-845-17T4

Superior Court of New Jersey

Appellate Division

Docket No. 000845-17T3

ORIGINAL WITH PROOF OF SERVICE

HILDA T. KENNEDY and JOHN F. KENNEDY, wife and husband,	:	CIVIL ACTION
	:	ON APPEAL FROM THE SEPTEMBER 25, 2017 NO CAUSE ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ATLANTIC COUNTY
Plaintiffs-Appellants,	:	
vs.	:	
FREDERIC A. POLLOCK; THE ESTATE OF FREDERIC A. POLLOCK,	:	DOCKET NO. ATL-L-1167-15
	:	Sat Below:
Defendants-Respondents.	:	HON. MARY C. SIRACUSA, J.S.C.

FILED APPELLATE DIVISION FEB 19 2019 CLERK

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

HILDA T. KENNEDY and JOHN F. KENNEDY, husband and wife,

Plaintiffs-Appellants,

-against-

FREDERIC A. POLLOCK; ESTATE OF FREDERIC A. POLLOCK,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

PRELIMINARY STATEMENT

Plaintiffs appeal from a no-cause order of the Superior Court, Atlantic County (Hon. Mary C. Siracusa), which followed a jury verdict in defendant's favor.

Hilda Kennedy was injured when an Atlantic City jitney ran her over after she exited the bus. Video evidence played at trial showed her exiting the jitney and stepping up onto an adjacent sidewalk before the jitney started moving. An instant later passengers and Mr. Kennedy were screaming that the jitney had run her over. No one knows how Mrs. Kennedy ended up in the street underneath the jitney. The Kennedys' best guess was that wind blew Mrs. Kennedy into the street and under the bus.

At trial, Mr. Pollock contested only liability. Relying primarily on the video evidence as captured by the jitney's cameras, he argued that the video showed he had stopped the jitney, allowed the Kennedys to exit, and watched them get safely to the sidewalk before moving again. Not until passengers and Mr. Kennedy began screaming did he know something was wrong.

After listening to testimony for three days, the jury found Mr. Pollock was not negligent and the trial court entered an order for no cause of action in his favor.

The order appealed from should be affirmed for the following reasons:(i) attorneys have wide latitude when cross-examining witnesses, especially when their credibility is at issue. Defendant's counsel's questions to Mrs. Kennedy did not exceed that scope, and (ii) because the Kennedys' counsel did not object to the trial court's charge it is reviewable only under the "plain error" standard. The trial court's charge was not plainly erroneous because it adequately covered the governing legal principles and appropriately asked the jury to assess Mr. Pollock's negligence and whether his negligence, if any, was a proximate cause of Mrs. Kennedy's injuries.

PROCEDURAL HISTORY

Plaintiffs John and Hilda Kennedy commenced this action on against Frederick A. Pollock and the Estate of Frederick A. Pollock to recover damages for personal injuries Mrs. Kennedy sustained in a November 17, 2014 accident (Pa 1-5). After a full course of discovery the case was tried before the Hon. Mary C. Siracusa and a jury between September 5 and 7, 2017.

On September 7, 2017, the jury returned a no-cause verdict in defendant's favor (Pa 11-12). The trial court issued a no-cause order and final order of dismissal on September 25, 2017 (Pa 13).

Plaintiffs appealed to this Court by filing their notice of appeal on October 23, 2017 (Pa 14-18).

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COUNTER-STATEMENT OF FACTS

The parties

Plaintiff Hilda Kennedy was injured after exiting an Atlantic City jitney in November 2014 (3T at 7)[1]. Plaintiff John Kennedy is her husband (2T at 9).

Frederick Pollock was driving the jitney the day Mrs. Kennedy was injured (1T at 15-16; 3T at 120). He died during the pendency of the case (3T at 96-97).

