IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Lou Cressman and Traci Burkhardt,	:	No. 401 C.D. 2012
Appellants	:	Submitted: July 13, 2012
v.	:	
Pennsylvania Turnpike Commission	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: August 17, 2012**

In this appeal, Mary Lou Cressman (Cressman) and Traci Burkhardt (Burkhardt) (collectively, Appellants) seek review of an order of the Court of Common Pleas of Montgomery County (trial court) that denied their post-trial motions after a jury determined the Pennsylvania Turnpike Commission (PTC) was not liable for damages arising out of a single-car accident. Appellants contend the trial court made a number of evidentiary errors, and the jury's verdict is not supported by the record. Upon review, we affirm.

I. Background

On September 15, 2004, Cressman, a resident of Allentown, Pennsylvania, departed her home with her husband and one of her daughters, Burkhardt, to attend an evening church service. During their commute, Cressman drove; Burkhardt sat in the front passenger seat; and, Cressman's husband sat behind his daughter. After leaving their home, Cressman drove southbound on the

Northeast Extension of the Pennsylvania Turnpike (Turnpike). As they approached mile marker 33, Cressman drove into a heavy rainstorm. Shortly thereafter, she lost control of her vehicle, drove over the road's shoulder, and careened down an embankment. The three occupants suffered a range of injuries.

Appellants subsequently filed suit against PTC alleging that its negligent design and maintenance of the Turnpike caused their accident and resulting injuries. After the parties completed discovery, the suit advanced toward a jury trial.

Prior to trial, the parties filed several motions in limine. Particularly, they asked the trial court to consider whether evidence of 1) PTC's subsequent repairs to the Turnpike, or 2) similar single-vehicle accidents occurring near the same location would be admissible. As to the evidence of similar accidents, Appellants asserted such evidence was relevant to establish the existence of a dangerous condition on the Turnpike and PTC's notice of that condition.

After a hearing, the trial court precluded the introduction of post-accident road repairs and erection of a hazard sign. However, the trial court determined the findings of PTC's post-accident investigations could be admissible as they formed the foundation of the expert witnesses' opinions.

Further, as to the evidence of similar accidents, the trial court determined evidence of accidents occurring after the date of Appellants' accident lacked relevancy. At the hearing, the trial court expressed its concern that

subsequent accidents could not provide notice of a dangerous condition, nor did such accidents occur under sufficiently similar circumstances. However, the trial court reasoned that evidence of accidents occurring the same evening and under similar conditions as Appellants' accident could be relevant and admissible. Additionally, evidence of prior similar accidents was relevant to establish notice and the presence of a dangerous condition on the road.

Thereafter, a jury trial commenced. The following summarizes the evidence on liability. Both Cressman and Burkhardt testified as lay witnesses. Cressman testified that on the evening of the accident she was driving her car, a sedan, southbound on the Turnpike. Cressman further testified that she drove approximately 65 to 70 miles per hour in the left lane. According to Cressman, she drove in the passing lane because it was smoother than the right lane.

Additionally, Cressman explained that when they left Allentown, the weather was a little misty, and that near the Quakertown interchange, mile marker 44, the roadway was completely dry. However, Cressman testified that around the Lansdale interchange, mile marker 33, she drove into a sudden torrential downpour. At that time, the rain was so heavy she had difficulty seeing the road despite using her windshield wipers at maximum speed. She further testified during the storm, she remained in the left lane to avoid the puddles developing in the right lane, and she slowed down.

Cressman next explained that after a few miles, she decided to move into the right lane. When doing so, the car hydroplaned, and she lost control of it.

In the following moments, the car travelled across the right lane, over the shoulder of the road, and down a hill into a ditch. When Cressman regained her composure, she realized her husband was unconscious, and she became hysterical. Burkhardt, who was in fair condition, calmed Cressman, woke her father, and called for help.

Eventually, paramedics and at least one police officer arrived at the scene. The first responders told Cressman they had to transport everyone to a hospital by ambulance because the storm was too strong for a helicopter evacuation. On cross-examination, Cressman acknowledged she spoke to Pennsylvania State Trooper Richard Eugene Heiserman at the scene. During their conversation, she told the trooper she was driving 65 to 70 miles per hour in the left lane when she hydroplaned.

At the scene, Cressman also observed that a second single-vehicle accident occurred where she lost control of her car after her accident. However, unlike her car, the second vehicle struck a guardrail and remained on the road.

