No. 22-cv-975

In the

District of Columbia Court of Appeals

GILBANE BUILDING COMPANY,

Appellant,

v.

CHADWICK WITKOWSKI,

Appellee.

Appeals from the Superior Court of the District of Columbia, Civil Division No. CAB006865-18 *(Hon. Hiram Puig-Lugo, Judge)*

REPLY BRIEF FOR APPELLANT

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Argument

Gilbane's Brief of Appellant argued that the Final Order must be reversed, because the Trial Court erroneously reduced Plaintiff's burden of proof on causation and Plaintiff failed to introduce evidence meeting the correct standard on that issue. See Br. of Appellant, at 20-47. Gilbane specifically explained how the Trial Court's treatment of the evidence purportedly supporting the jury's verdict was itself erroneous. Id., at 37-47. Finally, Gilbane demonstrated that it is entitled to final judgment due to Plaintiff's failure to meet his burden of proof. Id., at 48.

Appellee does not directly respond to either point. He does not argue that the Final Order was correct or should be affirmed. Indeed, the words "affirm" and "affirmed" do not appear in the Brief of Appellee at all.[1] Rather than defending the Final Order, Appellee makes several scattershot assertions why the case should have reached the jury. These arguments effectively concede that the Final Order was erroneous. Appellee's arguments that the verdict below should be affirmed rest on reasons other than those identified in the Final Order and do not present any basis for this Court to affirm the judgment. This Court should reverse the Final Order and enter final judgment in Gilbane's favor.

[1] The only variation of the word "affirm" to appear in the Brief of Appellee is "affirmance" on page 6. The word appears in a sentence describing the Trial Court's holding below. The sentence does directly not argue that the holding was correct or should be affirmed.

I. **The Trial Court Erred.**

An appellee that fails to contest an issue raised by the appellant effectively concedes the point for the purposes of the appeal. R.O. v. Dep't of Youth Rehab. Servs., 199 A.3d 1160, 1167 (D.C. 2019) (citing Coates v. Watts, 622 A.2d 25, 27 (D.C. 1993) for the proposition that, "by failing to contest issue in court of appeals, party 'effectively conced[ed] it'"). Plaintiff's Brief of Appellee fails to contest or otherwise directly respond to the issues raised by Gilbane's Brief of Appellant. As such, Appellee concedes that the Trial Court erred in several ways. In particular, Appellee concedes that the Trial Court relied on an incorrect standard and improperly disregarded uncontested testimony. Appellee further concedes that the evidence identified in the Final Order does not establish that Plaintiff physically encountered the tie wire. This Court should reverse the Final Order based on any or all of these errors.

A. **The Trial Court applied the wrong standard.**

Gilbane explained at length why this Court's precedent required Appellee to present evidence that he physically encountered or contacted the tie wire to create a jury question on causation and why the Trial Court's "consistent with" standard erroneously removed that requirement. See Br. of Appellant, at 20-29. Gilbane specifically explained why Rich v. District of Columbia, the only case on which the Trial Court relied for the "consistent with" standard, did not allow Plaintiff's

case to reach the jury without some evidence that he physically encountered the wire. Id., at 26-29. Appellee does not respond to these arguments.

In particular, Appellee fails to explain how the Trial Court's interpretation of Rich comports with this Court's subsequent holdings in Twyman v. Johnson, 655 A.2d 850, 851-53 (D.C. 1995), and Wilson v. Wash. Metro. Area Transit Auth., 912 A.2d 1186, 1187-90 (D.C. 2006), which implicitly if not explicitly rejected the "consistent with" standard on which the Trial Court relied. Moreover, Appellee's citation to District of Columbia v. Cooper, 445 A.2d 652 (D.C. 1982) does not avail him as it does not support the "consistent with" standard applied by the trial court. Rather, Cooper also required evidence of a physical encounter with the hazard to prove causation.

