

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
ASSIGNED ON BRIEF JULY 14, 2003

JOANNE HUNTER, ET AL. v. RICKY JACKSON

**Direct Appeal from the Circuit Court for Tipton County
No. 4924 Joseph H. Walker, Judge**

No. W2002-02857-COA-R3-CV - Filed August 26, 2003

The Plaintiffs appeal the judgment of the trial court contending that the award of compensatory damages was inadequate and that the trial court erred in failing to award punitive damages. Plaintiffs further contend the trial court erred in failing to award the full amount of their discretionary costs. We affirm the award of damages and modify the order of the trial court to the extent that Plaintiffs are awarded the full amount of their discretionary costs.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as
Modified; and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Jeffrey L. Stimpson, Munford, Tennessee, for the Appellants, Joanne Hunter and husband, Robert Hunter.

William C. Cole, Millington, Tennessee, for the Appellee, Ricky Jackson.

OPINION

This action results from a confrontation between plaintiff Joanne Hunter and her former husband, the defendant, Ricky Jackson. The complaint alleges that on December 23, 1994, Defendant assaulted Ms. Hunter in the parking lot of a shopping center. It is alleged that she sustained permanent injury to the head, neck, back, shoulders, extremities and the entire central nervous system, great fright and shock, great physical pain and suffering, both past and future, great mental anguish, medical expenses, past and future, loss of earning capacity and/or wages both past and future, and permanent physical disfigurement. Ms. Hunter sought to recover compensatory and punitive damages and Mr. Hunter sought to recover for loss of consortium. The defendant denied the material allegations set forth in the complaint.

Following a bench trial, the trial court awarded judgment in favor of Ms. Hunter in the amount of \$1,500 and Mr. Hunter in the amount of \$250. The court found that this was not a proper case for punitive damages.

The plaintiffs filed a timely notice of appeal and present the following issues for our review:

- I. Whether the trial court erred in awarding Plaintiffs an excessively low amount of compensatory damages.
- II. Whether the trial court erred in finding that Plaintiffs were not entitled to an award of punitive damages.
- III. Whether the trial court erred in failing to award Plaintiffs the amount of discretionary costs requested by motion after the trial.

Our review of findings of fact by the trial court is *de novo* upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Rule 13(d) Tenn. R. App. P. Our review of issues of law is *de novo*, with no presumption of correctness attached to the determinations of the trial court. *See Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

Ms. Hunter and Mr. Jackson were formerly husband and wife, having divorced in 1982. Both subsequently remarried. Ms. Hunter testified that on the date in question she was walking across the parking lot of a shopping center with her two children when she heard the present Ms. Jackson yell out “there she is.” Mr. Jackson was standing near his wife. Ms. Hunter then approached Mr. Jackson and asked him why his wife was harassing her. She testified that Mr. Jackson then struck her with his hand on both sides of the face. Mr. Jackson testified that Ms. Hunter approached him and his wife and pointed her finger in his face. He asked her to leave him alone and stated that he did not want to talk to her. He then admitted slapping her. He then went directly to the local police department to report what had happened.

With respect to the first issue, Plaintiffs contend that the trial court’s award was woefully inadequate considering the extent of Ms. Hunter’s injuries and her medical bills. Ms. Hunter was seen by Dr. Regina Lindsey, a medical doctor specializing in general practice, on December 27, 1994. Dr. Lindsey testified by deposition that she examined Ms. Hunter on that date. The patient was complaining of pain in her head, neck and back from having been assaulted four (4) days previously. Dr. Lindsey’s diagnosis was cervical strain and contusions to the face. That was the only office visit and Dr. Lindsey opined that she expected it would be at least five (5) days before Ms. Hunter was back to reasonably normal function. She testified that she did not prescribe a cervical collar as she would for someone with a severe whiplash injury. X-rays revealed no bony abnormalities. Dr. Lindsey’s bill for the office visit and x-rays totaled \$97.

Ms. Hunter was seen by Dr. R. Alan James, a chiropractor, on January 19, 1995. He conducted an examination on that date and found that the range of motion in the cervical spine was limited to a mild degree. He noted muscle spasm. The patient was seen again by Dr. James on January 28, February 1, February 4, February 17, March 11, March 24, April 18, May 13, June 3, July 29, August 5, September 15, October 25, November 24, December 13, 1995, January 12, February 7, March 9, 1996. He described her injury as a lateral whiplash. He opined that Ms. Hunter had not suffered any permanent physical impairment relating to the injury of December 23, 1994. Dr. James' bill for services was \$820.

Ms. Hunter argues that the trial court's award was inadequate considering the amount of her medical bills in comparison with the award for her injuries. However, as pointed out in the appellants' brief, as of the date of trial, Mr. Jackson had paid \$414 of Ms. Hunter's medicals. A determination concerning the amount of damages is factually driven and the amount of damages is essentially a fact question. *Beaty v. McGraw*, 15 S.W.3d 819, 827 (Tenn. Ct. App. 1998). Having conducted a *de novo* review of this record, we do not find the evidence to preponderate against the trial court's award of \$1,500 for Ms. Hunter and \$250 for Mr. Hunter.