Burkhardt corroborated much of Cressman's account. Specifically, she testified the downpour occurred suddenly, and although she did not see the car's speedometer, she believed she felt the car slow down when the storm began. Additionally, Burkhardt testified that after the accident her mother was hysterical, and she did not remember Trooper Heiserman talking to Cressman at the accident scene.

Another lay witness, Trooper Heiserman, testified that on September 15, 2004, he received a dispatch to respond to a single-vehicle accident near southbound mile marker 33 of the Turnpike. He explained the rain was so heavy at that time, that he could not safely drive over 50 miles per hour while responding to the accident.

Furthermore, Trooper Heiserman testified he interviewed Cressman at the scene. At that time, he did not believe Cressman was too upset to give an accurate account of the accident. According to him, she said "she was in the left lane and she was traveling between 65 and 70 miles per hour when she hydroplaned and went off the road." Supplemental Reproduced Record (S.R.R.) at 501b.

In addition to Cressman's accident, Trooper Heiserman testified he observed a second, unrelated single-vehicle accident nearby as he arrived at the scene. In the second accident, the car struck the guardrail, did not continue down the hill, and eventually continued southbound. In his opinion, the weather conditions and the driver's excessive speed likely caused the second accident.

As to the condition and engineering of the Turnpike, Appellants presented the testimony of civil highway engineers Michael Wagner (Wagner), James C. Shultz (Shultz), and Matthew R. Burd (Burd). In opposition, PTC re-called Burd to testify, and presented the testimony of civil highway engineer Steven Marc Schorr (Schorr).

Burd, a civil engineer for PTC, testified he learned there was an issue with the Turnpike's southbound lane between mile markers 33.3 and 33.7 in 2005. Specifically, he was informed that the guardrail for that section regularly needed repair and that over 10 accidents, including Appellants' accident, were reported along that stretch between 2001 and 2004.

Thereafter, PTC hired McMahon Associates, a civil engineering firm, to examine the road's surface. Burd testified PTC agreed with the manner McMahon Associates conducted its investigation and the grounds for its conclusions. Furthermore, Burd admitted, based on the report from McMahon Associates, the discovered conditions could cause water to pool, which, in turn, could result in a car hydroplaning. To that end, Burd explained it was his understanding hydroplaning could occur at any speed depending on the surrounding factors.

However, when later re-called by PTC, Burd explained PTC did not have a reason in 2004 to suspect a problem existed on that stretch of highway as a result of its road inspections. Specifically, he testified PTC conducted semi-annual visual examinations of the Turnpike to look for abnormalities. Additionally, the Pennsylvania Department of Transportation inspected the road's roughness and rutting for PTC. In sum, Burd testified that each inspection revealed the Turnpike was in adequate condition between mile markers 33.3 and 33.7. Furthermore, as to the prior accidents, Burd explained that many of the reports for those accidents indicated that driver behavior, such as speeding, caused the accidents.

Wagner, a civil engineer for McMahon Associates, testified he investigated the contours of the roadway between mile markers 33.3 and 33.7 after PTC hired his employer to evaluate the Turnpike in 2005. Based on his investigation, Wagner testified he discovered two irregular road conditions. First, he observed an uphill slope near some of the road's drainage inlets. Second, his inspection revealed that in some places the skip line between the right and left lanes was the road's lowest point. Wagner explained that these conditions occurred because PTC improperly repaired the road in 2000. Additionally, the conditions could cause water to pool on the road. He further opined a car could hydroplane from the standing water potentially created by these conditions.

However, Wagner could not testify that either condition occurred where Cressman lost control of her vehicle. Moreover, Wagner conceded that even the most well-designed and maintained road could accumulate water during a sudden downpour.

Shultz corroborated much of Wagner and Burd's opinions. Specifically, he opined that an improperly graded roadway could lead to standing water on a road. Moreover, he testified standing water could cause a car to hydroplane at speeds below 65 miles per hour.

Additionally, Schorr opined hydroplaning could occur on a perfectly designed and maintained roadway under certain conditions. He explained that during a heavy rain there necessarily would be water on any road, and thus, hydroplaning is always possible during a heavy storm. In short, Schorr testified

that when heavy rain is present, the existence of irregularities in the road, which could cause pooling after the storm, is a "red herring." S.R.R. at 523b.

