

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

KEVIN BROGAN,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
NICOLE BRESSI,	:	No. 533 EDA 2012

Appeal from the Judgment Entered February 8, 2012
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No: 1183 July Term, 2010

BEFORE: LAZARUS, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: March 19, 2013

Kevin Brogan (Brogan) appeals from the judgment¹ entered against him and in favor of Nicole Bressi (Bressi) in this negligence action. We vacate and remand.

This case arose from a motor vehicle accident that occurred on December 17, 2008, in Bensalem, Pennsylvania. Brogan's vehicle was struck from behind by Bressi as he yielded to oncoming traffic. Brogan filed a complaint against Bressi in the Philadelphia Court of Common Pleas on July 14, 2010, claiming that Bressi had negligently caused the collision, and that he now suffered severe pain as a result. A jury trial was held, and the jury returned a verdict in favor of Bressi and against Brogan on September 30,

¹ Brogan purports to appeal from the order denying his post-trial motion, which is not an appealable order. *Fanning v. Davne*, 795 A.2d 388, 391 (Pa. Super. 2002) (providing appeal to Superior Court can only lie from judgments entered subsequent to trial court's disposition of any post-trial motions, not from the order denying post-trial motions). We have amended the caption accordingly.

* Retired Senior Judge assigned to the Superior Court.

2011. The jury found that Bressi had been negligent, but that her negligence was not a factual cause of Brogan's harm. Brogan filed a post-trial motion on October 7, 2011, which was denied on February 3, 2012. Judgment was entered on February 8, 2012, and Brogan filed a timely notice of appeal. Both Brogan and the trial court complied with Pa.R.A.P. 1925.

Appellant raises a single issue² on appeal: "Did the trial court err in denying [Brogan's] motion for new trial, which motion was based on the trial court's refusal to fully instruct the jury as to factual causation?" Appellant's Brief at 1. Brogan argues that the trial court erred by not reading to the jury the second paragraph of Pennsylvania Suggested Standard Jury Instruction (Civil) 13.160 (the Instruction). *Id.* at 7. This is critical, Brogan claims, because Bressi testified at trial that the accident was caused when Brogan "slammed on his brakes." *Id.* at 9; *see also* N.T., 9/28/2011, at 105. Brogan contends that the trial court's failure to read the entirety of the Instruction "allowed the jury to credit [Bressi's] testimony that [Brogan's] alleged conduct in slamming his brakes was a cause of the accident, which the jury could believe would exonerate [Bressi] of liability for her own negligence." *Id.* at 9. Moreover, Bressi argued at trial that Brogan had failed

² In his 1925(b) Statement of Matters Complained of on Appeal, Brogan raised an additional issue regarding mitigation of damages, and Bressi devotes a portion of her brief to this issue. However, Brogan does not address it at all in his own brief, and thus it is waived. *See Commonwealth v. Nelson*, 567 A.2d 673, 676 (Pa. Super. 1989) ("We are required to deem those issues identified on appeal but unsupported by argument in the brief to have been abandoned.").

to mitigate any damages allegedly suffered because of the accident. N.T., 9/29/2011, at 39-42. Brogan asserts that “the incomplete instruction could have allowed the jury to believe that any alleged failure to mitigate damages (by failing to get physical therapy) or any pre-existing condition could have caused [Brogan’s] pain, and that such causes would relieve [Bressi] of liability.” Appellant’s Brief at 9.

Our well-settled standard of review is as follows:

Under Pennsylvania law, our standard of review when considering the adequacy of jury instructions in a civil case is to determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. It is only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue that error in a charge will be found to be a sufficient basis for the award of a new trial.

Hatwood v. Hospital of the University of Pennsylvania, 55 A.3d 1229, 1235 (Pa. Super. 2012) (quoting *Patton v. Worthington Associates, Inc.*, 43 A.3d 479, 490 (Pa. Super. 2012)) (citations and quotation marks omitted).

Instantly, the trial court gave the following instruction concerning factual cause and aggravation of an existing injury:

So if you find that the plaintiff has proven that the defendant, Nicole Bressi, was negligent, the next question that you are faced with is: Was the defendant’s negligence a factual cause of the plaintiff Kevin Brogan’s injuries?

* * *

Now, factual cause, what does that mean? Well, there’s nothing magical. It pretty much means what it says. **In order**

for the plaintiff to recover in this case, if you find that the defendant was negligent, that 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 the conduct. To be a factual cause the conduct must have been an actual, real factor in causing the harm, even if the result is a little unusual or unexpected. A factual cause cannot be an imaginary or fanciful factor having no connection or only an insignificant connection with the harm.

