IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN GELNER	**CIVIL ACTION**
	NO. 97-2135
v.	
AU BON PAIN CO., INC	

Broderick, J. **March 31, 1998**

MEMORANDUM

Presently before the Court is the post-trial motion of Plaintiff John Gelner for a new trial pursuant to Fed.R.Civ.P. 59. The Defendant Au Bon Pain Co., Inc. ("Au Bon Pain") has filed a response in opposition to Plaintiff's motion for a new trial, and Plaintiff has filed a brief in reply to Defendant's response. Defendant has also filed a motion for sanctions pursuant to Fed.R.Civ.P. 11, requesting that this Court, as a sanction, dismiss with prejudice Plaintiff's Rule 59 motion. Plaintiff has filed a response to Defendant's motion for sanctions, and Defendant has filed a brief in reply to Plaintiff's response. For the reasons stated below, the Court will deny Plaintiff's motion for a new trial and will dismiss Defendant's motion for sanctions as moot.

Plaintiff commenced this action against Defendant Au Bon Pain, claiming that as a result of Defendant's negligence, he was injured when a cup of coffee was spilled on him on March 18, 1996, while he was a customer at the Au Bon Pain cafe located at

30th Street Station in Philadelphia, Pennsylvania. Plaintiff is an employee of Amtrak, and he works at 30th Street Station.

A pre-trial conference was held on November 3, 1997, at which time a Joint Pre-Trial Order, prepared in accordance with this Court's Standing Order re Pretrial, was signed and submitted to the Court. The Joint Pre-Trial Order, which was subsequently signed by the Court and filed of record, states the following:

> Part VI. JURY/NON-JURY TRIALS
>
> A. Jury Trials:
>
> 1. Unless stated to the contrary herein, the issues relating to liability shall be severed and tried to verdict. Thereafter, all issues relating to damages will be tried before the same jury. The decision concerning bifurcation of the trial will be made by the Court at the pre-trial conference as a result of an informed exercise of discretion on the merits of the case.

Although there is no record as to what was stated by the Court or the Plaintiff's or Defendant's counsel, it is the practice of the Court whenever a question is raised at the pre-trial conference concerning bifurcation to make an informed decision and state in the pre-trial order the Court's decision as to whether the case will or will not be bifurcated. The signed Joint Pre-Trial Order filed of record nowhere indicates that any decision was made not to bifurcate the trial. However, Plaintiff alleges in his post-trial motion that his attorney objected to bifurcation before he signed the Joint Pre-Trial Order. A review of the Joint Pre-Trial Order shows no such objection.

Trial commenced on January 5, 1998. Before opening statements were made, the Court told the jury that the case would be bifurcated, explaining that bifurcation "simply means we are going to try this case in two parts. [In] the first part ... you will consider only the question as to whether or not the defendant is liable, and if you find that there is liability, then we will come back and we will determine the amount of damages that you find, if any, should be paid."

After the Court's final charge to the jury, Plaintiff's attorney made two requests for additional instructions. The first request was for an instruction that the jury was not to consider the extent of the Plaintiff's injuries in determining liability. Plaintiff's second request was for an instruction on res ipsa loquitur. The Court denied both requests.

On January 6, 1998, the jury returned a verdict on liability for Defendant.

Plaintiff moves for a new trial pursuant to Fed.R.Civ.P. 59, which permits a district court to "grant a new trial if required to prevent injustice or to correct a verdict that was against the weight of the evidence." American Bearing Co., Inc. v. Litton Industries, 729 F.2d 943, 948 (3rd Cir. 1984), cert. denied, 469 U.S. 854, 105 S.Ct. 178, 83 L.Ed.2d 112 (1984). In support of his motion, Plaintiff claims that 1) the verdict was against the

clear weight of the evidence; 2) bifurcation of the trial was improper, unduly prejudicial to plaintiff and resulted in manifest injustice; 3) the Court erred in refusing to give the two jury instructions requested by Plaintiff's counsel; and 4) the Court erred in two of its evidentiary rulings.

Verdict Against the Weight of the Evidence

When determining a motion for a new trial on the ground that the verdict is contrary to the weight of the evidence, "[t]he judge is not required to take that view of the evidence most favorable to the verdict-winner [and] ... the judge is free to weigh the evidence for himself." 11 Wright, Miller & Kane, Federal Practice & Procedure § 2806 at 65-67 (1995). However, "[t]he mere fact that the evidence is in conflict is not enough to set aside the verdict. Indeed the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." Id. at 67. Having reviewed the record and weighed the evidence according to this legal standard, the Court has determined that the jury's verdict was not contrary to the clear weight of the evidence.