Rather, Schorr opined Cressman's car hydroplaned because Cressman was driving too fast for the weather conditions, applied her breaks, creating instability on a wet road, and made a lateral movement to change lanes. Additionally, he explained that although a car could hydroplane at much lower speeds, a driver is able to regain control more quickly during a lower speed skid. Thus, Schorr opined Cressman's driving and not PTC's maintenance of the roadway caused the accident.

After deliberating, the jury concluded PTC was not negligent. Appellants filed post-trial motions, which were denied. Thereafter, the trial court entered judgment in favor of PTC. Appellants perfected this appeal, which is now before us for disposition.

II. Issues

On appeal, Appellants contend the trial court erred in determining whether evidence of subsequent single-vehicle accidents near Turnpike mile marker 33 was relevant and in limiting the scope of their cross-examinations. Appellants argue these errors restricted their ability to cross-examine PTC's witnesses, especially where those witnesses put previously precluded evidence at issue. As such, Appellants request a new trial. Alternatively, Appellants argue the

trial court erred in denying judgment notwithstanding the verdict (JNOV) in their favor.[1]

In response, PTC asserts the trial court did not abuse its discretion in excluding evidence of accidents that occurred after September 15, 2004 as irrelevant. Moreover, PTC contends its witnesses did not open the door to testimony that was otherwise excluded by the trial court's pre-trial order. Additionally, PTC argues Appellants' remaining issues are meritless.

III. Discussion

Our review of a trial court's denial of a request for new trial, based on legal error, requires a two-step analysis. Harman v. Borah, 562 Pa. 455, 756 A.2d 1116 (2000). First, we consider whether the trial court committed an error of law or an abuse of discretion. Id. If such error occurred, we then determine whether the trial court abused its discretion in determining its mistake was harmless and denying the requested new trial. Smith v. Se. Pa. Transp. Auth., 913 A.2d 338 (Pa.

[1] Appellants also assert they are entitled to a new trial based on substantial evidence of juror misconduct. Essentially, Appellants argue, in light of the volume of evidence presented during five days of testimony and the length of time the jury deliberated, two hours, it is clear the jury did not honor its obligation to thoroughly discuss and consider the evidence. However, when the jury returned its verdict, Appellants did not object to the alleged impropriety of its deliberation; thus, such objection was waived. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 598 Pa. 331, 956 A.2d 967 (2008).

Furthermore, Appellants mere assertion that the jury did not dutifully discharge its responsibilities is without merit. See Commonwealth v. Bridges, 563 Pa. 1, 757 A.2d 859 (2000) (the duration of jury deliberation is within the discretion of the trial court, which will only be reversed if there is clear evidence the jury's verdict was the product of coercion or fatigue). Here, Appellants do not contend the jury's verdict resulted from the coercion and exhaustion of a juror, but rather that the jury did not fully consider the evidence. This argument lacks merit. See id. (a juror cannot testify to what occurred during deliberations unless some evidence beyond mere speculation is presented that extraneous influences prejudiced the jury).

Cmwlth. 2006). An abuse of discretion will only be found where the trial court's judgment is manifestly unreasonable, arbitrary, or capricious, contrary to the law, or improperly motivated. Harman.

At the outset, we acknowledge that the threshold determination of whether evidence is legally relevant is within the sound discretion of the trial court, and that determination should not be displaced absent an abuse of discretion. Morrison v. Dep't of Pub. Welfare, 538 Pa. 122, 646 A.2d 565 (1994). Additionally, it is within the trial court's discretion to regulate the scope of a party's cross-examination of a witness. Chicchi v. Se. Pa. Transp. Auth., 727 A.2d 604 (Pa. Cmwlth. 1999). If a reviewing court determines the trial court abused its discretion, it nonetheless may not grant a new trial on those grounds unless the trial court's decision prejudiced the outcome of the case. Cipolone v. Port. Auth. Transit Sys. of Allegheny Cnty., 667 A.2d 474 (Pa. Cmwlth. 1995).

Evidence is relevant and admissible if it tends to prove a fact of consequence. Pa.R.E. 401-402. Although, evidence of a party's remedial measures after an accident are not generally admissible to establish a party's negligence, Pa.R.E. 407, evidence of subsequent accidents may be relevant to prove the existence of a hazardous condition. Fernandez v. City of Pitts., 643 A.2d 1176 (Pa. Cmwlth. 1994) (en banc) (citing Yoffee v. Pa. Power & Light Co., 385 Pa. 520, 123 A.2d 636 (1956)). Such evidence is relevant where the accidents occur in substantially the same place and under similar conditions. Stormer v. Alberts Const. Co., 401 Pa. 461, 165 A.2d 87 (1960); Mendenhall v. Dep't of Transp., 537 A.2d 951 (Pa. Cmwlth. 1988) (admission of evidence of similar

accidents must be tempered by judicial concern that such evidence may raise a series of collateral and irrelevant issues).

