IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 13, 2001 Session

ROBERT PERRY, ET AL. v. WINN-DIXIE STORES, INC.

Appeal from the Circuit Court for Knox County
No. 1-207-97 Dale C. Workman, Judge

FILED FEBRUARY 28, 2002

No. E-2001-00523-COA-R3-CV

This lawsuit was filed by Robert Perry ("Plaintiff") against Winn-Dixie Stores, Inc. ("Defendant"). The Trial Court excluded the testimony of Plaintiff's treating physician, presented by deposition at trial, pertaining to expenses for medical treatment provided by other physicians. The basis for this ruling was lack of a proper foundation. Plaintiff claims Defendant's trial objection to lack of proper foundation was waived because it was not made during the doctor's deposition. After the jury returned its verdict, the parties continued to negotiate a settlement in lieu of Plaintiff's filing an appeal. The amount of the judgment, $15,300.00 after the verdict was reduced pursuant to comparative fault principles, was deposited by Defendant's counsel with the Trial Court and later withdrawn by Plaintiff's counsel. After the original defense attorney moved out of state and the case was assigned to new defense counsel, Defendant offered and Plaintiff accepted $20,000.00 in full and final settlement of the claim. A disagreement later arose as to whether this settlement offer was $20,000.00 in "new money" or whether it included the $15,300.00 already paid by Plaintiff. Plaintiff filed a motion to enforce the settlement agreement claiming he was offered and accepted $20,000.00 in "new money." The Trial Court denied enforcement after concluding, among other things, that there was no meeting of the minds. Plaintiff appeals the evidentiary ruling excluding portions of his medical expenses, as well as the denial of his motion to enforce the settlement agreement. We affirm on both issues.

Tenn. R. App. P. 3 Appeal As of Right; Judgment of the Circuit Court Affirmed; Case Remanded.

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and CHARLES D. SUSANO, JR., J., joined.

Rufus W. Beamer, Jr., Knoxville, Tennessee, for the Appellants Robert and Lorene Perry.

Douglas L. Dutton and Kristi M. Davis, Knoxville, Tennessee, for the Appellee, Winn-Dixie Stores, Inc.

OPINION

Background

This lawsuit arises from Plaintiff's fall in Defendant's store which resulted in personal injury to Plaintiff. There are two issues on appeal. The first issue as stated by Plaintiff is whether the Trial Court erred "in excluding nearly half of the Plaintiff's medical expense evidence by sustaining an objection based on improper foundation which was not made at the deposition taken for proof?" The second issue involves whether a post-trial offer of settlement made by Defendant's counsel is enforceable in accordance with Plaintiff's understanding of the terms of that offer.

While discovery was proceeding and well before trial, Plaintiff served a Notice of Medical, Hospital, or Doctor Bills on Defendant seeking to rely on the presumption created by Tenn. Code Ann. § 24-5-113. The medical bills itemized in this Notice totaled $19,449.22. Defendant responded to the Notice, stating that it was "unclear to defendant whether all of these medical bills are causally related to plaintiff's fall" at the store. According to Defendant, the deposition of Dr. Stephen Natelson cast doubt on whether certain medical treatment was casually related to the accident. Plaintiff later filed a Request to Admit seeking Defendant's admission that all of Plaintiff's medical bills were related to the claimed injury. Defendant generally denied that these medical bills were causally related to the injury.

Approximately 1½ months prior to the trial, Dr. Steven Weissfeld ("Weissfeld") was deposed. The parties stipulated at the beginning of the deposition that: "All objections except to the form of the questions are reserved to on or before the hearing." As pertinent to this appeal, Weissfeld acknowledged that Plaintiff had been treated by other physicians after falling at Defendant's store, including Dr. Mardini, Dr. Natelson, Dr. Fardon, Dr. Norwood, and Dr. Bergia. After Weissfeld detailed the treatment he provided to Plaintiff as well as his opinion as to Plaintiff's permanent physical impairment, the following dialogue took place between Plaintiff's counsel and Weissfeld discussing the treatment Plaintiff received from other physicians:

> Q. Then let me show to you what I showed to you earlier, which is a cover sheet and some summaries in the back of a document for medical expenses.
>
> A. Right
>
> Q. And you have looked at those earlier, have you not?
>
> A. Yes.
>
> Q. And are familiar with this patient's history as to all those medical providers and charges; is that correct?
>
> A. Correct.