So that is all the law says that I'm supposed to tell you about factual cause.

Issue No. 2 is: Was the defendant's negligence a factual cause of the plaintiff Kevin's Brogan's injuries or harm? And that simply means, the harm that he says he has suffered would not have occurred absent the negligent conduct of the defendant.

If you answer "no" to this question, then again, there's no recovery. You come back to the courtroom and say there's no factual cause. If you find that the defendant's negligence is a factual cause in bringing about some harm to the plaintiff, then you go to the next issue.

* * *

Damages should be awarded for all injuries caused by the accident, even if the injuries caused by the accident were more severe than could have been foreseen because of the plaintiff's prior physical condition, or damages should be awarded even if a preexisting medical condition was aggravated by the accident.

If you find that the plaintiff did have a preexisting condition that was aggravated by the defendant's negligence, the defendant is responsible for any aggravation caused by the accident. The defendant can only be held responsible for those injuries or an aggravation of a prior injury or condition that you find was factually caused by the accident. The defendant can only be responsible for injuries caused by the accident, or just for an aggravation of a prior injury or condition.

N.T., 9/29/2011, at 63-64 (emphasis added).

The bolded portion of the quote above is an almost-verbatim reading of the first paragraph of the Instruction. The second paragraph of the Instruction, which Brogan contends should have been read to the jury as well, reads as follows:

To be a factual cause, the defendant's 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 defendant from liability as long as [his] [her] own negligence is a factual cause of the injury.^[3]

Brogan relies on *Gorman v. Costello*, 929 A.2d 1208 (Pa. Super. 2007), to support his claim. *Gorman*, like the instant case, involved a motor vehicle collision. *Id.* at 1209. Gorman sued, arguing that her degenerative spinal condition was aggravated by the accident. *Id.* at 1210. However, the jury found that the collision was not a factual cause of Gorman's injuries. *Id.* at 1211. Gorman appealed, and a panel of this Court reversed, finding that the trial court had failed to give an adequate instruction on factual cause.

³ The trial court explained that the second paragraph of the Instruction was not read to the jury because it

applies to other conduct; another cause that concurs with the negligence in producing the injury. To instruct the jury on the second paragraph of this instruction, then evidence would have needed to show that there was another factual cause at the time of the accident, or immediately thereafter, such as a multiple car accident where more than one person might have been negligent. Absent this type of evidence, the second paragraph is not necessary, and might be confusing.

Trial Court Opinion, 6/13/2012, at 4-5 (citations to the record omitted). The trial court provides no citation to authority in support of this characterization.

Id. at 1213. This Court observed that the trial court had inadvertently omitted a portion of the then-current Suggested Standard Jury Instruction 3.15. *Id.* As a result, the jury received the following instruction on aggravation of an existing injury and factual cause:

If you find that the Plaintiff did have a pre[-]existing condition that was aggravated by the Defendant's negligence, the Defendant is responsible for any aggravation caused by the accident. I remind you that the Defendant can be held responsible only for those injuries or the aggravation of a prior injury or condition that you find was factually caused by the accident.

* * *

The Plaintiff must prove to you that the Defendant's conduct caused the Plaintiff's damages. This is referred to as factual cause. The question is [:] was the Defendant's negligent conduct a factual cause in bringing about the Plaintiff's damages? Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. An act is a factual cause of an outcome if in the absence of the act, the outcome would not have occurred.

Id. at 1210-11 (citations omitted) (footnote omitted).

In *Gorman*, Judge, now Justice, McCaffery observed that “[j]ury instructions must contain correct definitions of legal terms,” and that while the Suggested Standard Jury Instructions are not binding on trial courts, they are “nonetheless instructive.” 929 A.2d at 1213. Justice McCaffery concluded for the panel that the trial court’s omission resulted in the jury receiving an incorrect definition of factual cause, and that “without a complete definition of factual cause, the jury was lacking an essential tool needed to make an informed decision based on correct and complete legal

principles relevant to its verdict on the issue of damages.” *Id.* We are constrained to find **Gorman** dispositive of this case. Like the trial court in **Gorman**, the trial court in the present case omitted a crucial portion of the definition of “factual cause.” This resulted in the jury receiving an incomplete instruction that impaired its ability to reach an informed decision. Thus, we must grant Brogan a new trial.

Judgment vacated. Case remanded for further proceedings consistent with this memorandum.