IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT KNOXVILLE

FILED

March 15, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STACY P. JARRETT HARVEY and HOID QUARLES,	)	
Plaintiffs/Appellees,	)	**Hamilton Circuit No. 92CV0551**
VS.	)	**Appeal No. 03A01-9505-CV-00277**
ANDREW GUY FULMER and RHETT BUTLER TRUCKING, INC.,	)	
Defendants/Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF HAMILTON COUNTY
AT CHATTANOOGA, TENNESSEE
THE HONORABLE ROBERT M. SUMMITT, JUDGE

JOHN T. RICE
Chattanooga, Tennessee
Attorney for Appellants

CLAYTON M. WHITTAKER
Chattanooga, Tennessee
Attorney for Appellee Stacy P. Jarrett Harvey

AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

Plaintiff-Appellee, Stacy P. Jarrett Harvey,[1] sued Defendants-Appellants, Andrew

[1]At the time of the accident, Ms. Harvey was driving an automobile owned by her father, Hoid Quarles. Mr. Quarles' claim for property damage to his automobile was settled and his claim was dismissed.

Guy Fulmer and Rhett Butler Trucking, Inc., for injuries sustained in an automobile accident which occurred in Hamilton County, Tennessee. The lower court directed a verdict against the Appellants on the issue of liability and sent the case to the jury on the issue of damages only. The jury returned with a verdict of $40,000 in favor of Ms. Harvey. The trial court overruled Appellants' Motion for a New Trial and Remittitur. This appeal followed.

The automobile accident which gave rise to the present suit occurred on March 7, 1991. At the time of the accident, Fulmer was driving southbound on I-75 in a 1983 International 18 wheel tractor-trailer truck. Ms. Harvey entered I-75, also traveling southbound, in a 1981 Pontiac Lemans. She looked through her left window to see whether there was any oncoming traffic. She saw Mr. Fulmer's truck in the distance behind her. Harvey stated that she entered the expressway in the right hand lane and did not change lanes. She alleges, and Appellants do not dispute, that Fulmer moved into the right hand lane, damaging Harvey's car where the lug nuts of his front drive wheel made contact with the left front well of her automobile.

Both parties pulled off the interstate after the accident. Harvey stated that she did not feel hurt, just upset. She went to work later that day, but left at 5:00 p.m., complaining of headache and nausea. Harvey saw her personal physician, Dr. Drake, that night. The next day Ms. Harvey visited Chiropractor Methvin, in Atlanta. Plaintiff continued to see Dr. Methvin until July, 1991. In November, 1991, Harvey came under the care of Chiropractor Lindsay Hathcock. She quit seeing Chiropractor Hathcock in early 1992 due to pregnancy. Ms. Harvey had a child on June 16, 1992. She began seeing Chiropractor Ronald Free two weeks later and continued to see him until December, 1993. At the advice of Chiropractor Free, Harvey began seeing Dr. Walter King in October, 1992. Dr. King gave Harvey a 10% permanent impairment rating.

At trial, Harvey sought damages for an alleged 509 days of work missed and $19,700 in wages lost as a result of the accident. Although there was some evidence that

she missed work due to family considerations, the majority of the proof showed that her inability to work was due to pain and sleeplessness caused by the accident. Ms. Harvey also sought damages for medical expenses related to the accident and for past and anticipated pain and suffering.

Appellants present seven issues on appeal. The first issue is whether the trial court erred in failing to allow each Appellant four peremptory challenges, for a total of eight challenges, as permitted by T.C.A. § 22-3-105(b) (Michie 1994). That statute provides:

> In the event there is more than one (1) party plaintiff or more than one (1) party defendant in a civil action, four (4) additional challenges shall be allowed to such side or sides of the case; and the trial court shall in its discretion divide the aggregate number of challenges between the parties on the same side which shall not exceed eight (8) challenges to the side, regardless of the number of parties. Even when two (2) or more cases are consolidated for trial purposes, the total challenges shall be (8), as herein provided.

In Tuggle v. Allright Parking Systems, Inc., No. 02A01-9306-CV-00136, 1994 WL 587081 (Tenn. App. W.S. Oct. 18, 1994), *perm. to app. granted*, Jan. 30, 1995, this Court considered the effect of a trial court's failure to allow a party the number of peremptory challenges permitted by statute. We stated: "[W]here plaintiffs were affirmatively denied the number of peremptory challenges to which they were entitled by statute, a new trial must be granted." Id. at *2. However, Tuggle does not change the longstanding rule that in order to object to a trial court's failure to grant the proper number of peremptory challenges, the party must first request additional challenges and be denied. Mfg. Co. v. Morris, 105 Tenn. 654, 58 S.W.2d 651 (1900). In the present case, the record is devoid of any evidence that Appellants' counsel affirmatively requested an additional challenge.

