

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

AARON ADAMS and
ANDREW ADAMS, JR.,
Appellants

vs.

No. 16-0153

BESART BERISHA, TERRY GERGAR,
JR., TERRY GERGAR, SR.,
Appellees

Robert W. Munley, III, Esquire
John W. Ashley, Esquire

Counsel for Plaintiffs
Counsel for Defendant, Besart
Berisha

Terry Gergar, Jr.
Terry Gergar, Sr.

Pro Se
Pro Se

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MEMORANDUM OPINION

Matika, J. - October 22, 2018

In this matter, the Plaintiffs, Aaron Adams and Andrew Adams, Jr., (hereinafter collectively "Adams") filed an appeal of the verdict entered on January 11, 2018 and the denial of their post-trial motion rendered by this Court on June 28, 2018. This Memorandum Opinion is issued in response to that appeal and in accordance with Pennsylvania Rule of Appellate Procedure 1925(a)(1).¹ For the reasons stated herein, this Court recommends affirmation of that verdict and the denial of Adams' post trial motion.

¹ The delay in filing this Memorandum Opinion was due to the fact that Adams' appeal had been quashed on September 14, 2018 but subsequently reinstated by Order dated October 12, 2018.

FACTUAL AND PROCEDURAL BACKGROUND

On January 25, 2016, Adams² filed an action against the defendants, Terry Gergar, Sr. and Terry Gergar, Jr. (hereinafter collectively "the Gergars") and Besart Berisha (hereinafter "Berisha"), arising out of a dog bite suffered by Aaron Adams. The Gergars were tenants at 10 W. Oak Street, Treskow, Pennsylvania and owners of a pit bull dog that bit Aaron Adams on July 7, 2014. Berisha was the owner of the real estate at 10 E. Oak Street, Treskow, Pennsylvania and the Gergars' landlord.

Trial was held in this case on January 10, 2018. The testimony revealed that the dog owned by the Gergars attacked without warning, Aaron Adams. Aaron Adams suffered serious injuries to his left arm and wrist area. The jury found the Gergars negligent as a result of the unprovoked attack. Testimony also revealed and the jury found, that Berisha was also negligent,³ however, when asked if Berisha's negligence was a factual cause of any harm to Aaron Adams, the jury found that it was not. Accordingly, the jury found the Gergars to be solely responsible

² At the time of the filing of this complaint, Aaron Adams was a minor and for purposes of this action the caption originally read, "Aaron Adams, a minor, by Andrew Adams, Jr., Guardian and Andrew Adams, Jr." By stipulation and based upon Aaron Adams attaining the age of eighteen (18) during the pendency of this action, the caption was amended accordingly.

³ A threshold issue for the jury to find was whether or not certain information learned by Berisha's father, Agim Berisha, regarding the dog's dangerous propensities should have been imputed to this defendant by virtue of the fact that Agim Berisha was an "agent" for his son, Berisha. The jury answered both questions in the affirmative.

for the ensuing damages. The jury thereafter awarded the Adams, the sum of One Hundred Twenty Thousand, Three Hundred, Ninety-Three Dollars and Forty-Seven Cents (\$120,393.47) in damages.⁴ The verdict was then molded on January 11, 2018 accordingly, and filed on January 12, 2018.⁵

On January 22, 2018, Adams filed a "Motion for Post-trial Relief." In that motion, Adams argued that the Court should direct that the verdict must also be entered against Berisha as the evidence, found by the jury supported Adams' theory of negligence as against Berisha, but the jury got it wrong when it did not find that this negligence was the factual cause of the injuries sustained by Aaron Adams. This post-trial motion was denied on June 28, 2018, prompting Adams to then file this appeal on July 23, 2018.

On July 26, 2018, the Court directed Adams to file their Concise Statement in accordance with Pennsylvania Rule of Appellate Procedure 1925(b). That statement was filed on August 14, 2018. In that statement, Adams complains that three errors occurred which entitle them to relief. These alleged errors are as follows:

⁴ The sum was broken down as \$100,000.00 in non-economic losses to Aaron Adams and the balance of \$20,393.47 attributed to past medical expenses to both Plaintiffs.

⁵ This verdict was reduced to judgment by Adams on August 21, 2018 by Order of the Superior Court dated August 15, 2018.

1. The Trial Court erred in Denying Plaintiff's [Aaron Adams] Motion for Post-Trial Relief.
2. The Jury's verdict, finding that Besart Berisha's negligence was not a factual cause of the Plaintiff's [Aaron Adams] injuries, is against the weight of the evidence which conclusively established that the injuries were caused by Defendant Gergar's pit bull, and that Defendant Berisha had actual knowledge of the dangerous propensities of the pit bull.
3. The Trial Court erred in denying Plaintiff's [Aaron Adams] Motion for a New Trial where the jury's verdict was so contrary to the evidence that it shocks one's sense of justice.

