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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

FELIX F. FITIAL, Plaintiff, v. KIM KYUNG DUK, Defendant.	)	CIVIL ACTION NO. 94-1 106 **ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL**

I. INTRODUCTION

THIS MATTER came on for a hearing before this court on February 24, 1999 on Defendant's motion for new trial. Michael W. Dotts, Esq. represented Plaintiff. Robert B. Dunlap II, Esq. represented Defendant. The court, having reviewed the memoranda, declarations, having heard and considered the arguments of counsel and being fully informed of the premises, now renders its written decision.

II. FACTUAL BACKGROUND

On the night of February 5, 1991, Plaintiff Felix F. Fitial, at Defendant's request, undertook night watch duties at Defendant's commercial building, which was under construction in Chalan Kanoa, Saipan. While inspecting the second floor of the building, Plaintiff saw what appeared to be a piece of steel reinforcement bar protruding from the edge of the building. Concerned that the object might fall to the ground and injure someone, Plaintiff reached out with one hand to remove it. The object, which was actually a live electrical wire, severely electrocuted Plaintiff on contact. Plaintiff tried to free himself with his other hand, but it was also locked onto the live electrical wire. A few moments later, Plaintiff was thrown back about five feet from the object and lay unconscious. As a result of the electrocution, both Plaintiffs arms had to be amputated.

On October 14, 1994, Plaintiff filed an action against Kim Kyung Duk, alleging that Plaintiff was seriously injured as a result of Defendant's negligence. The complaint specifically sought compensatory damages, damages for pain and suffering, loss of enjoyment of life, loss of past and future earnings, and cost of future medical treatment, including rehabilitative therapy.

Over the course of four years after the filing of the complaint, Defendant underwent about four substitutions of counsel. At the pre-trial conference on September 30, 1998, Defendant's most recent counsel, Antonio M. Atalig (Mr. Atalig), requested a continuance of the jury trial, which the court denied. After a week-long trial beginning October 19, 1998, the jury returned a verdict in Plaintiffs favor in the amount of $3.5 million.

Defendant filed a motion for new trial pursuant to Corn. R. Civ. P. 59(a) based on four main grounds: 1) that the jury verdict is inconsistent with the evidence presented; 2) that one of the jurors failed to disclose that she was closely related to a member of Plaintiffs trial team; 3) that the court erred in denying the Defendant's request for continuance; and 4) that the amount of the verdict was excessive.

III. ISSUE

Whether Defendant's motion for new trial should be granted based on any or all of the grounds listed above.

IV. ANALYSIS

Rule 59(a) of the Commonwealth Rules of Civil Procedure, which provides the basis for motions for new trial, states in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . .

Corn. R. Civ. P. 59(a)(l).

1. Jury Verdict

A trial judge has a duty to set aside a verdict and grant a new trial once he finds that the jury's verdict is "against the clear weight of the evidence." Fenner v. Denendable Trucking Co., Inc., 716 F.2d 598,602 (9th Cir.1983).

Defendant's argument that the evidence is insufficient to support the verdict is based on the premise that an eight-foot high barricade securing the high voltage wire about sixteen feet from the outer edge of the building existed. Such a barricade would have prevented the Plaintiff from touching the wire unless he climbed over it, thereby becoming a trespasser and relieving the Defendant of any liability. The jury, however, received conflicting testimony regarding the alleged barricade and, as the trier of fact, resolved those conflicts in favor of the Plaintiff. At trial, a school teacher, who resided across the street from the construction site, testified that there was no such barricade on the second floor visible from the ground. More significantly, Plaintiffs rescuer testified that there was no eight-foot high barrier that he had to cross to reach the Plaintiff.

Defendant, on the other hand, testified that there was a six-foot high wooden barrier. OSHA safety regulations require an eight-foot high barrier to secure high voltage wires. However, Defendant's construction engineer testified that the barrier was eight feet high and not six. Defendant further presented photographs of various parts of the construction site bearing warning signs, but offered no photographs of the alleged eight-foot high barrier.[1] Defendant also answered interrogatories identifying several warning signs on the premises, but did not identify any warning sign on the alleged barricade.

The jury based its verdict on an assessment of conflicting testimonies and weighed the evidence presented at trial in plaintiffs favor.