Trial testimony about the accident

Video evidence and Mr. Kennedy told vastly different stories. Undisputed was that after walking to a local supermarket to pick up items for Thanksgiving dinner, Mr. and Mrs. Kennedy boarded an Atlantic City jitney to go back to their apartment (2T at 20, 22, 24; 3T at 14-16). They wanted to exit the jitney near Massachusetts Avenue but Mr. Pollock missed the stop (2T at 55; 3T at 16). He eventually stopped the jitney near the intersection of Rhode Island and Pacific Avenues (2T at 56). Mr. Pollock did not stop the jitney immediately adjacent to the curb; there were several feet between the jitney's stairwell and the sidewalk (2T at 28; 3T at 17). After exiting the jitney,

[1] References to 1T, 2T, and 3T are to the three volumes of the trial transcript and page numbers on which the relevant testimony is located.

Mr. Kennedy placed his shopping cart on the sidewalk, returned to the jitney, and helped his wife exit the bus (2T at 28-29). He was able to get her to the sidewalk without incident (2T at 29, 31). Mr. Kennedy did not dispute that both he and his wife exited the jitney safely (2T at 56). From there, the video and Mr. Kennedy diverge.

Before being shown the jitney's video footage Mr. Kennedy claimed it was so windy it affected their ability to walk and the wind blew his wife into the street, under the jitney (2T at 31-32, 54, 69). He claimed immediately started banging on the side of the bus, screaming "don't move" (2T at 32, 64-65). As Mr. Kennedy tried to pick his wife up out of the street the jitney began moving and ran her over (2T at 68-69). Had the jitney not moved, Mr. Kennedy would have picked his wife up and continued on their way home (2T at 32).

But after seeing the video Mr. Kennedy acknowledged both he and his wife were on the sidewalk when the jitney began to move (2T at 72). He later backtracked and denied that he and his wife were on the sidewalk when the jitney started moving (2T at 72). Mr. Kennedy did acknowledge that the video showed both of them on the sidewalk as the jitney started moving, but did not show Mrs. Kennedy falling into the street or Mr. Kennedy going to help her while banging

on the bus shouting "don't move" (2T at 78). Mr. Kennedy also had to admit that there was no audio evidence of him shouting "don't move" (2T at 85).

Mrs. Kennedy's testimony on direct examination largely mirrored her husband's. They had walked to the supermarket to buy food for Thanksgiving dinner, but decided to take the jitney back because it started raining while they were in the store (3T at 14-16). Although Mr. Pollock missed their stop, he eventually stopped the jitney let them off (3T at 16-17). Mrs. Kennedy was nervous about exiting the jitney so Mr. Kennedy took their shopping cart to the sidewalk and returned to help her out (3T at 18-19). She was not sure how—perhaps it was the jitney—but she fell into the street, landing on her back (3T at 19-20). Although her husband told Mr. Pollock not to move, he did (3T at 21).

But on cross-examination Mrs. Kennedy was often confused and unsure of her answers. For instance, first she could not recall whether she was able to make it safely to the sidewalk (3T at 48), then acknowledged getting on the sidewalk with her husband's help (3T at 49). But then she changed her answer again, saying she did not know if she made it to the sidewalk (3T at 50). Indeed, Mrs. Kennedy admitted that the entire situation confused her (3T at 51).

She nevertheless insisted that the jitney caused her fall when she was "close to" the sidewalk but still in the middle of the street (3T at 52-53).

The charge and verdict

Defendant did not call any witnesses, and the trial court charged the jury after less than three days of testimony (3T at 118). At the preceding charge conference all parties agreed that it was appropriate for the court to give model charge 6.10 regarding proximate cause (3T at 69-70).

After reiterating the basic facts of the case Judge Siracusa noted (i) the Kennedys alleged Mr. Pollock negligently operated his jitney and proximately caused Mrs. Kennedy's injuries but (ii) Mr. Pollock contended he was not negligent and that his conduct was not a proximate cause of Mrs. Kennedy's injuries (3T at 120). In fact, although the Kennedys attempt to make much of one sentence of the charge concerning Mr. Pollock's claims, only moments before uttering those words the Court specifically told the jury (3T at 120) (emphasis added):

> Mr. Pollock was discharging passengers, including Mr. and Mrs. Kennedy, near the intersection of Rhode Island Avenue. <u>After Mrs. Kennedy exited from the jitney the jitney made contact with her causing personal injuries</u>.

