

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

ELIZABETH TILSON,)	
)	
Plaintiff,)	
)	
v.)	C.A. N12C-01-187 PRW
)	
LUTHERAN SENIOR)	
SERVICES, INC., a Delaware)	
Corporation,)	
)	
Defendant.)	

Submitted: October 23, 2013
Decided: December 12, 2013

OPINION

Upon Defendants' Motion for New Trial,
DENIED.

Kevin G. Healy, Esquire, Morris James LLP, Newark, Delaware, Attorney
for Plaintiff.

Gerald J. Hager, Esquire, Margolis Edelstein, Wilmington, Delaware,
Attorney for Defendant.

WALLACE, J.

I. INTRODUCTION

Plaintiff, Elizabeth Tilson, a ninety-nine year-old former resident of Luther Towers, a two-building assisted living center owned by Defendant Lutheran Senior Services (“LSS”), filed this premises-liability action after a bookcase in the library of Luther Towers II fell on top of her. Mrs. Tilson alleged that the bookcase was a hazardous condition which, because of LSS’s failure to maintain and inspect it and to protect Luther Towers II residents, caused her injuries.¹ Trial was held on May 29 and May 30, 2013, and the jury returned a verdict in Mrs. Tilson’s favor in the amount of \$155,000.²

LSS filed a Motion for New Trial on June 13, 2013, which was later amended. Plaintiff answered, and at the Court’s request, LSS filed a reply brief addressing several specific questions posed. For the reasons stated herein, the Motion for New Trial is **DENIED**.

II. FACTUAL BACKGROUND

Mrs. Tilson testified at trial that on October 18, 2010, she went to the Luther Towers II library after dinner to straighten up books. Once finished

¹ See Complaint at ¶ 7.

² LSS had previously agreed that Mrs. Tilson’s treatment for her injuries was reasonable, necessary, and causally related to the subject accident. The Parties stipulated that her medical bills alone amounted to \$77,073.89

with her task, she turned around with her walker, heard a noise, and realized the bookcase was falling down. When the bookcase fell, it knocked Mrs. Tilson to the ground, and she was pinned between the bookcase and the cement floor until someone responded to her calls for help. Mrs. Tilson testified that she heard a crack in her back when the bookcase fell on top of her.

Following the accident, emergency medical personnel transported Mrs. Tilson to Wilmington Hospital. She was examined there, but not admitted. In the following weeks, though, Mrs. Tilson suffered from a stiff back, and one night she was transported to St. Francis Hospital. Doctors then told Mrs. Tilson she had fractured her tailbone and required physical therapy. During her treatment, Mrs. Tilson suffered from muscle spasms and was unable to walk for a time. She testified that through continued therapies and home exercise, she has healed from her injuries, but she still experiences some pain.

John Teoli, LSS's Chief Executive Officer and Executive Director, testified that the bookcase in question was constructed of solid wood by a carpenter approximately 30 years prior to trial. Mr. Teoli also testified that he believed the bookcase had been in the same approximate location since he arrived at Luther Towers in November 2009, and that no one informed

him of any prior issues with the bookcases. At the time of the accident in 2010, Mr. Teoli was unaware that the bookcase was not anchored to the wall. He testified he would have instructed his staff to anchor the bookcases in Luther Towers II if he had been aware they were freestanding.

III. PARTIES' CONTENTIONS

LSS has moved for a new trial on five separate grounds: (1) this Court erred in denying LSS's application for judgment as a matter of law based on Mrs. Tilson's alleged failure to prove proximate cause as an essential element of her case; (2) the Court erred in denying LSS's application for a mistrial after a plaintiff's witness mistakenly testified to subsequent remedial measures; (3) the Court should have *sua sponte* declared a mistrial after Mrs. Tilson's counsel, in closing, asked the jurors to imagine she were their own grandmother; (4) the Court should have declared a mistrial after Mrs. Tilson's counsel, in closing, suggested many new bookcases come with wall anchors;³ and (5) the Court erred by allowing into evidence photographs of bookcases from a library in Luther Towers I, when the incident occurred in Luther Towers II.⁴

³ See Tr. Trans. May 30, 2013, at 73-74.