This Court believes that these three alleged errors are all related to the same issue.⁶

Adams argues that the jury's responses to the interrogatories relative to Berisha's negligence/factual cause/damages were so against the weight of the evidence that it "shocks one's sense of justice." As a result, the Court should have granted Adams post-trial motion and direct a verdict against Berisha on the issue of

⁶ Adams has reserved the right to file supplemental errors complained of after this opinion is filed on the basis that the Court only summarily dismissed the post-trial motion for relief. While this Court agrees with Adams, it does not find it necessary. However, if filed, the Court will file a supplemental opinion.

liability and order a new trial on the issue of damages. Our denial has prompted this appeal.

LEGAL DISCUSSION

Adams contends that the jury's verdict was against the weight of the evidence regarding the jury's finding that although it found Berisha negligent it did not find that Berisha's negligence was a factual cause of Aaron Adams' injuries. Further, Adams argues that the Court erred in not granting its post-trial motion requesting a new trial on the basis that the jury's verdict was against the weight of the evidence.

The general rule in this Commonwealth is that a weight of the evidence claim is primarily addressed to the discretion of the judge who actually presided at trial. There is, of course, some tension between the power of trial courts to overturn jury verdicts premised upon weight claims, and the bedrock principle that questions of credibility are exclusively for the fact-finder. Accordingly, the authority of the trial judge to upset a verdict premised upon a weight claim is narrowly circumscribed. A trial judge cannot grant a new trial because of a mere conflict in testimony or because the trial judge on the same facts would have arrived at a different conclusion. Instead, a new trial should be granted only in truly extraordinary circumstances, i.e., when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. *Armbruster v. Horowitz*, 572 Pa. 1, 813 A.2d 698, 702-703 (Pa. 2002) (internal quotations and citations omitted).

With this legal principle in mind, the Court turns to the claims of Adams. There was testimony that an ex-girlfriend of one of the Gergars owned a pit bull which had been in an altercation

with the subject pit bull and that Berisha's father, Agim Berisha was aware of that incident. There was other testimony that on occasions, Agim Berisha acted as an "agent" for his son, Defendant, Berisha by collecting rents and doing some routine maintenance at his son's property. Accordingly, the jury found not only that Agim Berisha was an agent for Besart Berisha but as a result of what Agim Berisha knew regarding the aggression shown by the subject pit bull towards the other dog, this knowledge would be imputed to Defendant, Besart Berisha. Further, the jury found Besart Berisha negligent, but not a factual cause of the injuries of Aaron Adams.

In the closing instructions to the jury, the Court described negligence and factual cause in the following way:

The Court: I will now give you the instructions on the specific causes of action involved in this case. In this case, you must decide whether any or all of the defendants were negligent, and I will now explain to you what negligence is. A person must act in a reasonably careful manner to avoid injuring others. The care required varies according to the circumstances and the degree of danger at a particular time. You must decide how a reasonably careful person would act under the circumstances established by the evidence in this case. A person who does something a reasonably careful person would not do under the circumstances is negligent. A person can be negligent by failing to act also. A person who fails to do something a reasonable person would do under the circumstances is negligent.

Now, the mere happening of an accident does not establish negligence by itself nor raise an inference nor a presumption of negligence. In order for the plaintiffs to recover in this case, the defendants' negligent conduct must have been a factual cause in bringing about the harm. Conduct is a factual cause of

harm when the harm would not have occurred absent that conduct. To be a factual cause, the conduct must have been an actual real factor in causing the harm even if the result is unusual or unexpected. A factual cause cannot be an imaginary or fanciful factor having no connection or only an insignificant connection with the harm. To be a factual cause, the defendants' conduct need not be the only factual cause. The fact that some other causes concur with the negligence of the defendant in producing an injury does not relieve the defendants from liability as long as their own negligence is a factual cause of that injury.

Now, sometimes a person's negligent conduct combines with other people's conduct to cause harm. When a defendant's negligent conduct combines with the conduct of other persons, the defendant is legally responsible if his or her negligent conduct was one of the factual causes of that harm. In such a case, the defendant is fully responsible for the harm suffered by the defendant, I'm sorry, by the plaintiff regardless of the extent to which the defendant's conduct contributed to that harm.

(N.T. January 10, 2018 p. 42-43)

Additionally, during the closing jury instructions, this Court gave an instruction on an out-of-possession landlord which read as follows:

The Court: Now, in this case, Defendant Berisha was a landlord out of possession of the rental property at the time of this incident. A landlord out of possession still has a duty to use reasonable care to prevent injuries by animals kept by his tenant and to protect against or remove an animal on his rental property when he has actual knowledge of the animal's dangerous propensities. Actual knowledge of the dog's dangerous propensities is required before a duty is imposed upon a landlord to protect against or remove an animal housed on rental property.

(N.T. January 10, 2018, p. 45.)

At the conclusion of the original closing instructions, the jury was sent out to deliberate. During the course of the deliberations, the jury presented two questions to the Court which requested that the Court: 1) re-read the instruction on factual cause; and 2) asked whether the jury could attribute "0 percent" casual negligence to a defendant if the jury found a defendant negligent and was a factual cause of the harm to the Plaintiffs. After discussing these questions in Chambers with counsel, Court re-convened and the following occurred:

THE COURT: Now, ladies and gentlemen of the jury, I understand that you have presented two questions to the Court which I've had an opportunity to review and go over with counsel.