The court continued, noting that the Kennedys had the burden of proving their case by a preponderance of the evidence, and the types of evidence the jury had to consider in making their decision (3T at 120-22). After instructing the jury that it alone was to determine witnesses' credibility, including the experts, the court defined negligence, advised the jury of the standard of care for common carriers, and explained that if the jury found Mr. Pollock negligent it also needed to find that his conduct proximately caused Mrs. Kennedy's injuries (3T at 122-30). No one objected to the charge.

After deliberating for 90 minutes the jury returned a verdict for Mr. Pollock, answering question one on the verdict sheet that the Kennedys had not proven negligence by a preponderance of the evidence (3T at 144, 1Pa at 11). The lower court then issued a final order of dismissal on September 25, 2017 (1Pa at 13).

ARGUMENT

THE JURY'S NO-CAUSE VERDICT SHOULD STAND BECAUSE IT WAS NOT A MISCARRIAGE OF JUSTICE, NOR COULD IT HAVE BEEN MOTIVATED BY A MISTAKE, PARTIATLITY, PASSION OR PREJUDICE.

Jury verdicts have been described by New Jersey courts as virtually "impregnable." *Doe v. Arts*, 360 N.J. Super. 492, 502-03 (App. Div. 2003). They should be overturned "only where to do otherwise would result in a miscarriage of justice shocking to the conscience of the court." *Zaman v. Felton*, 219 N.J. 199, 214 (2014); see also *Jacobs v. Jersey Central Power & Light Company*, 452 N.J. Super. 494, 502 (App. Div. 2017) ("We ordinarily do not set [verdicts] aside and order a new trial unless there has been a proven manifest injustice").

An appellate court's disagreement with the result is not a basis for disturbing a jury's verdict. *Zaman*, 219 N.J. at 214 ("An appellate court should not disturb the findings of the jury merely because it would have found otherwise upon a review of the same evidence"). It is the jury's sole province to assess credibility and its "verdict can be set aside only when the 'conclusion could only have been motivated by a mistake, partiality, passion or prejudice.'" *Id.* at 503.

The Kennedys not only have to overcome this "high standard" for setting aside a verdict (*Satellite Entertainment Center, Inc. v. Keaton*, 347 N.J. Super. 268, 275 (App. Div. 2002)), they are limited to review under the "plain error" standard of R. 2:10-2 because their attorney did not object to cross-examination questions or the trial court's charge. See, e.g. *Willner v. Vertical Realty, Inc.*, 235 N.J. 65, 79 (2018) ("the failure to object to a jury instruction requires review under the plain error standard"). But relief under the plain error rule should be "sparingly employed" because the losing party is not entitled to a second chance after failing to object before the jury began deliberations. *Gaido v. Weiser*, 115 N.J. 310, 310 (1989)[2], affirming *Gaido v. Weiser*, 227 N.J. Super. 175 (App. Div. 1988). Using those standards, there is no basis for setting aside this verdict.

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[2] The Kennedys also cite *Gaido*, but for the proposition that the Appellate Division invoked the plain error rule to "reverse[] the trial court due to an erroneous jury charge" (Pb 25). The opposite is true. Indeed, the Appellate Division found that the charge "adequately conveyed the concept of proximate cause" and plaintiff therefore was "not entitled to have the jury charged in words of her own choosing." 227 N.J. Super. at 199-200.

A. Defense counsel did not exceed the bounds of proper cross-examination in questioning Mrs. Kennedy.

Although there are both practical and logical limits on cross-examination, courts have broad discretion in determining its permissible scope. *See, e.g. State v. Silva*, 131 N.J. 438, 444 (1993). Included within that scope as acceptable bases for attacking a witness' credibility are (i) the witness' inability to "observe, remember, or recount matters" and (ii) proof that facts are contrary to the witness' testimony. Id. Indeed, "[a] paramount purpose of cross-examination is the impeachment of the credibility of the witness." *Perna v. Pirozzi*, 92 N.J. 446, 456 (1983). An appellate court should therefore not interfere with a trial court's control of cross-examination "unless clear error and prejudice are shown." *State v. Gaikwad*, 349 N.J. Super. 62, 86 (App. Div. 2002).

