JOHN W. IRION, Administrator of the Estate of JERRY J. IRION, JULIA M. IRION, Administratrix of the Estate of JERRY J. IRION, and the Estate of JERRY J. IRION,	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
vs.	:	NO. 96-01,710
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION and BETSEY S. WHIPPLE; MARY McCOY,	:	CIVIL ACTION - LAW JURY TRIAL DEMANDED
Defendants	:	POST-TRIAL MOTIONS

OPINION and ORDER

The matter before the Court concerns the Motion for New Trial and/or Judgment N.O.V. filed by Plaintiffs on February 10, 1999, following jury trial in which no damages were awarded to Plaintiffs. The jury's verdict, rendered February 1, 1999, found both Defendants Whipple and PennDOT were negligent, but that their negligence was not a substantial factor in causing the accident. The jury found no negligence on the part of Defendant Mary McCoy (hereinafter "Ms. McCoy").[1] Based upon the following discussion, Plaintiffs' Motion must be denied.

Background

On July 25, 1996, Decedent, Jerry J. Irion (hereinafter "Decedent"), was killed as a result of injuries received in a traffic accident at an intersection when Decedent's vehicle

[1] According to the instructions on the Special Verdict Slip, upon making this last finding the jury ended its deliberations and returned to the Courtroom with the verdict. Consequently, they did not reach questions 7 or 8, which asked whether Decedent was contributorily negligent and if so, whether this was a substantial factor in causing his own injuries.

collided with a vehicle driven by Defendant Betsy S. Whipple (hereinafter "Ms. Whipple"). The accident occurred in a rural area. Just before the accident occurred, Decedent was driving southerly in his 1990 Toyota pick-up truck on Woodly Hollow Road (T-562) at approximately 6:30 a.m. and would have been going up a slight grade approaching a stop sign where T-562 intersects State Road (SR)864. At the same time, Ms. Whipple was driving a 1984 Ford Ranger pick-up westerly on SR864, approaching the intersection from Decedent's left. The vehicles collided in the intersection as the front of Ms. Whipple's vehicle struck the left side of Decedent's vehicle. No one is known to have witnessed the actual impact of the two vehicles. At the intersection, SR864 is a two-lane macadam through-highway 20 feet wide. The speed limit for SR864 is 40 m.p.h. The intersection is controlled by a stop sign for traffic on Woodly Hollow Road, a 21-foot wide township macadam road. The land at the northeast corner of the intersection is owned by Ms. McCoy.

Plaintiffs contended the accident was due to Ms. Whipple's negligence in either exceeding the safe speed and/or her inattentiveness. Plaintiffs further claimed Ms. McCoy was negligent because vegetation on her property, of which she was aware and failed to remove, obstructed the view of the Decedent and Ms. Whipple. Plaintiffs alleged the Commonwealth of Pennsylvania, Department of Transportation (hereinafter "PennDOT") failed in its obligation to remove the obstructions to ensure a clear and adequate site distance from the stop sign at the intersection where the accident occurred. The Defendants' theory of the case, as presented to the jury, was that Decedent must have failed to stop at the stop sign when his vehicle reached SR864, and/or, that he failed to yield the right-of-way to Ms. Whipple as the sight distance

available to him at the intersection, at least from a position being stopped at the stop sign, was sufficient for him to have seen Ms. Whipple approaching on the through highway.