⁴ While LSS's counsel raised issues (1), (2), and (5) at trial, issue (3) was not, and the relief sought in relation to issue (4) is new to this post-trial motion.

In response to LSS's motion, Mrs. Tilson argues that proximate cause was proven as part of her case-in-chief, and that any erroneous statements or witness miscues were cured by the Court's instructions. Mrs. Tilson also contends that LSS waived its right to object to statements alluding to Mrs. Tilson as the jurors' own grandmother when LSS failed to contemporaneously object to the error it now alleges. Finally, Mrs. Tilson suggests the Court correctly admitted photographs of the Luther Towers I bookcases.

IV. STANDARD OF REVIEW

Upon motion for new trial, "[t]he jury's verdict is presumed to be correct,"⁵ though "Delaware Courts will [] order a new trial when the jury's verdict is tainted by legal error committed by the trial court before or during the trial."⁶ In considering a motion for new trial, the Court ascribes "enormous deference" to the jury's verdict and to the jury's role as the ultimate finder of fact.⁷ "Thus the Court will not disturb a jury's verdict

⁵ *Galindez v. Narragansett Housing Assoc., L.P.*, 2006 WL 3457628, at *1 (Del. Super. Ct. Nov. 28, 2006) ("The standard of review on a motion for new trial is well-settled."); *Kelly v. McHaddon*, 2002 WL 388120, at *4 (Del. Super. Ct. Feb. 28, 2012) (same).

⁶ *Galindez*, 2006 WL 3457628, at *1 (internal citations omitted).

⁷ *Crist v. Connor*, 2007 WL 2473322, at *1 (Del. Super. Ct. Aug. 31, 2007).

unless the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.”⁸

Where no contemporaneous objection was made to the now-complained-of error, the standard of review is plain error.⁹ Such “exists when the error [i]s so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial process.”¹⁰

V. DISCUSSION

A. The Court denied LSS’s application for judgment as a matter of law because Mrs. Tilson presented sufficient evidence to support her negligence claim.

Following the close of Mrs. Tilson’s case, LSS moved for judgment as a matter of law pursuant to Super. Ct. Civ. R. 50(a), arguing that Mrs. Tilson failed to prove that it was LSS’s negligence that proximately caused her injuries. In its Motion for New Trial, LSS relies on *Wilson v. Derrickson*,¹¹ for the proposition that “[i]f the proven circumstances are as

⁸ *Id.* (internal quotation marked omitted).

⁹ *Shortness v. New Castle County*, 2002 WL 388116, at *3 (Del. Super. Ct. Feb. 26, 2002) (“A party who urges reversal of a decision for a reason not raised below may succeed only when there has been plain error.”); *see Riggins v. Mauriello*, 603 A.2d 827, 830 (Del. 1992) (finding an objection raised for the first time during oral argument on appeal is subject to the plain error standard).

¹⁰ *Shortness*, 2002 WL 388116, at *3.

¹¹ 175 A.2d 400 (Del. 1961).

consistent with the absence of negligence as with the existence of negligence, neither conclusion can be said to have been established and, accordingly, it would follow that a *prima facie* case of negligence has not been established.”¹² In *Wilson*, the question was not whether an oily substance on a drugstore floor had caused the plaintiff to trip and fall, but whether that hazardous condition was attributable to the storeowner. Upon review of the evidence, the Court determined it was equally as likely that the oily substance had come into the store on the shoe of a customer, or via some other agent, as it was that the storeowner had failed to clean the floor after applying oil to the wood floor several days prior to the accident.¹³ LSS argues that the instant case is similar; namely, that the evidence here supports two equally likely inferences: (1) that the bookcase fell on its own; or (2) that Mrs. Tilson or someone else acted in a way that caused the bookcase to fall.