The Kennedys claim they were prejudiced by defense counsel's "poor behavior" in cross-examining Mrs. Kennedy; that counsel purportedly "harass[ed] and harangu[ed]" her (Pb 10). Not true.

The first instance of counsel's claimed harassment concerns questions about whether Mrs. Kennedy was actually able to get on to the sidewalk after leaving the jitney (3T at 48-50). True, counsel asked many questions on this

topic. Reading Mrs. Kennedy's testimony demonstrates why that was necessary: her answers were either unresponsive (3T at 48; 3T at 49, 11-22); asked for clarification (3T at 49, 6-10); offered different answers than previously given (3T at 50, 1-8); or were just plain confused (3T at 50-52).

Contrary to the Kennedys' claim, this was not an "ancillary" issue. Even Mr. Kennedy acknowledged the video evidence showed the couple on the sidewalk before the jitney moved (2T at 72). Asking Mrs. Kennedy to confirm that fact was a central part of the defense: if both Mr. and Mrs. Kennedy were on the sidewalk when the jitney started moving, how could Mr. Pollock have been negligent? Cross-examining Mrs. Kennedy to get a precise answer hardly exceeded the bounds of permissible questioning. And apparently the Kennedys' counsel agreed, as he did not object to any of the questions now claimed as problematic.

The same is true of counsel's questions about how far Mrs. Kennedy had to walk to get to the sidewalk after exiting the jitney. First, Mrs. Kennedy said she was "in the middle" of the street (3T at 54, 20-25). Then she said she was "far" from the curb, so counsel asked her to estimate in feet or total steps how far she was (3T at 55, 1-25). After guessing it was four or five steps, Mrs. Kennedy backtracked and said she did not know (3T at 56, 2-

3). After only three more questions the trial court instructed counsel to end that line of questioning, and he did (3T at 56, 22-24).

Both lines of questioning were nothing more than counsel's testing Mrs. Kennedy's ability to "observe, remember, or recount matters" and demonstrate that the video evidence was contrary to her testimony. *Silva*, 131 N.J. at 444. Review of the questions and answers under the plain error standard demonstrates that they were not at all prejudicial, and certainly not "capable of producing an unjust result." *Willner*, 235 N.J. at 79.

B. The charge adequately conveyed the applicable legal principles.

To determine whether a jury charge was appropriate it is considered "as a whole, whether counsel voiced any contemporaneous objection, and the likelihood that the flaw was so serious that it was likely to have produced an unfair outcome." *Jacobs*, 452 N.J. Super. at 503. Indeed, if counsel does not object to the charge "there is a presumption that [it] was not error and unlikely to prejudice the…case." *Willner*, 235 N.J. at 79. Thus, if a charge "adequately covered the governing legal principles" a verdict should not be set aside on the ground that the charge was improper. *Gaido*, 227 N.J. Super. at 199-200.

Here, the Kennedys' counsel did not object to the charge. Not only that, he actively participated in the charge conference and agreed with the trial court and Mr. Pollock's counsel about the controlling legal principles and contents of the charge (3T at 66-80). In fact, more than once he told the trial court that he would accept whatever it charged (3T at 70—"Whatever Your Honor determines to be the model jury charge I'm fine with" and 3T at 79—indicating he was "fine with" any neutral language about the applicability of the Atlantic City Municipal Ordinance). As a starting point, the presumption is that the charge was appropriate. *Willner*, 235 N.J. at 79.

