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2012 PA Super 133

DAVID GILLINGHAM AND DEBRA GILLINGHAM, HIS WIFE, Appellees v. CONSOL ENERGY, INC., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 968 WDA 2011

Appeal from the Judgment Entered May 27, 2011
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): G.D. No. 08-011621

CLIFFORD DECKER AND PAMELA A. DECKER, Appellees v. CONSOL ENERGY, INC., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 969 WDA 2011

Appeal from the Judgment Entered May 27, 2011
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): G.D. No. 08-010867

BEFORE: BOWES, OLSON, and PLATT,* JJ.

OPINION BY BOWES, J.: FILED: JUNE 27, 2012

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* Retired Senior Judge assigned to the Superior Court.

In these consolidated appeals, Consol Energy, Inc., ("Consol") raises challenges to various rulings made during the course of this personal injury action as well as to the jury award in favor of Appellees herein, David and Debra Gillingham and Clifford and Pamela Decker. We affirm.

We set forth a brief factual and procedural recitation before addressing the issues raised in this appeal. On June 12, 2007, Mr. Gillingham and Mr. Decker were working at Building No. 19 at the Consol facility in South Park, Pennsylvania, when they exited the second floor of the concrete building by using an exterior metal stairway. As they started to descend, the steps separated from the building due to the disintegration of rusty bolts that secured the staircase to the structure. The two men fell thirteen feet and sustained bodily injuries that we outline in more detail, *infra*.

The Deckers and Gillinghams instituted separate civil actions against Consol to recover damages caused by the injuries suffered by the two men. The two actions were consolidated for purposes of trial. The jury awarded Mr. Gillingham $1,877,000, Mrs. Gillingham $923,000, Mr. Decker $4,543,000, and Mrs. Decker $457,000. Consol filed a motion for post-trial relief, the motion was denied, and these appeals followed entry of judgment on the verdict.

Consol raises these issues for our consideration:

A. Whether Consol is entitled to the entry of remittitur or, in the alternative, a new trial on the issue of damages, because the damages awarded by the jury are plainly exorbitant, excessive and beyond what the evidence warranted?

B. Whether Consol is entitled to a new trial because the trial court erred in permitting Mr. Decker's employer and economic expert to testify based upon speculation and contrary to the facts?

C. Whether Consol is entitled to a new trial because the trial court erred in allowing testimony relating to Mr. Gillingham's claim for lost wages, lost future earnings and earning capacity?

D. Whether Consol is entitled to a new trial because the trial court erred in submitting a jury verdict form for completion by the jury which included 12 separate line items for damages, many of which had no evidentiary support?

E. Whether Consol is entitled to Judgment N.O.V. or, in the alternative, a new trial because the trial court erred in denying Consol's motion *in limine* relating to liability expert witnesses and testimony and overruled Consol's objections to speculative testimony?

F. Whether Consol is entitled to Judgment N.O.V. or, in the alternative, a new trial because David Gillingham executed a valid release and waiver of liability?

G. Whether Consol is entitled to Judgment N.O.V., or, in the alternative, a new trial, because the evidence at trial established that Plaintiff David Gillingham was Consol's "Borrowed Servant"?

H. Whether Consol is entitled to a new trial because the trial court erred in refusing Consol's requested instructions 19, 27 and 28 where said instructions were a correct statement of the law and were not otherwise covered in the court's charge to the jury?

Appellant's brief at 6-7.

Issue E relates to whether Consol is entitled to judgment notwithstanding the verdict ("NOV") as to liability. If Consol prevails in this connection, the need to address the remaining issues would be obviated.

Issues F and G pertain to different bases for judgment NOV with respect to Mr. Gillingham. If Consol's arguments regarding judgment NOV as to that plaintiff were meritorious, issue C would be rendered moot. Finally, issue H would result in a new trial as to both liability and damages rather than merely damages. Hence, we will first address issue E, followed by F, G, and H. We will then return to resolve all contentions concerning damages.

> Our standard of review of a trial court's denial of a motion for judgment notwithstanding the verdict is whether there was sufficient competent evidence to sustain the verdict. Judgment notwithstanding the verdict will be entered only in a clear case where the facts are such that no two reasonable minds could fail to agree that the verdict was improper. An Appellate court will reverse a trial court ruling only if it finds an abuse of discretion or an error of law that controlled the outcome of the case.

Portside Investors, L.P. v. Northern Insurance Co. of New York, 41 A.3d 1, 8 (Pa.Super. 2011) (quoting ***Antz v. GAF Materials Corp.***, 719 A.2d 758, 760 (Pa.Super. 1998)).