Upon a motion for judgment as a matter of law, the Court must determine whether there is any “legally sufficient evidentiary basis for a

¹² *Id.* at 402; see *Midcap v. Sears, Roebuck and Co.*, 2004 WL 1588329, at *6 (Del. Super. Ct. May 26, 2004).

¹³ *Wilson*, 175 A.2d at 402.

reasonable jury to find for [the opposing] party on that issue.”¹⁴ Looking at the evidence in the light most favorable to Mrs. Tilson, the non-moving party,¹⁵ the Court reasonably concluded then and concludes now that she had presented sufficient evidence to support her *prima facie* case of negligence. This is a premises liability case in which Mrs. Tilson bore the burden of demonstrating her injuries were caused by a hazardous condition on LSS’s property that it should have discovered by reasonable inspection. She did so and accordingly the case went to the jury.

As the Court noted when LSS moved mid-trial for judgment as a matter of law, Mr. Teoli testified that Luther Towers housed a population of elderly people, and it was foreseeable that those who needed assistance walking would either steady themselves with furniture or may bump into furniture with walkers. Mr. Teoli testified that the bookcases in the Luther Towers I library were anchored to the wall, and that had he known the Luther Tower II bookcases were unanchored, he would have ordered anchors installed. He further testified that in managing the assisted living facility, the residents’ safety is his top priority. Given such evidence, the

¹⁴ Super. Ct. Civ. R. 50(a)(1).

¹⁵ *Midcap*, 2004 WL 1588329, at *5.

Court correctly determined that the jury could reasonably conclude LSS's negligence was the proximate cause of Mrs. Tilson's injuries.

Wilson is distinguishable. In *Wilson*, the question was whether to attribute a hazardous condition to the storeowner or some third-party. Here, the question is whether the unanchored bookcase was itself a hazardous condition. If so, there was no dispute that LSS was responsible for maintenance of the building, including of the bookcase.¹⁶ And if the bookcase was a hazardous condition, LSS was negligent as a property owner for not curing the condition. Thus, the jury reasonably determined the bookcase in October 2010 was a hazardous condition to the elderly population of Luther Towers, and that that condition was the proximate cause of Mrs. Tilson's injuries.¹⁷ The Court's mid-trial ruling denying judgment of a matter of law was proper in light of the evidence presented.

¹⁶ In fact, one of LSS's maintenance workers testified that the Luther Towers II library was remodeled around 2007-08, at which point he and two other workers removed the bookcases from the library for the remodel, and returned the bookcases to the library when the project was complete. Tr. Trans. May 30, 2013, at 64-65. Thus the jury was presented with evidence that, contrary to Defendant's assertions that the bookcases had been stationary for nearly 30 years, the bookcases were removed by LSS as recently as two or three years prior to Mrs. Tilson's accident and returned unanchored.

¹⁷ It is worth noting too that LSS had the benefit of a comparative negligence instruction. In turn, the jury had to specifically determine whether LSS was negligent in allowing a hazardous condition under the circumstances, whether Mrs. Tilson was negligent herself in causing the toppling of the bookcase, or if there was some negligence attributable to both parties. The jury found no contributory negligence on Mrs. Tilson's part. Tr. Trans. May 30, 2013, at 116-17.

So to is a denial of LSS's post-trial motion for a new trial raising the same claim.

B. Any potential prejudice created by Mrs. Tilson's granddaughter's unexpected statement revealing a subsequent remedial measure was cured by the Court's instruction.