Plaintiff's counsel and Defense counsel presented conflicting evidence regarding how the coffee spilled. Plaintiff testified that he ordered his coffee, put his money on the counter, and turned away to speak with an acquaintance, Mr.

Steffney, a fellow Amtrak employee who was standing at the counter. Plaintiff testified that he never reached for the cup of coffee, but that he saw "coffee or a cup coming at me out of the side of my eye." Plaintiff also called Mr. Steffney, who testified that Mr. Gelner did not touch the cup of coffee. Rather, Mr. Steffney testified that when the server reached over the counter to hand Mr. Gelner the cup, "It looked like it struck the top where the coffee, where you pour the coffee, like a square box and it's higher above the counter... I didn't watch her pour it but I know when she reached over to give it to him, I noticed it hit something, the bottom hit or something but it started coming out."

Plaintiff's counsel also submitted an incident report completed by the manager at the Au Bon Pain, which stated that "Coffee spilled on customer's arm (left) around wrist area (cup tilted over edge of counter top CSR name Audrey)." Finally, Plaintiff called John Whalen, an Amtrak supervisor who testified that he investigated the accident and filed an accident report. Mr. Whalen testified that in the course of the investigation, the server told him the coffee spilled when she lifted the cup over the counter and it hit the edge of the counter. The Amtrak accident report, which was admitted into evidence, described the accident as follows: "While waiting for his [Mr. Gelner's] purchase, Au Bon Pain employee inadvertently spilled hot coffee

on his left arm causing first degree burn. CAUSE: Au Bon Pain employee hit edge of counter top with container of hot coffee causing cup to spill its contents on Mr. Gelner's arm."

Defendant's counsel called Audrey Elam, the woman who served Mr. Gelner when the coffee spilled, although she is no longer employed at Au Bon Pain. Ms. Elam testified that she set the coffee cup on the counter, saw Mr. Gelner begin to reach for it, and then turned away to make change. While she was making change at her cash register, Ms. Elam testified that she heard Mr. Gelner yell, and she looked up to find the coffee spilled. She also testified that she never told anyone that she had hit the counter or the coffee maker with the coffee cup.

Plaintiff had the burden of proving Defendant's negligence in causing the coffee to spill. In such a case, a jury is charged by the Court that the Plaintiff must carry this burden of proof by a preponderance of the evidence. Clearly in this case the jury did not find that Plaintiff carried his burden of proving Defendant's negligence by a preponderance of the evidence. A determination by the jury that Plaintiff failed to carry his burden of proof by a preponderance of the evidence was not against the clear weight of the evidence.

Bifurcation Resulting in Manifest Injustice

Plaintiff claims that the Court's decision to bifurcate the

trial was unduly prejudicial, resulting in manifest injustice, and that the Court should thus grant a new trial on equitable grounds. Plaintiff characterizes the Court's bifurcation decision as "sua sponte .. without notice or request from either party." Plaintiff claims that the Court's "sua sponte" decision to bifurcate was prejudicial in light of recent publicity regarding other "coffee spill" cases, which Plaintiff claims could have led the jury to believe that his case was frivolous unless they knew the extent of his injuries before considering the issue of liability.

Plaintiff's claim that the Court decided to bifurcate the trial "sua sponte" and without notice is entirely without merit. Plaintiff alleges that he first received notice that the trial would be bifurcated when the Court explained bifurcation to the jury at the start of the trial. The notes of testimony indicate that after the Court's comments to the jury, Plaintiff's counsel told the Court at side-bar that he understood from the pre-trial conference that the trial would not be bifurcated. The Court responded that it generally bifurcates negligence cases, and asked whether a decision to the contrary had been made at the pre-trial conference. Plaintiff's counsel responded, "I thought because the duration of the case in terms of it being very short overall, was my understanding that we were going to do the whole matter."

