State of New Hampshire Supreme Court

No. 99-764

2000 TERM

AUGUST SESSION

ELIZABETH GRAHAM

v.

GERALD GLOVER

RULE 7 APPEAL FROM FINAL DECISION OF
HILLSBOROUGH COUNTY (SOUTH) SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLANT, ELIZABETH GRAHAM

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QUESTIONS PRESENTED

1. A jury of fewer than twelve, unless the lesser number is waived by the parties, is not a constitutional trial. While the plaintiff accepted a jury of eleven, just ten jurors decided this case. Did the court err in accepting the verdict of the substandard jury?

2. The court must set aside a verdict which is conclusively against the weight of the evidence. The defendant admitted all the elements necessary to establish his own negligence, and offered none to show the plaintiff was negligent. Should the court have set aside the jury's verdict which found the plaintiff was negligent to such a degree that she did not recover for her injuries?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On the evening of September 21, 1995, the plaintiff, Elizabeth Graham, was invited to visit the defendant, Gerald Glover, at Mr. Glover's home in Hollis, which was a small dairy farm. *Trn.* at 32, 136. When Ms. Graham arrived sometime between 8:00 and 9:00 pm, *Trn.* at 38, 169, she found no one home, but noticed the lights on in Mr. Glover's barn. *Trn.* at 33. She and her companion went into the barn, and were greeted by their host, the defendant, and then by his friend Bess Parks. *Trn.* at 34, 148. Mr. Glover lead the group, including Ms. Graham and her companion Ernest Knockwood, to an area of the barn where his pigs were kept. *Trn.* at 148. As Mr. Glover had been doing his evening chores when Ms. Graham arrived and had not yet finished, he left the group looking at the pigs and resumed cleaning the barn. *Trn.* at 149.

Ms. Graham has progressive Parkinson's Disease, for which she is being treated. Her condition makes it difficult for her to talk, and affects her mobility. *Trn.* at 9-14, 85-96. She has characteristic stiffness of motion which can be likened to "the tin man after a rain storm." *Video Deposition*: Dr. David King (Neurologist), (Aug. 26, 1999). Ms. Graham was thus carrying a flashlight, but apparently found no use for it in the barn. *Trn.* at 96.

To facilitate cleaning, the barn had a gutter system which carried waste into a manure pit located underneath. *Trn.* at 142-143. In the vicinity of the pig pen, there was a hole on the side of the walk-way. The hole was normally covered by boards fitted for the purpose so that people near the pig pen would not accidently fall into the manure pit below. *Trn.* at 150-151. Because Mr. Glover had been cleaning the barn when Ms. Graham arrived, the cover was standing up, leaning against the barn machinery, and thus the hole was left uncovered. *Trn.* at 159, 170.

Although Ms. Graham had been in the barn before, she was unfamiliar with the cleaning system, the manure pit, the holes leading to it, or the covers intended to protect people from

falling into the holes. *Trn.* at 27-28. The manure pit below the barn was unlit, *Trn.* at 151-153, and the lights in the vicinity of the pig pen were off. The hole, therefore, was not easily noticed.

Mr. Glover's did not warn Ms. Graham of the uncovered holes. *Trn.* at 149, 157. After he walked away from the group near the pig pen to resume his chores, Ms. Graham fell into the hole near the pig pen, landed amidst manure under the barn, and sustained injuries. *Trn.* at 171.

Ms. Graham sued Mr. Glover.

Twelve jurors, plus one alternate, were impaneled for the trial. At some point very early in the trial, one juror was excused for reasons not revealed in the record, leaving twelve jurors. During Ms. Graham's testimony, another juror was excused because the juror believed he had worked in a restaurant with Ms. Graham 30 years ago. *Trn.* at 64. This left eleven jurors to decide the case, to which Ms. Graham did not object.

After the jury was sent to deliberate, the court received notice that there may be a problem with another juror, and he was brought into court. The juror revealed that his brother had been injured in a friend's basement, that a lawsuit resulted, and that the brother may have won his case. *Trn.* at 197-98. The juror did not say that he would be influenced by his brother's experience. *Id.* Because excusing another juror would leave just ten, Ms. Graham's attorney objected to excusing him. *Trn.* at 199.

