IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RICHARD A. BIANCO, II,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. 99C-02-148-VAB**
	)	
	)	
FRANK ROBINO ASSOCIATES, INC.,	)	
	)	
	)	
Defendant.	)	

Submitted: October 13, 2000
Decided: January 31, 2001

ORDER

Upon Defendant's Motions for Judgment Notwithstanding the Verdict or for a New Trial -- *DENIED*; and
Upon Plaintiff's Application for Costs -- *GRANTED*

SILVERMAN, J.

Bianco, a workman, was injured seriously when a second-floor railing gave way at a construction site. A jury found Robino, the builder, liable for negligence and awarded $347,376. On October 10, 2000, Robino filed interrelated motions for judgment as a matter of law and for a new trial. Bianco opposes the motions and asks for costs.

Robino challenges the verdict in several ways. Primarily, Robino contends that Bianco's evidence failed to establish negligence. Robino also contends that the Court incorrectly admitted hearsay concerning an OSHA violation by Robino. And finally, Defendant attacks the verdict as excessive.

I.

To a large extent, the parties do not dispute the facts concerning liability. Their disagreement largely is about what to make of them. It is agreed that Bianco was a "carpet helper." Bianco was not new to the trade. He was training to become a full-time carpet layer. He had been involved with flooring companies for about two years before he was injured.

On December 15, 1998, Plaintiff was working on Defendant's project, near Middletown. He was helping to install carpet on the second floor of an almost finished town house. Bianco had been on the job for three hours that day. He had used the stairs, but he had not noticed the railing. Just before

lunch, Bianco began collecting carpet and padding scraps, putting them in trash bags. Instead of carrying the bags downstairs, Bianco started throwing them over the railing. As he described it to the jury, "I threw one bag, and then I went to grab the next bag, and when I went to throw the second bag, I leaned on the railing at the same time as throwing the bag, and the rail just gave way." As mentioned, Bianco fell to the floor below.

Although the parties wrangle over what to call the railing, Bianco refers to it as temporary and Robino calls it unfinished, the parties agree about the railing's construction. It was an ordinary, wooden banister, except that its dress cap, or hand railing, had not been installed. The balusters were attached to a fillet, which was attached by nails to the newel posts. Robino did not finish the banister because the carpet installation was incomplete and Robino feared that the dress cap might be damaged. Although Robino left the railings incomplete throughout the project where Bianco was injured, the practice does not appear to be common in the construction industry.

The dress cap's absence is significant. While the parties differ over how weak the unfinished banister was, they agree that without a dress cap, the railing was "substantially weaker" than a finished banister. Robino's job superintendent agreed that the dress cap is not just cosmetic, "[i]t actually gives

the full strength of the rail." In part, the dress cap adds strength to the banister because the dress cap is not just nailed, it is screwed into the newel post. The railing that failed was fastened with only two, small 6D nails.

The railing's span was "[f]ive and a half feet, something like that." It is unclear where Bianco hit the railing, but it failed where the top fillet piece was nailed to the newel post. According to a structural engineer called by Bianco, the fillet "was attached in a reasonable manner. It would not provide the required strength to ultimately support the rail." The ability to withstand a 200 pound load "is what theoretically is required for a railing system." Based on the engineer's calculations, as Robino left the railing, it could withstand from five to thirty two pounds, depending on where the load was placed on the span. The railing was strongest at its ends and weakest in the middle.

The lynchpin for Robino's evidentiary argument is that no one offered unequivocal opinions about how much force the finished banister could have withstood and the precise force that Bianco put on the unfinished railing before it failed. Bianco left open the possibility that even if Robino had completed the railing, Bianco might still have crashed through it. Initially, the Court agrees that even viewing the evidence in the light most favorable to Bianco,

there is room to argue about the banister's strength and especially about the strain put on it. That, however, misses Bianco's point and the verdict's essence.

In the exercise of due care, Robino was obliged to construct a railing that would do what railings are supposed to do, keep people from falling. While Robino was not required to construct a banister that would withstand every conceivable force, Defendant was required, as a matter of law, to keep its construction site reasonably safe. Toward that end, Robino's railing had to withstand a reasonably foreseeable load, which a qualified expert opined was 200 pounds. In short, it did not matter what the complete rail system could hold. Nor did it matter how much force Bianco put on it. What mattered was whether the railing could stand up to a reasonably foreseeable force and whether Bianco exceeded that parameter. Alternatively, Robino had to give warning that the railing might not hold under normal use.

