

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ERIKA FAIRWEATHER	)	
	)	
Plaintiff	)	CIVIL NO. 1166/1986
	)	
vs.	)	ACTION FOR DAMAGES
	)	
CARMEN MALLOY	)	
	)	
Defendant	)	
	)	

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FINCH, Judge

MEMORANDUM OPINION AND ORDER
(June 30, 1988)

I. INTRODUCTION

This matter came before the Court on defendant's motion for judgment notwithstanding the verdict, and in the alternative, for a new trial. For the reasons mentioned below, this Court holds that the motion for judgment n.o.v. is procedurally barred, and that the verdict is not against the weight of the evidence. Accordingly, both motions will be denied.

FACTS

On or about September 11, 1986, plaintiff, Erika Fairweather, and defendant, Carmen Malloy, was involved in an argument. Fairweather testified that during the argument Malloy picked up four large stones and threw them at her. She further testified that as a result of being struck, she sustained injuries to her mouth, face, breast, forearm, and hips. Fairweather also testified that she was unable to work because of her injuries. Malloy denied throwing any stones at Fairweather. She testified that she threw dirt at Fairweather, because Fairweather wet her with a water hose. Fairweather admitted she accidentally wet Malloy.

Both parties reside adjacently at Good Hope Townhouse apartments. Their patios, the situs of the incident, are separated by a decorative block wall approximately seven feet high. Fairweather testified that some of the stones came through and some over the wall.

Fairweather's expert witness, Dr. Wilbur Williams, Jr., testified that he treated her for injuries caused by the stones. He also stated that she may suffer future pain. Another witness, Dr. Raymond Dehler, testified that Fairweather sustained extensive damage to her mouth, which he treated at substantial costs.

At the close of plaintiff's case, Malloy moved for a directed verdict. This motion was denied. Based upon a review of the record, Malloy did not renew her motion at the close of all the evidence.

The jury returned a verdict for Fairweather in the amount of \$10,000 broken down as follows: Battery - \$1,500; Pain and Suffering - \$1,500; Medical Expenses - \$3,000; Lost Income - \$2,000; Emotional Distress - \$1,000; and Punitive Damages - \$1,000.

DISCUSSION

Defendant, Malloy's motion for directed verdict was made pursuant to F.R.Civ.P. Rule 50(b). That rule reads in part:

Whenever a motion for a directed verdict made at the close of all the evidence is denied, ... the court is deemed to have submitted the action to the jury subject to a later determination on the legal questions raised by the motion... a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside... (Emphasis supplied).

F.R.Civ.P. Rule 50(b). It is quite apparent from the language of the rule, that a predicate to a judgment n.o.v., is a directed verdict motion at the close of all the evidence. This motion was not raised by plaintiff. However, it is well settled in the Third Circuit, that "a court may grant a motion for judgment notwithstanding the verdict only when the moving

party formally renewed its motion for a directed verdict at the close of all the evidence." Mallick v. International Broth. of Elec. Workers, 644 F.2d 228, 233 (3rd Cir. 1981); See also Acosta v. Honda Motor Co., Ltd., 717 F.2d 828, 831 (3rd Cir. 1983); Wall v. United States, 592 F.2d 154, 159 (3rd Cir. 1979); and Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken 536 F.2d 9, 11 (3rd Cir. 1976). This Court thus holds that it is without power to grant a motion for judgment n.o.v. where, as here, the movant failed to make a directed verdict motion at the close of all the evidence. Accordingly, defendant's motion will be denied.

A directed verdict motion, however, is not a prerequisite to a motion for a new trial. Thus the Court will consider Malloy's alternative motion for a new trial. The decision to grant a motion rests within this Court's sound discretion. Gutzan v. Altair Airlines, Inc., 766 F.2d 135, 140 (3rd Cir. 1985). The motion will be tested under the same standards as if it was made under F.R.Civ.P. Rule 59. It will be granted only where necessary to prevent injustice or where the verdict is against the weight of the evidence. American Bearing Co., Inc. v. Litton Industries, 729 F.2d 943, 948 (3rd Cir. 1984). In making this determination a court can weigh evidence and disbelieve witnesses. Ryan By Ryan v. McDonough Power Equipment, Inc., 734 F.2d 385, 387 (8th Cir. 1984).

Malloy contends that the evidence established that plaintiff, Fairweather, by spraying water on Malloy, was the aggressor. This Court disagrees. Fairweather admitted to spraying water on Malloy, but maintains that it was accidental. She also said that Malloy threw stones not dirt at her. The jury could believe either party. There was no other witness to the incident. This Court fails to see how the weight of the evidence is against one story rather than the other. "A dispute over credibility will not justify a new trial." Consumers Power Co. v. Curtiss-Wright Corp., 780 F.2d 1093, 1097 (3rd Cir. 1986). Malloy's argument is thus without merit.

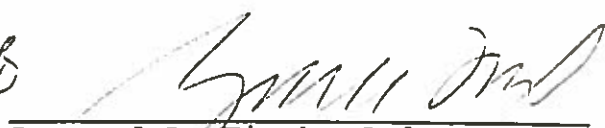
The second contention raised by Malloy is that her conduct as alleged by Fairweather, was impossible. She argues that Fairweather complained of injuries to five parts of her body, though only four stones were thrown. It is not at all clear to this Court that a stone thrown at someone can cause injury only to one body part. But even if that were so, and Fairweather really received injuries only to four body parts, nothing before this Court suggests that Fairweather was awarded compensation for injuries to five body parts. Malloy further contends that it was impossible for Fairweather to have been hit, in the manner alleged, because of the structure of the location of the incident. Fairweather testified that some of the stones came over a decorative block wall, and some through

it. Nothing in evidence indicates that the stones could not pass over the wall and hit Fairweather, or that it was impossible for the stones to pass through the decorative blocks. A review of the record reveals evidence sufficient for the jury to find that Malloy struck Fairweather with the stones though there was a wall separating them. The weight of the evidence is not clearly against such a conclusion. This Court will not substitute its judgment for that of the jury. Malloy's contentions are without merit.

Malloy's final attempt to procure a new trial is an assertion that the verdict of \$10,000 is excessive. She does not, however, indicate which of the six items, i.e., battery, pain and suffering, medical expenses, loss of income, emotional distress, and punitive damages, were excessive. Although the award for some items appear somewhat high, the conscience of this Court is not shocked thereby. Stafford v. Neurological Medicine, Inc., 811 F.2d 470, 475 (8th Cir. 1987).

For the foregoing reasons, this Court holds that the verdict in this case is not against the clear weight of the evidence, and that there is no injustice in need of prevention. Accordingly, defendant's motions will be denied.

6/30/80


Raymond L. Finch, Judge
Territorial Court