Counsel for both the Appellants and the Appellee refer to the fact that Appellants' counsel mentioned his right to four additional challenges at an unrecorded bench conference. As counsel for the Appellee states, this Court has no way of knowing whether Appellants failed to receive the appropriate number of challenges, or whether counsel for the Appellants merely failed to properly request the additional challenges. The only reference to Appellants' alleged request for additional challenges is in Appellants' Motion

for a New Trial. There is no record of Appellants' request for additional challenges in the actual transcript of the proceedings.

This Court may only review matters that appear in the record. Richmond v. Richmond, 690 S.W.2d 534, 535 (Tenn. App. 1985). It is well settled that "a motion for a new trial is a pleading and it is not evidence of what occurred on the trial." Koehn v. Hooper, 193 Tenn. 417, 246 S.W.2d 68 (Tenn. 1952) (citations omitted). Accordingly, statements of counsel contained in the Motion for a New Trial may not be reviewed by this Court on appeal. We hold that on the record before us, the trial court did not err in failing to allow Appellants four additional peremptory challenges.

Appellants' second issue presented is whether the trial court erred in not granting Appellants a new trial as a result of affirmative jury misconduct. Appellants argue, based on a juror's affidavit, that the jury's verdict was influenced by Juror #79's comments about his personal experiences with pain.

Before this Court may consider whether alleged jury misconduct occurred, we must have competent evidence on that issue. Affidavits concerning jury deliberations are admissible only in limited circumstances, as defined by Tenn. R. Evid. 606(b) (Michie 1995), which states:

> Inquiry into the Validity of Verdict or Indictment. -- Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotion as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

In Caldararo v. Vanderbilt University, 794 S.W.2d 738 (Tenn. App. 1990) this Court

considered whether the alleged misconduct of Mr. Hicks, the jury foreman in that case, contaminated the verdict. Caldararo involved alleged malpractice on the part of Caldararo's nurses. Mr. Caldararo, who was a chronic, insulin-dependent diabetic, went to the hospital to receive treatment for an infection in his foot. Id. at 740. After he returned to his room, he went into cardiopulmonary arrest. Id. Before his doctors were able to restore his circulation and breathing, Mr. Caldararo suffered brain damage due to lack of oxygen. Id. Caldararo's wife sued the hospital, alleging that the failure of her husband's attending nurses to diagnose his condition caused a delay in care which resulted in brain damage to Mr. Caldararo. Id.

Mr. Hicks' wife was a surgical nurse at the time Caldararo was a patient at Vanderbilt. Although counsel were aware of that fact, Hicks was seated in the jury. Id. at 741. During deliberations, Hicks told the jurors that nurses know how to tell whether a patient is not breathing properly, or whether difficulty in breathing is due to the patient's diabetes. Id. The appellants in Caldararo, with the support of juror affidavits, sought to invalidate the verdict, urging that Hicks' comments constituted "external" information under Tenn. R. Evid. 606(b).

The Caldararo court found that the jurors' affidavits were not competent evidence because they failed to allege facts which constituted external influence. The court stated that external influences include "(1) exposure to new items about the trial, (2) consideration of facts not admitted in evidence, and (3) communications with non-jurors about the case." Id. at 742. Internal influences, which would not invalidate a jury's verdict, include "(1) discussions among jurors, (2) intimidation or harassment of one juror by another, (3) a juror's personal experiences not directly related to the litigation, and (4) a juror's subjective thoughts, fears, and emotions. Id. The Caldararo court found:

> None of the statements attributed to Mr. Hicks indicate that he had any prior or extraneous knowledge of the parties or of the events that gave rise to this suit. At most, he claimed to have some specialized knowledge about diabetics and proper resuscitation procedures, presumably because he was married to a nurse. This is not the type of extraneous information that requires us to overturn a verdict.

Id. at 744.

Much like Mr. Hicks in Caldararo, Juror #79 in the case at bar did not claim to have prior or extraneous knowledge about the parties or the lawsuit generally. Like Mr. Hicks, he had "specialized knowledge" about a factor in the case, long term pain, that derived from personal experience.