Bianco is not extraordinarily tall or heavy. He is 5'11" and 155 lbs. Similarly, nothing suggested that when Robino's railing gave way, Bianco was horse playing or that he otherwise crashed into the railing heedlessly. Viewed in the light most favorable to Bianco, the evidence easily supports the conclusion that Bianco was not misbehaving or otherwise acting unreasonably or unforeseeably. Apparently, the railing that Robino provided for Bianco's safety

gave way, like Bianco testified, when he leaned on it while dumping a trash bag of scraps. He estimated that the bag weighed thirty pounds.

In summary, the jury heard that the basic standard for a railing system is 200 pound holding capacity. Presumably, a railing that meets the standard will protect someone under normal circumstances. Bianco was behaving reasonably. Nevertheless, the railing failed. It separated at an attachment point that Robino fastened with two, light nails, instead of with nails and screws. Instead of being able to hold 200 pounds, Robino's railing only could hold less than thirty two pounds. Moreover, thanks to its construction, the railing could not prevent a typical worker from falling through it, regardless of the railing's actual capacity and the actual load put on it. The jury easily could have concluded, without speculating, that most likely the railing's failure was not Bianco's fault, the railing probably failed because it was not reasonably safe and Robino did nothing to warn Bianco that the railing would not hold if he leaned into it.

Finally in this regard, the defense rested without calling any witnesses. Thus, it is arguable that the jury had no choice but to find in Bianco's favor. From the evidence presented, the jury would have been hard-pressed to conclude that the unfinished railing was reasonably safe, that Bianco put an

extraordinary load on it and that probably it would have failed even if it had a dress cap attached to the newel with screws. Not only was Robino negligent in leaving the railing as it did, Robino's negligence proximately caused Bianco's serious injury. But for its flimsy nailing, the railing probably would have held when Bianco leaned into it and if Robino had warned Bianco, he probably would not have relied on the railing. There is an unbroken chain of causation from Robino's decision to keep the dress cap pristine, through the decision to attach the fillet with small nails, to Bianco's fall when he relied on the railing for his safety and ending with Bianco's injury. Again, even without expert testimony about the load Bianco put on the railing, the Court is satisfied that the verdict reflected reasonable inferences drawn from the available evidence and Bianco established Robino's negligence and proximate cause.

II.

When he fell, as described above, Bianco dropped about twelve feet and landed on both ankles. He was seriously hurt. When he hit, Bianco heard and felt both ankles crack. He described the pain as the greatest he had ever felt. The pain was "a ten" and it was constant. Of course, Bianco was taken to the hospital for treatment. While waiting for emergency orthopedic surgery, Bianco received pain medicine. He testified: "Even with morphine it was still

excruciating, still a lot of pain." The surgeons installed hardware in Bianco's ankles, put him in casts and sent him home a day later.

After he came home from the hospital, Bianco was dependant on his fiancé for almost everything. She cooked his meals, helped him shower and she emptied his urinal. Bianco said he was in a wheelchair for "two or three weeks." Then he was on crutches. His left cast was on for six weeks and the right for eight weeks. When the casts came off, he started physical therapy.

Bianco's recovery was not complication free. He developed a persistent infection requiring further surgery, post-operative drains and elaborate, intravenous antibiotic treatment for six weeks under an infectious disease specialist's supervision. Bianco's surgeon testified clearly that the infection was a complication of the surgery, including the pins that the surgeons installed. In other words, the infection was a recognized risk of and attributable to the surgery necessitated by Robino's negligence. That testimony is unrebutted.

To Robino's consternation, Bianco still can surf and he does. That is a sore point especially because during pretrial proceedings, Bianco minimized and denied surfing. His professed confusion about his surfing did not clear until Robino's counsel produced photographs. Then, Bianco finally admitted unequivocally that he surfed. At trial, when asked to explain his denials, Bianco

testified: "Like I got confused." Fortunately for Bianco, his credibility was not very important. His fall and his initial injuries were indisputable. And as for surfing, while Bianco falsely denied or minimized it, Bianco's orthopedist explained that surfing is not just recreational, it is therapeutic for Bianco.