At trial, testimony was introduced which established that Ms. McCoy, from a distance of approximately a quarter of a mile away, had observed Decedent traveling on T-562 approaching the intersection "putting along, not real fast." Ms. McCoy did not observe any brake lights come on the vehicle as it approached the stop sign; however, the vehicle left her view prior to actually reaching the stop sign. She then, a few seconds later, heard the sound of the collision. Ms. Whipple's testimony at trial established that she did not see Decedent's vehicle until after the impact had occurred. A Pennsylvania State Police Trooper who investigated the accident gave testimony concerning markings on the highway made by one front wheel of the Decedent's vehicle just across (south of) the centerline of SR864, made after the impact took place during the course of collision. Based upon objections made by defense counsel, the Trooper was not allowed to offer an opinion as to the position of either vehicle at the time of the initial impact. The State Trooper also testified that he stopped his car at the stop sign on T-562 on the day of the accident and did not observe any obstructions to his view of SR864 as he looked to his left. Plaintiffs called an expert, John Comiskey, who testified as to his qualifications in accident reconstruction. He testified that, based upon his view of the gouge marks, the impact of the vehicles occurred when at least the left front wheel of Decedent's vehicle had crossed the centerline of SR864 by a small distance. He also testified that, based upon his observations of the marks on the highway and comparison of photographs which showed the "crush" of vehicles, his opinion was the Whipple vehicle was traveling at 50-55 mile per hour at the time of impact. He did not give any opinion as to the speed of Decedent's

vehicle. He also testified there was 100 feet of sight distance at the intersection from the stop sign at T-562, looking to the driver's left (easterly). This sight distance was based upon his view of photographs taken at the time of the accident and his investigation which occurred several months after the accident.

Testimony from Ms. Whipple introduced during the trial indicated she believed she was traveling at approximately 40 miles per hour. She was familiar with the scene of the intersection due to traveling that road on a daily basis. She was confident she would have a clear view of the intersection and vehicles at the stop sign while traveling on SR864.

The testimony at trial of Ms. McCoy clearly established that she owned the property at the intersection where the supposed obstruction of brush would have impaired the Decedent's view of vehicles approaching from his left on SR864. However, she denied the overgrowth was such as to impair anyone's vision as they approached the intersection on either highway.

Ms. McCoy also introduced the testimony of a traffic reconstruction expert, Walter P. Kilareski. Dr. Kilareski's expert testimony had been the subject of several pre-trial motions and rulings. Initially, Dr. Kilareski had submitted a report that would have seemed to confirm the speed analysis of Plaintiffs' expert. Subsequently, he submitted a second report, based upon learning the actual weight of Ms. Whipple's vehicle instead of an estimated weight used in the first report, in which he changed his opinion, substantially changing his speed estimates. His second opinion of the speed of the vehicles prior to impact would have placed the Decedent's at 19-26 miles per hour and Ms. Whipple's at 37-45 miles per hour. As set forth in several pre-trial rulings, because of ambiguities in the expert's report and the late date the

supplemental report was furnished, the Court permitted Plaintiffs to take a pre-trial deposition of Dr. Kilareski. That occurred on or about January 4, 1999, several weeks prior to commencement of trial.

At trial, Ms. McCoy's counsel called the expert witness, Dr. Kilareski, to testify only as to his opinion as to sight distance at the intersection. He gave an opinion, based upon his examination of the scene several years after the accident, as well as photographs which he had been supplied concerning the scene at about the time of the accident, that the sight distance from the stop sign looking to the east (the Decedent's left) would have been in excess of 700 feet. He did not offer any testimony concerning the speed of the vehicles. Plaintiffs sought to cross-examine Dr. Kilareski concerning his reports and opinions concerning speed, but the defense objection to such cross-examination was sustained.

Discussion

A new trial should be granted when the jury verdict is so contrary to the evidence as to shock one's sense of justice and a new trial is imperative so that right may be given another opportunity to prevail. ***Randt v. Abex Corp***., 671 A.2d 228 (Pa.Super. 1996). However, a new trial should not be granted on mere conflicts in testimony. *Ibid.* A new trial will not be granted on 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. ***Brindley v. Woodland Village Restaurant, Inc***., 652 A.2d 865 (Pa.Super. 1995). Further, judgment notwithstanding the verdict is an extreme remedy, entered only where, after viewing the evidence in the light most favorable to the verdict winner (as the Court is required to do in ruling on post-trial motions), no two

reasonable minds could fail to agree the verdict was improper. ***Giosa v. School District of Philadelphia***, 630 A.2d 511 (Pa.Cmwlth. 1993) (*allocatur denied).*

Evidence as to Negligence of Ms. Whipple Being a Substantial Factor

Plaintiffs first argue Ms. Whipple testified she never saw Decedent's vehicle prior to the accident, even though she hit it in the opposite lane of travel in which she was travelling. According to Plaintiffs, Ms. Whipple would have had to see the vehicle under this situation and her failure to look was negligence as a matter of law, which in turn demands the conclusion the resulting accident was her responsibility.