Q. Do you find those to be reasonable and necessary as it relates to Mr. Perry's condition in this accident?

A. Yes, I do.

MR. DIXON: All right. We would ask that that top sheet be filed as the next exhibit.

MR. LONG: I will object just to the hearsay nature of it.

MR. DIXON: All right. . . . That's all I have.

A jury trial was conducted on September 30, 1999. During the course of the trial, Weissfeld's deposition was read to the jury for Plaintiff's medical proof. At trial, Defendant objected to the above testimony on the basis that a proper foundation had not been laid with regard to Weissfeld's testimony about the medical treatment provided by other health care providers. The Trial Court sustained the objection and excluded from evidence the medical bills of the other providers. As a result, Plaintiff was able to introduce to the jury only $11,523.00 of the claimed $19,949.22 in medical bills. The jury found Plaintiff's damages to be $30,000.00. The jury allocated 51% of the fault to Defendant and the remaining 49% to Plaintiff. Applying comparative fault allocation, Plaintiff was awarded a total judgment of $15,300.00, plus costs.

Plaintiff filed a post-trial motion to alter or amend the judgment claiming the evidentiary ruling was in error. Alternatively, and in lieu of a new trial, Plaintiff requested an additur to the verdict which would reflect a judgment in accordance with the entire amount of his medical expenses. This motion was denied.[1] During oral argument at trial on Defendant's objection, the following discussion occurred:

MR. DIXON: The objection that was made following the filing of Exhibit 1 was, "I will object just to the hearsay nature of it." Now, the objection that has been raised today is as to the form of the question, as I understand it.

THE COURT: No, it was not just the form of the question. The objection she raised is that the record does not show he is qualified to know the reasonableness and necessity of those other specialties not his, or other areas of practice. It was not a form of the question objection.

[1] Plaintiff did file a supposed curative affidavit of Weissfeld post-trial. On appeal, however, Plaintiff does not claim the Trial Court abused its discretion in overruling this post-trial motion or otherwise failing to consider the contents of this affidavit.

> MR. DIXON: All right, I understand. I wanted to be sure I understood the ruling. I submit that it is, your Honor, and that it's waived by not being raised. And the fair implication of his question and answer being familiar with the patient's history, "Do you find those to be reasonable and necessary," fairly implies that he is knowledgeable as to those areas.
>
> THE COURT: But what he was not asked is what you raised in that line of cases, that when we start getting doctors saying, "Well, I know –" and testifying about other's bills and the amounts of them and whether they are necessary or not, the court says that a doctor, not in his field, can testify if he testifies he is familiar with the reasonable and necessary charges and the reasonable and necessary treatment of another specialist, he can testify to it.
>
> The objection is that the groundwork wasn't laid. For instance, $4,000 worth of prescriptions. It doesn't say anything about what the prescriptions were, who prescribed them, or what, he says they are reasonable and necessary. There is no groundwork what he knew, if anything, about $4,000 worth of prescriptions.
>
> MR. DIXON: But there is, your Honor. He was asked a specific question –
>
> * * * *
>
> THE COURT: But he was asked "are you familiar with his condition." He was never asked are you familiar with what services have been rendered. You never asked "are you familiar with what services are rendered by people of the various areas such as Dr. Bergia." He was never asked, "Are you familiar with what persons in that field in this community would normally charge for those types of services." If he's done that, then he could testify to it. You just asked, are you familiar with the condition, are you familiar with the charges, and are they reasonable and necessary; lacks the predicate groundwork.

In denying Plaintiff's post-trial motion, the Trial Court affirmed the above ruling made at trial that this medical proof was properly excluded because Plaintiff did not establish a proper foundation for this testimony pursuant to *Long v. Mattingly*, 797 S.W.2d 889 (Tenn. Ct. App. 1990).

