NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MICHELLE C. ECKER, ADMINISTRATRIX OF THE ESTATE OF JOSEPH F. ECKER, DECEASED and MICHELLE C. ECKER, IN HER OWN RIGHT	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOAN A. DIAMOND, ADMINISTRATRIX OF THE ESTATE OF FREDERICK L. DIAMOND, JONES MOTOR CO., INC., THE JONES MOTOR GROUP and ROBERT A. MCCANN	:	
APPEAL OF: MICHELLE C. ECKER	:	No. 719 MDA 2004

Appeal from the Judgment entered May 13, 2004
in the Court of Common Pleas of Lebanon County,
Civil Division, at No. 1998-00410

BEFORE: DEL SOLE, P.J., LALLY-GREEN and POPOVICH, JJ.

MEMORANDUM: FILED: March 4, 2005

Appellant appeals the judgment entered following the denial of post-trial motions which sought to challenge an adverse jury verdict. On appeal she claims that the trial court erred in its refusal to permit the admission of certain evidence and that the verdict was contrary to the weight of the evidence. We affirm.

Appellant's decedent died while traveling as a passenger in a vehicle operated by Robert McCann when it collided with a tractor-

trailer operated by Frederick Diamond[1] on behalf of Appellee Jones Motor Company, Inc. The collision occurred as the tractor-trailer was attempting to complete a left-hand turn across the lane of traffic traveled by the McCann vehicle. Appellant brought an action against McCann, Diamond and Jones Motor and claimed that Diamond pulled into the intersection at a time when he could have and should have seen the oncoming McCann vehicle. Appellees Diamond and Jones Motor claimed that the McCann vehicle was speeding and that McCann's intoxication, measured by a BAC of .270, was the exclusive cause of the accident.

Following a jury trial, the jury found McCann was negligent and his negligence was a legal cause of Appellant's harm. The jury also found Appellant's decedent was comparatively negligent. The jury exonerated Diamond and Jones Motor of any negligence. Appellant voluntarily chose not to further pursue the action against McCann because he was uninsured, but she filed post-trial motions challenging the jury's finding regarding Diamond's and Jones Motor's liability for the accident and certain evidentiary rulings made by the trial court. The motions were denied and this appeal followed.

---

[1] Prior to trial Diamond died of unrelated causes and his interests are now represented by Appellee Joan A. Diamond, Administratrix of the Estate of Frederick L. Diamond.

Appellant's first two issues challenge the trial court's refusal to allow the admission of evidence regarding Diamond's involvement in prior motor vehicle accidents and the fact that he was subject to termination from his employment if he was involved in another "preventable" accident.

During trial an in-camera discussion was held regarding portions of Diamond's deposition to determine what testimony would be read to the jury. Appellant sought to have the jury hear Diamond's testimony wherein he denied having been involved in prior motor vehicle accidents. Appellant also sought to challenge this statement with evidence that Diamond had been involved in eight prior motor vehicle accidents and that he was subject to punishment from his employer if he were to be involved in one more preventable accident. The trial court disallowed Appellant's request. The court refused to present to the jury that portion of Diamond's deposition where he denied being involved in prior motor vehicle accidents and correspondingly refused to permit evidence of those accidents to be presented to the jury.

On appeal Appellant claims the trial court's ruling was error warranting a new trial. She asserts that the receipt of information of other accidents involving Diamond would allow the jury to assess his credibility. Appellant argues that Diamond's credibility was "key," as

he offered the only "unimpaired testimony about how the accident occurred." Appellant's Brief at 15.

"The basic requisite for the admission of any evidence is that it be both competent and relevant. Evidence is 'competent' if it is material to the issues to be determined at trial, and 'relevant' if it tends to prove or disprove a material fact in issue." ***Turney Media Fuel, Inc. v. Toll Bros.***, 725 A.2d 836, 839 (Pa. Super. 1999) (citations omitted). It is the function of the trial court to exclude any evidence which would divert attention from the primary issues in the case; therefore, the trial judge has broad discretion regarding the admissibility of potentially misleading or confusing evidence. ***Id.*** It is the task of the trial judge to balance the probative value of evidence against any prejudicial effect. ***Brinich v. Jencka***, 757 A.2d 388, 396 (Pa. Super. 2000). "Evidence is prejudicial not where it merely hurts a party's case, but where it tends to fix a decision which has an improper basis in the minds of the jury." ***Curran v. Stradley, Ronon, Stevens & Young***, 521 A.2d 451, 459 (Pa. Super. 1987).