The trial testimony clearly established Decedent's vehicle had entered and at least partially crossed Ms. Whipple's lane of westbound travel. There was conflicting evidence as to each vehicle's location at the time of impact, whether the accident occurred in the middle of the roadway, whether Ms. Whipple's vehicle was entirely within her own lane, or whether her vehicle had partially crossed the middle line of the highway. The location of the vehicles at the time of the collision was a question for the jury. Viewing the evidence in the light most favorable to the verdict winner, it is clear the jury found Ms. Whipple's negligence was not a substantial factor in causing the accident and resulting injuries to the Decedent. This could include, then, an implied finding that Ms. Whipple was negligent in failing to observe Decedent's vehicle, or speeding, or both, but that she remained within her own lane of travel. Even if Ms. Whipple veered slightly from her lane, given the location of damage on each vehicle, the jury could have reasonably found a large part, if not all, of Decedent's vehicle was in Ms. Whipple's lane of travel when the accident occurred.

Moreover, even though Ms. Whipple did not see the vehicle prior to impact, under the facts of the case it does not necessarily follow such inattentiveness, if any, by Ms. Whipple of necessity constituted a substantial factor in the accident and injuries to the Decedent. At trial, Plaintiffs claimed Ms. Whipple was travelling 50-55 m.p.h.[2] Assuming, *arguendo*, this claim was accurate and accepted by the jury, the evidence further established that even if the Decedent properly stopped at the stop sign present in the intersection, he could then have accelerated to 15 m.p.h. without difficulty before the collision. Thus, from a stop Decedent could have traveled up to 11 feet in a second, while Ms. Whipple traveled 80 feet in the same second. Plaintiff further presented evidence Ms. Whipple wouldn't have been able to see the stop sign at a point greater than 50 feet from the intersection because of vision impairment caused by overgrown vegetation. Therefore, even assuming the Decedent stopped at the stop sign, had Ms. Whipple glanced away for a second or less at some point after traveling to within 80 feet of the intersection, the accident could have occurred without Ms. Whipple seeing Decedent pulling out in front of her. It was for the jury to decide if this was in fact what happened and if so, whether Ms. Whipple's looking away for a second constituted negligence which was a substantial factor in causing the accident.

Given the verdict, the jury apparently found either the Decedent had not properly stopped or that even if he had, Ms. Whipple's conduct was not a substantial factor in the resulting accident.[3] Moreover, given the lack of evidence as to the speed of Decedent's vehicle, the jury could have reasonably found, as proposed in Ms. Whipple's brief, that it was the Decedent rather than Ms. Whipple who was exceeding the speed limit.

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[2] 1 M.P.H. is equated at 1.46 feet per second.

Evidence as to Negligence of Ms. McCoy and PennDOT

Plaintiffs' second contention is that Ms. McCoy should have been found guilty of negligence. Plaintiffs claim vegetation on her property obstructed the view of drivers at the intersection and constituted a traffic hazard in violation of 75 P.S. [sic] §6112, constituting negligence *per se*. Plaintiffs claim "[t]here was not one iota of evidence that the shrubs, brush and trees on McCoy's property did not constitute a traffic accident [sic]." Plaintiff's Brief p. 3 (pages not numbered).

There was substantial dispute in the testimony as to the extent of growth of the vegetation, creating an issue whether it was to such extent so as to improperly impair the view of drivers on either highway at the intersection. Ms. McCoy's brief correctly points out that in fact, numerous witnesses testified the vegetation did not obstruct the view of traffic if the person approaching the stop sign actually stopped at the stop sign. The jury apparently accepted the testimony of some or all of these witnesses, as no negligence was assigned to Ms. McCoy. Credibility determinations are for the jury. The jury is entitled to believe all, part or none of the evidence presented. A jury may disregard any portion of testimony they disbelieve. ***Randt***, *supra*, at 233.