After the denial of the post-trial motion, counsel undertook settlement negotiations in an attempt to resolve the lawsuit in lieu of an appeal. What happened during the course of these negotiations gave rise to Plaintiff's second issue on appeal. Plaintiff claims a settlement agreement

was reached wherein Defendant offered to settle for $20,000.00 in "new money", i.e., in addition to the $15,300.00 Plaintiff already had received. Defendant claims, on the other hand, that it offered to settle for a total amount of $20,000.00, which would include the $15,300.00 already paid. Plaintiff filed a motion seeking to enforce the alleged settlement agreement according to his understanding of what that offer was. Defendant opposed the motion, claiming, at a minimum, that there was a unilateral or mutual mistake and Plaintiff was not entitled to enforcement.

A hearing was held on Plaintiff's motions. Because Plaintiff's counsel ("Dixon") was a witness, Plaintiff was required to obtain new counsel for that portion of the proceedings and on appeal. In any event, during the hearing, Dixon admitted it was "true" he did not lay a proper foundation for the testimony of Weissfeld which had been excluded. He nevertheless maintained that the successful objection was improper under the Tennessee Rules of Civil Procedure because it was not made during the deposition. With regard to the settlement negotiations, Dixon testified that after the trial and while the post-trial motions were pending, Defendant's counsel, Beth Townsend ("Townsend"), obtained a check for the amount of the judgment ($15,300.00) and deposited same with the court clerk. Dixon later withdrew and disbursed the funds. Townsend at some point moved out of state, and the defense of the case was undertaken by David Long ("Long"), who also was a witness at the hearing.

By letter dated February 9, 2000, Dixon made a settlement demand in writing seeking to settle the case for a total of $35,000.00. In the letter, Dixon acknowledged already receiving $15,300.00, which made the demand for "new money" to be $19,700.00. Further discussions regarding settlement took place. After Plaintiff's post-trial motions were overruled, Dixon sent Long a letter dated March 14, 2000, indicating that he intended to file an appeal. In that letter, Dixon stated: "The last time we talked you stated that your client was not willing to pay more than $20,000, including what has already been paid, to settle the case. . . ." Dixon testified that at this point in time, it was his understanding that Defendant would not pay any more than $20,000.00 to settle the case, minus what had already been paid. In other words, Defendant would not pay more than $4,700.00 in "new money." Long then verbally communicated a settlement offer to Dixon via Dixon's legal assistant. Dixon testified that his assistant said the offer was for "an additional $20,000.00, and I argued with her a little bit. I said, 'Oh, that can't be right . . . . But I'll call David.'" Several days later, Dixon then sent a letter to his client, which we quote in relevant part:

> Mr. Long called a week or so ago indicating Winn Dixie was not willing to pay more than $20,000.00 to resolve the case. I asked him if this included the $2,000 [in discretionary costs] which was already owed. He said he had forgotten about that, and did not know. I told him to find out before I bothered to convey the offer to you.
>
> I then received another telephone message on March 15th which is not entirely clear. It says he is also sending me a letter which I have not received, but says his client will pay the $2,000 discovery costs and an additional $18,000 for a total of $20,000, while the note does not say this, I am sure that means credit for the

> amount already paid. That means they are only offering the difference between what we have collected and the gross sum of $20,000. This would be less than $5,000. . . .

After the above letter was sent to his client, Dixon testified he had a conversation with Long which lead Dixon to believe that his client was being offered $20,000.00 in "new money" to settle the case. Dixon then received a letter from Long dated March 23, 2000, offering the $2,000.00 in discretionary costs plus an additional $18,000.00 "for a total of Twenty Thousand Dollars ($20,000.00) in full and final settlement of this matter." Dixon took this to mean $20,000.00 in "new money", and accepted the offer. Dixon never explained to the Trial Court why he believed Defendant would offer $20,000 of "new money" when Plaintiff's February 9, 2000, settlement demand letter asked for only $19,700.00 of "new money." Dixon then received a call from Long indicating that a mistake had been made, that Long had not realized that $15,300.00 already had been paid into court, and that the offer was for $20,000.00, less the $15,300.00 already paid, for a total of $4,300.00 in "new money." Dixon later called Long to let him know he would be filing a motion to enforce his interpretation of the settlement agreement. Dixon told Long that:

> I do accept that you didn't know the judgment had been paid; and I can see how that can happen, since the lawyers changed and she didn't tell you or you didn't look deeply in the file.
>
> And I have no doubt that you didn't know that, and I had no doubt that you didn't know I'd withdrawn the money from court.…

After acknowledging that Long did not know that the $15,300.00 had been paid into Court and withdrawn by Plaintiff, Dixon went on to state that:

> [W]hen that offer was made, apparently Mr. Long and apparently Ms. Hairston didn't realize that that money represent[ing] the judgment had already been paid.
>
> And that's when I began to think about the possibility of filing this motion … when I learned the nature of the mistake that had been made, and thought that legally I had a fair chance of enforcing the settlement agreement.

Long testified that during the course of these settlement negotiations, Dixon indicated that his client would perhaps settle for a total of $30,000.00, to which Long responded: "I told him on several occasions that my client was not going to pay anywhere near $30,000.00 to settle the case." Long testified he offered $20,000.00 in total to settle the case, and was unaware that the $15,300.00 already had been paid. Long testified that his authority to settle the case "was always $20,000 on the whole case and nothing else." When Dixon accepted the offer of $20,000.00, Long informed the adjuster on the file, who indicated she would have a check processed for $4,700.00. Long inquired about that figure, and learned for the first time that $15,300.00 already had been paid

into court. Long then called Dixon about the withdrawal of the $15,300.00. Long told Dixon he did not know that money had been deposited with the Court and dispersed. Long testified Dixon then said he had been aware since the hearing on the motion for new trial and/or additur that Long did not know of the disbursement. Long then stated he would send a check for $4,700.00. Dixon said he wanted $20,000.00, and then "went into a tirade that he was tired of defendant lawyers screwing him … [and] it was his turn now to send a message to the defense lawyer and to the insurance companies."

The Trial Court denied Plaintiff's motion to enforce the settlement agreement. The Trial Court held there was no meeting of the minds as to what was being offered and therefore it could not be enforced under general contract principles. The Trial Court also concluded there had been a unilateral mistake which "went to the heart" of the settlement itself. According to the Trial Court, there was an ambiguity in Long's letter offering the $20,000.00, with the ambiguity centering around whether that amount was "new money" or the total amount to be paid by Defendant. A judgment was entered in accordance with the Trial Court's conclusion. Plaintiff appeals the Trial Court's exclusion of the portion of Weissfeld's testimony described above, as well as the decision that the settlement agreement as interpreted by Plaintiff was not enforceable.

Discussion

A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. *See Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

With regard to the exclusion of portions of Weissfeld's testimony, Plaintiff argues that since Defendant made no objection to lack of foundation during the deposition, that objection could not be made at trial. While Plaintiff discusses the case of *Long v. Mattingly*, 797 S.W.2d 889 (Tenn. Ct. App. 1990) in his brief, he does not argue that the criteria set forth in that case were actually met. This is consistent with his counsel's statement at the hearing before the Trial Court wherein he admitted it was true that a proper foundation had not been established. Accordingly, we need not address whether the criteria set forth in *Long v. Mattingly* were met and will limit our discussion to whether Defendant was precluded from making the objection as to lack of foundation.

Plaintiff relies on Tenn. R. Civ. P. 32.04(3)(A) which provides:

> **32.04 Effect of Errors and Irregularities in Depositions**.–
>
> (3) As to Taking of Deposition.– (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