The Joint Pre-Trial Order signed by Plaintiff in November of 1997, two months before the trial began, clearly states that the trial will be bifurcated "[u]nless stated to the contrary herein." Nothing to the contrary is stated therein, and there is no objection to bifurcation noted in the Joint Pre-Trial Order. On the contrary, Defense counsel stated at side-bar that "My recollection from what is in the initial materials from your Honor's chambers was that all trials will be bifurcated unless otherwise designated. I don't remember even discussing this at the pre-trial conference." Unfortunately, no record was made of the pre-trial conference. However, based on the one written document resulting from that conference, the Joint Pre-Trial Order, Plaintiff was clearly on notice that the trial would be bifurcated. No manifest injustice resulted from the Court's discretionary decision to bifurcate the trial which could serve as the basis for a new trial.

Plaintiff's Request for Jury Instructions

Plaintiff claims that the Court erred in denying his two requests for jury instructions. "In reviewing jury instructions when error has been alleged, a new trial will be required only if the instructions, taken as a whole, give a misleading impression or inadequate understanding of the law and the issues to be resolved." Malloy-Duff & Associates v. Crown Life Ins. Co., 734

F.2d 133, 147 (3rd Cir. 1984).

Plaintiff's counsel requested the following instruction:

> In making a determination on liability you may not consider, in any way, the extent of plaintiff's injuries. The extent of the injuries, whether a pin prick or paralysis, has no bearing on the issue of negligence. You have heard no evidence of the extent of the injuries and you may not use this phase of the trial to determine the amount of damages, if any, plaintiff is entitled to recover.

In his motion for a new trial, Plaintiff alleges that the Court's refusal to give this instruction was clear error because without such an instruction, the jury, which had heard no evidence regarding damages, might regard Plaintiff's injury as superficial and find for Defendant even if Plaintiff had proven negligence and causation. However, prior to Plaintiff's counsel making his opening to the jury, the Court answered his question as to whether he could tell the jury that Plaintiff had been injured as a result of Defendant's negligence as follows: "I have already said that your client was burned [and] you can certainly say that and [that he] suffered damages, but you don't go into the extent of the damages."

The Court's charge, taken as a whole, clearly instructed the jury that they were not to consider Plaintiff's injuries during the liability phase of the trial. Early in the trial, the Court told the jury that the trial would be bifurcated, explaining that in the first part "you will consider only the question as to

whether or not the defendant is liable, and if you find that there is liability, then we will come back and we will determine the amount of damages that you find, if any, should be paid." In its charge, the Court referred back to this comment, noting once again that the trial was bifurcated and reminding the jury that "we are only going to determine at this stage of the trial whether or not the defendant is negligent and whether its negligence is a proximate cause of the plaintiff's injury." The jury had ample instruction regarding bifurcation and what was to be considered during the liability phase of the trial. These instructions, taken as a whole, were not inadequate or misleading, and the Court did not err in refusing to further instruct the jury as requested by Plaintiff's counsel.

Plaintiff also claims that the Court's refusal to instruct the jury on res ipsa loquitur was prejudicial error. "[R]es ipsa loquitur is a rule that provides that a plaintiff may satisfy his burden of producing evidence of a defendant's negligence by proving that he has been injured by a casualty of a sort that normally would not have occurred in the absence of the defendant's negligence." McCormick on Evidence, 2nd Edition, §342 at 804. This is clearly not a res ipsa loquitur case. This was not a trial where the Plaintiff claimed the coffee was served too hot; such a case might be a res ipsa loquitur case. Rather, the issue raised at trial was who spilled the coffee, and without

question, the coffee could have spilled for any number of reasons other than Defendant's negligence. The Court did not err in refusing Plaintiff's request for a res ipsa loquitur instruction.

Evidentiary Rulings

Plaintiff contends that the Court committed prejudicial error in two of its evidentiary rulings. The decision to admit or exclude evidence is within the discretion of the trial court. Glass v. Philadelphia Electric Company, 34 F.3d 188, 191 (3rd Cir. 1994)(Appeals Court reviews trial court rulings concerning admission of evidence for an abuse of discretion). "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected..." Id. (quoting Linkstrom v. Golden T. Farms, 883 F.2d 269, 269 (3rd Cir. 1989).

Plaintiff claims that the Court committed prejudicial error when it refused to allow Plaintiff's attorney to read to the jury the following stipulated facts:

> On March 18, 1996, plaintiff sustained a first degree burn to his left forearm and wrist. Coffee is maintained by Au Bon Pain at 175 - 185° Fahrenheit.

Plaintiff first claims it was necessary to read this stipulation so that the jury would know that Plaintiff had been injured. The Court correctly ruled that Plaintiff's injury was not relevant in the liability phase of the trial.