What remained of the jury determined that the defendant was 40 percent at fault, and the plaintiff 60 percent at fault. FORM FOR SPECIAL VERDICT (Oct. 14, 1999), *N.O.A.* at 17. Ms. Graham was thus awarded no damages. The Hillsborough County (South) Superior Court (*Brennan*, J.), refused to set aside the verdict. ORDER ON THE PLAINTIFF'S MOTION TO SET ASIDE VERDICT (Nov. 9, 1999), *N.O.A.* at 8. This appeal followed.

SUMMARY OF ARGUMENT

The plaintiff, Elizabeth Graham, first points out that in New Hampshire a constitutional jury comprises twelve members. Ms. Graham concedes that litigants may waive a full jury, but that the waiver must be explicit as to each juror excused. She lists some of the problems with substandard juries, and notes that the grounds upon which the trial court excused the last juror were probably insufficient. Ms. Graham argues that the court's error was not harmless, and that the verdict should be reversed.

Ms. Graham then argues that the evidence does not support the verdict. She notes that the defendant admitted all the facts necessary to establish his negligence. After reviewing the law of comparative fault, she points out that the defendant offered no evidence to establish that the plaintiff was also negligent. She suggests that the jury may have been confused by allegations that the plaintiff exaggerated her injuries, or by whether the defendant's duties were lessened by the plaintiff's Parkinson's disease. The plaintiff then argues that because of the dearth of evidence establishing the plaintiff's negligence, the jury's verdict was conclusively against the weight of the evidence and that the court should have set aside the verdict.

ARGUMENT

I. The Verdict Was Rendered by a Substandard Jury, and Must Be Reversed

A. "Jury" is a Body of Twelve

The New Hampshire constitution guarantees "a right to a trial by jury." N.H. CONST., pt. I, arts. 20 & 21. This Court has settled that a "jury" means a body of twelve. *Opinion of the Justices,* 41 N.H. 550, 552 (1860) ("no body of less than twelve men . . . would be a jury within the meaning of the constitution; nor would a trial by such a body [be] within the meaning of the instrument"); *Copp v. Henniker*, 55 N.H. 179, 193 (1875) ("And a trial by a jury of eleven men, or a trial in which the verdict is given by the agreement of eleven out of twelve jurors, would not be a trial by jury in the constitutional sense.").

Although the Legislature cannot constitutionally reduce the size of a jury below twelve, *Opinion of the Justices*, 41 N.H. at 550, litigants are free to waive the right to a jury of twelve and stipulate to a lesser number. *Opinion of the Justices*, 121 N.H. at 483-84 ("Nothing in this opinion is to be construed as preventing parties by stipulation from obtaining a trial with less than twelve jurors in both civil and criminal cases."); *see also* FED. R. CIV. 48.

Once a substandard jury is approved by a litigant, however, the trial court is not free to further reduce the jury without explicit waiver of each reduction. This Court has approved a jury of eleven only after finding that the criminal defendant had the assistance of counsel, that the waiver of twelve was knowing and intelligent, and that the waiver was explicit. *State v. Ellard*, 95 N.H. 217, 222 (1948), *cert. denied*, 335 U.S. 904; *see generally, Validity of Agreement, by Stipulation or Waiver in State Civil Case, to Accept Verdict by Number or Proportion of Jurors Less than that Constitutionally Permitted,* 15 A.L.R. 4th 213; *Sufficiency of Waiver of Full Jury*, 93 A.L.R. 2nd 410. It is unreasonable to suggest, as the plaintiff did below, that once a litigant

waives a twelve-member jury, a trial court can reduce the jury to any convenient number.

