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JURY REJECTS VIOLINIST'S CLAIM THAT BOXER KNOCKED HER DOWN IN DOG PARK DUE TO OWNERS' NEGLIGENCE

Steven A. Meyerowitz, Esq., Director, FC&S Legal

A Texas jury has rejected a negligence claim brought by a woman who alleged that she had been injured when a dog ran into her from behind at a dog park.

Facts & Allegations

Tammy Sparks, a violin teacher for the Wichita Falls School District, a member of the Wichita Falls Symphony Orchestra and a coach of the Wichita Falls Youth Orchestra in Wichita Falls, Texas, alleged that she was with her husband and their two dogs, in the "large dog" section of a dog park in Wichita Falls when a 45-pound female boxer named Riley, belonging to Bethany Windal and her husband, ran into her from behind at full speed and she fell and broke her wrist.

Ms. Sparks sued the Windals on theories of negligence and strict liability. The negligence theory was that Riley had been out of control that day and that the defendants had negligently failed to restrain her and handle her properly. Ms. Sparks alleged that Riley had jumped up on several people that day, including her own husband.

Ms. Sparks further alleged that Riley had dangerous propensities and that the Windals were therefore strictly liable. The trial court, however, dismissed that claim on summary judgment, finding that there was no evidence that the dog had dangerous propensities.

Regarding the negligence claim, the defendants contended that Riley had been behaving no differently than the many other dogs in the park, and that Ms. Sparks had been negligent for standing with her back to the dogs and failing to keep a proper lookout. The defense also questioned the allegation that Riley had jumped on anyone that day.

Ms. Sparks sought a little more than $12,000 in past medical bills and sought damages for past and future pain and suffering, physical impairment and disfigurement. She sought a total of $75,000.

Result

The jury found Ms. Sparks alone negligent.

The case is *Sparks v. Windal*, No. 177,243-C (Tx. Wichita Co. Jan. 14, 2016). Attorneys involved include: Plaintiff Attorney(s): Carolyn A. Ostovich; Ostovich & Associates; Wichita Falls, TX, for Tammy Sparks; Defense Attorney(s):Richard E. Harrison; Harrison & Hull; McKinney, TX, for Brian Windal, Bethany Windal; Matthew R. Mumm; Harrison & Hull; McKinney, TX, for Brian Windal, Bethany Windal.

FC&S Legal Comment

This report is based on information that was provided by defense counsel. Plaintiff's counsel did not respond to the reporter's phone calls.

PLAINTIFF'S JURY VERDICT COMES AFTER HE ASSERTED OTHER DRIVER HAD WORKED AN OVERNIGHT SHIFT AND FATIGUE MAY HAVE PLAYED A ROLE IN ACCIDENT

Steven A. Meyerowitz, Esq., Director, FC&S Legal

A jury has ruled in favor of a plaintiff who was injured in an auto accident by a driver who, the plaintiff contended, may have suffered from fatigue after working an overnight shift as a nurse.

Facts & Allegations

Ricky King alleged that he was rear-ended at a stoplight by Sibi Joseph. He sued Ms. Joseph, alleging that she had negligently failed to keep a proper lookout, failed to control her speed, and followed too closely.

Mr. King's counsel argued that fatigue may have played a role in the accident because Ms. Joseph, a nurse, was driving home from an overnight shift at a hospital.

Ms. Joseph, in her deposition and at trial, maintained that there was a car directly ahead of her and behind Mr. King's car and that this vehicle suddenly changed lanes, revealing Mr. King's stopped vehicle. She said that, by the time she saw his vehicle, it was too late for her to avoid the accident.

Mr. King sought $7,904.66 for past medical bills, $5,760 for future medical bills, $5,000 for past physical pain and mental anguish, $5,000 for future physical pain and mental anguish, $5,000 for past physical impairment, $5,000 for future physical impairment, and $812 for past lost earning capacity.

Result

The jury found Ms. Joseph negligent and awarded Mr. King $13,250.

