

Documents Uncovered Mid-Trial Fuel \$51 Million Injury Verdict vs. SEPTA

Massiah-Jackson Holding Hearings on Discovery Sanctions



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[Tom Kline's](#) latest record-stretching verdict might inspire him to wish outgoing Mayor Edward Rendell had privatized mass transit in Southeastern Pennsylvania - so Kline's clients could be sure to see more than a fraction of the \$51 million a Philadelphia jury awarded them yesterday to punish SEPTA for its role in an escalator accident that tore a 4-year-old boy's foot from his leg.



But Kline has already taken steps to secure a recovery far beyond the statutory cap of \$250,000 per tort claim against commonwealth defendants. It's no longer just a tort case, Kline said; in the past few days it has been transformed into a civil rights case.

Half of the jury's award to Shareif Hall - \$25 million - was made to compensate him for SEPTA's violation of his civil rights, Kline said - and there's no cap on civil rights damages. He said that under current law, a minimum \$30 million of the award is collectible.

SEPTA is apt to contest that assertion, of course.

But Kline said the case merits the award because it brought to light a pressing public safety issue - the "deplorable" condition of the escalators in the transit agency's subway system - and he pointed to its outcome as "a verdict that is going to make a major difference in the lives of Philadelphians."

The courtroom drama that unfolded during the six-day trial in Judge Frederica A. Massiah-Jackson's courtroom has brought Hall's suit over the November 1996 accident, as Kline said, "far beyond a garden-variety tort case."

STATE-CREATED DANGER

A series of internal SEPTA documents including memoranda and accident reports produced enough evidence for Kline to amend his complaint to add a civil rights claim under the "state-created danger" theory.

Such a claim must rest on an allegation that the injury the plaintiff suffered at the state's hands was "foreseeable and direct" and that an agent of the state acted with deliberate indifference to or reckless or willful disregard of the harm that could ensue from a dangerous condition created by the state.

The documents Kline used to buttress his state-created-danger claim include:

* A memo dated May 5, 1994, stating that "the condition and maintainability of the [SEPTA subway system's] 27 escalators is poor and getting worse at an ever increasing rate."

* A report written 15 days before the accident stating that an escalator at the Cecil B. Moore station on the Broad Street Subway Line - where Hall's accident happened - had missed its annual safety inspection and that the chain that kept it moving needed to be repaired or "the escalator will not be safe to operate."

But Kline didn't amend his complaint to include the civil rights claim until several days into the trial. Massiah-Jackson allowed him to make the change at such a late date, he said, because he never knew those very damaging documents existed until he called SEPTA's director of safety and risk management, Russell Figueira, as a hostile witness during the trial.

DISCOVERY PROBLEMS

When Kline announced that he planned to call Figueira, he said, SEPTA suddenly came forward with an accident report bearing Figueira's signature. It had never been produced during discovery; Kline had been given only a "preliminary report," he said.

During Kline's cross-examination of him, Figueira referred to several more documents that had never been produced during discovery.

In an interview yesterday, Kline said he had quizzed Figueira: "Where does a lawyer like me find these papers?"

Figueira gave him detailed directions to his office, Kline said, and Massiah-Jackson ordered Figueira to go to his office and retrieve the file during the lunch recess.

Later, Kline moved to amend the complaint to add the civil rights claim he believed to be supported by the evidence he found in the canary-yellow file Figueira brought back to the courtroom on Massiah-Jackson's order. Massiah-Jackson granted the request.

"The case had already been proven," Kline said yesterday. "She essentially allowed the complaint to be amended to conform to facts already proven."

An appeal of Massiah-Jackson's decision to allow the amendment is expected, and the appeal is likely to be thoroughly litigated.

SANCTIONS HEARING

Massiah-Jackson has already begun a hearing to determine whether and how SEPTA should be sanctioned for the discovery violations, Kline said.

It will continue today.

According to Kline, SEPTA's deputy general counsel, Eileen Giordano Katz, yesterday gave testimony that could affect other cases currently being litigated against SEPTA - and perhaps some that have already been lost.

Katz, he said, testified that she never knew that a file on the accident was kept in the department of safety and risk management.

This revelation, Kline said, "puts into question all of the present cases in discovery now and past cases that may have been defeated" because the agency's safety and risk management department possibly contains a cache of files that were never subject to discovery before because SEPTA's lawyers did not know they existed.

The Legal was unable to contact SEPTA's attorneys before press time yesterday. Further coverage of the sanctions hearing and Massiah-Jackson's findings and conclusions will follow in later editions of the paper.

THE AWARD

The revelation of the undiscovered documents, Kline said, occurred right in front of the jury - and their verdict indicates that the panel was angered by the contents of the yellow folder.

The case was a gruesome one, and the plaintiffs - a 4-year-old boy and his mother, who watched as her son's foot was ground off by the escalator - were sympathetic.

Kline said that when workers finally arrived to shut the escalator off, they descended into it and found "Shareif's little black boot with the shoestring still tied" - one of SEPTA's defenses was that the untied shoelace had caused the accident. His foot was still in it.

The boy was rushed to Children's Hospital, and an operation to reattach the foot was considered, Kline said, but the damage to the limb was too severe.

Kline said that he told the jury SEPTA "had never so much as offered to pay [Shareif's mother] \$65 to replace his little FILA boot, and he asked them to make sure that whatever they awarded Deneen Hall, it ended in the number 65.

The jury returned with a verdict of \$1 million plus \$65 on the mother's emotional distress claim.

The rest of the total was comprised of \$25 million to Shareif on the civil rights claim and \$25 million on the personal injury claim, Kline said.

According to Kline, existing case law mandates that SEPTA pay delay damages on the entire verdict, despite the cap - that works out to about \$4 million on Shareif's tort claim and \$1 million on his mother's. He also said he intends to argue that the cap itself is unconstitutional.

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