Anyway, Bianco was a self-described athlete. He claimed that he could " run a 440 in 40," before he fell. Now, he cannot run because "it hurts way too bad." He has to ice his foot before surfing and at night. His right foot hurts, especially during rainy or cold weather. He has orthopedic inserts, which he claims that he wears in his shoes, as recommended. Bianco also testified that occasionally he wears a non-prescription brace on his right ankle.

Even considering the $58,000 worker's compensation lien and attorney's fees, the verdict was not stinting. Bianco's permanent injuries are not hugely debilitating. Nevertheless, the verdict is not shocking. Bianco felt and heard both his leg or ankle bones break. He suffered terrible, intense pain after the accident and before surgery. He had two operations and he likely will need a third. His post-operative convalescence was long, complicated and unpleasant. He was in a wheelchair and casts. Then he had physical therapy. Although he can surf, it is not like before. Bianco was 24 years old when he was hurt. He has permanent damage in his right foot and he understands that "later on down the

road arthritis will set in, and I believe probably later I won't be surfing." Meanwhile, he cannot run. And he continues to have pain. Bianco can work as a carpet helper, but because of his injuries he no longer expects to be an installer. He is preparing to leave construction.

Again, the verdict was substantial, but Bianco truly was hurt. The Court cannot point to anything that undermines the verdict's reliability, including its size. Bianco did not come off as a special source of sympathy. Bianco's attorney did not play to the jury's passion or prejudice. To the contrary, his approach was restrained. The Court is satisfied that the verdict was the product of a jury's proper consideration of the evidence and there is no reason to second-guess, much less reject it.

III.

Finally, as it did at trial, Robino challenges the way Robino's OSHA violation was put to the jury. It is undisputed that OSHA investigated the incident and found a violation. The Court admitted an OSHA violation notice over Robino's objection. Among other things, Robino argues that the notice was "hearsay within hearsay."

Typically, OSHA violations present two evidentiary challenges. The first concerns how the OSHA violation is established. Typically, where the violation is contested, an expert is necessary. In this case, however, not only was the OSHA violation undenied, it was admitted. Robino's job superintendent conceded that OSHA had given Robino a fine and Robino had paid it. Perhaps, if Robino had approached the OSHA violation differently, Bianco might have had to show more. As the record stands, however, there was no reason to insist that an expert testify that Robino had violated OSHA regulations. And, frankly, it is difficult to believe that Robino truly wanted Bianco to emphasis the violation by producing expert testimony, as Robino now insists. The way both sides approached the OSHA violation, it largely was a "make weight." The second OSHA concern typically involves its use by the jury. The Court correctly

instructed the jury that an OSHA violation does not establish negligence *per se*. An OSHA violation is evidence of negligence.

Finally, with respect to OSHA, Robino's negligence was not esoteric. Once the structural engineer testified that the railing should hold 200 pounds and it could hold 32 pounds or less, it was clear that the railing was unsafe. Similarly, it did not take an OSHA expert to establish that if Robino wanted to leave its railing unfinished, it should have taped a piece of paper with a warning on it. The OSHA violation merely confirmed what the jurors' common sense would have told them. This painful accident could have been avoided with a piece of card board, a piece of tape, a magic marker and a little more care.

IV.

As mentioned, Bianco has asked for $3,763.19 in expert witness fees, which Robino opposes. Robino contends that the structural engineer's bill is unclear. It might include unreimbursable components. Also, Robino prefers that the Court wait until after its appeal. The Court will resolve the costs now.

The engineer's bill is $870.69. Accordingly, to his September 29, 2000 invoice, his fee for testifying is $600 and the rest is for "Professional Personnel" and "Reimbursable Expenses." Considering the amounts and the expert's importance, the bill is reasonable and further litigation over its

imprecision is not warranted. Moreover, Plaintiff's entire application is reasonable.

V.

For the foregoing reasons, Defendant's Motions for Judgment Notwithstanding the Verdict or for a New Trial are DENIED and Plaintiff's Application for Costs is GRANTED .

IT IS SO ORDERED.

Judge

oc: Prothonotary (Civil Division)
pc: Neal J. Levitsky, Esquire
John D. Balaguer, Esquire