

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

NORBERT ERYSTHEE,	)	
	)	
Plaintiff,	)	CIVIL NO. 1101/86
	)	
v.	)	
	)	
EL NUEVO LIRIO GROCERY,	)	
BODEGAS ESPANOLAS ARGENTINAS,	)	
CORP., and ANTILLES WHOLESALE,	)	ACTION FOR DAMAGES
INC.,	)	
Defendants.	)	

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PETERSEN, Judge

MEMORANDUM OPINION
February 20, 1989

This cause came to trial by jury on June 29, 1988 and on June 30, 1988 the jury returned its verdict. The jury found that Defendant Bodegas Espanolas Argentinas Corporation had manufactured a defective product and that both Defendants had breached their implied warranty of fitness for consumption when they sold a defective product. Both Defendants were further

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 2

found liable to Plaintiff Erysthee in the following amounts:
Antilles Wholesale, Thirty-five Thousand (\$35,000.00) Dollars
and Bodegas Espanolas Argentinas Corp., Sixty-five Thousand
(\$65,000.00) Dollars.

Both Defendants submitted a post trial Motion for Judgment notwithstanding the verdict or, in the alternative a New Trial, pursuant to Rule 50 and 59 of the Federal Rules of Civil Procedure. This Court must now determine whether the evidence support the jury's verdict and whether the damages awarded to the Plaintiff are excessive.

FACTS

As a preliminary to an analysis of the motion now before this Court, an outline of the evidence is essential. Plaintiff, Norbert Erysthee, initiated this action for breach of implied warranty after he drank bottled orange juice containing glass particles. Norbert Erysthee testified that he purchased a sealed bottle of Richy brand orange juice from El Nuevo Lirio Grocery in St. Croix, on August 20, 1986. Richy orange juice is manufactured by Bodegas Espanolas Argentinas Corp. (Bodegas) and is distributed in St. Croix by Antilles Wholesale Inc. (Antilles).

The evidence presented at trial indicates that while in the company of Peter Cadette, a friend and co-worker, Plaintiff opened the sealed bottle of orange juice in the grocery

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 3

store and drank directly from the bottle. While drinking the juice, Plaintiff began to gag and choke before expelling a piece of glass. Upon finding that there was glass in the bottle of Richy orange juice, Plaintiff took the bottle to Antonio Rodriguez, who along with his wife, managed the grocery store.

Rodriguez testified that he kept the bottle with a piece of the glass in it so that he could show it to Antilles. However, when asked if the ten-ounce bottle displayed in Court was the bottle Plaintiff bought and drank from, Rodriguez said it was the larger sixteen-ounce bottle. He also claimed that Plaintiff never returned for the bottle. Rodriguez further indicated that Peter Cadette, the eyewitness, was not at El Nuevo Lirio Grocery on the date of the incident.

It was further revealed in Antonio Rodriguez's testimony that El Nuevo Lirio Grocery was a named defendant to this lawsuit but later dismissed.

Peter Cadette testified that he took the Plaintiff to the Emergency Room at the St. Croix Hospital immediately after Erysthee discovered he was drinking orange juice with glass particles. The later testimony of Judith McGrath, records custodian at the Hospital, substantiated that Plaintiff indeed visited the St. Croix Hospital Emergency Room on August 20, 1986.

The evidence further revealed that after returning

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 4

home from the Hospital on the evening of August 20th, Plaintiff suffered from nausea, vomiting, diarrhea, stomach pains and insomnia. As a result, he remained in bed for three days. Norbert Erysthee described his anguish and nervousness as well as a litany of physical and mental problems he has suffered since the incident: he no longer drinks bottled beverages or engages in the physical and social activities he did prior to the incident; he visited a psychiatrist for the ensuing emotional problems; for weeks he drank aloe juice hoping to rid himself of the glass; he consulted a private medical doctor for the rectal bleeding he experienced; and for six weeks he was unable to perform sexual intercourse with this wife.

Both Peter Cadette and Erysthee testified that the Plaintiff also lost farm income as he was unable to sell several heads of cattle and sheep during the three days he remained bedridden.