Trial courts cannot prevent jurors from being influenced by their own backgrounds and experiences, as well as the backgrounds and experiences of fellow jurors. These facts are the "very human elements that constitute one of the strengths of the jury system." Id. (citing United States v. McKinney, 429 F.2d 1019, 1022-23 (5th Cir. 1970), *cert. denied*, 401 U.S. 922, 91 S. Ct. 910, 27 L.Ed.2d 825 (1971)). We hold that the affidavit concerning the statements of Juror #79 does not contain evidence of extraneous prejudicial information. Thus, the affidavit is incompetent under Tenn. R. Evid. 609(b) and does not provide a basis for invalidating the verdict.

We consider Appellants' third and sixth issues together. Appellants' third issue is whether the trial court erred in directing a verdict in favor of the Plaintiffs on the issue of liability. Appellants' sixth issue concerns whether the trial court erred in both failing to direct a verdict in Appellants' favor and in its procedure regarding directed verdicts.

A trial court may grant a party's motion for a directed verdict where "the evidence, viewed reasonably, supports one conclusion. . . . They are inappropriate where the material facts are in dispute or when substantial disagreement exists concerning the conclusions to be drawn from the evidence." Pettus v. Hurst, 882 S.W.2d 783, 788 (Tenn. App. 1994) (citations omitted). In examining whether or not the trial court should have granted a party's motion for a directed verdict, the role of an appellate court is not to reweigh the evidence presented at trial; rather, it is to take "the strongest legitimate view of the evidence in favor of the motion's opponent, allow all reasonable inferences from the evidence that favor the opponent, and disregard all evidence to the contrary." Id.

In the case at bar, the trial court granted Appellee's Motion for a Directed Verdict on the issue of liability. The evidence reveals that Harvey entered the right hand lane of I-75 traveling at approximately fifty-five miles per hour. She did not change lanes. Fulmer, who had been in the left hand lane, looked in his mirror, gave the proper signal, and began to move into the right hand lane. He did not see Harvey because she was in his blind spot. There is no evidence that either party was speeding.

In Langford v. Arnold, 707 S.W.2d 521 (Tenn. App. 1985), this Court considered an automobile accident involving facts similar to the case at bar. The plaintiff in Landford was traveling in the left hand, or inside lane of Highland Avenue, a four lane highway in Jackson, Tennessee. Id. Defendant entered Highland Avenue from I-40, merging into the right hand, or outside lane. Id. at 522. An ambulance entered Highland Ave. behind the defendant, then passed her on the right hand side of what remained of the merger lane from I-40 onto Highland Ave. Id. Defendant alleges that the ambulance's action caused her to swerve into the left hand lane, where she collided with the plaintiff, whose automobile was almost parallel with defendant's automobile. Defendant stated that she did not see plaintiff's automobile until after the accident. Id.

The issue on appeal in Langford was whether the trial court erred in instructing the jury on the issue of contributory negligence. This Court held that there was no evidence of negligence on the part of plaintiff: "The proof is uncontroverted that Ms. Langford was at all times in question in her proper lane, with her automobile under control, and maintaining a proper look-out." Id. We held that, in cases where there is no proof of negligence, it is error to instruct the jury on that issue.

Postelle v. Mercier, 1988 WL 86495 (Tenn. App. E.S., Aug. 19, 1988), is a similar case involving an accident caused because of a driver's blind spot. In that case the proof showed that the accident occurred because defendant failed to see plaintiff's vehicle, which was in defendant's blind spot. Id. at *2. This Court held that, in the absence of proof of negligence by the plaintiff, the jury should not gave been instructed to consider plaintiff's

remote contributory negligence. Id. at *3.

In the present case, the lower court found that Harvey's actions were free of negligence. Appellee's counsel did not move for a directed verdict on that issue until the trial judge indicated that he found no evidence of negligence. However, the fact that the trial judge prompted counsel to move for a directed verdict does not imply error, as Appellants suggest, for it is well established that a trial judge may grant a directed verdict on his own motion. Ewell v. Rucker, 28 Tenn. App. 156, 187 S.W.2d 644 (1945). We hold that the trial court was correct in directing a verdict in Harvey's favor on the issue of liability.

Appellants also contend that the trial court erred in not granting a directed verdict on the following issues: the amount of days Harvey was unable to work because of her injuries, the amount of Harvey's medical bills, and the nature of Ms. Harvey's permanent impairment due to the accident. We find that there was substantial disagreement as to these issues and the conclusions that might be drawn from the parties' evidence. Thus, Appellants were not entitled to a directed verdict. Tenn. R. Civ. P. 50; Pettus, 882 S.W.2d at 788. Because Appellants were not entitled to a directed verdict, we conclude that the trial court did not commit reversible error by not allowing Appellants' counsel to argue Appellants' right to a directed verdict on the aforementioned issues.