In Cooper, the Plaintiff alleged she fell where a brick sidewalk was being repaired and had been filled with sand, creating an unlevel surface. 445 A.2d at 653-54. "Although she was not sure of the exact difference in elevation, she was positive that the sand base was lower than the bricks." Id., at 654. Additionally, two witnesses saw her fall at that location. Id.[2] Therefore, Cooper relied on evidence that Plaintiff had physically encountered the hazard created by the negligence of the defendant to find proof of proximate cause. Id. at 655.

[2] "The testimony of Frances Fuller was substantially the same as appellee's. She testified that she [Fuller] almost tripped in the same area. She turned to warn appellee, only to see her fall." Id., at 654.

Rather than address the physical encounter Mrs. Cooper had with the uneven walkway, Appellee here relies entirely on the evidence of the breach of duty[3] and the evidence of injury in the altered gait of Mrs. Cooper when she left the facility. See Br. of Appellee, at 6-7. Appellee's argument that "No other hazards were present in the area where Mr. Witkowski fell" ignores the testimony of Nicholas Sames and Mr. Witkowski himself, who both testified the ground was uneven, wavy, covered with gravel and other debris. Sames Dep., at 31:1-14 (A46); Trial Tr., Day II, at 32:16 – 33:1 (A327-28). Appellee thus concedes that the Trial Court erred when it relied on the "consistent with" standard.

Appellee argues that his evidence met the trial court's "consistent with" standard. See Br. of Appellee, at 4-5. This argument misses the point. Indeed, the fact that his evidence met the wrong standard is irrelevant to whether or not he met the correct burden of proof. Appellee fails to offer any basis why the "consistent with" standard is correct, so the fact that his evidence met that incorrect standard provides no basis to affirm the Trial Court's ruling.

Appellee also claims that Gilbane "places the incorrect burden on [Plaintiff], arguing that physical evidence is required in order to satisfy the elements of

[3] Indeed, the fact that the brick walkway was the "only avenue to reach the inmate Mrs. Cooper was visiting", Br. of Appellee, at 6, implicated only the breach of duty to make that pathway safe. Cooper, 455 A.2d at 655 (noting that, "the District is not an insurer of the safety of those who utilize its streets and sidewalks. It is, however, required to maintain the same in a reasonably safe condition.").

negligence." Id., at 7-8. Gilbane has not argued that physical evidence is necessary, only that Plaintiff was required to provide some evidence indicating that he physically contacted the tie wire. That evidence could have been physical evidence, testimony, photographs, video, or any other form of evidence linking Plaintiff's fall to physical contact with the tie wire. The problem is not that Plaintiff lacked physical evidence, but that he lacked any evidence whatsoever that he actually contacted the tie wire. Regardless, Appellee's mistaken criticism of Gilbane's proffered standard provides no reason why the Trial Court's standard was correct.

Finally, even had Appellee responded to Gilbane's arguments on the correct standard of proof as to causation, the Trial Court's "consistent with" standard could not survive appellate review. Such a standard would impermissibly allow a jury to rely on speculation to link an accident to a hazard. See Br. of Appellant, at 25-29. Indeed, under such a standard, a defendant could be liable for an incident where the plaintiff loses his footing somewhere in the vicinity of a trip hazard. Such a trip incident would be near the hazard and in a manner "consistent with" tripping over the hazard. Even if the plaintiff did not actually contact the hazard, causation would be a jury question under the standard proposed by Appellee and applied by the Trial Court. Nothing in law or logic supports such a result. For the reasons discussed more fully in Gilbane's Brief of Appellant, the Final Order

should be reversed due to Trial Court's application of the wrong standard as to Plaintiff's burden of proof on causation.

B. The Trial Court improperly disregarded or ignored positive testimony.

The Trial Court found that an investigative report prepared by Robert Hinderliter, as well as Mr. Hinderliter's trial testimony, "admitted Defendant's liability." Final Order, at 5. The Final Order also states that the evidence supporting the jury's verdict includes "an admission from the Defendant that a tie wire caused Plaintiff's fall[.]" Id., at 6. Gilbane argued that this treatment of the investigation and report is erroneous in two ways. Br. of Appellant, at 38-41. Treating the report as an admission of liability rather than simply as a statement against interest impermissibly deprived Gilbane of its ability to explain the statements therein, because the admissibility of the report depended on Gilbane's ability to explain or rebut the report. Id., at 38-39.