2. Juror's Familial Relationship

A party seeking a new trial on the ground of non-disclosure by a juror during *voir dire* must do more than raise a speculative allegation that the juror's possible bias may have influenced the outcome of the trial. Dall v. Coffin, 970 F.2d 964, 969, (1st Cir. 1992). Rather, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire* and then further

[1] Plaintiff was able cast doubt on the date the photographs were taken. The photographs show an imprinted date "90-1-12" which Plaintiff's counsel argued stands for January 12, 1990, months before construction even began. Defendant attempted to characterize the date as December 1, 1990, about two months before the accident. Plaintiff, however, produced evidence that the electronic data formatting on Defendant's particular camera read year, month and day. Since it was impossible for Defendant to have taken the pictures before construction began, Plaintiff argued that the camera's electronic dates were tampered with.

show that a correct response would have provided a valid basis for a challenge for cause." Id., auoting McDonough Power Eauiument. Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845,850 (1984). Moreover, a party seeking a new trial has the burden of proving that it suffered actual prejudice or bias as a result of non-disclosure by a juror. Id.. citing United States v. Anonte-Suarez, 905 F.2d 483, 492 (1st Cir.1990). This burden of proof cannot be sustained as a matter of speculation. Id., citing United States v. Vargas, 606 F.2d 341,344 (1st Cir. 1979). Actual prejudice or bias must be a "demonstrable reality." Id.

During *voir dire* examination, juror Cecilia Repeki Sablan revealed to Mr. Atalig that she was somehow related to the Plaintiff.' Yet, Mr. Atalig neither attempted to excuse her for cause nor exercised a peremptory challenge against her. The following is juror Sablan's *voir dire* by Mr. Atalig on the afternoon of October 19, 1998:

Q: Ms. Sablan, are you related to the plaintiff by any reason?
A: I'm not sure.
Q: You're not sure? It means that there is a possibility that you might be related somehow or you're not sure.
A: I know that some Fitials are a relative of ours.
Q: Okay.
A: But the plaintiff is not familiar to me.
Q: Okay. Do you know that the plaintiff is a Fitial, correct?
A: Yes.
Q: The fact that some of the Fitials are related to you, even though you don't know the plaintiff, would that have any effect on your ability to be fair to both sides?
A: No.

The fact that juror Sablan was related to "some Fitials" placed the Defendant on notice that there was also some familial relationship between juror Sablan and Felix R. Fitial (Mr. Fitial), Plaintiffs trial assistant. Nevertheless, Mr. Atalig failed to make further inquiries and did not challenge her juror qualification. A juror cannot be faulted for failing to disclose information for which he or she was never asked. Dall, 970 F.2d at 970, citing Anonte-Suarez, 905 F.2d at 492. Since Defendant accepted juror Sablan before trial and did not challenge her for actual bias after being afforded the fullest opportunity for doing so legally and factually, Defendant cannot successfully challenge her in a motion for new trial. See Frazier v. United States, 335 U.S. 497, 69

[2] There were two Felix Fitials present at the trial: the Plaintiff and his elderly uncle, Felix R. Fitial, who assisted Plaintiffs trial team.

S.Ct. 201, 210, 93 L.Ed187 (1948).

Under the Commonwealth Rules of Civil Procedure, a number of potential jurors can be disqualified during ***voir dire,*** including "[a]ny person who is related to any party or such party's counsel so as to clearly disqualify such person." Corn. R. Civ. P. 47(d)(2). The purpose of this provision, as can be seen also in Corn. R. Civ. P. 47(d)(4),[3] is to help ensure a fair and impartial jury by eliminating potential jurors who may be prejudiced against or align themselves with a particular party. The issue here is what degree of relationship would "clearly disqualify" a potential juror.

Although the rule is imprecise as to what clearly disqualifies a potential juror, juror Sablan's qualification can be determined by analogy to the statute for disqualifying judges. Pursuant to 1 CMC § 3308(b)(5), a judge shall disqualify himself or herself where "he or she, or his or her spouse, or a person within the second degree of relationship to either of them, or the spouse of such persons" is either a party or acting as a lawyer in the proceeding. Under the civil law, a person has a "second degree" relationship with his siblings, grandparents, and grandchildren. Smallman v. Powell, 23 P. 249 (Or. 1890).

In the present case, juror Sablan is the third cousin of Plaintiffs trial assistant. See Declaration of Felix R. Fitial, filed January 25, 1999 at para 6.[4] Based on the civil law, juror Sablan is related in the eighth degree to Felix R. Fitial. An eighth degree relationship between a juror and a party's trial assistant is not so obvious a disqualification or so inherently prejudicial as a matter of law, in the absence of any challenge to them before trial, as to require the court on its own motion or on Defendant's motion after trial to set the verdict aside and grant a new trial. See Frazier, 69 S.Ct. at 210. Juror Sablan's distant degree of consanguinity does not "clearly disqualify" her under Com. R. Civ. P. 47(d)(2).

[3] Corn. R. Civ. P. 47(d)(4) disqualifies "[a]ny person who, although not related to counsel or a party, has such friendship/animosity with counsel or a party as would clearly disqualify such person.

[4] Benigno M. Sablan, who assisted Mr. Atalig during the trial and was present for part of the jury trial, asserted that "Felix R. Fitial is the second cousin of Cecilia Repeki Sablan." See Declaration of Benigno M. Sablan, filed November 19, 1998 at para 6. However, he did not offer any explanation as to how Mr. Fitial and juror Sablan were second cousins.