First question was, please give an explanation of factual cause. What I'm going to do, ladies and gentlemen, is simply re-read the instruction on factual cause for you and hopefully that will further enlighten you as to that explanation that you're seeking.

So I'm going to re-read this charge. It reads as follows:

In order for the plaintiffs to recover in this case, the defendants' negligent conduct, that of the Gergars and that of Mr. Berisha, must have been a factual cause in bringing about harm. Conduct is a factual cause of harm when the harm would not have occurred absent that conduct. To be a factual cause, the conduct must have been an actual real factor in causing the harm even if the result is unusual or unexpected. A factual cause cannot be an imaginary or fanciful factor having no connection or only an insignificant connection with the harm.

To be a factual cause, the defendants' conduct need not be the only factual cause. The fact that some other causes concur with the negligence of the defendants from liability as long as their own negligence is a factual cause of that injury. So that, again, is the instruction on factual cause.

The second question that you presented to the Court that I've discussed with counsel was, can someone be negligent in questions three and four but yet be assigned zero and in parenthesis zero percentage in question five? The simple answer to that is no. Okay.

Mr. Herrmann, Mr. Foreperson, I've provided you with the answers you've asked. Is the jury ready to continue their deliberations?

THE FOREPERSON: Yes, we are, Your Honor.

THE COURT: Counsel, anything further on responding to the questions?

ATTORNEY ASHLEY: No, Your Honor.

ATTORNEY NEALON: No, Your Honor.

THE COURT: Okay.

(N.T. January 10, 2018, p. 59-60.)

The charge given and re-read to the jury was the Pennsylvania Suggested Standard Civil Jury Instruction for factual cause, one which has been labelled as "a complete definition of factual cause." *Gorman v. Costello*, 929 A.2d 1208, 1213 (Pa. Super. Ct. 2007). Thus, it was up to the jury to decide, based upon its finding that Berisha was negligent, whether such negligence was a factual cause that brought about the harm to Aaron Adams. In finding negligence, the jury considered the facts regarding Berisha's imputed knowledge of the subject pit bull's "dangerous propensities" and whether that knowledge imposed a duty to use reasonable care to prevent injuries to Adams. This the jury did in finding Berisha negligent. However, the jury refused to find

that this negligence was a factual cause of the injuries Aaron Adams sustained.

In *Palermo v. Nails*, 483 A.2d 871, 873 (1984), the Court held that a landlord may be responsible for injuries to a person caused by an animal owned and maintained by his tenant where the landlord was aware of the possibility of a dangerous animal and where the landlord had the right to control or remove the animal or re-take the premises. (emphasis ours).

All of this begs the question: "What was the jury thinking during deliberations and thereafter with the responses they gave to the verdict interrogatories?" Needless to say, the court cannot delve into that and question a jury's deliberations. It is conceivable that the jury could have found that: 1) Berisha knew of a situation that occurred between Gergar's dog and Gergar's ex-girlfriend's dog; 2) that this was an "alpha male" fight between these two dogs and that was the only dangerous propensities the subject pit bull had (this was the only testimony presented that could be imputed to Berisha on the issue of the dog's dangerous propensities); 3) the moving of the ex-girlfriend and her dog resolved what Berisha felt was the situation that caused the dangerous propensities; and 4) once the ex-girlfriend and her dog moved, there was no need to control or remove the subject pit bull any longer by retaking the premises from the Gergars. These inferences could have been drawn from the testimony by the jury.

In weighing the testimony in light of these inferences, the jury was of the belief that, despite what happened to Aaron Adams, his injuries were not attributed to Berisha and perhaps that Berisha was no longer required to take steps to alleviate all possible dangers based upon the information imputed to him through his agent/father Agim Berisha that this dog fought with another dog.

In *Daniel v. William R. Drach, Co., Inc.*, 849 A.2d 1265 (Pa. Super. Ct. 2004), the jury found the Defendant's company negligent in failing to properly maintain it's loading dock but refused to find that the negligence was for a substantive factor in causing the Plaintiff's injuries and that in so finding, the verdict was not against the weight of the evidence. The Court in that case further held that the jury properly determined that the negligence did not produce the injuries that the Plaintiff sustained because what caused the Plaintiff's injuries was not the negligence of the company, but some other factor.⁷

In the case *sub judice*, the jury could have determined that Berisha's negligence had an insignificant connection to the harm, if any, and in so determining, his negligence was not a factual cause of the harm as that term is defined.

⁷ The company's negligence was as a result of the fact that the loading dock was oily and wet, however the injuries were not caused by that fact but by the fact that the Plaintiff lost control of the 800-pound drum of scrap metal he was picking up.

CONCLUSION

For the foregoing reasons, the Court request the Honorable Superior Court to affirm the trial court's denial of Adams' post-trial motion and the jury's verdict.

BY THE COURT:



Joseph J. Matika, J.