Plaintiff also claims that the jury needed to know the temperature at which Au Bon Pain serves coffee in order to determine the scope of the duty Defendant owed Plaintiff. A review of the Joint Pre-Trial Order shows that Plaintiff's negligence claim was based on the server's negligence in serving the coffee, and not in Au Bon Pain's negligence in serving coffee at a too high temperature. The only expert listed for the Plaintiff in the Joint Pre-Trial Order is a medical expert regarding alleged injuries sustained by Plaintiff. Furthermore, the only testimony presented during trial pertained to the alleged negligence of Audrey Elam in serving the coffee. The basic issue presented to the jury was who spilled the coffee, and the Court correctly refused to allow the stipulation regarding the temperature of the coffee out of a concern that it would confuse the issues for the jury. The Court's ruling was an exercise of its discretion and cannot serve as a basis for a new trial. There was no error which affected a substantial right of the Plaintiff.

Plaintiff also claims that the Court committed prejudicial error when it sustained Defendant's objection to two written statements made by Plaintiff's witness Mr. Steffney shortly after the accident. The statements described the incident he had witnessed, and were consistent with his testimony in court. On direct examination of Mr. Steffney, Plaintiff's counsel attempted

to introduce these statements, and Defense counsel objected. The Court correctly ruled that "You can't fortify a person's statement by saying he said the same thing" in a prior statement. See Weinstein's Federal Evidence, 2nd Edition, § 801,12[2][c] at 801-31 (prior consistent statements which are "merely cumulative" are inadmissible).

Plaintiff's counsel then explained that he was offering the prior consistent statements pursuant to Federal Rule of Evidence 801(d)(1)(B) in order to rebut the implication, made in Defense counsel's opening statements to the jury, that Mr. Steffney's testimony was the product of an improper influence or motive due to his long-standing friendship/work relationship with the Plaintiff. Rule 801(d)(1)(B) provides that "A statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

The Court correctly refused to allow Mr. Steffney's prior consistent statements into evidence because Rule 801(d)(1)(B) is not applicable in this situation. In Tome v. United States, 513 U.S. 150, 115 S.Ct. 696 (1995), the Supreme Court held that Fed.R.Evid. 801(d)(1)(B) "permits the introduction of a declarant's consistent out-of-court statements to rebut a charge

of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive." Id. at 166, 115 S.Ct. at 705. In the instant case, the evidence shows that Mr. Steffney's friendship/work relationship with Plaintiff goes back at least twenty years. Because Mr. Steffney's prior consistent statements clearly did not predate his relationship with Plaintiff, they could not be offered, pursuant to Rule 801(d)(1)(B), to rebut a charge of improper influence or motive resulting from that relationship. The Court's ruling was not in error and cannot serve as the basis for a new trial.

Defendant's Motion for Sanctions

Defendant has filed a motion for sanctions pursuant to Fed.R.Civ.P. 11. Defendant alleges that in Plaintiff's motion for a new trial, Plaintiff made factual representations "wholly without evidentiary support," and that Plaintiff made legal arguments which he could not have asserted in good faith had he first made a reasonable inquiry as to the legal basis for his position. Defendant asks that the Court impose sanctions in the form of dismissal with prejudice of Plaintiff's motion for a new trial. As the Court has considered the merits of Plaintiff's motion and has concluded that it should be denied, Defendant's motion for sanctions is rendered moot.

Accordingly, for the reasons set forth above, the post-trial motion of Plaintiff John Gelner for a new trial will be denied, and the Defendant Au Bon Pain’s motion for sanctions will be dismissed as moot.

An appropriate Order follows.

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ORDER

AND NOW, this 31st day of March, 1998; Plaintiff John Gelner having filed a motion for a new trial pursuant to Fed.R.Civ.P. 59; Defendant Au Bon Pain Co., Inc. having filed a motion for sanctions pursuant to Fed.R.Civ.P. 11, requesting that the Court dismiss with prejudice Plaintiff's motion for a new trail; for the reasons stated in the accompanying memorandum of March 31, 1998;

IT IS ORDERED: Plaintiff John Gelner's motion for a new trial pursuant to Fed.R.Civ.P. 59 is **DENIED**;

IT IS FURTHER ORDERED: Defendant Au Bon Pain Co., Inc.'s motion for sanctions pursuant to Fed.R.Civ.P. 11 is **DISMISSED AS MOOT**.

RAYMOND J. BRODERICK, J.