New Hampshire law is suspicious of substandard juries. This is because they reduce the certainty of justice and narrow the representation of the community. This Court has noted:

- "progressively smaller juries are less likely to foster effective group deliberation"
- "at some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts"
- "the risk of convicting an innocent person . . . rises as the size of the jury diminishes"
- "the chance of hung-juries would decline"
- "further reduction in size will erect additional barriers to minority representation"

Opinion of the Justices, 121 N.H. 480, 482 (1981) (internal quotations, citations, brackets, and ellipses omitted, bullets added), *citing* Note, *The Jury Size Question in Pennsylvania: Six of One and a Dozen of the Other*, 53 TEMPLE L. Q. 89 (1980). Because it is not clear what number of jurors is sufficient to avoid these problems, the United States Supreme Court has "refused to speculate when this so-called 'slippery slope' would become too steep." *Ballew v. Georgia*, 435 U.S. 223, 231 (1978). Accordingly, in New Hampshire, a twelve-member jury is a mandate.

In Ms. Graham's case, she waived a jury of twelve, thus accepting eleven. She did not, however, make a further waiver. She did not accept a jury of ten. In forcing a verdict from the substandard jury, the court violated Ms. Graham's constitutional right to a trial by jury. The court may also have dipped below the critical number of jurors necessary to provide justice which is certain and which represents the judgment of the community. In any case, the verdict was not legitimate, and must be reversed.

Moreover, it appears from the record that the trial court was far too cautious in excusing the final juror. The standard for excusing jurors has long been whether they are "indifferent" to

the case. *Pierce v. State*, 13 N.H. 536, 554 (1843), *aff'd*, 46 U.S. (5 How.) 554 (1847); *State v. Cannata*, 130 N.H. 545 (1988) (juror involved in alcohol abuse counseling need not be excused from drug sale case). In Ms. Graham's case, the juror was excused because his brother had been injured in the basement of a friend's house. The juror believed, but was not sure, that his brother had won the resulting law suit, and did not know how much, if anything, his brother received as damages. *Trn.* at 197. The juror did not say that he would be influenced by his brother's experience. *Trn.* at 198. The juror was thus apparently indifferent, and probably should not have been excused.

B. The Verdict Was Too Close For Harmless Error

The defendant may allege that the court's error was harmless. "To conclude that an error is harmless," however, this Court "must be convinced beyond a reasonable doubt that it did not affect the verdict." *Tsiatsios v. Tsiatsios*, 140 N.H. 173, 179 (1995).

> "In civil cases, . . . where a case is a close one on the facts, and the jury might have decided either way, any substantial error which might have tipped the scales in favor of successful party calls for reversal.'"

Kallgren v. Chadwick, 134 N.H. 110, 117 (1991) (citations and quotation omitted).

This case is close on the facts. The ten-member jury itself found that liability was split 60 percent to 40 percent, not far from the preponderance-of-the-evidence standard. It is apparent that the jury might have decided the other way, and that a differently-composed jury or the additional juror might have "tipped the scales" in favor of Ms. Graham. A jury of twelve is a "corner-stone" of democracy, and is "the great safeguard of life, liberty, and property" which is our "birthright in every contest with arbitrary power." *Copp v. Henniker*, 55 N.H. at 193. Forcing a verdict from a jury of fewer than twelve is thus substantial error. Because one cannot be sure beyond a reasonable doubt that the error did not effect the verdict, it must be reversed.

II. The Jury's Verdict Was Conclusively Against the Weight of the Evidence, and Should Have Been Set Aside

A. The Defendant Admitted Facts Necessary for His Negligence

When a defendant has a duty of care, which he breaches, and which causes the plaintiff an injury, the defendant is liable to the plaintiff. *Wright v. Dunn*, 134 N.H. 669 (1991). In this case, the defendant admitted all facts necessary for liability.

Mr. Glover had a duty toward the plaintiff of reasonable care. He had invited Ms. Graham to visit him at his home, and greeted her in his barn. *Trn.* at 147-148, 167. Once there, he escorted her to the pig pen to look at his pigs. *Trn.* at 148.

Mr. Glover breached his duty of reasonable care. Although Ms. Graham had visited Mr. Glover's barn in the past, *Trn.* at 139, her visits were apparently not during cleaning and she was not aware of the hole, the cover for it, or its role in the cleaning system. *Trn.* at 27, 97-98. In any case, she had not seen the hole before. *Trn.* at 27. Mr. Glover knew of the hole, and had covers fitted for it to prevent people from falling through into the manure pit below. *Trn.* at 150, 152, 157-158.