Further, as set forth in 75 Pa.C.S. §6112 (b) and (c), the statute requires notice first be given to the property owner of the existence of the vegetation hazard obstructing vision by the Department of Transportation. The property owner's subsequent failure to remove the hazard within 10 days after such notice is given is what constitutes a summary offense. There is

[3] Note Plaintiffs' brief alleges the jury found Ms. Whipple's negligence was "not a cause of the accident at all." This misstates the verdict. The jury found Ms. Whipple to be negligent. The jury simply concluded that her negligence was not a substantial factor in causing the accident.

nothing in the record to indicate Ms. McCoy was ever given any such notice, nor that she in fact had violated the statute.

Alternatively, the jury could have reasonably concluded that any vegetation involved in or contributing to the accident was within PennDOT's right of way and therefore their responsibility to remove, given the jury did find PennDOT was negligent. Nonetheless, the fact the jury found PennDOT's negligence was not a substantial factor indicates the jury accepted the overall contention of the defense: the Decedent proceeded into the intersection improperly. This determination could have been reasonably based upon the damage to each vehicle, observations of the Decedent's vehicle as it approached the intersection and Ms. Whipple's statement that she did not see the vehicle. Assuming this defense was accepted by the jury, any negligence assigned to PennDOT for failure to trim the vegetative growth from its right of way was not the cause of the accident; rather, the accident occurred because the Decedent failed to stop. The Court in its charge included a statement substantially as follows: "A person having the right of way [such as Ms. Whipple] has the right to presume that others will comply with the duty to recognize it and yield to it." ***Barney v. Foradas***, 451 A.2d 710, 713 (Pa.Super. 1982). At least sixteen (16) other requested points submitted by counsel for all parties concerning the duties of drivers at intersections were given to the jury for their consideration.

Granted, Plaintiffs did introduce testimony from which the jury was free to infer the Decedent entered the intersection keeping a proper lookout but nevertheless was struck by Ms. Whipple, either because of her negligent driving or the negligent design or maintenance of the right-of-way. However, this was but one of two choices the jury could have inferred from the evidence. Obviously, the jury inferred the Decedent entered the intersection without properly

yielding the right-of-way to Ms. Whipple. This Court can find no error in the jury's determination and necessary implication that the Decedent's conduct was the substantial factor in causing this accident and it was not caused by the conduct of any Defendant.

Trial Errors

Finally, Plaintiffs allege the Court committed several trial errors.[4] In considering post-trial motions, the Court can order a new trial upon concluding that a factual or legal mistake was made at trial, which under the particular circumstances of the case, forms a sufficient basis to order a new trial. ***Riccio v. American Republic Insurance Co.***, 705 A.2d 422 (Pa. 1997).

The first three errors involve the Court's refusal to allow Plaintiffs to cross-examine the Defendants' expert witness, Dr. Walter P. Kilareski, on certain issues while allowing certain other cross-examination of Plaintiffs' expert witness, Mr. Charles Comiskey, which Plaintiffs claim was improper.

Plaintiffs wanted to cross-examine Dr. Kilareski concerning a part of his expert report involving certain speed calculations. However, Defendants chose during direct examination not to elicit any testimony from Dr. Kilareski regarding this area, nor to enter into evidence this part of the report. Instead, Defendants used this witness to testify as to his observations at the scene and whether the intersection had been appropriately designed (proper site distance). They apparently determined, as part of their trial strategy, not to use any testimony by Dr. Kilareski to counter the testimony of Plaintiffs' expert, Mr. Comiskey,

[4] Although not in Plaintiffs' Motion, Plaintiffs' brief contains a reference to an error of this Court whereby a "trial by ambush" was a result of Defendants knowing, by court order, all of Plaintiffs' rebuttal and cross-examination while being under no obligation to disclose their own cross-examination. While this Court is not prepared to go as far as Ms. Whipple's counsel (who states in his brief: "At no time did this Honorable Court require that 'cross-examination issues' be disclosed. It did not happen. Plaintiffs are making this up." Ms. Whipple's Brief p. 10), we must state we have no recollection of making such ruling.