Dr. Donna Green, Plaintiff's attending physician, found Erysthee to be nervous, distraught and suffering from periodic nausea and stomach cramping. A barium enema and colonoscopy were prescribed for the rectal bleeding. Dr. Green's diagnosis attributed the rectal bleeding to the hemorrhoidal tissues being cut by the ingested glass.

The defense introduced evidence at trial that Mrs. Genoveva Cintron, owner of El Nuevo Lirio Grocery, threw away

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 5

the subject Richy bottle when Plaintiff failed to return to collect it. However, it was earlier conceded by Antonio Rodriguez, co-manager of the grocery at the time, that the bottle given to him by Plaintiff contained pieces of glass.

David Farlow, president of Antilles Wholesale, Inc., testifying for the Defendant, said that his company receives Richy products in sealed boxes. Hence, it is practically and economically impossible to inspect every bottle. Farlow further indicated that the only way he believed glass could get into a bottle would be if the consumer opened the bottle with his teeth or utilized another improper method. No evidence revealed that the bottle from which Plaintiff drank was in an imperfect condition nor did Plaintiff open it in an unusual or improper manner.

The bottling process for Richy orange juice was described in detail by Hugo Surace, an employee in Bodegas marketing department. His testimony indicated that over 40,000,000 items have been bottled and processed by Bodegas and only three times, including this one, did Bodegas receive claims of foreign substance in the bottled juices.

The jury verdict following the conclusion of the trial found that: the Richy orange juice manufactured by Bodegas Espanolas Argentinas and distributed in St. Croix by Antilles Wholesale, Inc. was a defective product; both Defendants

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 6

breached their implied warranty to Plaintiff; that the Richy orange juice was not fit for consumption; and that as a proximate result of drinking Richy orange juice Plaintiff was damaged. Norbert Erysthee was awarded judgment in the sum of (Sixty-Five Thousand (\$65,000.00) Dollars from Bodegas and Thirty-five Thousand (\$35,000.00) Dollars from Antilles.

DISCUSSION

To support their motion for judgment notwithstanding the verdict or, in the alternative a new Trial, the Defendants argue that (1) there was no evidence to support the jury's verdict and (2) the damages awarded to Plaintiff are so excessive as to shock the judicial conscience. The alternative requests submitted by the Defendants are best dealt with separately and in the order presented as the requisite standards are different.

Judgment Notwithstanding the Verdict

The Defendants preserved their right, pursuant to Fed. R. Civ. P. 50(b), for their Motion for a Judgment Notwithstanding the Verdict by appropriately requesting a directed verdict at the close of Plaintiff's case and at the close of all the evidence.

In considering a Motion for a Judgment Notwithstanding the Verdict, the Court is bound to interpret the evidence in the

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 7

light most favorable to the verdict winner for, a jury verdict carries with it the benefit of all reasonable inferences capable of being drawn therefrom. Hahn v. Atlantic Richfield, 625 F.2d 1095, 1098 (3d Cir. 1980). The overwhelming preponderance of proof for a judgment notwithstanding the verdict must be in favor of the movant as to permit no other rational conclusion. Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1231, 1234 (10th Cir. 1973).

This Court is further reminded that a Judgment Notwithstanding the Verdict may be granted only if, as a matter of law, the record is critically different of that minimum quantity of evidence from which a party might reasonably afford relief. Dudley v. South Jersey Metal Inc., 555 F.2d 96 (3d Cir. 1977). As the District Court noted in Clarke v. Bruckner, 19 V.I. 74 (1982), "entering a Judgment Notwithstanding the Verdict for the party having a burden of proof is rare and reserved for extreme circumstances."

The Defendants contend that no evidence was presented at trial which would allow them to be negligent in the instant case. However, it must be noted that Plaintiff brought his products liability action on the theory of strict liability (see RESTATEMENT, SECOND, TORTS §402A) and also contended that there was a breach of implied warranty of fitness for consumption. It is the Court's recollection that during the trial the issue of

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 8

alleged negligence on the part of Bodegas and Antilles was raised by the Defendants, not the Plaintiff. Plaintiff presented a case asserting Defendant's breach of implied warranty of fitness for consumption and the record provides ample support for the jury to conclude, as it did, that Bodegas manufactured a bottle of Richy orange juice bought by the Plaintiff which contained glass.

