*, 727 A.2d 604, 609 (Pa. Cmwlth. 1999). An instruction that accurately reflects the law and guides the jury in its deliberation will be upheld. *Id.* To constitute reversible error, a jury instruction, when considered in its totality, must not only be erroneous but also prejudicial to the complaining party. *Id.*

(Footnote continued on the next page . . .)

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose such as impeachment or--if disputed--proving ownership, control, or the feasibility of precautionary measures.

PA. R.E. 407.

To preserve an objection to a jury instruction, the litigant must lodge a specific objection. General objections will not preserve the issue for appellate review. PA. R.A.P. 302(b).[4] The following exchange occurred between the trial court and counsel for Temple:

> The Court: . . . [A]s far as I can determine in reading [Temple's] proposed charge, they are all non-standard issues.
>
> [Counsel for Temple]: Well, then, I just note my exception.
>
> The Court: Thank you. I think all of the categories have been covered by the points submitted by [McQueen].
>
> [Counsel for Temple]: Without going through all of them, Your Honor, *there is one in particular that I would request having to do with comparative contributory negligence only with respect to the issue that evidence of contributory negligence* may come from the plaintiff's case despite the defendant's obligation to prove contributory negligence and I don't think that's included in any of the charges.

R.R. 923a-24a (emphasis added). Thus, Temple made a specific objection to the denial of its proposed instruction that contributory negligence can be found on the basis of the plaintiff's evidence.

The jury was instructed as follows:

> Remember, evidence is what you heard and saw from the witnesses while on the witness stand after having been sworn to

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[4] Pennsylvania Rule of Appellate Procedure 302 states:

> (a) General rule. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.
>
> (b) Charge to jury. A general exception to the charge to the jury will not preserve an issue for appeal. Specific exception shall be taken to the language or omission complained of.

PA. R.A.P. 302.

> tell the truth. That is the evidence for your consideration, not the questions or the speeches of the attorneys or this Court.

R.R. 992a-93a. This standard instruction was sufficient. It directed the jury to consider all the evidence, which included all witness testimony, including that of the plaintiff.[5] Therefore, the trial court did not err in refusing to instruct the jury, specifically, that it could consider plaintiff's testimony in determining the plaintiff's contributory negligence, if any.

Temple contends that because the trial court denied all of its proposed instructions at once, it was not required to specifically object to each individual instruction. We disagree. The trial court rejected Temple's proposed instructions *in toto*, but it is unclear that Temple took exception to this ruling on each and every one of its proposed instructions. In the absence of specific exceptions, Temple has waived them.

Even assuming, *arguendo*, that Temple preserved its objection to the denial of its other jury instruction issues, they lack merit. Temple sought to instruct the jury that "it is the duty of every person to look where he is walking" and to see what is obvious and that it was the plaintiff's burden to show that the defect was non-obvious. R.R. 490a-93a. Instead of this language, the trial court provided the following standard instruction to the jury:

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[5] Temple cites *Matteo v. Sharon Hill Lanes, Inc.*, 263 A.2d 910 (Pa. Super. 1970), in support of its argument that the jury needed to be instructed that it could rely on evidence from McQueen's case in deciding whether he was contributorily negligent. In *Matteo*, the jury was instructed "[n]ow, if you believe that by a fair preponderance of the evidence, and that the plaintiff was guilty of conduct *attributed to him by the defendant's evidence*, then such conduct would be negligence." *Id.* at 912 (emphasis added). There was no analogous instruction to the jury in the present case that it could only consider Temple's evidence on the issue of contributory negligence. Consequently, *Matteo* is inapposite.

> These are the issues presented by this case: The plaintiff claims that he was injured by the negligent conduct of the defendant. The plaintiff has the burden of proving their [sic] claims.
>
> The defendant denies plaintiff's claims. The issues for you to decide in accordance with the law as I give it to you are was the defendant negligent? Was defendant's negligence a factual cause in bringing about harm to the plaintiff? Was the plaintiff negligent? Was plaintiff's negligence a factual cause in bringing about harm to itself - - himself?

R.R. 1003a. The trial court was not required to accept Temple's precise language so long as the given instructions accurately defined the issues and correctly reviewed the applicable law. *News Printing Co., Inc. v. Roundry*, 597 A.2d 662, 666 (Pa. Super. 1991). The standard instruction used at trial was not so misleading or inaccurate as to warrant a new trial. We conclude the trial court did not err in denying Temple's proposed instructions regarding contributory negligence.