More generally, the Trial Court was required to consider all of the evidence in the record, "not merely the evidence favorable to the non-moving party[,]" Furline v. Morrison, 953 A.2d 344, 351 (D.C. 2008) (citation omitted), and could not disregard or ignore "positive testimony which is not inherently improbable, inconsistent, contradicted, or discredited". Hamilton v. Hojeij Branded Food, Inc., 41 A.3d 464, 473 (D.C. 2012) (citation omitted). Considering evidence in the light most favorable to one party does not mean ignoring or disregarding unfavorable

evidence.[4] On the contrary, the D.C. Court of Appeals has defined this standard as "[t]he prevailing party is entitled to the benefit of every reasonable inference from the evidence." District of Columbia v. Poindexter, 104 A.3d 848, 854 (D.C. 2014). Notably, this standard does not countenance reasonable inferences from only some of the evidence, but encompasses all of the evidence. See Rivas v. United States, 783 A.2d 125, 134 (D.C. 2001) (*en banc*) ("Judicial review is deferential, giving 'full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). "[W]hile '[a] jury is entitled to draw a vast range of reasonable inferences from evidence, [it] may not base a verdict on mere speculation.'" Id. (citing United States v. Long, 284 U.S. App. D.C. 405, 409 (1990)). By failing to consider testimony from Mr. Hinderliter and Kendall Romrell explaining the results of the investigation and basis for the statements in the report, the Final Order erroneously failed to consider the entire record and improperly disregarded or ignored positive testimony.

[4] "Viewing the evidence in the light most favorable to plaintiff does not mean ignoring plaintiff's own conflicting accounts nor ignoring all other evidence adverse to plaintiff." Law v. Gripe, 2018 U.S. Dist. LEXIS 48544 at *32 (E.D.Cal. 2018).

Again, Appellee fails to respond to Gilbane on this point. Appellee does not argue that the Trial Court considered the testimony from Mr. Hinderliter and Mr. Romrell showing that the report was based entirely on statements by people who did not know what caused Plaintiff to fall. Appellee thus concedes that the Trial Court failed to consider all of the evidence in the record, including positive testimony which was not improbable, inconsistent, contradicted, or discredited. Such a failure would be improper generally, but particularly so in this case, where the admissibility of the incident report depends on Gilbane's ability to explain and rebut the very statements on which the Trial Court relied. By failing to offer any explanation how the Court either considered this evidence or could properly disregard the testimony when deciding the Renewed Motion for Judgment as a Matter of Law, Appellee effectively concedes that the Final Order contains reversible error.

C. **The evidence identified in the Final Order does not establish that Plaintiff physically encountered the tie wire.**

The Trial Court held that the following evidence was sufficient for the issue of causation to reach the jury: 1) Gilbane's purported admission that the tie wire caused the fall; 2) "a recognition that Gilbane connected the tie wire to a sump pump on the date that Plaintiff fell[;]" and 3) "uncontested hearsay testimony that Plaintiff tripped over a tie wire." Final Order, at 6 (A542). The Trial Court did not identify any other evidence that would have allowed the issue of causation to reach

the jury. And the only admission identified in the Final Order was the incident report and Mr. Hinderliter's related testimony. See id., at 5 (A541).