Ms. Hunter contends that the trial court was in error in failing to award her punitive damages. It is not disputed that Mr. Jackson struck Ms. Hunter, thus entitling her to an award for compensatory damages. He admitted his actions and immediately went to the local police department to report the incident. Punitive damages may be awarded in cases involving only the most egregious of wrongs. Punitive damages may be awarded in this jurisdiction only if a court finds a defendant has acted either intentionally, fraudulently, maliciously or recklessly. *See Hodges v. S.C. Toof*, 833 S.W.2d 896, 901 (Tenn. 1992). *Hodges* further instructs us that "the primary purpose of a punitive award is to deter misconduct, while the purpose of compensatory damages is to make plaintiff whole." *Id.* at 902. A plaintiff seeking to recover punitive damages must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence. *Id.* at 901. The award of punitive damages is within the discretion of the trial court. *Lock v. Nat'l Union Fire Ins. Co.*, 809 S.W.2d 483, 490 (Tenn. 1991); *Foster v. Jeffers*, 813 S.W.2d 449, 454 (Tenn. Ct. App. 1991). Ms. Hunter testified that during the eight (8) years she was married to Mr. Jackson and the time subsequent thereto, there had never been any physical confrontation between them. She testified that Mr. Jackson was not a violent person. Based upon our review of this record, we do not find the trial court to be in error for failing to award punitive damages.

Plaintiffs filed a post trial motion for discretionary costs supported by an itemized and verified bill of costs pursuant to Rule 54.04(2) Tenn. R. Civ. P., which provides as follows:

Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, reasonable and necessary interpreter fees for dispositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs. Subject to Rule 41.04, a party requesting discretionary costs shall

file and serve a motion within thirty (30) days after entry of judgment. The trial court retains jurisdiction over a motion for discretionary costs even though a party has filed a notice of appeal. The court may tax discretionary costs at the time of voluntary dismissal.

The itemized bill of costs states:

1. COURT REPORTER'S CHARGES.

<u>DATE</u>	<u>DESCRIPTION</u>	<u>CHARGE</u>
09/29/99	Depo. Ricky Jackson	\$ 37.50
03/13/00	Depo. Judy Max	80.00
08/11/00	Depo. R. Alan James Transcript	241.40
09/19/01	Transcript of Ricky Jackson, Joanne Hunter and Robert Hunter	337.90
03/12/01	Depo. & transcript of Dr. Regina Lindsey	154.00
01/09/02	Transcript depo of Judy Max	95.20
08/22/02	Court reporter for trial	200.00

2. PLAINTIFF'S EXPERTS.

<u>DATE</u>	<u>DESCRIPTION</u>	<u>CHARGE</u>
08/11/00	Deposition of R. Alan James, D.C.	\$ 250.00
01/30/01	Deposition of Dr. Regina Lindsey	350.00
Total		\$1,746.00

The trial court awarded Plaintiffs one-half the court reporter costs (\$573) and Dr. James fee (\$250) for a total of \$823. Plaintiffs concede that the award of such costs is a discretionary matter with the trial court. *See Lock*, 809 S.W.2d at 490; *Hodges v. S.C. Toof*, 833 S.W.2d 896, 902 (Tenn. 1992).

Plaintiffs argue that the trial court's failure to award them the full amount of their costs was an abuse of discretion because the court took into consideration a statement by opposing counsel when, at argument on Plaintiffs' motion, counsel advised the court that the amount offered to settle prior to trial was greater than the amount of the trial court's award. A transcript of that court proceeding is not in the record before this Court. However, the trial court's order does include the following language: "Negotiations towards settlement of the civil case were unsuccessful; however the judgment was less than the offer." Plaintiffs argue that the Defendant failed to make an offer of judgment pursuant to Rule 68 Tenn. R. Civ. P.¹

In reviewing the exercise of the trial court's discretion, this Court considers (1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. See *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Decisions to award these costs are, by the very wording of the rule, discretionary. Therefore, this Court applies a deferential standard when reviewing decisions either to award or to deny discretionary costs. The party is not automatically entitled to discretionary costs simply because it prevails. See *Scholtz v. S.B. Int'l, Inc.*, 40 S.W.3d 78, 82 (Tenn. Ct. App. 2000).

In reviewing the order of the trial court denying the motion for discretionary costs, the only basis stated for denial is that negotiations towards settlement were unsuccessful and the judgment was less than the offer. As heretofore stated, no offer of judgment was made by the Defendant and we do not believe that trial counsel's statement to the court that the judgment awarded was less than the offer should properly be considered in determining the assessment of the awarding of discretionary costs. Therefore, the order of the trial court is modified to include an award of discretionary costs to the Plaintiffs in the amount of \$1,746. The judgment of the trial court is otherwise affirmed and this cause is remanded for such further proceedings as may be necessary.

Costs of this appeal are taxed one-half to the appellants, Joanne Hunter and Robert Hunter and their surety, and one-half to defendant, Ricky Jackson.

DAVID R. FARMER, JUDGE

¹The essence of Rule 68 is that a party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay all costs accruing after the making of the offer.