Temple also sought to instruct the jury that a landowner is not the "insurer of safety of those on his premises" and that the plaintiff must prove that the landowner was negligent by failing to uncover the defect that caused the injury. R.R. 480a-87a. Instead, the jury was instructed:

> An owner/occupier of land is required to use reasonable care in the maintenance and use of the land, and to protect invitees from foreseeable harm.
>
> An owner/occupier of land is also required to inspect the premises and to discover dangerous conditions.
>
> *An owner/occupier of land is liable for harm caused to invitees by a condition on the land if, one, the owner/occupier knows, or by using reasonable care would discover the condition* and should realize that it involves an unreasonable risk of harm. And, two, the owner/occupier should expect that the invitees

> will not discover or realize the danger or will fail to protect themselves against it.
>
> And, three, the owner/occupier fails to use reasonable care to protect the invitee against the danger.
>
> An owner/occupier of land is liable to invitees for any harm that the owner/occupier should have anticipated, regardless of whether the danger is known or obvious.
>
> One in possession of land is required to maintain the abutting public sidewalks in a reasonably safe condition to prevent or eliminate any hazardous or unsafe condition that, upon all the circumstances involved, would be an unreasonable risk of harm to pedestrians properly using walks.

Notes of Testimony (N.T.), October 10, 2013, at 92-93 (emphasis added). The trial court used the standard charge on the liability of landowners for injuries to invitees, and it is modeled on the Restatement (Second) of Torts §343. Because the instruction accurately states the applicable law, the trial court did not err in using it instead of the one proposed by Temple.

Remittitur

Temple's third issue is whether the trial court erred in denying its motion for a new trial or, in the alternative, *remittitur* because the jury verdict of $350,330 was excessive. The grant or refusal of a new trial due to the excessiveness of the verdict is committed to the discretion of the trial court. *Hall v. George*, 170 A.2d 367, 371 (Pa. 1961). The jury verdict is not excessive unless it is "so grossly excessive as to shock our sense of justice." *Kane v. Scranton Transit Corporation*, 94 A.2d 560, 563 (Pa. 1953) (quoting *Mashinsky v. Philadelphia*, 3 A.2d 790, 795 (Pa. 1939)). The relevant factors in determining whether to grant a new trial include: (1) the severity of the injury, (2) whether the injury is manifested by objective physical evidence instead of the subjective

testimony of the plaintiff, (3) whether the injury is permanent, (4) whether the plaintiff can continue to be employed, (5) the amount of the plaintiff's out-of-pocket expenses, and (6) the amount demanded in the original complaint. *Robert v. Chodoff*, 393 A.2d 853, 871 (Pa. Super. 1978).

Temple contends that the verdict was excessive because McQueen's injury was minor and required no surgery; he appears to have fully recovered; he has not been employed for decades; his out-of-pocket expenses were stipulated to be $22,000; and the amount demanded in the original complaint was in excess of $50,000. McQueen argues that the evidence supported a finding that he suffered a severe spinal cord injury which will continue to worsen without surgery. The trial court held that the verdict did not "shock its sense of justice."

The evidence at trial established that McQueen suffers general weakness, has an altered gait, and is hyperreflexic as a result of the slip and fall incident. He will require surgery in the future to minimize, but not cure, his injury and pain. The amount of $350,330 will compensate McQueen for these injuries. The trial court did not err or abuse its discretion in refusing to grant a new trial or *remittitur*.

Oral Argument

Finally, Temple argues that the trial court erred in denying its request for oral argument on its post-trial motions, which Temple contends was required by the local rules of civil procedure.[6] The trial court held that because Temple

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[6] Local Rule 227 provides, in relevant part:

> (e) Disposition of Post-Verdict Motions
>
> > (1) Oral Argument. The Trial Judge shall schedule oral argument for a date certain taking into consideration the dictates of Pa. R.C.P. [No.] 227.4(1)(b).

(continued . . .)

never requested argument, and because Temple's issues were fully argued during trial, oral argument was not required. Even if, *arguendo*, Temple is correct in its assertion that it had a right to oral argument, the error was harmless. As noted by the trial court, all the issues raised on appeal were argued before the trial court when the relevant objections were made. Therefore, Temple did not suffer any prejudice by being denied post-trial oral argument.

Conclusion

For these reasons, we affirm the trial court's decision.

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MARY HANNAH LEAVITT, Judge

(Footnote continued on the next page . . .)

(2) Briefs. The Court may require the parties to submit briefs in support of, or contra, the post-verdict motions.

Philadelphia R.C.P. No. 227(e); Brief of Appellant at 30.

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O R D E R

AND NOW, this 26th day of March, 2015, the order of the Philadelphia County Court of Common Pleas dated December 13, 2013, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge