

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

Mary Ellen Foley	:	
Plaintiff	:	
	:	August Term, 2014
vs.	:	
	:	No. 0385
	:	
1559 OTR, Inc. d/b/a	:	
Billy Blues Irish Sports Bar	:	
Defendant	:	

ORDER

And Now, this *9th* day of March, 2016, after a non-jury proceeding in this matter on February 18, 2016, and for the reasons set forth in the Findings of Fact and Conclusions of Law filed this date, it is hereby **ORDERED** that damages are awarded in favor of Plaintiff Mary Ellen Foley and against 1559 OTR, Inc. d/b/a Billy Blues Irish Sports Bar in the amount of **Twenty Five Thousand Dollars (\$25,000.00)**.

BY THE COURT:


FREDERICA A. MASSIAH-JACKSON, J.

DOCKETED
COMPLEX LIT CENTER

MAR 9 2016

J. STEWART

Foley Vs 1559 Otr, Inc. D/B/A Billy Blues Ir-ORDER



14080038500040

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

Mary Ellen Foley	:	
Plaintiff	:	
	:	August Term, 2014
vs.	:	
	:	No. 0385
	:	
1559 OTR, Inc. d/b/a	:	
Billy Blues Irish Sports Bar	:	
Defendant	:	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
IN FAVOR OF PLAINTIFF**

MASSIAH-JACKSON, J.

March *9th*, 2016

A. PROCEDURAL HISTORY

- June 9, 2013 – Altercation at Defendant-Billy Blues Irish Sports Bar (“Bar”).
- August 5, 2014 – As a result of injuries sustained, Plaintiff-Mary Ellen Foley initiated this litigation against the Defendant-Bar.
- August 11, 2014 – The Bar was served with the Complaint.
- September 16, 2014 – The Bar was served with the Notice of Intention to Take Default Judgment for failure to answer or otherwise respond to the Complaint.
- November 13, 2014 – Default Judgment entered.
- May 5, 2015 – Arbitration Award in the amount of \$40,000.00 for Plaintiff-Foley. Defendant failed to appear.
- June 3, 2015 – Defendant-Bar filed a timely Notice of Appeal to the Court of Common Pleas.
- September 17, 2015 – Defendant-Bar filed a Petition to Open the Default Judgment dated November 13, 2014.
- November 10, 2015 – The Petition to Open Default Judgment was denied by Motions Court.
- February 18, 2016 – Non-Jury Assessment of Damages Proceedings. The parties stipulate to Rule 1311.1(a) limits.
- March 3, 2016 – Memorandum of Law due and received from all parties.

B. FINDINGS OF FACT

1. On June 9, 2013, Ms. Foley and her friend, Ms. Patricia Frye, were seated at the counter in the Bar.

2. Both ladies were seated on bar stools when a fight broke out with a Bar employee and visitors to the Bar.

3. The fight escalated and moved to an area behind Ms. Foley and Ms. Frye. Plaintiff-Foley was pushed off of the bar stool and onto the floor by the men who were fighting.

4. Plaintiff-Foley submitted photographs of the bruising and contusions she suffered.

5. Plaintiff-Foley suffered injuries to her back, neck and legs. She also suffered aggravation of previous chronic back pain.

6. The Bar owner and the bartender, Renée Nicoletti and Jennifer Nicoletti, testified that Ms. Foley was not hit, that she did not fall and that she suffered no injuries.

7. Plaintiff-Foley has presented medical records of treatments, therapies and tests in support of her claim for economic loss:

a.	Philadelphia Pain Management June 19, 2013 – November 6, 2013	\$7,735.00
b.	Advanced Diagnostics August 1, 2013 October 2, 2013 (MRI)	\$3,883.00 \$1,845.00
c.	Regional Orthopedic Assoc.	\$ 380.00

8. Dr. Lance Yarus reported that Ms. Foley's activities of daily living are reduced as a result of this incident. The objective test findings and records from Dr. Mario DiPrinzio, Dr. Daniel Monozghan and Dr. Byrne Solberg reveal cervical, thoracic and lumbar sprain and strain, brachial neuritis, disc herniations, cervical radiculopathy:

- a. Disc herniation at C2-3 and C3-4.
- b. Disc herniation at L2-3 and L5-S1.
- c. Disc protrusions at L3-4 and L4-5.
- d. Multiple cervical disc bulges.
- e. Cervical and lumbar strain and sprain.

9. The Defendant-Bar did not submit an Independent Medical Examination report.

10. The total claim for economic loss due to medical bills is \$13,843.00, was established by this Plaintiff.

11. The testimony of Mary Ellen Foley and Patricia Frye was credible and persuasive.

12. The non-economic losses of pain and suffering, loss of enjoyment of life's pleasures and aggravation of pre-existing injuries were established by this Plaintiff.

C. CONCLUSIONS OF LAW

1. A compulsory arbitration award may be challenged by a timely appeal to the Court of Common Pleas for a trial *de novo*. Stivers Temporary Personnel v. Brown, 789 A.2d 292 (Pa. Superior Ct. 2001).

2. In this case where the Default Judgment was entered in November, 2014 and no timely Petition to Open was filed, it became a final judgment. Accordingly, the proceeding before the Board of Arbitrators in May, 2015 was an Assessment of Damages hearing and not a trial on the merits. See generally, Kelly v Siuma, 34 A.3d 86, 92 (Pa. Superior Ct. 2011); US Bank N.A. v. Mallory, 982 A.2d 986, 995 (Pa. Superior Ct. 2009).

3. On February 18, 2016, this Court held a *de novo* Assessment of Damages hearing and not a trial on the merits.

4. The Defendant-Bar's failure to produce the surveillance video or disc entitles the finder of fact to infer that it would be unfavorable to the Defendant. See, Magette v. Goodman, M.D., 771 A.2d 775, 780-781 (Pa. Superior Ct. 2001), holding that although hospital personnel described what they saw on a missing EKG strip, the plaintiff was entitled to an adverse inference instruction.

5. Ms. Foley was a business invitee and was owed the highest degree of care on June 9, 2013.

6. The Bar owed Mary Ellen Foley a duty to take reasonable precautions against harmful third party conduct. See, Restatement (Second) of Torts, §344; Rabutino v. Freedom State Realty Co., Inc., 809 A.2d 933 (Pa. Superior Ct. 2002).

7. Although Defendant-Bar suggests that Ms. Foley failed to move to a different area of the bar, the testimony of Ms. Foley and Ms. Frye was clear that there was no safe path to move

and they were caught by surprise when the men fell onto them. Mirabel v. Morales, 57 A.3d 144, 154 (Pa. Superior Ct. 2012), holding that the “choice of ways” doctrine has a narrow application.

8. Plaintiff-Foley was not comparatively negligent.

D. CONCLUSION

For all of the reasons set forth above, and in consideration of Rule 1311.1(a) Stipulation, the Plaintiff Mary Ellen Foley is awarded **Twenty Five Thousand Dollars (\$25,000.00)**.

BY THE COURT:



FREDERICA A. MASSIAH-JACKSON, J.
3-9-16