Nor is there any other basis for finding that the charge was so prejudicial that it was likely to have produced an unfair outcome. In fact, the Kennedys assert that only one sentence of the charge was improper; that the trial court's compound sentence about what Mr. Pollock asserted essentially told the jury to find for the defendant (Pb 20). Reading the charge as transcribed does not bear out the Kennedys' claim. At most, the sentence advises the jury about Mr. Pollock's basic claim, i.e. that he was neither negligent nor a proximate cause of Mrs. Kennedy's injuries (3T at 120, 19-23). The two preceding sentences convey the same information about the Kennedys'

claims—that Mr. Pollock negligently operated his jitney and caused various injuries (3T at 120, 14-19).

Were this Court to view single sentences of the charge in a vacuum as the Kennedys suggest, equally prejudicial would be the trial court's comment that "[a]fter Mrs. Kennedy exited from the jitney the jitney made contact with her causing personal injuries." (3T at 120, 10-12). But because the charge must be viewed as a whole, singling out a few words is not enough to show prejudice. The trial court appropriately charged that Mrs. Kennedy had the burden of establishing her case by a preponderance of the evidence (3T at 121); that the jury could consider direct and circumstantial evidence and draw appropriate inferences from that evidence (3T at 121-22); and that it had to assess witnesses' credibility, including the expert witnesses (3T at 123-25).

The trial court continued, noting that the Kennedys claimed Mr. Pollock violated the Atlantic City Municipal Code, and that as a common carrier he was required to "act with the highest possible care consistent with the nature of the undertaking involved" (3T at 126-27). Finally, the court charged the jury in accordance with Model Jury Charge 6.10 that if it determined Mr. Pollock was negligent, it also had to answer whether his negligence was a proximate

cause of the accident, and read the definition verbatim from the Model Charge (3T at 129-30).

The Kennedys take no issue with any of this. Instead, they complain that one sentence of a lengthy, otherwise unobjectionable charge, is grounds for a new trial. Even if the trial court erred in describing the parties' contentions—and it did not—because the rest of the charge "present[ed] the law fairly and clearly, the fact that some expressions, standing alone, may be said to be erroneous affords no ground for reversal." *Bradford v. Kupper Associates*, 283 N.J. Super. 556, 575 (App. Div. 1995).

Finally, the Kennedys claim prejudice is apparent from Mr. Pollock's response to one pre-trial interrogatory where he purportedly acknowledged hearing Mr. Kennedy bang on the bus before driving off (Pb at 22-23). But that is not what the interrogatory response recites. Mr. Pollock responded that he "was still stopped at a red light when he heard a loud. He got up and looked out the passenger-side door to find Plaintiff lying on the ground near the rear passenger-side wheel" (1PA at 19). All we know from reading this response is that Mr. Pollock heard something loud outside his bus. Whatever that meant, the jury had that, the video, and the Kennedys' testimony to assess the fact. Evidently, they concluded that the video showing the Kennedys on the

sidewalk before Mr. Pollock drove away demonstrated he was not negligent. The verdict should stand and the order appealed from should be affirmed.

CONCLUSION

Questioning a witness to test her ability to observe or remember and confronting her with facts contrary to her testimony is acceptable cross-examination. Mrs. Kennedy's age and inability to remember details do not convert non-objectionable questions to harassment. Nor does a single—even if compound—sentence of an otherwise appropriate charge constitute a ground for ordering a new trial.

The order appealed from should therefore be affirmed.

Dated: Philadelphia, Pennsylvania
February 14, 2019

Respectfully Submitted,

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AFFIDAVIT OF SERVICE

DOCKET NO. A-000845-17T3

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Hilda T. Kennedy, et al.

vs.

Frederic A. Pollock; The Estate of Frederic A. Pollock

---------EDWARD T. O'CONNELL----------x

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I, , swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on **February 14, 2019**

I served the within **Brief on behalf of Defendants-Respondent** in the above captioned matter upon:

Hilda T. Kennedy, Pro Se
John F. Kennedy, Pro Se
2834 Atlantic Avenue, Suite 815
Atlantic City, NJ 08401

via **Express Mail and First Class Mail** by depositing **2** copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

Sworn to before me on February 14, 2019

Maryna Sapyelkina
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2019

Edward T. O'Connell

Job # 283774