regarding speed.[5] We see no error in not allowing Plaintiffs to cross-examine Dr. Kilareski on subject matter not introduced during direct testimony. The cases cited by counsel do not support a different conclusion. *See,* e.g., ***Foster v. McKeesport Hosp.***, 394 A.2d 1031 (Pa. Super. 1978), ***Havasay v. Resnick***, 609 a.2d 1326 (Pa. Super. 1992), ***Clark v. Philadelphia College of Osteopathic Medicine***, 693 A.2d 202 (Pa. Super. 1997).[6]

Plaintiffs argue Dr. Kilareski's testimony was improperly allowed, claiming it was nothing more than conjecture as the expert did not see the site until over two years after the accident, at which time the scene was altered and the time of year was different. Consequently, there was no substantial foundation for his opinion.

We know of no case law, nor have Plaintiffs presented any, which would have this Court find an expert must be precluded from testifying because he or she did not see an accident site within a certain period of time after the accident occurred. Further, Dr. Kilareski's testimony may even have helped Plaintiffs, in that he never attempted to claim he knew the condition of the site on the day of the accident and it was obvious the site was different when he examined it, based upon his photographs compared to the time of the accident. There was a question whether there could have been as much as 735 feet of site distance, or as little as 50 feet.

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[5] Plaintiffs' counsel, by a Motion in Limine filed January 20, 1999, had sought to exclude such testimony by Dr. Kilareski. The Court denied that Motion.

[6] With respect to Plaintiffs' third error of contention, "Failure to allow plaintiff [sic] to cross examine defendant's witness as to all things he did at the accident scene and conclusion drawn therefrom" this Court agrees with Defendants that we have no recollection of precluding Plaintiffs from asking the expert what he did at the accident scene, unless Plaintiffs are referring to the issue concerning the speed calculations already addressed.

Plaintiffs also claim error with respect to Mr. Comiskey being cross-examined improperly when he testified with respect to speed and his methods of measurement based on "vehicle crush." Specifically, Mr. Comiskey claimed on cross-examination that it was impossible to have a potential range of speed results – varying by as much as 30 m.p.h.- by using his methods. Having done so, Ms. Whipple's counsel then produced a prior report, authored by Mr. Comiskey, wherein he said such a range was possible. It was clearly permissible to allow this effective cross-examination by the use of this witness' prior inconsistent statement.

Plaintiffs claim as trial error this Court exclaimed in open court "that the scene was not altered when it was; or else the photograph was." [7] Plaintiffs' Motion No. 4 (trial errors). This did not occur. At trial, Plaintiffs' counsel, during cross-examination of Dr. Kilareski, told the jury the photographs he was showing the witness were altered. This Court sustained an objection by the defense, ordered the statement stricken and also addressed the fact that there was no evidence or basis for this assertion. Counsel's statement was a gratuitous, improper attempt to testify before the jury. Given counsel's years of experience, he should have known better. The unsubstantiated comment would have been severely prejudicial to Defendants had it been left for the jury's consideration. Given the situation brought about by counsel's statement, this Court had no choice but to address counsel's error. We do not agree counsel was improperly "excoriated" by the Court. Plaintiffs' Brief p. 5 (unnumbered).

Finally, Plaintiffs claim this Court erred in failing to enter a directed verdict. We disagree. On a motion for directed verdict, we must accept as true all facts and inferences which

[7] Our recollection of the statement and objection is that it concerned statements whether the photographs were altered, not the scene.

tend to support the non-moving party (or parties) and reject all testimony to the contrary. ***Correll v. Werner***, 437 A.2d 1004 (Pa.Super.1981). A case should be removed from a jury's consideration only when all the facts are clear and there is no room for doubt. *Ibid.* Obviously, this was not such a case.

Accordingly, the following Order is entered:

O R D E R

AND NOW, this 7th day of June 1999, based upon the foregoing Opinion, Plaintiffs' Motion for New Trial and/or Judgment N.O.V. is **HEREBY DENIED**.

BY THE COURT,

William S. Kieser, Judge

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