The case is *King v. Joseph*, No. 219-02853-2014 (Tex. Collin Co. Feb. 3, 2016). Attorneys involved include: Plaintiff Attorney(s): Javier Gonzalez; Eberstein & Witherite; Dallas, TX, for Ricky King; Adewale Odetunde; Eberstein & Witherite; Dallas, TX, for Ricky King; Defense Attorney(s): Scott A Whitcomb; Susan L. Florence & Associates; Dallas, TX, for Sibi Joseph

FC&S Legal Comment

This report is based on information that was provided by plaintiff's counsel. Defense counsel did not respond to the reporter's phone calls.

JURY AWARDS $538,845.43 TO 70-YEAR-OLD WOMAN WHO CLAIMED THAT INJURIES FROM AUTO WRECK LED TO HER EARLY RETIREMENT

Steven A. Meyerowitz, Esq., Director, FC&S Legal

A Texas jury has awarded $538,845.43 to a 70-year-old woman who claimed that she was injured in an automobile accident and could no longer work.

Facts & Allegations

Mary Jo Gaustad, a 70-year-old woman who was a continuing education instructor for mortgage banking, asserted that she was stopped in traffic on a Texas road when James Connor Ramsey rear-ended her. Ms. Gaustad asserted that the impact pushed her vehicle into the back of a pickup truck.

Ms. Gaustad settled with Mr. Ramsey's insurer for $175,000 of his $250,000 policy limit. Ms. Gaustad had $250,000 in underinsured motorist coverage with Travelers Insurance Company, and she sued Travelers for underinsured motorist benefits. Ms. Gaustad claimed that she could no longer work after the accident and that she would have kept working for the rest of her life. She earned about $70,000 annually. Her economist said that Ms. Gaustad's lost earnings through age 80 would be about $420,000.

The insurer contended that Ms. Gaustad already was winding down her career before the accident, and that she had worked for only two or three of the preceding six years.

Result

The jury found Mr. Ramsey negligent and awarded Ms. Gaustad $538,845.43.

The case is *Gaustad v. Travelers Ins. Co.*, No. 14-04765-367 (Tx. Denton Co. Dec. 16, 2015). Attorneys involved include: Plaintiff Attorney(s): William Wood; Wood, Thacker & Weatherly; Denton, TX, for Mary Jo Gaustad; Grace Weatherly; Wood, Thacker & Weatherly; Denton, TX, for Mary Jo Gaustad; Defense Attorney(s): Michael Beene; Taylor Anderson LLP; Dallas, TX, for Travelers Insurance Co.

FC&S Legal Comment

This report is based on information that was provided by plaintiff's and defense counsel.

$1.7 MILLION AWARD IN WORKER'S ASBESTOS EXPOSURE CASE

Steven A. Meyerowitz, Esq., Director, FC&S Legal

A Philadelphia jury has awarded plaintiffs $1.7 million in a case in which a retired employee claimed that his former employer had negligently failed to protect him from dangers associated with asbestos-containing products present at the workplace.

Facts & Allegations

In July 2012, JoÚ Busbey died from mesothelioma, having been diagnosed with the condition the previous January. In 2001, Mr. Busbey had retired from ESAB Group Inc., where he had worked as a laborer for 39 years at its Alloy Rods welding-rod plant, in Hanover, Pennsylvania. Mr. Busbey alleged that he had been exposed to chrysotile (and some amosite) asbestos during his years at the plant. His primary exposure allegedly came from using a sweeper (a golf-cart-size street sweeper with an open cab), which cleaned the plant's approximately 300,000 square feet.

Mr. Busbey claimed that the machine kicked up debris that caused him to ingest airborne-asbestos particles. When the sweeper was unable to reach enclosed areas, Mr. Busbey alleged that he would use a push-broom and shovel to collect debris. He claimed that further exposure came from his duties as a front-end inspector, in which he sat in front of a welding rod oven and observed 18-inch steel rods travel on a conveyor belt and into the oven. Frequently, he said, he was required to clear internal oven jams, which allegedly caused him to be exposed to asbestos insulation in the interior of the ovens.