Consol claims entitlement to judgment NOV as to all plaintiffs based on the fact that Appellees' expert witness allegedly presented testimony that was speculative. Specifically, Consol maintains that Appellees "theorized that there was some sort of 'rework' to the upper bolts. However, there was no proof to support that theory." Consol's brief at 41.[1] The law provides that

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[1] While Appellees urge a finding of waiver of this objection, we conclude that it was adequately preserved by presentation of a motion *in limine* and
(Footnote Continued Next Page)

> expert testimony is incompetent if it lacks an adequate basis in fact. While an expert's opinion need not be based on absolute certainty, an opinion based on mere possibilities is not competent evidence. This means that expert testimony cannot be based solely upon conjecture or surmise. Rather, an expert's assumptions must be based upon such facts as the jury would be warranted in finding from the evidence. Accordingly, the Pennsylvania Rules of Evidence prescribe a threshold for admission of expert testimony dependent upon the extent to which the expert's opinion is based on facts and data:
>
> Rule 703. Bases of opinion testimony by experts
>
> > The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
>
> Pa.R.E. 703.

Helpin v. Trustees of University of Pennsylvania, 969 A.2d 601, 617 (Pa.Super. 2009) (citation and quotation marks omitted).

After careful review, we conclude that the expert testimony proffered by Appellees did not lack a foundational basis. In this case, Appellees premised liability against Consol upon allegations that it failed to maintain, inspect, and repair the stairwell and that the structure collapsed after the bolts securing it to the building disintegrated due to rust. Based both upon an actual inspection of the staircase components and building as well as

(Footnote Continued) ———————————

numerous objections at trial that the expert witnesses' opinions were speculative.

pictures, Appellees' expert witnesses were able to opine to a reasonable degree of certainty that the bolts holding the stairwell to the building were corroded, the corrosion caused those bolts to fail, there was visible rust on part of the mechanism that secured the staircase, and Consol failed to exercise reasonable care because it did not discover the corrosion.

We now outline the basis for Consol's liability herein. Messrs. Gillingham and Decker were on Consol's property to perform services for Consol. Thus, they were invitees as defined by Restatement (Second) of Torts § 332, which is utilized by this Court to determine the status of a plaintiff. ***See Gutteridge v. A.P. Green Services, Inc.***, 804 A.2d 643 (Pa.Super. 2002). Restatement § 332 provides:

> (1) An invitee is either a public invitee or a business visitor.
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Restatement (Second) of Torts § 332; ***see Rudy v. A-Best Products Co.***, 870 A.2d 330, 333 n.3 (Pa.Super. 2005) ("It is undisputed that as an employee of an independent contractor, [plaintiff] was a business invitee at the [defendant's] site.").

The duty that a possessor of land owes to an invitee is "the highest duty owed to any entrant upon land." ***Gutteridge v. A.P. Green Services,***

Inc.*, *supra at 656. "The landowner must protect an invitee not only against known dangers, but also against those which might be discovered with reasonable care." ***Id***. The duty a possessor of land owes to invitees is as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> > (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> >
> > (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> >
> > (c) fails to exercise reasonable care to protect them against the danger.

Id.; Restatement (Second) of Torts § 343.

Appellees presented expert witness Philip Hundley, an architect for forty-four years, on the question of liability. He reviewed photographs taken during the site inspection, a report from engineer Dr. Behzad Kasraie, and a report from technical engineering consultant John Frank. Mr. Hundley testified as follows. The Consol building was constructed of concrete, which is very porous and absorbs water into its interior where it cannot be dissipated by sun and wind. N.T. Trial, 11/15/10, at 304. Rust is also a concern with respect to buildings in that "rust is really the first step of the deteriorating metal or any other structure contacted with that." ***Id***. at 312-

13. There are two types of rust: surface rust, which "would not affect the integrity of the structure," ***id***. at 315, as well as corrosive rust that begins to destroy the fabric of the metal. When metal supports columns or a stairway, caution dictates that the building owner control that substance to prevent deterioration of the metal. ***Id***. at 313. Once metal displays any type of rust, it is a warning sign that the owner "would need to clean the metal, whatever the problem was, refinish it, making sure you got all the rust off. If you find rust in one place, you need to make sure you investigate and rule out if you have any hidden rust conditions." ***Id***. at 315-16.

Mr. Hundley noted that the stairwell in question herein was secured to the building by four bolts. The upper two bolts were load-bearing that took the stress from the stairs, while the bottom two braced the structure and aided in support. Mr. Hundley continued, "When I use the term bolts, these are actually studs that have threads on them, that have really nuts and washers on either end." ***Id***. at 313. Since the bolts supported the stairwell, "if the bolts disappear, the stair collapses immediately because nothing is holding the stair in the air. Therefore, it is critical that those bolts and/or nuts be maintained." ***Id***. at 313-14.

