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

NOREEN COFFIN and DARVIN COFFIN, Plaintiffs	:	No. 20-1403
v.	:	
CARBON COUNTY and ZACHARY THOMAS, Defendants.	:	

Michael J. Perry, Esquire — Counsel for Plaintiffs

Gerald J. Gieger, Esquire — Counsel for Defendants

MEMORANDUM OPINION

Serfass, J. - March 13, 2024

On June 11, 2020, Noreen Coffin and Darvin Coffin, (hereinafter "Plaintiffs") filed a Complaint for negligence, negligence pro se and loss of consortium against Carbon County Animal Shelter and Zachary Thomas, (hereinafter "Defendants"). This action relates to a dog bite sustained by Plaintiff Noreen Coffin which caused her to fall to the ground and break her ankle. Following a jury trial and a verdict in favor of Noreen Coffin, Plaintiffs filed a "Motion for New Trial" which we denied via Order dated November 29, 2023. The appeal from that order is presently before the Court and we file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), respectfully recommending that our Order of November 29, 2023, be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a Complaint against Defendants on June 11, 2020, averring two (2) counts of negligence, two (2) counts of negligence per se, and one (1) count of loss of consortium arising out of injuries allegedly sustained as a result of a dog bite.

On June 30, 2020, Defendants filed preliminary objections to Plaintiffs' Complaint, asking for a more specific pleading, and preliminary objections in the nature of a demurrer alleging that Plaintiffs cannot state a negligence per se claim against Defendants because: a) as an employee of the Carbon County Animal Shelter, Zachary Thomas was neither the owner nor the keeper of the dog and thus has no liability under the dog law; and b) while the Political Subdivision Tort Claims Act provides an exception to tort immunity relating to the care of animals, the shelter and county have no liability under the dog law for summary offenses, which form the basis for the Coffins' claim of negligence per se. On August 17, 2020, an Order was entered approving the parties' stipulation in which Plaintiffs agreed to dismissal of both counts of negligence per se.

On September 20, 2020, Plaintiffs filed an Amended Complaint which substituted Carbon County as a defendant in lieu of the Carbon County Animal Shelter. On November 23, 2020, Defendants filed an Answer to the Complaint which denied all allegations of negligence and raised New Matter alleging the following: Plaintiff

Noreen Coffin's injuries, if any, were caused by her own negligence, recklessness, and carelessness, which completely bars or limits her recovery; Carbon County Animal Shelter is not a legal entity subject to suit; Plaintiffs' claims are barred and/or limited by the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. Ann. § 8541 et seq.; Plaintiffs' action is barred because they failed to file the proper notice within six months of their claim as required by 42 Pa. Cons. Stat. Ann. § 5522; Defendants are immune from suit; Plaintiffs' damages are limited by 42 Pa. Cons. Stat. Ann. § 8553; to the extent that Plaintiff Noreen Coffin is entitled to monetary damages for her alleged injuries under a policy of insurance, the amount of such benefits must be deducted from the amount of damages otherwise recoverable against the Defendants. 42 Pa. Cons. Stat. Ann. § 8553(d); and, Plaintiff Noreen Coffin was comparatively negligent, which bars and/or limits her right to recovery.

On January 18, 2022, Defendants filed a Motion for Summary Judgment which averred that the discovery process has produced no evidence that Parker (the subject dog) had ever attacked anyone prior to the incident with Noreen Coffin and, as a result, no one at the shelter knew or should have known that Parker posed a risk to her. Defendants claim that because there is no prior evidence known to the staff that Parker posed a danger, Plaintiffs are not able to prove negligence. On February 22, 2022, Plaintiffs filed

a "Response to Defendants' Motion for Summary Judgment" disputing Defendants' arguments and requesting that Defendants' Motion for Summary Judgment be denied. On April 4, 2022, an Order was entered denying Defendants' Summary Judgment Motion.

On October 4, 2022, an Order was entered scheduling this matter for a jury trial to begin on January 16, 2023. Jury selection in this matter commenced on January 16, 2023, and on January 19, 2023, the jury entered a verdict in favor of Plaintiff, Noreen Coffin. The jury determined that Mrs. Coffin was comparatively negligent and that her comparative negligence was a factual cause of her harm. Specifically, the jury determined that the percentage of negligence attributable to Mrs. Coffin was fifty percent (50%). Thus, the total damages awarded by the jury to Noreen Coffin ($40,000.00) was reduced to $20,000.00. Plaintiff, Darvin Coffin, was not awarded any damages for his loss of consortium claim.