That night, however, because he was in the process of cleaning the barn, Mr. Glover said he had removed the cover from the hole, and had stood the cover in its storage spot where it could not prevent injury. *Trn.* at 159, 170. Mr. Glover admitted that he did not warn Ms. Graham of the hole, of the removed cover, or of any danger. *Trn.* at 149, 157. During this visit, the defendant further testified that the lights in the vicinity of the pig pen were off. *Trn.* at 146-147. Nonetheless, he left Ms. Graham in the vicinity of the uncovered hole, and walked away. *Trn.* at 149.

Shortly after he left, Ms. Graham fell into the hole, which caused her injury. *Trn.* at 171. These facts were undisputed, and all admitted by the defendant.

The testimony reveals considerable dispute, however, about the *extent* of Ms. Graham's injuries and her conduct immediately after her fall. The defendant maintains that Ms. Graham's account is an exaggeration. Ms. Graham alleged, for instance, that she fell 12 or 20 feet, *Trn.* at 99-100, while the defendant maintained that the pit was just 8 or 9 feet deep. *Trn.* at 161, 176. (During its view, the jury was unable to enter the pit due to a large pile of manure there. *Trn.* at 101.) Ms. Graham alleged that the pile of manure was up to her head, *Trn.* at 45, while the defendant suggested it was just 5 feet high. *Trn.* at 144, 154. Ms. Graham alleged that there was a deep puddle of liquid in the pit, *Trn.* at 45, and that it was animal waste, *Trn.* at 53, while the defendant claimed it was less, and mostly rain water. *Trn.* at 145, 154. Ms. Graham alleged she lost consciousness and broke bones in her fall, while the defendant maintains she did not. *Trn.* at 100, 102. Ms. Graham alleged that after the fall she screamed and could not at first get anyone to help her out, *Trn.* at 53, while the defendant claims that he responded immediately, and that Ms. Graham did not cooperate in her rescue. *Trn.* at 162-164. Ms. Graham alleged that after her fall, the defendant wanted to hose her off, would not immediately call an ambulance, that she had to take her clothes off outside in the cold to get cleaned up, and that she could not move because her body had stiffened at least in part due to Parkinson's, *Trn.* at 50-53, while the defendant instead alleges that it was Ms. Graham who did not cooperate in her rescue and generally overreacted to the situation. *Trn.* at 155, 162-164, 172-178. Ms. Graham alleged that she was housebound and needed a wheelchair and live-in help at home as a result of her fall, *Trn.* at 85, 95-105, while the defendant contested this. *Trn.* at 95-105.

B. The Defendant Offered No Evidence to Prove Comparative Negligence

New Hampshire's comparative fault statute bars recovery in tort actions if the plaintiff's negligence is greater than the defendant's. RSA 507:7-d.

The comparative fault statute "applies only when the plaintiff is negligent," *Lavoie v. Hollinracke*, 127 N.H. 764, 769 (1986), which the defendant bears the burden of proving. *Townsend v. Legere*, 141 N.H. 593 (1997). If the plaintiff is not negligent, there is no comparative fault, and the defendant alone is liable.

In order to be at fault, the danger must be *apparent* to the plaintiff. The plaintiff "is not to be held careless because he did not look out for dangers he had no occasion to anticipate. There is no carelessness in encountering dangers not reasonably to be sensed and not in fact known."

Piateck v. Swindell, 84 N.H. 402, 403 (1930); *see Forsberg v. Volkswagen of America, Inc.*, 769 F. Supp. 33, 35 (D.N.H. 1990) ("To prove a plaintiff's comparative negligence in New Hampshire, a defendant must show that the plaintiff breached a duty to act with reasonable care to avoid an apparent danger.").