In this case the trial court carefully considered Appellant's request regarding the admission of evidence of Diamond's prior accidents. The trial court recognized that this information would be relevant to Diamond's credibility, but found that his credibility was "of minimal importance in the overall context" of the case. Order of

Court, 6/3/04, at 4. It found that additional eye-witness testimony, as well as testimony from accident-reconstruction experts, minimized the overall significance of Diamond's testimony, and the probative value of the proffered evidence. Trial Court Opinion, 3/22/04, at 12. The trial court ultimately concluded that "the probative value of evidence concerning Mr. Diamond's prior accidents was outweighed by its danger of unfair prejudice to the Defendants and confusion of issues for the jury." Order of Court, at 5. The trial court reasoned that introduction of evidence of prior accidents involving Diamond would create an inference that Diamond was negligent in this case based solely upon his poor driving record.

We have reviewed Appellant's claims in light of the trial court's ruling and the rationale expressed by the court in support of that ruling. The trial court recognized that Appellant sought to challenge Diamond's credibility with the admission of evidence of his involvement in prior accidents. However, the trial court provided sound reasons in support of its decision to exclude evidence of prior accidents by weighing the value of such a challenge to the witness's credibility against the potential prejudice that its introduction could have caused. See Pa.R.E. 403. We find no abuse of discretion in the trial court's finding that the evidence of prior accidents was unduly

prejudicial and in its decision to preclude such evidence from being presented to the jury.

Appellant next contends that the trial court erred in failing to grant a judgment notwithstanding the verdict or to order a new trial based upon Appellant's claim that the verdict was against the weight of the evidence.

In reviewing an order denying a motion for judgment notwithstanding the verdict, we must determine whether there was sufficient competent evidence to sustain the verdict. ***Armstrong v. Paoli Memorial Hosp.***, 633 A.2d 605 (Pa. Super. 1993). In so doing, we consider the evidence in the light most favorable to the verdict winner, who must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in favor of the verdict winner. ***Wasserman v. Fifth & Reed Hosp.***, 660 A.2d 600 (Pa. Super. 1995). We will reverse a trial court's grant or denial of a judgment notwithstanding the verdict only when we find abuse of discretion or an error of law that controlled the outcome of the case. ***Jones v. Constantino***, 631 A.2d 1289 (Pa. Super. 1993). A new trial will not be granted on the basis of a weight of the evidence claim unless the evidence supporting the verdict is so inherently improbable or at variance with admitted or proven facts or with ordinary experience as to render the verdict shocking to the

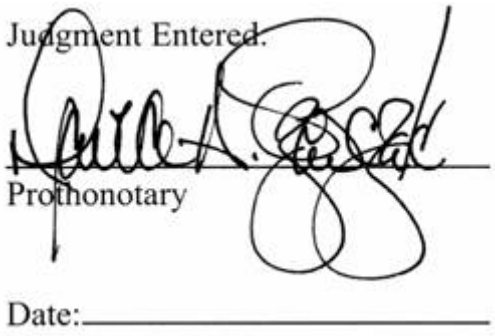
court's sense of justice. This Court will reverse the action of the trial court only if it determines that it acted capriciously or palpably abused its discretion. ***Brindley v. Woodland Village Restaurant***, 652 A.2d 865 (Pa. Super. 1995).

Appellant argues that although the evidence at trial established the negligence of McCann, it also "displays that some degree of negligence should have been attributed to Diamond." Appellant's Brief at 21. Appellant notes that the trial court summarized the sufficiency of the evidence to support the jury's verdict, which included McCann's blood alcohol content, the lack of skid marks from the McCann vehicle and Diamond's 1,000-foot sight distance for oncoming traffic. However, she asserts that the trial judge's reference to the record and ultimate conclusion "ignores the conduct of Diamond." ***Id.***, at 223.

We disagree. The trial court clearly explained why the evidence received at trial would justify a verdict exclusively against McCann. In addition to the evidence of McCann's extreme intoxication, the court referred to evidence that the McCann vehicle left no skid marks indicating that McCann made no effort to slow or stop his vehicle prior to impact. In addition, evidence was offered that although Diamond had a 1,000-foot sight distance, he would not have been able to see the oncoming McCann vehicle if it was traveling at a speed of 67 miles

per hour or greater. The court concluded that the jury, viewing the damage to the McCann vehicle, the lack of skid marks and the evidence of McCann's intoxication, could justifiably conclude that McCann was traveling at 67 miles per hour or greater and that no negligence should be assigned to Diamond. Based upon our review of the record, recognizing the conflicting testimony offered at trial, we conclude there is no reason to disturb the verdict of the jury who chose to accept the testimony offered by the defense. Accordingly, we find no error in the trial court's denial of Appellant's request for a judgment n.o.v. or a new trial.

Judgment affirmed.



March 4, 2005