3. Defendant's Request For Continuance

The decision to grant or deny a motion for continuance lies withing the broad discretion of the trial court. United States v. Flynt, 756 F.2d 1352, 1358 (9th Cir.1985), citing United States v. Daly, 716 F.2d 1499, 1511 (9th Cir.1983). At the pre-trial conference, Mr. Atalig told the court that "we're actually prepared to go" and that "we're prepared to proceed except that there's a conflict in this case with my calendar." Mr. Atalig clearly stated that the defense was ready to go to trial, but was only concerned about a scheduling conflict.[5]

In the interest of judicial economy and efficiency that cases be resolved quickly, especially cases such as this one, the court denied Defendant's request for continuance. Discovery had been completed and both parties had already represented to the court that they were prepared to proceed to trial. In denying the continuance, the court informed the parties that this matter was approaching its fourth anniversary since the filing of the complaint. The case had been before at least three different judges over the course of that time.

Any prejudice Defendant suffered as a result of the denial of the continuance was caused by his own lack of diligence in procuring new counsel and cannot be grounds for a continuance. Guerrero v. Guerrero, 2 N.M.I. 61 (1991). In Guerrero, the Commonwealth Supreme Court held that the moving party, after learning of her counsel's motion to withdrawal as counsel, at least a month and a half before trial, had "more than sufficient time . . . to seek other counsel in the matter." Id. at 76. Here, Defendant's counsel moved to withdraw as counsel on July 14, 1998, about three months before trial.[6] More significantly, the motion was granted on August 7, 1998, over two months before trial.

[5] Defendant's previous attorneys failed to set forth the statute of limitations defense in any of the pleadings. Defendant indicated in his motion for new trial that he would have raised the statute of limitations defense had he been granted the continuance. However, Mr. Atalig failed to mention the statute of limitations defense at the pre-trial hearing.

[6] Defendant's counsel, in fact, advised him of his intent to withdraw on April 27, 1998, about five and a half months before trial. See Declaration of Counsel in Support of Motion for an Order Granting Leave to Withdraw as Counsel, filed July 14, 1998 at para 9.

4. Excessive Verdict Amount

A new trial may be granted if the jury's award is "so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial." Palmer v. Citv of Monticello, 3 1 F.3d 1499, 1508 (1 0th Cir. 1994), citing Specht v. Jensen, 832 F.2d 1516, 1528 (10th Cir.1987).

At trial, Plaintiff presented evidence of economic damages, medical treatment and rehabilitation costs, his dependence on his sister and other relatives for such daily regiments as using the bathroom, pain and suffering, emotional distress, and loss of enjoyment of life resulting from his injuries. Similarly, in Jarrell v. Fort Worth Steel & Manufacturing. Co., 666 S.W.2d 828 (Mo.App. 1984), the plaintiff in that case presented evidence of traumatic circumstances surrounding the loss of his right arm, lost of past and future wages, loss and enjoyment of the use of his right arm, his dependence on his wife, and total destruction of his previous way of life. The court upheld the jury's award of $1.5 million, stating that it was not excessive. Id. at 840. Other courts that have dealt with personal injury cases involving loss of limbs have comparable results. See Caldwell v. Ohio Power Co., 710 F.Supp. 194 (N.D.Ohio 1989) (upholding a $1.232 million award for bodily injuries, including serious electrical burns and partial loss of right foot, sustained after coming into contact with uninsulated power line and receiving severe electrocution); Bandstra v. Intl. Harvester Co., 367 N.W.2d 282 (Iowa App. 1985) (holding that $3.4 million award for loss of both legs in an accident was not excessive); and Burnett v. Mackworth G. Rees. Inc., 3 11 N.W.2d 417 (Mich.App. 1981) (holding that $1.5 million award for loss of four fingers was not excessive). Among other injuries, Plaintiff lost both of his arms and sustained severe damage to his feet and lower legs. Plaintiff testified that the prosthetic arms made for him proved too burdensome because of their weightiness. Based on the evidence Plaintiff presented at trial, concerning the injuries to his physical, emotional, social and economic well-being, it cannot be said that Plaintiffs award of $3.5 million for his injuries is "so excessive as to shock the judicial conscience." Palmer, 31 F.3d at 1508.

Since the jury award is not excessive, it does not raise an "irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial." Palmer, 3 1 F.3d atl 508. During

voir dire and in its jury instructions, the court admonished the jurors to honestly render an objective opinion based on the evidence and to set aside their sympathy for the Plaintiff.

V. CONCLUSION

For the foregoing reasons, Defendant's motion for new trial is hereby **DENIED.**

SO ORDERED this JUN 25 1999

JOHN A. MANGLONA, Associate Judge