Appellant explained why this evidence was insufficient as a matter of law. The incident report simply demonstrates that Gilbane believed Plaintiff's veracity when he claimed that he tripped over the tie wire. The Br. of Appellant, at 41-44. That belief "has the same probative value as the vision of a psychic: it reflects nothing more than the individual's foundationless faith in what he believes to be true." Williams v. United States, 130 A.3d 343, 355 (D.C. 2016). Second, the recognition that Gilbane connected the tie wire to a sump pump on the date that Plaintiff fell does not bolster any inference that Plaintiff actually fell over it. At most, it supports a conclusion that the hazard was present at the time of Plaintiff's fall. It does not evidence that Plaintiff actually contacted the wire. Br. of Appellant, at 46. Finally, any hearsay from Plaintiff's written statement cannot overcome his positive testimony that he did not know what actually caused his fall. Id., at 47.[5]

Appellee does not directly respond to Gilbane's arguments on these points. Indeed, he does not argue that any evidence demonstrated that he physically

[5] "Viewing the evidence in the light most favorable to plaintiff does not mean ignoring plaintiff's own conflicting accounts nor ignoring all other evidence adverse to plaintiff." Law v. Gripe, 2018 U.S. Dist. LEXIS 48544 at *32 (E.D.Cal. 2018).

contacted the tie wire. To the contrary, he argues that he did not need to present evidence that he physically contacted the wire. See Br. of Appellee, at 7-8. Appellee argues that the jury could permissibly infer that his fall was caused by the tie wire even without evidence of physical contact. Id., at 5-9. More specifically, he argues that the jury could infer that the tie wire caused the fall based on evidence showing that he fell near the tie wire in a manner consistent with the tie wire. See id., at 4-5, He does not argue that the evidence identified by the Trial Court or, for that matter, any other evidence, demonstrated that he physically encountered the hazard.

By failing to argue that his evidence showed that he physically encountered the tie wire, Appellee concedes that the evidence identified in the Final Order does not demonstrate that he physically contacted the tie wire. He does not concede that such proof was necessary, but he concedes that the evidence on which the Trial Court relied falls short of demonstrating that he physically encountered the tie wire. This concession is fatal, because this Court's clear, consistent precedent requires some evidence that the plaintiff physically contacted the hazard to prove causation.

II. **Appellee's Arguments Do Not Present Any Viable Basis to Affirm the Jury's Verdict.**

Instead of defending the Final Order, Appellee argues that the following evidence was sufficient to allow the case to reach the jury: 1) the location of the fall; 2) the presence of the tie wire; 3) a lack of other trip hazards; 4) Gilbane's incident report; and 5) Gilbane's investigation. Br. of Appellee, at 3-4. These arguments do not provide any basis to affirm the jury's verdict. Appellee misstates the testimony on which he relies and, regardless, Appellee relies on impermissible speculation to link his accident to the tie wire.

As an initial matter, these arguments misstate the record in several material respects.[6] Mr. Witkowski never identified the specific location where he fell, but rather stated that he was "briskly walking over there[]" towards the space between the dumpster and the fence. See Trial Tr., Day I, at 152:6 (A271). When pressed for a more specific location during his cross-examination, Plaintiff guessed that he was three-quarters of the way to the dumpster but could not provide any details supporting that guess. Trial Tr., Day II, at 52:14-53:4 (A347-A348).

[6] Appellee also falsely claims to have testified that his foot caught the tie wire: "Mr. Witkowski testified that his fall was caused when his foot was caught by tie wire causing him to fall." Br. of Appellee, at 2. In reality, Plaintiff did not use the word "foot" and explicitly stated that, "I don't know what I tripped on." Trial Tr., Day I, at 152:6-7 (A271). Appellee's good faith basis for his claim to have testified that his foot caught the tie wire is not clear.

Similarly, the record is clear that there were other trip hazards in the area of the fall. The construction area had uneven ground, which was strewn with gravel, broken concrete, and other construction debris. Trial Tr., Day II, at 52:9-13 (A347); Sames Dep., at 36:6-37:6 (A51-A52); Pl. Ex. 1. Plaintiff's foreman even volunteered that the site had "big boulder rocks" and "you could twist your ankle if you were walking on it". Sames Dep., at 31:1-14 (A46). Mr. Witkowski also conceded that he was not paying attention as he crossed this terrain. Trial Tr., Day II, at 52:6-13 (A347). The site condition would present a trip hazard to someone walking carefully, much less someone attempting to cross the same terrain without paying attention. Appellee's claim that no other hazards were present is not supported by the record.