The Court did not err in declining to grant a mistrial after Mrs. Tilson's granddaughter, Christine Patton, on cross-examination, stated that the bookcases in Luther Towers II had been anchored to the wall and the books on the shelves rearranged following Mrs. Tilson's accident.¹⁸ "To consider whether a mistrial should be declared, a court must decide whether the error was so prejudicial and flagrant that it was incurable."¹⁹ "The question is always one for the sound discretion of a trial judge."²⁰ Where a trial witness improperly states impermissible evidence, "[o]rdinarily, an appropriate instruction to disregard the statement is sufficient to avoid prejudice to the defendant."²¹

¹⁸ Trial Tr. May 29, 2013, at 66-67 ("In fact, Grandma said when we went back and looked at the bookcase again after the accident and it was then anchored to the wall, all the books were on all the shelves and Grandma said it didn't look like that before.").

¹⁹ *Burris v. McKiver*, 1992 WL 91166, at *2 (Del. Super. Ct. Apr. 15, 1992); see *McNally v. Eckman*, 466 A.2d 363, 375 (Del. 1983).

²⁰ *Chavin v. Cope*, 243 A.2d 694, 696 (Del. 1968).

²¹ *Id.*; see *Burris*, 1992 WL 91166, at *3 ("Considering this court cured any possible prejudice . . . the inference that the verdict was a result of passion, prejudice, sympathy,

While the Court denied LSS’s application for a mistrial, the Court provided it the option of a curative instruction. LSS requested and agreed to²² the language of the curative instruction that was given.²³ “A curative jury instruction is normally sufficient, and jurors are presumed to follow the instruction.”²⁴ Here, Ms. Patton’s brief remark alluding to LSS’s subsequent remedial measure following the incident was not so prejudicial as to warrant a mistrial, and any prejudice was swiftly cured by the Court’s instruction.

C. LSS waived its right to object to counsel’s statements suggesting that jurors imagine Mrs. Tilson were their own grandmother.

The Court did not err in failing to *sua sponte* declare a mistrial following remarks by Mrs. Tilson’s attorney in closing arguments inviting

partiality, corruption or an unfair determination, is simply unsupported”); *see also Kornbluth v. State*, 580 A.2d 556, 560 (Del. 1990) (“This Court has held that even when prejudicial error is committed, it will usually be cured by the trial judge’s instruction to the jury to disregard the remarks.”).

²² Tr. Trans. May 29, 2013 at 88.

²³ *Id.* at 89 (“During the cross-examination of Christine Patton, she testified regarding the condition of the bookcase after the accident. I advise you that the condition of the bookcase after the accident is not relevant and, therefore, I advise you that you must disregard that testimony and it should not be considered by you in your deliberations in any way.”)

²⁴ *State Farm Mut. Auto. Ins. Co. v. Enrique*, 2010 WL 3448534, at *3 (Del. 2010); *Chavin*, 243 A.2d at 696 (“Ordinarily, an appropriate instruction to disregard the statement is sufficient to avoid prejudice to the defendant”); *see Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993) (“As a general rule, a curative instruction is usually sufficient to remedy any prejudice which might result from inadmissible evidence admitted through oversight.”).

jurors to imagine that Mrs. Tilson were their own grandmother. At trial, LSS's counsel never objected to the alleged misconduct, nor did he request a curative instruction or a mistrial. As a result, LSS has waived its right to object at this stage.²⁵

The waiver rule is intended to afford a trial court the immediate opportunity to correct any trial error.²⁶ The rule fosters the efficient trial of cases by ensuring that the Court may contemporaneously address any objectionable statement or conduct, either with a curative instruction or otherwise. Our supreme court has recognized that, "for strategy reasons, counsel may choose not to object to an opponent's closing remarks."²⁷ Here, LSS's counsel certainly demonstrated he would object when necessary. Before the closing arguments: counsel objected to trial exhibits; moved for a directed verdict; and applied for a mistrial following one of Mrs. Tilson's witness's errant statements. As discussed below, LSS also

²⁵ *Med. Center of Delaware, Inc. v. Loughheed*, 661 A.2d 1055, 1060 (Del. 1995) ("A party must timely object to improper statements made during closing argument in order to give the trial court the opportunity to correct any error. . . . [T]he failure to object generally constitutes waiver of the right subsequently to raise the issue.").

