

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TAMMY PARRY and COLIN PARRY, in their own right	:	NO. 07 - 00,445
and as guardians for Samantha Parry, their minor child,	:	
Plaintiffs	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
FRANCIS DYER, Executor of the Estate of Mabel Dyer,	:	Motion for Post-Trial Relief
Defendant	:	Entry of Judgment

OPINION AND ORDER

Before the Court is Plaintiffs' Motion for Post-Trial Relief, filed March 31, 2008. Argument on the motion was heard April 18, 2008.

After a trial on March 20, 2008, the jury returned a verdict in favor of Defendant, finding that Defendant's decedent was not negligent. In their post-trial motions, Plaintiffs seek a judgment notwithstanding the verdict or, in the alternative, a new trial.

Plaintiff Tammy Parry was injured, and Defendant's decedent, Mabel Dyer, died, in an automobile accident which occurred in an intersection controlled by a traffic signal. Both sides have contended the signal was green in her respective favor. In support of the request for a judgment notwithstanding the verdict, Plaintiffs argue that the only evidence regarding the color of the light at the time of the accident was testimony offered by Plaintiffs, and thus the jury's disregard of this evidence must have been based on speculation and/or sympathy for the Defendant. Unless the testimony of a witness remains uncontroverted, however, it is the prerogative of the jury to believe any, all or none of the witness' testimony. Carroll v. Avallone, 939 A.2d 872 (Pa. 2007). In the instant case, the testimony offered by Plaintiffs was questioned by Defendant through cross-examination, and the Court thus cannot find that it remained "uncontroverted" such as would prevent the jury from disregarding it.¹ The Court finds no reason to enter a judgment against the jury's verdict.

¹ As the Court stated in Carroll v. Avallone, 939 A.2d 872, 875 (Pa. 2007), "[I]f there is no argument or opposition on a particular point, the jury may not be free to disregard such information."

In seeking a new trial, Plaintiffs contend the Court erred in admitting into evidence several large police photographs of the vehicles after the accident. Plaintiffs contend the photographs were not relevant and were unduly prejudicial. As the photographs showed the vehicles after they collided and came to rest, the Court believes them sufficiently relevant to be admissible. Further, as they were of only the vehicles and no one involved in the accident was shown in the photographs, the Court also finds they were not inflammatory by their very nature and thus could not have “improperly inflame[d] the minds and passions of the jury.” *See Commonwealth v. Malloy*, 856 A.2d 767, 776 (Pa. 2004)(If a photograph is deemed inflammatory, the court must determine whether its evidentiary value outweighs the likelihood that the photograph will “improperly inflame the minds and passions of the jury.”) Plaintiffs are thus not entitled to a new trial on this basis.

Plaintiffs also contend in support of their request for a new trial that the Dead Man’s Act² is unconstitutional and as the Court relied on such to prevent Plaintiff Tammy Parry from testifying as to the events leading up to the accident, Plaintiffs should be granted a new trial at which Tammy Parry should be allowed to testify without restriction by the Act. While the Court did address the application of the Dead Man’s Act to the facts of this case in response to Defendant’s Motion in Limine seeking application of the Act, Plaintiffs did not at any time raise the constitutionality of the Act as an issue. Accordingly, this issue is considered to have been waived. *See* Pa.R.C.P. 227.1 (b)(1).

ORDER

AND NOW, this 30th day of April 2008, for the foregoing reasons, Plaintiffs’ Motion for Post-Trial Relief is hereby DENIED. In accordance with the verdict rendered by the jury on March 20, 2008, judgment is hereby entered in favor of Defendant and against Plaintiffs.

BY THE COURT,

cc: Scott T. Williams, Esq.
Gary Weber, Esq.
Hon. Dudley N. Anderson

Dudley N. Anderson, Judge

² 42 Pa.C.S. Section 5930.