The bolts were secured by a metal plate located inside the building, which is called a backing plate. The inside backing plate for the staircase in question had rust along the side and bottom. Mr. Hundley stated that the rust visible on the backing plate was an indication that there were additional

problems on the inside bolts that should have been inspected. ***Id***. at 324. Mr. Hundley also indicated that there was rust on the outside bolts that would have been evidence that the portion of the bolts inside the building may have been rusted. ***Id***. at 333. He related that the presence of rust triggered a responsibility to further investigate the structural integrity of the bolts.

Mr. Hundley confirmed that the stairway collapsed due to "rust, corrosion of the bolts holding it up" and that an inspection of the backing plate and outside bolts would have alerted Consol to the problem. ***Id***. If Mr. Hundley had viewed the outside rust on the bolts and on the backing plate, he would have obtained a structural engineer and removed the bolts to determine their condition. ***Id***. at 338.

Appellees also presented Dr. Kasraie, an engineer, as a witness. He actually inspected the nuts, bolts, and plates involved in the June 12, 2007 stair collapse, took numerous photographs of those materials, and performed testing. He confirmed that the stairwell was supported by the top two bolts and that the stairwell collapsed because "the bolts failed because they were rusted, they were corroded. There was really nothing left. They were just hanging by a thread[.]" ***Id***. at 478. He substantiated that the inside backing plate displayed signs of rust. Dr. Kasraie continued that rust is a concern to an engineer because "rust is really what kills the metal. Any time you design something, we worry about the rust." ***Id***. at 483. He

stated that "corrosion is a sign of trouble and triggers a duty to investigate." ***Id***. at 483-84.

Dr. Kasraie also observed, through visual inspection of the bolts themselves and as evidenced from photographs of those items, the following:

> [W]e noticed that the top two rods that are larger, they had a big huge, you know, hammering mark at the end of it, lead to the point you couldn't really take the nut out. You could see the hammer mark.
>
> So that indicated to us that somebody basically drove that thing in with a hammer. And possibly the hole wasn't large enough, or it got stuck somewhere or something, but the hammering mark indicates an unprofessional installation. You are not supposed to be doing that, but that's what we observed.
>
> Q. When that was hammered - - do the hammer marks appear on Figure 11 up there?
>
> A. Yes.
>
> Q. Were the hammer marks on the inside of the upper bolt?
>
> A. They were from the inside.
>
> Q. Now, what does that indicate to you then, if both of the upper bolts have hammer marks on them?
>
> A. I just said that. It looks like it wasn't going in, and somebody had to force it in.
>
> Q. Would you be able to tell the jury and show them why they are deformed, why those, the ends of that bolt are deformed.
>
> Can you tell them that, show them.
>
> A. Because they were beaten up by a hammer, you know. We have samples to show and pictures.

Id. at 492-93.

The witness continued that one of the bolts that he visually observed was deformed and bent and that it would not have bent due to the stair collapse. The only explanation for the bent bolt was that it was hammered into the wall. ***Id***. at 494-95. Based on his review of the photographs, visual inspection, and testing of the materials, he concluded that there was some "sort of rework after the initial installation." ***Id***. at 500.

Thus, as is readily evidenced by the record, Dr. Kasraie's opinion about reworking was not to any extent based upon speculation. Rather, Dr. Kasraie premised his conclusion that the bolts were reworked on a visual inspection of the items in question and the existence of hammer marks on them. This case bears no resemblance to that relied upon by Consol. ***Collins v. Hand***, 246 A.2d 398 (Pa. 1968) (expert made unsupported assumptions about the manner in which a medical procedure was conducted). Furthermore, as is readily apparent from a review of the testimony of the expert witnesses, liability against Consol was not premised upon the fact that the bolts were hammered into the building; rather, Consol was subject to liability in this action due to its failure to inspect the building and recognize that the visible rust on the outside of the bolts and backing plate meant that the structural integrity of the interior bolts that supported the stairwell may have been compromised by rust and corrosion. Hence, we reject Consol's request for judgment NOV as to all plaintiffs.