Section 402A of the RESTATEMENT (SECOND) OF TORTS makes a seller liable for injuries caused by defective or unreasonably dangerous products. "Defective condition" is defined in comment (g) as...a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. A product is "unreasonably dangerous" according to comment (i) if it is...dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics. See Battiste v. St. Thomas Diving Club, 15 V.I. 184 (1979).

In order to prevail under the RESTATEMENT (SECOND) OF TORTS) §402A, the Plaintiff must establish that: 1) the product in question was defective; 2) the defect existed at the time the product left the hands of the defendants; 3) that because of the defect, the product was unreasonably dangerous to the user or consumer (the plaintiff); 4) that the consumer was injured or suffered damages; 5) and that the defect (if proved) was the

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 9

proximate cause of the injuries suffered. Matthews v. Campbell Soup Company, 380 F. Supp. 1061 (S.D. Tex. 1974), Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1974). Thus, the evidence presented at trial led the jury to conclude that Bodegas defectively manufactured product, which was distributed in St. Croix by Antilles and eventually bought by Erysthee, caused him damage.

In Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1243 (5th Cir. 1974) the court noted:

If a product is unreasonably dangerous as marketed the manufacturer may be held liable for injuries proximately caused by what he has produced, whether or not it was manufactured exactly as intended, that is without a production "defect"... We do not understand this approach to dispense with the principle that to prompt liability a product must reach the consuming public in a "defective condition". Rather, by rephrasing the defectiveness requirement in terms of "unreasonable danger" it becomes clear that the circumstances of marketing themselves can amount to a defect; the defect can be extrinsic to the product. All that we need determine here is first, whether the product (vacine) was unreasonably dangerous and second, whether the showing of proximate cause was sufficient...

Another point raised in the Defendants' supporting memorandum is the contradiction in Plaintiff Erysthee's interrogatory answer regarding the time he remained at home in

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 10

bed and that presented at trial. It is this Court's position that minute variance between pretrial testimony and actual testimony do not support a Judgment Notwithstanding the Verdict or a New Trial. See Marks v. Mobile Oil Corp., 562 F. Supp. 759, affirmed 727 F.2d 1100 (3d Cir. 1984), and Mobile Oil Corp. v. McCreight, 727 F.2d 1100 (3d Cir. 1984).

This Court also realizes that one of the factors outside the perimeters of the Court's review of a Judgment Notwithstanding the Verdict is the credibility of the evidence and the weight of it. "It is the function of the trier of fact alone, the jury in this instance, to evaluate contradictory evidence and to draw inferences therefrom." Firemans, 540 F.2d at 1178 (1986). Apparently, the jury found the Plaintiff's version more credible. This Court will not disturb that finding.

New Trial

The Defendants have also moved for a New Trial pursuant to Rule 59(a) Fed. R. Civ. P.

Unlike a Motion for Judgment Notwithstanding the Verdict, the Court in a Rule 59 Motion, is free to weight the evidence. However, as Lind v. Schenley Industries, 278 F.2d 79 (3d Cir. 1960), Cert. Den. 364 U.S. 835 (1961) has taught us, in weighing the evidence, the judge has:

"Substituted his judgment of the facts
and the credibility of the witnesses

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 11

for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp the prime function of the jury as the trier of facts." Id at 901.