A.

Here, Appellants sought to introduce evidence regarding the occurrence of similar single-vehicle accidents occurring 1) prior to, 2) under nearly identical conditions within an hour of, and 3) after the date of their accident. The purpose of this evidence was to establish the existence of a dangerous condition on the roadway and PTC's notice of it. As to the subsequent accidents, Appellants represented they intended to submit photographic evidence of accident scenes and damaged guardrails to prove the presence of a dangerous condition.

The trial court did not abuse its discretion in permitting evidence of prior accidents and the other September 15, 2004 accident, but precluding evidence of accidents occurring over the following two years. See Fernandez (admitting evidence of a second unrelated accident under the same conditions); Mendenhall (excluding evidence of accidents that occurred under circumstances that were not substantially similar). Unlike the accident that occurred during the same storm, each subsequent accident would present a wide array of unique circumstances. Evidence of these subsequent accidents would likely raise a multitude of collateral issues and have limited probative value. See Stormer (where evidence of subsequent accidents would raise a range of collateral issues and tend to confuse

the jury, the exclusion of such evidence is not an abuse of discretion).[2] Moreover, as the trial court concluded, subsequent accidents cannot be used to establish notice of a dangerous condition, whereas the prior accidents may help establish notice and a dangerous condition on the road. See MCCORMICK ON EVIDENCE §200 (Kenneth S. Brown et al. eds., 6th ed. 1992) (comparing the probative values of prior and subsequent accidents). Therefore, we discern no abuse of discretion.

B.

Appellants further argue that despite the trial court's pre-trial order, testimony by Burd and Trooper Heiserman put the subject of subsequent accidents at issue, thereby opening the door to the presentation of the precluded evidence. Specifically, Appellants argue that Burd's description of the reported accidents from 2001 to 2004, and Trooper Heiserman's account of the unrelated September 15, 2004 accident misled the jury to believe no other accidents occurred on that section of the Turnpike after Appellants' accident.

Contrary to Appellants' assertions, during cross-examination, Burd clearly explained the limitations of his testimony. Specifically, he stated his testimony was based on a report that PTC generated in 2005 that listed the accidents reported between 2001 and 2004. S.R.R. at 477b. Additionally, he conceded that other accidents may have occurred after Appellants' accident, but that those accidents were outside the scope of the report he reviewed. Thus, given

[2] However, had the subsequent unrelated accidents occurred under similar circumstances as Appellants' accident, evidence of those accidents would have been admissible to establish the existence of a dangerous condition on the roadway. See Fernandez.

his explanation of the limits of his testimony, the trial court did not err in restricting the scope of Appellants' cross-examination of Burd to accidents occurring between 2001 and 2004. See Chicchi.

Additionally, Trooper Heiserman did not put the existence of subsequent accidents at issue. S.R.R. at 499b, 506b-507b. When Appellants' counsel asked Trooper Heiserman whether he ever investigated any other accidents in that area, Trooper Heiserman stated, "I know of those two that night. I think one other. I may have had more. I don't recall exactly how many I had there." S.R.R. at 513b. Thus, as Trooper Heiserman testified within the confines of the trial court's pre-trial order, and he did not deny that other accidents may have occurred, his testimony did not put the lack of subsequent accidents at issue. See E. Express, Inc. v. Food Haulers Inc., 445 Pa. 432, 285 A.2d 152 (1971) (police officer's account of his response did not open the door for an examination about otherwise excluded events). As such, Appellants' argument is meritless.

C.

Appellants also contend Schorr's testimony opened the door to the introduction of evidence of PTC's subsequent remedial measures, which was excluded by pre-trial order. See Mendenhall (evidence of road repairs after an accident is inadmissible for the purposes of imputing negligence for maintaining a dangerous condition on the road under Pa.R.E. 407). Schorr testified he first viewed the relevant section of the road in 2008, but the road was "obviously not in the same condition [as it] was at the time of the accident." S.R.R. at 529b. Schorr

did not explain how or why the road was in a different condition when he inspected it, nor did his testimony open the door to evidence on that issue.