We now address Consol's contention that it should have been granted judgment NOV as to Mr. Gillingham since he executed a release. The trial court submitted the issue of the release's validity to the jury due to Mr. Gillingham's assertion that the release was a contract of adhesion. Exculpatory documents releasing a party in advance for that party's own negligence are not favored in Pennsylvania and are strictly construed. ***Nissley v. Candytown Motorcycle Club, Inc.***, 913 A.2d 887, 890 (Pa.Super. 2006) (citing ***Employers Liability Assurance Corp. v. Greenville Business Men's Association***, 224 A.2d 620 (Pa. 1966)). "It is generally accepted that an exculpatory clause is valid where three conditions are met. First, the clause must not contravene public policy. Secondly, the contract must be between persons relating entirely to their own private affairs and thirdly, each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion." ***Chepkevich v. Hidden Valley Resort, L.P.***, 2 A.3d 1174, 1189 (Pa. 2010); ***accord Employers Liability Assurance Corp., supra***. As noted in the Summary of Pennsylvania Jurisprudence, "The conditions allowing an exculpation agreement to be valid include each party being a free bargaining agent. Courts refuse to enforce releases from liability, when the agreement does not reflect the free choice of one party who is forced to accept the releases by the necessities of his or her situation. Thus, for example, an exculpatory

clause in a contract of adhesion is not valid." Pa. Jur. Commercial § 4:70 (footnotes omitted).

For example, in ***Soxman v. Goodge***, 539 A.2d 826 (Pa.Super. 1988), we invalidated releases executed by a patient and her husband as a condition for receiving medical records. We concluded that the releases were infirm because they "violated public policy and were not the result of a freely bargained for exchange" and instead, were a product of the disparate bargaining positions of the parties. ***Id***. at 828. We noted that Pennsylvania jurisprudence was antagonistic to a blanket exculpation of liability and that our courts refuse "to enforce such releases when the agreement does not reflect the free choice of one party who is forced to accept the releases by the necessities of his or her situation." ***Id***.

In this case, Mr. Gillingham argues that the trial court's decision to submit the issue to the jury was proper under the authority of ***Leibowitz v. H.A. Winston Co.***, 493 A.2d 111 (Pa.Super. 1985). Therein, an employee was asked by his employer to take a lie detector test, which he felt compelled to undergo, about money that was missing from the employer's safe. When he arrived for questioning, the polygraph administrator gave the employee a document to execute and told him that he had to sign it in order to take the test. The instrument in question apprised the employee that he could not be required to take the polygraph examination as a condition of his continued employment, stated that the worker was not pressured into

undergoing the questioning, and contained a release of any liability as to the employer and the agency that administered the test in connection with its administration.

The worker acknowledged that he quickly reviewed the document but stated that he did not understand it. After he failed the test, he protested that it was incorrect and that he had not taken the money. The employee then underwent and passed a polygraph given by another agency. After he was terminated, the employee sued both his employer and the polygraph administrator under various theories of liability. The case proceeded to trial, where the trial court entered a nonsuit in favor of both defendants at trial based upon the plaintiff's execution of the release. On appeal, we reversed.

We noted it is against the public policy of Pennsylvania to require an employee to undergo a polygraph as a condition of employment. The trial court concluded that the release of the two defendants was valid unless the plaintiff showed that the releases were required as a condition of employment, and that any testimony to that effect was merely based upon the subjective belief of the plaintiff rather than express statements by either defendant. We ruled that the trial court should have submitted to the jury the issue of whether the plaintiff signed the release and took the test "under a compulsion consisting of fear of losing his job if he refused." ***Id***. at 113. We noted that if there is a disparity of bargaining power between the plaintiff and defendant, exculpatory agreements can be invalidated on the

ground that the plaintiff's entry into the accord did not represent a free choice by the plaintiff but was the result of economic necessity.

Applying that law to the case at hand, we conclude that the trial court did not err in submitting the issue to the jury for resolution. Mr. Gillingham's testimony was sufficient to present a genuine issue of material fact as to whether the release was a contract of adhesion. Mr. Gillingham was an electrical engineer who specialized in microelectronics. He designed electronic circuits for computer programs and wrote software for automation designed to coordinate the equipment in a plant. In 2001, Mr. Gillingham started his own consulting business called Drayham Automation. In 2006, he was contacted by Technical Solutions and asked to work on a project as its employee. The project base was Consol Energy, South Park, and involved the following. Doug Farnham, who owned Farnham & Pfile Construction Company, had acquired technology to generate power from waste coal. Mr. Farnham was attempting to sell that technology to Consol, which leased buildings on its South Park property so that Farnham could demonstrate the technology before Consol decided whether to purchase it.

The project ran into difficulties with electrical controls and the software development was behind schedule. Technical Solutions hired Mr. Gillingham to solve those problems. Mr. Gillingham's involvement was scheduled to last three months, and Technical Solutions hired him for a 36.5 hour work week.