On January 27, 2023, Plaintiffs filed a "Motion for New Trial." On November 29, 2023, following the oral argument of counsel, and this Court's review of the parties' briefs and post-argument submissions, we entered an Order denying Plaintiffs' "Motion for New Trial".

Plaintiffs filed a Notice of Appeal on December 21, 2023. This Court was not served with the Notice of Appeal until January 19, 2024. On that same date, we entered an order directing

Plaintiffs to file a concise statement of matters complained of on appeal within twenty-one (21) days pursuant to Pa.R.A.P. 1925(b). Plaintiffs filed their concise statement on February 12, 2024.

ISSUES

Upon review of Plaintiffs' 1925(b) statement, this Court will address the following two issues:

(1) Does Plaintiffs' late filing of the concise statement waive the issue raised on appeal?

(2) Did the Court abuse its discretion and commit an error of law by instructing the jury on Plaintiffs' comparative negligence and including it on the verdict slip?

DISCUSSION

Before addressing the merits of Plaintiffs' claim, we must determine whether this issue has been properly preserved for appellate review. On January 19, 2024, we entered an order directing Plaintiffs to file a concise statement of matters complained of on appeal within twenty-one (21) days of the date of the order pursuant to Pa.R.A.P. 1925(b). Plaintiffs had until February 9, 2024, to file the concise statement, but did not do so until February 12, 2024, which is three (3) days past the due date.

In Commonwealth v. Castillo, a similar situation arose whereby the appellant filed an untimely concise statement. 888 A.2d 775, 777(Pa. 2005). The Superior Court held that it would

address the issues raised in the untimely filed concise statement because the trial court was still able to address those issues. Id. The Supreme Court reversed this decision, holding that the untimely filing of the 1925(b) concise statement resulted in waiver of all issues on appeal and mandated the dismissal of the appeal. Id. at 780.

It is well-settled that a failure to timely file a concise statement of errors complained of on appeal results in a waiver of all issues raised on appeal. *See* Estate of Cherry, 111 A.3d 1204, 1206 n.1 (Pa.Super. 2015); *see also* Commonwealth v. Fransen, 42 A.3d 1100 (Pa.Super. 2012) (wherein a defendant filed his concise statement three (3) days late and the Superior Court concluded that he had waived all claims by failing to file a 1925(b) statement).

Upon a showing of good cause, Pa.R.A.P. 1925(b)(2) provides for the filing of a statement or amended or supplemental statement *nunc pro tunc*."[1] However, nothing in this case indicates that any extraordinary circumstances arose to warrant the late filing of a 1925(b) statement. For this reason, the issue raised in the concise statement is waived.

In the event that the Honorable Commonwealth Court finds that Plaintiffs have properly preserved the issue they seek to raise on

[1] *See also* Commonwealth v. Kearney, 92 A.3d 51 (Pa.Super. 2014), (holding the 2007 revision of Rule 1925 gives judges the authority to allow for the filing of concise statements *nunc pro tunc*), appeal denied, 101 A.3d 102 (Pa. 2014).

appeal, we will address that issue as contained in their concise statement. Specifically, Plaintiffs contend that this Court abused its discretion and committed an error of law by instructing the jury on Plaintiff Noreen Coffin's comparative negligence and including it on the verdict slip. Specifically, Plaintiffs contend that Defendants failed to establish any evidence of Noreen Coffin's comparative negligence during the trial and that the inclusion of an instruction on comparative negligence likely confused or misled the jury.

"The standard of review for determining whether a court properly issued jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error which controlled the outcome of the case." Johnson v. Rodrigues, No. 3071 EDA 2022, 2023 WL 128155 *4 (Pa. Super. Jan. 11, 2024) (non-precedential decision) (quoting Krepps v. Snyder, 112 A.3d 1246, 1256 (Pa. Super. 2015)).