To avoid liability because of the plaintiff's fault, the defendant must offer evidence of "misconduct" by the plaintiff. *Bohan v. Ritzo*, 141 N.H. 210, 216 (1996). Misconduct is defined as "the plaintiff voluntarily or unreasonably expos[ing] himself to a foreseeable risk of injury of the type he suffered." *Id.* The plaintiff may be at fault if she "knowingly put h[er]self into a dangerous situation or provoked the [harm], thereby creating or exacerbating his risk of harm." *Id.* For instance, in *Bellacome v. Bailey*, 121 N.H. 23, 27 (1981), the Court found that there was evidence "of the plaintiff's negligence for not choosing to use an available crosswalk and for

failing to exercise due care while crossing in the middle of the street."

Moreover, the plaintiff's misconduct must cause her injury. A jury may "find legal fault on the part of the plaintiff if such negligence caused or contributed to cause the alleged accident." *Bellacome*, 121 N.H. at 26. If the plaintiff's misconduct comes *after* the cause of the harm, the comparative negligence statute does not apply. *Bohan*, 141 N.H. at 216-17 ("the defendants merely allege that the plaintiff did not act properly in *reacting* to the" harm).

It is unclear what evidence the defendant has adduced which show that the Ms. Graham was negligent, that the danger of the uncovered holes was apparent to the her, that she engaged in some misconduct, or that any alleged misconduct caused her injury. *Townsend v. Legere*, 141 N.H. 593 (1997) (improper to instruct jury on comparative negligence when defendant adduced no evidence of it).

The defendant did offer evidence that, during the time group was gathered near the pig pen, in order to see the pigs Ms. Graham turned and pulled herself toward the pig pen. The defendant's witness offered "I would imagine that [Ms. Graham] misjudged the distance that she had to pull up to grab hold. . . . And she stepped backwards and when she stepped backwards, her free leg went into the hole." *Trn.* at 171. At most this is supposition, admittedly based on the witness's imagination. Even if this is what happened, it does not obviate the invitation to view the pigs, does not negate the non-apparent-ness of the uncovered hole, and is not an allegation or a proof that she unreasonably exposed herself to a foreseeable risk of injury.

The jury nonetheless found that the plaintiff was negligent; so much so that she did not recover any damages. It is likely that, rather than basing its finding on relative fault as the law requires, the jury was confused: it may have regarded the plaintiff as unsympathetic due to

allegations of exaggeration of what occurred after the fall, and it may have believed that the defendant had a lower duty toward the plaintiff because she had difficulty walking and performing other tasks due to her Parkinson's disease. *See Cyr v. J.I. Case Co.*, 139 N.H. 193 (1994).

"Determining the comparative negligence of the parties is a matter for the fact-finder, and its decision will not be set aside if the evidence reasonably supports it." *Bellacome*, 121 N.H. at 27. The jury's finding that the plaintiff was at fault was not reasonably based on any evidence. It was in error, and the court therefore should have granted the plaintiff's motion to set aside the verdict.

C. The Jury's Verdict Was Conclusively Against the Weight of the Evidence

The trial court must set aside a verdict when it is "conclusively against the weight of the evidence," that is, when the "verdict was one no reasonable jury could return." *Panas v. Harakis*, 129 N.H. 591, 599-603 (1987). In Ms. Graham's case, the defendant's own testimony established all the elements of negligence against him. Beyond allegations about the extent of Ms. Graham's injuries and concerns whether her Parkinson's disease may have slowed her reactions, there were no evidentiary disputes in this case. The defendant offered no evidence tending to show that Ms. Graham was herself negligent. *Townsend v. Legere*, 141 N.H. at 595 ("Although we agree that the plaintiff had a duty to exercise due care, the fatal flaw in the defendant's argument is the absence of evidence indicating that the plaintiff breached that duty."). The jury's verdict was therefore conclusively against the weight of the evidence, and the court should have set aside its verdict.

CONCLUSION

In accordance with the foregoing, the plaintiff Elizabeth Graham requests that this Court find that the trial court should have granted her motion to set aside the verdict, or in the alternative, to set aside the verdict and remand for a new trial.

Respectfully submitted,

Elizabeth Graham,
By her Attorney,

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Dated: August 6, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Elizabeth Graham requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on August 6, 2000, copies of the foregoing will be forwarded to Richard A. Mitchell, Esq.

Dated: August 6, 2000

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