He started working full-time on the project in March 2006. A couple of weeks after he started, he was called into the Consol offices and asked to sign some documents. Mr. Gillingham testified that Consol indicated that he "needed to sign . . . a non-compete agreement." N.T. Jury Trial, 11/18/10, at 1103. The witness explained that occasionally, when he went to a customer site, the client would have proprietary technology and the client would ask him to sign a statement indicating that he would not share the technology with another company.

When Mr. Gillingham arrived at the office, Consol presented him "with a stack of documents" containing several hundred pages and informed Mr. Gillingham that he "had to sign those." ***Id***. The places where he had to execute his name were marked with stickers. Mr. Gillingham was never informed that he was assenting to a waiver of his right to sue Consol in the event he was injured due to its negligence. He felt that he had to sign the pages in question since he was contractually obligated to provide his services on the project through Technical Solutions. Mr. Gillingham believed that he was not in a position to refuse to sign the documents presented to him by Consol, and he stated, "If I would have not signed them, I would have to leave the site . . . because it's like saying, No, I'm not going to honor your agreement and protect this technology." ***Id***. at 1105. He also would have violated his contract with Technical Solutions.

This proof was sufficient to present a question of fact as to whether Mr. Gillingham, who was under contract to provide services on the project, was compelled to execute the documents due to Consol's superior bargaining position. Mr. Gillingham's testimony was sufficient to support a finding that the release was a contract of adhesion and that Mr. Gillingham was not a free bargaining agent in the matter. Hence, the trial court did not err in submitting the question of the release's validity to the jury, and the jury's verdict on the matter was based upon sufficient evidence.

On appeal, Consol attempts to impugn the veracity of Mr. Gillingham's testimony by noting that he never produced the hundreds of pages of documents. However, this position is disingenuous since Consol, not Mr. Gillingham, retained those items, as is evidenced by the fact that it produced the signed release at trial. Mr. Gillingham's contractual obligation to Technical Solutions and subjective belief that he would have had to leave the work site if he did not sign the papers that Consol presented to him were sufficient for this matter to fall within the parameters of the ***Liebowitz*** decision.

Consol also claims that it is entitled to judgment NOV as to Mr. Gillingham because it is immune from his suit under the Pennsylvania Workers' Compensation Act. 77 P.S. § 481(a) ("The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees, his legal representative, husband or wife, parents,

dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death[.]").

Herein, Mr. Gillingham admittedly was on the payroll as an employee of Technical Solutions, which paid workers' compensation on his behalf. Furthermore, the contract between Consol and Technical Solutions expressly stated that Mr. Gillingham's relationship with Consol was that of an independent contractor and that he was an employee of Technical Solutions. The fact that Mr. Gillingham was not Consol's employee is further evidenced by the fact that it had him sign a release, which would have been unnecessary if Consol enjoyed immunity from suit under the Workers' Compensation Act. Finally, Mr. Gillingham was working on the development of a software program and Consol neither directed that enterprise nor told him how to solve the software issues that it was experiencing.

Thus, while Mr. Gillingham worked at its site, Consol management did not dictate how Mr. Gillingham was to troubleshoot the situation nor did Consol give him the tools to perform that service. Mr. Gillingham specifically testified at trial that no one from Consol told him the manner in which to perform his job since none of its employees had expertise in software development. N.T. Jury Trial, 11/18/10, at 1008. Consol did not provide the computers that he was using to write the software for the control systems. ***Id***. at 1009. When Mr. Gillingham required a day off from work, he directed that request to Technical Solutions.

Given these facts, we conclude that the trial court did not err in submitting the issue of whether Mr. Gillingham was Consol's employee under the Workers' Compensation Act to the jury. ***Patton v. Worthington Associates, Inc.***, 2012 PA Super 74, 2012 WL 1010492 (Pa.Super. 2012). The statutory-employer immunity defense, which Consol seeks to invoke herein, arises pursuant to 77 P.S. § 52 of the Workers' Compensation Act. That section, which is entitled "Employers' Liability to Employee of Employee or Contractor Permitted to Enter Upon Premises," provides, "An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employee." An employer "is declared to be synonymous with master" and includes corporations, 77 P.S. 21, while an employee is "declared to be synonymous with servant." 77 P.S. § 22. Finally, 77 P.S. § 25 states that the term *contractor* "shall not include a contractor engaged in an independent business, other than that of supplying laborers or assistants, in which he serves persons other than the employer in whose service the injury occurs[.]" We use the following test to determine if a person is a servant:

> "In ascertaining the character of the relationship, the basic inquiry is whether the alleged servant is subject to the alleged master's control or right to control." ***Knepper v. Curfman***, 158 Pa.Super. 287, 44 A.2d 852, 853–854 (1945). "A master is one