Appellants' fourth contention on appeal is that the trial court erred in allowing certain medical testimony and records into evidence which Appellants allege were not supported by expert testimony regarding the content of the record, as to whether the charge was reasonable or necessary, and as to the bill's relation to Harvey's Complaint. Our review of the record reveals that the following medical expenses were admitted into evidence: Dr. James Drake, $65, Chiropractor Lindsay L. Hathcock, $112, and Dr. Walter King, $641. There was evidence that each of the foregoing medical expenses was necessary.

Exhibits one through eight, which contain documentation of Harvey's medical

expenses totaling $5,224.70, were marked for identification. Harvey identified the bills contained in exhibits one through eight at trial. Counsel for the Appellants' did not object to Ms. Harvey identifying the medical bills, and stated that "[the bills] can come in at the proper time." However, the bills were never admitted into evidence.

The record contains no proof that the jury saw, or improperly considered, evidence of Harvey's medical expenses that was not admitted as evidence. Moreover, there is no evidence that counsel for the Appellants objected to Harvey identifying the records of her medical expenses, nor is there evidence that Appellants' counsel requested a limiting jury instruction with regard to the medical proof. Counsel cannot raise an objection to the trial court's admission of evidence, Wright v. United Services Auto Assn., 789 S.W.2d 911, 914 (Tenn. App. 1990), nor to the trial court's jury charge, Johnson v. Lawrence, 720 S.W.2d 50, 59-60 (Tenn. App. 1986), *appeal after remand*, No. 89-142-II, 1990 WL 20123 (Tenn. App. Mar. 7, 1990), *aff'd and remanded*, No. 01-S-01-9006-CV00054, 1991 WL 147362 (Tenn. Aug. 5, 1991), for the first time on appeal.

Appellants' fifth issue on appeal is whether the trial court erred in failing to sustain their Motion for Remittitur pursuant to T.C.A. § 20-10-102 (Michie 1994). In the present case, the trial court sustained the jury's verdict of $40,000. There is material evidence in the record to support the jury's conclusion that Harvey lost 509 days of work because of the accident, and that her lost wages amounted to $19,700. Dr. Walter King treated Ms. Harvey. He testified that she had a permanent impairment of 10%. Dr. King stated that Harvey had suffered pain in the past and would suffer pain in the future because of the accident. Finally, $818 of Harvey's medical expenses were admitted into evidence.

In Benson v. Tennessee Valley Electric Co-op, 868 S.W.2d 630, 640 (Tenn. App. 1993), this Court stated: "When, as here, a trial judge has approved a jury award, our review is subject to the rule that if there is any material evidence to support the award it should not be disturbed." Based on the foregoing, we find that there is material evidence in the record to support the jury's award. The trial court did not err in failing to sustain the

Motion for Remittitur.

Appellants' final issue on appeal is whether the trial court erred in allowing Appellee's counsel to read into evidence Appellants' responses to Appellee's Request to Admit, promulgated pursuant to Tenn. R. Civ. P. 36. The Request to Admit asked Appellants to admit to the authenticity of certain documents concerning Mr. Fulmer's employment at Rhett Butler Trucking. Appellants' response admitted that the documents were authentic, but objected to the admissibility of the documents on the grounds of relevancy and materiality. The trial court overruled the objections of Appellants' counsel.

We find that Fulmer's status at Rhett Butler Trucking, that is, whether he was an employee or an independent contractor, was both material and relevant to the outcome of this case. Tenn. R. Evid. 401, 403. The purpose of Tenn. R. Civ. P. 36 is to reduce the number of issues that must be proven at trial by establishing the matter prior to trial. Tenn. Dep't of Human Servs. v. Barbee, 714 S.W.2d 263, 267 (Tenn. 1986). The Barbee court stated: "Unlike responses to other discovery procedures which are evidentiary and are obtained for the purpose of introduction at trial and subject to contradiction at trial, a Rule 36 admission, unless it is allowed to be withdrawn or amended, concludes that matter and avoids any need for proof at trial." Id. at 266. Accordingly, we hold that it was not error for the trial court to permit Appellee's counsel to read Appellants' responses to its Request to Admit.

For the reasons stated herein, we affirm the judgment of the lower court. Costs are taxed to Appellants.

HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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FARMER, J.