As to Gilbane's investigation, the fifth and final category of evidence on which Appellee relies to support the verdict, Appellee provides no citation to the record supporting his assertion that Gilbane "concluded that the only possible explanation of this incident was that the tie wire caused Mr. Witkowski's fall." See Br. of Appellee, at 4. Nothing in the record supports this claim. To the contrary, the record is clear that Gilbane accepted Plaintiff's false report of what happened. Gilbane did not consider other potential causes of the incident, much less determine that the tie wire was the only possible explanation.

Appellee's reliance on Gilbane's investigation, like the Trial Court's reliance on Plaintiff's hearsay statement, is particularly troubling. Plaintiff did not know what caused him to fall. Despite that lack of knowledge, he reported to Gilbane that he tripped over the tie wire. By affirmatively representing what caused his fall, Plaintiff necessarily represented that he knew what happened. In so doing, Plaintiff misrepresented his own knowledge. See Saucier v. Countrywide Home Loans, 64 A.3d 428, 438 (D.C. 2013) ("A misrepresentation is an assertion that is not in accord with the facts."). Gilbane relied on that misrepresentation by accepting Plaintiff's statement as true and incorporating it into the incident report. Appellee now admits that he misrepresented, but asks this Court to spare him the consequences of his own false report. Quite the opposite, Appellee asks the Court to allow him to benefit from his false statement at Gilbane's expense. Such a result is manifestly unjust. Nothing in law or logic would allow a confidence man to prove that a fraudulent statement was true by demonstrating that his victim naively believed the fraud. That result is exactly what Plaintiff asks this Court to affirm. The fact that Gilbane relied on Plaintiff's false statement when it investigated the incident and completed its incident report is simply not sufficient to allow the jury to find that Plaintiff contacted the tie wire.

Putting those issues aside, Appellee's misstatements of the record are ultimately not relevant to the disposition of the appeal. Appellee argues that his

evidence demonstrated that he fell near the tie wire in a manner consistent with tripping over the tie wire. See Br. of Appellee, at 5. Unfortunately for Appellee, such evidence still fails to create a jury question on causation. The problem is that Plaintiff's evidence is also consistent with Plaintiff's tripping over the ground itself, debris at the work site, his own feet, or any number of other potential causes for someone to trip. Plaintiff had to present some evidence past mere consistency to link his accident to the specific hazard at issue. Without that evidence, the jury necessarily had to resort to impermissible speculation to link his fall to the tie wire. See Twyman, 655 A.2d, at 853; Wilson, at 1190. Appellee's argument that he presented enough evidence to demonstrate that he fell near the tie wire in a manner consistent with tripping over the wire is irrelevant, because such evidence of location and consistency is not sufficient to meet his burden of proof on causation.

III. **Gilbane Is Entitled to Judgment as a Matter of Law.**

Finally, Gilbane explained why it was entitled to judgment as a matter of law due to Plaintiff's failure to prove causation. Br. of Appellant, at 48. Once again, Appellee concedes the issue by entirely failing to respond. Appellee provided no more evidence linking his accident to the tie wire than the plaintiff in Twyman linked her accident to the defective step or the plaintiff in Wilson linked her fall to the orange substance. See Twyman, 655 A.2d, at 852 and Wilson, 912 A.2d, at 1190. To find that Appellee's fall was caused by the tie wire, as opposed

to any other potential explanation why he fell, the jury in this case would necessarily have to rely on impermissible speculation and surmise. For the same reasons that the questions of causation were properly taken from the juries in Twyman and Wilson, Gilbane is entitled to judgment as a matter of law here. This Court should reverse the Final Order and enter judgment in Gilbane's favor.

Conclusion

The Trial Court erred in several ways and the Final Order must be reversed for the reasons set forth in Gilbane's Brief of Appellant. The Brief of Appellee fails to provide any basis for this Court to affirm the Final Order. This Court should reverse the Final Order and enter final judgment in Gilbane's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2023, the following individuals were served by e-mail notification from the Court's filing system:

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Robert E. Worst	22-cv-975
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