Rather, Schorr opined that any irregularities in the roadway were a "red herring" here because heavy rain was present at the time of the accident. S.R.R. at 520b, 523b. Therefore, his opinion did not put PTC's repairs to the road at issue because the condition of the roadway was irrelevant to his opinion. Additionally, Appellants did not question Schorr as to why the road was different. Thus, they did not eliminate the obvious inference that the difference was the lack of water from ongoing heavy rain, rather than from subsequent repairs. In sum, Appellants' argument lacks merit.

For the reasons discussed, the trial court's determinations as to the relevancy of the subsequent accidents and the proper scope of witness examination do not present a clear abuse of discretion. See Cipolone. Therefore, because we discern no underlying error, it is clear the trial court did not err in denying Appellants' request for a new trial. See C.C.H. v. Phila. Phillies, Inc., 596 Pa. 23, 940 A.2d 336 (2008) (where the trial court did not err, a decision to deny a new trial must stand).

D.

Appellants next assert the jury's verdict was against the weight of the evidence, and therefore, they are entitled to JNOV.[3] Relief in the nature of JNOV

[3] PTC contends Appellants waived this issue by failing to include it within their appellate brief's statement of questions involved. Here, Appellants' requested JNOV before the trial court. Despite omitting the issue from their appellate brief's statement of questions involved, **(Footnote continued on next page…)**

may only be entered in a clear case. Rohm & Haas Co. v. Cont'l Cas. Co., 566 Pa. 464, 781 A.2d 1172 (2001). "When a court reviews a motion for [JNOV], the reviewing court considers the evidence in the light most favorable to the verdict winner, who must receive the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his or her favor." Beil v. Telesis Const., Inc., 608 Pa. 273, 283, 11 A.3d 456, 462 (2011) (citing Metts v. Griglak, 438 Pa. 392, 395, 264 A.2d 684, 686 (1970)).

The issue of whether a party was negligent is a question for the jury to decide. Stong v. Pa. Dep't of Transp., 817 A.2d 576 (Pa. Cmwlth. 2003). A court may not vacate a jury's findings unless reasonable minds could not disagree, based on the evidence, that judgment should have been granted in favor of the movant. Commonwealth v. TAP Pharm. Prods. (Bristol-Myers Squibb), 36 A.3d 1197 (Pa. Cmwlth. 2011).

Here, the parties presented conflicting evidence as to whether PTC breached its duty of care to Appellants, and whether such breach caused Appellants' injuries. Specifically, Appellants presented evidence that PTC built and maintained the Turnpike in a way that could cause rain water to pool on the road. Moreover, Appellants introduced testimony that such condition was

(continued…)

Appellants fully addressed the issue elsewhere in their written argument. Therefore, we will address the merits. See Eckart v. Dep't of Agric., 8 A.3d 401, 407 n.10 (Pa. Cmwlth. 2010) ("Although this Court may refuse to consider arguments a petitioner addresses in his brief if his brief fails to include a statement of questions involved, we have exercised our discretion in the past to address issues subsumed elsewhere in briefs when the petitioner has clearly identified the issue.")

hazardous, and PTC had notice of it. Furthermore, Appellants testified their car hydroplaned because of standing water on the Turnpike.

On the other hand, Schorr testified that the fact that the Turnpike's design could cause rain water to pool was a "red herring" to this case. S.R.R. at 523b. As such, the jury could have concluded, regardless of whether PTC improperly constructed or maintained the Turnpike, such action was not the factual cause of Appellants' accident. See TAP Pharm. Prods. (a jury is entitled to believe all, part, or none of the evidence presented).

Furthermore, PTC presented testimony that it regularly inspected the Turnpike, that the road was in fair condition in 2004, and that it lacked notice that a condition on the roadway caused any prior accidents. Therefore, viewing the evidence in the light most favorable to PTC, sufficient evidence supports the jury's determination that PTC did not breach its standard of care. See id. (citing Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 927 A.2d 717 (Pa. Cmwlth. 2007)) (where conflicting evidence as to a material fact is presented, a court may not enter JNOV).[4] Thus, the trial court did not err in denying Appellants' motion for JNOV.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

[4] Additionally, to the extent Appellants argue the trial court erred in denying relief in the nature of JNOV based in part on the reversal of its evidentiary rulings, such request is meritless as the remedy in that scenario is to grant a new trial. See TAP Pharm. Prod.

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O R D E R

AND NOW, this 17th day of August, 2012, the order of the Court of Common Pleas of Montgomery County is **AFFIRMED**.

ROBERT SIMPSON, Judge