Plaintiff claims that if the objection had been made at the deposition, he could have cured any defect in the foundation. Relying on the language in Rule 32.04, Plaintiff claims that Defendant's objection to the foundation for this testimony was waived. What this argument ignores is that at the start of Weissfeld's deposition, the parties, by and through their attorneys, expressly stipulated that: "All objections except to the form of the questions are reserved to on or before the hearing." The Trial Court properly concluded that the objection made at trial was not to the form of the question. Plaintiff expressly stipulated that the type of objection which Defendant made at trial was reserved for trial. To accept Plaintiff's argument would require us to completely ignore the express stipulation the parties made at the deposition. This we will not do. Stipulations are agreements between counsel regarding business before the court which are entered into mutually and voluntarily between the parties. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 701 (Tenn. Ct. App. 1999). While parties may not stipulate to questions of law, they may stipulate "within the range of possibly true facts and valid legal strategies …." *Id.* On appeal, stipulations are binding on the parties and may not be altered. *Id*. at 702 (citing *Bearman v. Camatsos*, 215 Tenn. 231, 236, 385 S.W.2d 91, 93 (1964); *First Southern Trust Co. v. Sowell*, 683 S.W.2d 680, 681 (Tenn. Ct. App. 1984)). The stipulation entered into between the parties involved a valid legal strategy and is the type of stipulation allowed under the law. It is, therefore, binding upon the parties. We hold that the stipulation permitted Defendant to make an objection at trial regarding whether a proper foundation had been laid for the introduction of Weissfeld's testimony as to treatment by and medical expenses of other physicians. Plaintiff cannot use the Rules of Civil Procedure as a shield to ward off an objection which he expressly stipulated was reserved for trial. The judgment of the Trial Court on this issue is affirmed.

The second issue on appeal is Plaintiff's claim that the Trial Court should have enforced the settlement agreement according to his understanding of what that agreement encompassed (i.e. $20,000.00 in "new money"). In resolving this issue, the Trial Court concluded there were several reasons why Plaintiff's motion to enforce the settlement agreement must fail, one of which was there was no meeting of the minds.

In *Sweeten v. Trade Envelopes, Inc.*, 938 S.W.2d 383 (Tenn. 1996), our Supreme Court observed that:

> "A settlement agreement is merely a contract between the parties to the litigation.... As such, the formation, construction, and enforceability of a settlement agreement is governed by local contract law." *Carr v. Runyan*, 89 F.3d 327, 331 (7th Cir. 1996). Under general principles of contract law, a contract "must result from a meeting of the minds of the parties in mutual assent to the terms." *Higgins v. Oil, Chemical & Atomic Workers*, 811 S.W.2d 875, 879 (Tenn. 1991) (quoting *Johnson v. Central Nat'l Ins. Co.*, 210 Tenn. 24, 34-5, 356 S.W.2d 277, 281 (1962)). "It is fundamental that a contract is enforceable only to the extent that it is assented to by the parties." *State v. Clements*, 925 S.W.2d 224, 227 (Tenn. 1996).

Sweeten, 938 S.W.2d at 385, 386.

In resolving the factual issues presented for appeal, we must keep in mind that the Trial Court heard the conflicting testimony from the witnesses regarding their intent during the settlement negotiations and what was said by these attorneys. "Unlike this Court, the trial court observed the manner and demeanor of the witnesses and was in the best position to evaluate their credibility." *Union Planters Nat'l Bank v. Island Mgmt. Auth., Inc.*, 43 S.W.3d 498, 502 (Tenn. Ct. App. 2000). The trial court's determinations regarding credibility are accorded considerable deference by this Court. *Id.*; *Davis v. Liberty Mutual Ins. Co.*, 38 S.W.3d 560, 563 (Tenn. 2001). "'[A]ppellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary.'" *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

According to Dixon's testimony, he believed Plaintiff was offered $20,000.00 over and above the $15,300.00 already paid. On the other hand, Long testified that at no time did he ever have any settlement authority in excess of $20,000.00 total in which to settle the whole case. This fact is not changed because Long was unaware that $15,300.00 had already been paid to Plaintiff. If anything, this lack of knowledge reinforces Long's testimony that the offer he made was to settle the case for $20,000.00 total. If he was unaware that $15,300.00 already had been paid, he could not have intended for the offer of $20,000.00 to be in addition to the $15,300.00. We find no reversible error in the Trial Court's conclusion that there was no meeting of the minds with regard to what was offered in the settlement negotiations, and affirm the Trial Court's conclusion on this issue. Because we affirm the Trial Court's conclusion that there was no meeting of the minds, we need not address whether the settlement offer was unenforceable for the other reasons which the Trial Court found precluded enforceability as well.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the Appellants, Robert and Lorene Perry, and their surety.

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D. MICHAEL SWINEY, JUDGE