Mr. Busbey, prior to his death, sued ESAB on a tort-based claim of negligence. (He also sued a number of other companies on claims based on products liability. The claims against those parties were concluded prior to trial through dispositions of undisclosed natures; Air Liquide, which manufactured one of the ovens for the ESAB plant, remained at trial and was dismissed via non-suit, at the close of Mr. Busbey's case.)

Mr. Busbey's suit proceeded on a theory that the employer (ESAB) had negligently failed to protect its employees from dangers associated with asbestos-containing products present at the workplace. Mr. Busbey's counsel brought the case under a tort theory following the Pennsylvania Supreme Court's determinations in *Tooey v. A.K. Steel Corp.* and *Landis v. A.W. Chesterton Co.* that workers' compensation laws did not bar a plaintiff from pursuing third-party tort damages against an employer in latent-disease cases such as those arising from exposure to asbestos.

Mr. Busbey's counsel produced ESAB internal documents that showed significant amounts of asbestos had been in place for decades throughout the Alloy Rods plant and that Mr. Busbey had worked with and around those asbestos products and had been exposed to dust and debris in his various positions, during his 39-year career at the plant.

According to Mr. Busbey's counsel, in the 1980s and 1990s, Alloy Rods remediated and abated some of the asbestos in the plant, but never told the workers of the potential health risks posed by asbestos and never took steps to protect the employees against the dangers. The removals continued into the 2000s, but Alloy Rods remained silent, asserted Mr. Busbey's counsel.

Counsel asserted the evidence showed that, although OSHA passed regulations to control workers' exposure to asbestos in 1971, the release of asbestos-laden dust at the Alloy Rods plant continued through the '70s, '80s, '90s, and even after 2001, when Mr. Busbey retired.

ESAB's counsel argued that the company did not use asbestos in its manufacturing process, and asbestos was only present as insulation in certain areas of the plant. ESAB contended that it began using outside professionals to monitor asbestos insulation in its facility in the 1970s, after OSHA issued asbestos regulations. From that point on, ESAB said, it used those outside professionals to advise it on whether to abate, encapsulate, or monitor the remaining asbestos. The company's counsel maintained that ESAB was not negligent, having used the outside professionals and having provided its workers, including Mr. Busbey, with personal protective equipment, such as dust masks. Counsel also argued that

Mr. Busbey had other industrial exposure, at his prior employment (although the court excluded any testimony regarding the presence of asbestos there, on foundational grounds).

The defense explained that other sweepers wore dust masks, and argued that Mr. Busbey should share a portion of the fault for failing to protect himself by not wearing a mask or a respirator while performing his job duties.

ESAB had a cross-claim based on strict liability against Midland-Ross Corp., another oven manufacturer. ESAB maintained that the Midland-Ross ovens were defective, because they were delivered with asbestos but without warnings. The defense claimed that, if asbestos from the ovens had caused Mr. Busbey's asbestos exposure and mesothelioma, the jury should find Midland-Ross responsible under Pennsylvania products liability law, which holds manufacturers strictly liable. Mr. Busbey's counsel contended that it was ESAB's responsibility to maintain, insulate, and repair the Midland-Ross oven, which the company delivered to the ESAB plant in 1968.

Result

The jury found ESAB was 100 percent liable. No comparative negligence was found against Mr. Busbey, and no liability was found against Midland-Ross.

The plaintiffs were awarded $1.7 million.