²⁶ *Id.*

²⁷ *Id.* (holding that nevertheless a party who does not contemporaneously object waives its right to raise the issue at a later stage).

objected during closing to another argument by Mrs. Tilson's counsel.²⁸ Counsel readily objected when it benefitted LSS's case, thus his apparently strategic decision not to object to this particular statement during closing arguments is deemed a waiver of any claim based on it.

D. There was no prejudice to LSS where, upon its agreement, the Court struck impermissible statements during closing arguments, rather than *sua sponte* declaring a mistrial.

While impermissible, a remark during Plaintiff's closing argument referencing anchors included with store-bought bookcases did not warrant a mistrial.²⁹ As previously discussed, mistrial is warranted only where the error is flagrant and where no other suitable cure exists.³⁰ At the sidebar discussion following his objection, LSS's counsel did not request a mistrial, but agreed that a curative instruction was appropriate.³¹ The Court instructed the jury that, "the last part of the argument related to how one might buy bookcases and what may be with them is not in evidence, and

²⁸ Tr. Trans. May 30, 2013, at 74-75.

²⁹ See *id.* at 75 ("Ladies and gentlemen, the last part of the argument related to how one might buy bookcases and what may be with them is not in evidence, and therefore that part of the argument is stricken.").

³⁰ See Part V.B, *supra*.

³¹ An appropriate instruction is deemed to cure the error. See n.24, *supra*.

therefore that part of the argument is stricken.”³² That instruction was sufficient to avoid any potential prejudice arising from counsel’s statements. The Court was not required, as LSS now argues, to *sua sponte* declare a mistrial.

E. Photographs of Luther Towers I were properly admitted.

LSS finally claims that the Court should not have admitted pictures of bookcases in the Luther Tower I library that show those bookcases were anchored to the wall. LSS twice objected to the photographs pre-trial. Although the bookcases in Luther Towers I and II were not identical, the photographs of bookcases in Luther Towers I were relevant to: (1) demonstrate LSS’s knowledge of how to avoid creating a hazardous condition in its facility; and (2) the question of whether unanchored bookcases created a hazardous condition in an assisted living community with an elderly population. LSS again now argues that the probative value of the photographs was substantially outweighed by potential prejudice because the photographs misled the jury. Not so.

Mrs. Tilson used the photographs during examination of Mr. Teoli, whom LSS had ample opportunity to cross-examine. Any dissimilarity between the anchored bookcases in Luther Towers I and the unanchored

³² Tr. Trans. May 30, 2013, at 75; *see* n.21, *supra*.

bookcases in Luther Towers II went to the weight of the evidence, rather than its admissibility. The Court did not err in admitting the photographs.

F. No “cumulative error” exists that would warrant a new trial.

Even when properly asserted, in the proper context, and with adequate supporting legal citations,³³ “[c]umulative error must derive from multiple errors that caused ‘actual prejudice.’”³⁴ Having determined that none of the errors alleged created actual unfair prejudice in the context of the entirety of the trial evidence, the sum of errors alleged also does not justify vacatur of the jury verdict and grant of a new trial.

³³ LSS’s “cumulative error” argument is one line buried in page 10 of its amended motion, without supporting citations.

³⁴ *Michaels v. State*, 970 A.2d 223, 231 (Del. 2009) (quoting *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008)); see *McNally v. Eckman*, 466 A.2d 363, 375 (Del. 1983) (denying reversal based on cumulative error).

VI. CONCLUSION

AND NOW, for the reasons stated above, LSS's Motion for New Trial is **DENIED**.

SO ORDERED this 12TH day of December, 2013.

/s/ Paul R. Wallace
PAUL R. WALLACE, JUDGE

Original to Prothonotary
cc: Counsel via File and Serve