"The standard for determining whether a jury instruction on comparative negligence is warranted under Pennsylvania law is well settled. The burden of establishing comparative negligence rests on the defendant." Pascal v. Carter, 436 Pa.Super. 40, 647 A.2d 231, 233 (citing McCullough v. Monroeville Home Ass'n, *Post 820, Inc.*, 270 Pa.Super. 428, 411 A.2d 794, 795 (1979)). "[I]f there is some evidence of [comparative] negligence produced in any of the evidence, it is reversible error not to charge the jury on the

issue, when requested to do so by the defendant." Id. (citing Matteo v. Sharon Hill Lanes, Inc., 216 Pa.Super. 118, 263 A.2d A.2d 910 (1970).

In the instant matter, there is ample evidence of Noreen Coffin's comparative negligence. Mrs. Coffin was a volunteer at the shelter for three years before the dog bite occurred. (N.T. 01/17/23, p. 52). The director of the shelter, Tom Connors, worked very closely with Mrs. Coffin, having described her as his right-hand man and even as his "work wife." (N.T. 1/18/23, pp. 128, 142). Due to Mrs. Coffin's experience and commitment to the shelter, she was given more leeway and access to the shelter compared to other volunteers. (N.T. 1/18/23, p. 143). The employee involved in the dog bite incident, Zachary Thomas, explained that he had only been working at the shelter for a period of two months before the incident occurred and he received training from Mrs. Coffin. (N.T. 01/17/23, N.T. p. 63); (N.T. 1/18/23, Nt. p. 71). It was understood that Mrs. Coffin was a knowledgeable and experienced volunteer at the shelter whose judgement could be relied on. (N.T. 1/18/23, pp. 142-143).

On the day of the dog bite incident, Mr. Thomas had been taking the dog, Parker, who would eventually bite Mrs. Coffin, on a walk. (N.T. 1/18/23, pp. 62-63). At this point, no one at the shelter noticed any signs of aggression in Parker nor was the shelter aware of any past history of aggression with the dog.

(N.T. 1/18/23, p. 55). As Mr. Thomas was exiting the dog path with Parker, he saw Mrs. Coffin. She said hi and called Parker over. (N.T. 1/18/23, pp. 62-63). When she stopped petting Parker, he jumped on her. (N.T. 1/18/23, pp. 62-63). At this point the story of what happened is different according to Mr. Thomas and Mrs. Coffin. Mr. Thomas alleged that when he asked if Parker tried to bite Mrs. Coffin, she said no and explained that his nose just hit her cheek. (N.T. 1/18/23, p. 63). Mrs. Coffin said they should head inside, so they started walking in together, getting closer in proximity to each other as they walked. Parker was in the middle of them. (N.T. 1/18/23, pp. 64-65). Parker then stopped walking and lunged at Mrs. Coffin and bit her. (N.T. 1/18/23, p. 65). In Mrs. Coffin's version of events, she indicated that once Parker jumped on her she told Mr. Thomas that the dog seemed anxious and that he should get him away from her. (N.T. 01/17/23, p. 38). Mrs. Coffin recalled taking about fifty steps toward the shelter and the dog coming up from behind her and biting her. (N.T. 01/17/23, p. 38). Ultimately, it is for the jury to determine which version of events was true.

In the facts described above, there is sufficient evidence of comparative negligence. If Mrs. Coffin considered the dog to be a threat, she could have waited until Mr. Thomas took the dog inside. However, she chose not to do so and continued her conversation with Mr. Thomas. The bite would not have occurred had Mrs. Coffin

not been in close proximity to Mr. Thomas and Parker to carry on a conversation. Ultimately, Defendants only needed to produce some evidence of negligence in the part of Mrs. Coffin in order to require the instruction on comparative negligence and such evidence has clearly been established in this case.

While we recommend that this appeal be denied, if it were to be determined that the comparative negligence instruction should not have been given to the jury, we submit that the remedy would be not be a new trial as Plaintiffs suggest. Rather, it would be the elimination of the fifty percent (50%) reduction in total damages which was assessed as a consequence of the jury's comparative negligence finding, resulting in a $40,000 total damages award to Mrs. Coffin.[2]

CONCLUSION

Based upon the foregoing, we respectfully recommend that the instant appeal be denied and that our Order of November 29, 2023 be affirmed accordingly.

BY THE COURT:

Steven R. Serfass, J.

[2] See Krivijanski v. Union R. Co., 515 A.2d 933, 938-39 (Pa. Super 1986) (holding the decision that comparative negligence is not applicable does not require a new trial to be granted on the issue of liability, but rather the amount in damages need only be modified to eliminate the reduction made to reflect comparative negligence.)