The case is *Busbey v. Yarway Corp.*, No. 120503046 (Penn. Phil. Co. Nov. 6, 2015). Attorneys involved include: Plaintiff Attorney(s): Benjamin P. Shein; Shein Law Center, Ltd.; Philadelphia, PA, for Doris Busbey, JoÚ F. Busbey; Bethann Schaffzin Kagan; Shein Law Center, Ltd.; Philadelphia, PA, for Doris Busbey, JoÚ F. Busbey; Defense Attorney(s): None reported; ; for CBS Corp., Crane Co., Air Liquide, Sepco Corp., Pecora Corp., Yarway Corp.,Bell & Gossett, Chemtron Corp., Goodrich Corp., IMO Industries, The Austin Co., Aurora Pump Co.,Guard-Line Inc., J.D. Ross Corp., Ross Industries, Steel Grip Inc., A.O. Smith Corp., Warren Pumps LLC, Certainteed Corp., Copes-Vulcan Inc., DAP Products Inc., Goulds Pumps Inc., J.A. Sexauer Inc., Spirax Sarco Inc., Ingersoll Rand Co., Midland-Ross Corp., Taco Products Inc., Flack Brothers Inc., Union Carbide Corp., Armstrong Pumps Inc., Clark-Reliance Corp., General Electric Co., Goodyear Canada Inc., Hedman Resources Ltd., Parker-Hannifin Corp., SOS Products Co. Inc., American Optical Corp., The William Powell Co., Fort Kent Holdings Inc., Mueller Steam Specialty, Baltimore Ennis Land Co., Greene, Tweed & Co. Inc., Ross Engineering Division, Air & Liquid Systems Corp., Mine Safety Appliances Co., J.D. Ross Engineering Corp., Armstrong International Inc., Safety First Industries Inc., Electrolux Home Products Inc., Durametallic Manufacturing Co., The Goodyear Tire & Rubber Co., Metropolitan Life Insurance Co., Weir Valves & Controls, USA Inc., Wheeler Protective Apparel Corp., Susquehanna Valley Insulators Inc.,C.A.R.S. - Couche Asbestos Removal Services Inc. Bobbie R. Bailey; Leader & Berkon LLP; Los Angeles, CA, for ESAB Group Inc. Joseph G. Colao; Leader & Berkon LLP; New York, NY, for ESAB Group Inc. Joseph I. Fontak; Leader & Berkon LLP; Philadelphia, PA, for ESAB Group Inc.

FC&S Legal Comment

This report is based on information that was provided by plaintiffs' and defense counsel. The other defendants were not asked to contribute.

JURY REJECTS PREMISES LIABILITY CLAIM BY PLAINTIFF WHO FELL OFF EXERCISE MACHINE

Steven A. Meyerowitz, Esq., Director, FC&S Legal

A jury in Illinois has rejected a premises liability claim brought by a woman who alleged that she had been injured at a gym when she fell from an exercise machine.

Facts & Allegations

Jessica Cleary, a health educator, alleged that she was using a glute ham raise machine at Quads Gym on Broadway in Chicago when she fell from the machine and struck the front of her neck on a metal bar on the machine, sustaining an injury. Ms. Cleary sued Quads, claiming premises liability.

Her counsel argued that Ms. Cleary had fallen because the machine had shifted underneath her, due to a gap left in the floor matting by Quads employees. Her counsel also maintained that the machine was routinely moved for cleaning, causing the gap to open up and create a dangerous condition.

Ms. Cleary sought $129,317.36 for past medical expenses, $25,000 for past and future disfigurement, $400,000 for past and future pain and suffering, and $600,000 for past and future loss of normal life.

Defense counsel for Quads denied negligence. The defense denied that the claimed gap in the floor matting existed. Defense counsel argued that of the 11 eyewitnesses called, including Ms. Cleary's husband, only Ms. Cleary claimed to have seen a gap. The defense contended that the machine was rarely moved because of its weight. Defense counsel

argued that user error could cause the user to fall off the machine and maintained that this was the actual cause of Ms. Cleary's fall.

Result

The jury found no premises liability.

The case is *Cleary v. Elitefits Inc.*, No. 2010-L-006503 (Ill. Cook Cty. Dec. 3, 2015). Attorneys involved include: Plaintiff Attorney(s): Robert J. Adelman; Levin, Riback Law Group, P.C.; Chicago, IL, for Jessica Cleary; Defense Attorney(s): Jessica Biagi; Daniel P. Costello & Associates, LLC; Chicago, IL, for Quads Gym Inc.; Daniel P. Costello; Daniel P. Costello & Associates, LLC; Chicago, IL, for Quads Gym Inc.

FC&S Legal Comment

This report is based on information that was provided by plaintiff's and defense counsel.