A Motion for a New Trial requires the exercise of discretion by the Court whose "duty is essentially to see that there is no miscarriage of justice." Laltoo v. Bank of Nova Scotia, 18 V.I. 479 483 (D.V.I. 1981) citing, 6A J. Moore, Moore's Federal Practice §59.08 [5] at 56-160 (footnote omitted) 2ed. 1974). The power to grant a new trial should be invoked only in exceptional instances where the evidence weights heavily against the verdict. It is well established that the verdict should be viewed in the overall setting by considering the character of the evidence and the complexity of the legal principles which the jury had to apply. Lind v. Schenley Industries, Inc., 278 F.2d 79, 89 (3d Cir. 1960), cert. denied, 364 U.S. 835 (1961). Unless the jury has reached a seriously erroneous result, the verdict should not be disturbed. Thus, a New Trial should not be granted merely because a trial judge believes that another result would have been more reasonable. Fireman's Fund Insurance Co. v. AALCO Wrecking Co., Inc., 466 F.2d 179 (8th Cir. 1972), cert. denied, 410 U.S. 930 (1973).

Applying these principles to this case, this Court finds that the jury could have found that the Defendants'

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 12

conduct was the proximate cause of Plaintiff's injuries. The jury had fair and ample opportunity to scrutinize the testimony, determine the credibility of witnesses and make a finding of liability. This finding does not constitute a miscarriage of justice. Moreover, it would be an error for this Court to disturb the jury's verdict and grant a New Trial merely because the jury gave greater weight to the testimony given by the Plaintiff. See Bevens v. Triumpho, 17 V.I. 144 (Terr. Ct. St. T. & St. J. 1980).

As this Court views the evidence, this Court is not left with a firm conviction that a mistake as to the weight of the evidence has been committed, and thus will not upset the jury verdict on that basis.

The Defendants also asserts that this Court must find that the damages award is so grossly excessive as to shock the judicial conscience.

The testimony as to Erysthee' injuries was that, as a result of the ingestion of glass, he immediately began to choke and vomited a piece of glass. He became extremely frightened, nervous and nauseated. When the doctors advised him that an X-ray would not reveal the location of glass, this made him even more nervous. He experienced immense stomach cramps. He attempted to self-vomit on numerous occasions. He was unable to sleep for three nights. He claimed that he felt that if he

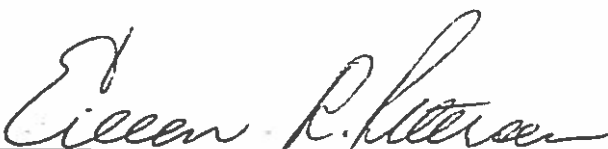
moved around the glass particles would play havoc with his body. His anxiety level increased to the point that he felt that he was becoming insane. The un rebutted evidence revealed that he drank large quantities of the bitter-tasting aloes for several months. Even though he was aware of the stigma attached, he visited a psychiatrist. The psychiatrist then advised him to see a medical doctor. Dr. Green corroborated his testimony that he appeared extremely distraught and claimed to be suffering from stomach cramps. Dr. Green recommended that Erysthee obtain a barium enema. Erysthee further detailed to the jury how painful and humiliated he felt as he was forced to remain undressed in the presence of strangers while a tube was stuffed up his rectum. He also described the pain and agony he experienced as he received the barium. Erysthee also indicated the misery he experienced when he was unable to perform sexual intercourse with his wife. Other witnesses also testified that Erysthee's lifestyle has changed considerably. He is unable to drink any bottled product; he has lost his wit and sense of humor; he does not socialize with his friends anymore. He has stopped playing his two favorite sports, cricket and soccer. He still labors under the impression that a piece of glass is embedded in his entrails and that someday as he moves around, it will dislodge and pierce his heart or brain and kill him. He believes that he is a "walking time bomb."

ERYSTHEE v. EL NUEVO LIRIO GROCERY, ET AL.
CIVIL NO. 1101/86
ACTION FOR DAMAGES
Page 14

~~moved from~~ The Jury has had ample opportunity to observe the Plaintiff and place a value on the quality of his life, his pain and emotional sufferings.

Given the evidence presented, this Court cannot conclude that its conscience is shocked by the jury's award. An extremely generous award must be upheld so long as it is rationally based. Walter v. Pueblo Supermarket of St. Thomas, Inc., 433 F.2d 935 (3d Cir. 1970).

Accordingly, the Defendants' Motion for a Judgment Notwithstanding the Verdict or in the alternative, a New Trial, is denied.


EILEEN R. PETERSEN
Judge