IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

December 18, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

WANDA GARNETT MARKHAM	)	WASHINGTON COUNTY
	)	03A01-9603-CV-00083
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. G. RICHARD JOHNSON
	)	CHANCELLOR
	)	(Sitting by Standing Order
CITY OF JOHNSON CITY,	)	of Designation)
d/b/a JOHNSON CITY TRANSIT	)	
	)	AFFIRMED AS MODIFIED
Defendant-Appellee	)	and REMANDED

HOWARD R. DUNBAR OF JOHNSON CITY FOR APPELLANT

JOHN RAMBO OF JOHNSON CITY FOR APPELLEE

OPINION

Goddard, P.J.

This is a non-jury case wherein Wanda Garnett Markham appeals a judgment rendered in her favor against City of Johnson City, d/b/a Johnson City Transit, in the amount of $3000.

She insists the evidence preponderates in favor of a larger award, and at a minimum the stipulated medical expenses of $6396.20. She also insists that the Trial Court was in error in disregarding the opinions expressed in the deposition of her physician, Dr. Ted Sykes, upon the ground the Doctor's testimony was not based upon a "reasonable medical certainty," and even if it were appropriate to exclude Dr. Sykes' testimony for that reason, the City had waived any objection by not registering it at the time the deposition was taken.

It appears from the transcript that Ms. Markham was struck by a bus being operated by a transit employee, Trudy Hodges, as she moved the bus forward from a stopped position while Ms. Markham was crossing in front of it.

The evidence is sharply disputed as to the force of the impact, as well as to the injuries received by Ms. Markham. The Trial Court, however, found that the negligence of the bus driver was 100% and, as already noted, granted a judgment in the amount of $3000.

Excluding the opinions of Dr. Sykes, as did the Trial Court, we find upon our de novo review that the evidence does not preponderate in favor of an award larger than $3000, unless, as counsel for Ms. Markham argues, the City stipulated medical expenses in excess of that amount.

The proof as to the stipulation is as follows:

> MR. DUNBAR: May it please the Court, should we inform the Court of the stipulations that we've...
>
> THE COURT: Sure.
>
> MR. DUNBAR: ...agreed upon?
>
> THE COURT: Sure.
>
> Mr. DUNBAR: The accident report and the emergency room report and the medical bills. May I approach the Bench, the medical bills, the emergency room report and the police report.

Whereupon, counsel for the City acquiesced by making no objection and advised the Trial Court of certain other stipulations.

The validity of Ms. Markham's contention relative to the stipulation depends upon whether the parties intended to stipulate the $6396.20 incurred as medical expenses were reasonable and necessary, and also resulted from the injuries she received in the accident. As will be noted above, the stipulation is silent as to both points.

We conclude both intentions may be inferred from the stipulation. It would be rare indeed for counsel to stipulate matters which are incompetent, viz., medical expenses neither reasonable and necessary, nor resulting from the injuries Ms. Markham received in the accident. It seems to us that it was incumbent upon counsel for the City to make it clear to the Trial

Court that he was stipulating that these medical expenses were incurred by Ms. Markham, but not that they were reasonable and necessary, nor as a result of the injuries received in the accident.

In light of the foregoing, we find that counsel for the City stipulated the medical expenses incident to Ms. Markham's injury to be the sum of $6396.20 and increase the award to that amount.

Apropos of the third issue, as already noted, the Trial Court disregarded any opinion of Dr. Sykes, and in doing so stated the following:

> THE COURT: Well, the Court finds that the opinions of Dr. Sykes were not based on reasonable medical certainty, therefore the Court will disregard all opinions expressed by Dr. Sykes in his deposition.

Ms. Markham insists the Trial Court was in error because the standard to be applied to the admissibility of the doctor's testimony is not reasonable medical certainty, but more probable than not, and also that no objection was registered at the time the deposition was taken.

We do not deem it necessary to resolve either insistence by Ms. Markham because our review of the record persuades us that even using the more probable than not standard, Dr. Sykes never found a causal relation between the accident and

the injuries claimed by Ms. Markham, a necessary element to predicate a judgment for damages.

For the foregoing reasons the judgment of the Trial Court as modified is affirmed and the cause remanded to the Circuit Court for Washington County for collection of the judgment and costs below. Costs of appeal are adjudged one-half against Ms. Markham and one-half against the City of Johnson City.

_____
Houston M. Goddard, P.J.

CONCUR:

(Separate Concurring Opinion)
Herschel P. Franks, J.

(Separate Opinion--Concurring
in Part and Dissenting in Part)
Charles D. Susano, Jr., J.

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	)	
Plaintiff-Appellant,	)	WASHINGTON COUNTY
	)	
v.	)	
	)	
CITY OF JOHNSON CITY, d/b/a JOHNSON CITY TRANSIT,	)	
	)	
Defendant-Appellee.	)	

CONCURRING OPINION

I concur with Judge Goddard on all issues. However, I would add that stipulations are encouraged to save expense and time of the parties and the courts. Moreover, stipulations should be construed in view of the issues involved in the pleadings. *Brown v. McCulloch, et al.*, 24 Tenn. App. 342, 144 S.W.2d 1 (1940). Stipulations should receive a fair and liberal construction with all the inferences that may be legitimately drawn from them, and ?in all cases of doubt that construction should be adopted which is favorable to the party in whose favor it is made?. *Still v. Equitable Life Assurance Society*, 165 Tenn. 224, 237 (1932).

Public policy of this State encourages stipulation of medical bills in personal injury cases. The Legislature has established the presumption that medical, doctor and hospital bills are reasonable and necessary if the statutory procedures are followed and no objection is made. T.C.A. §24-5-113. If the defendant had intended to limit the stipulation on medical expenses, then it had an obligation to object or clarify the stipulation at the time it was entered.

_____
Herschel P. Franks, J.

IN THE COURT OF APPEALS OF TENNESSEE

WANDA GARNETT MARKHAM, Plaintiff-Appellant,	)	C/A NO. 03A01-9603-CV-00083
	)	WASHINGTON COUNTY LAW COURT
v.	)	
CITY OF JOHNSON CITY, d/b/a JOHNSON CITY TRANSIT, Defendant-Appellee.	)	HONORABLE G. RICHARD JOHNSON, CHANCELLOR, By designation

OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur in part and dissent in part.

I dissent from so much of the majority opinion as holds that the stipulation in the record before us embodies the parties' agreement that the "agreed upon" medical bills were incurred as a proximate result of the accident. As to the issue of proximate cause, I do not believe the colloquy cited in the majority opinion meets the definition of a stipulation:

> A stipulation is an agreement by the parties on a certain matter. It often involves an agreement that specific facts are undisputed and are to be considered as proved.

Cohen, Sheppeard and Paine, *Tennessee Law of Evidence* § 201.8 (3rd. ed. 1995).

As pertinent to this appeal, the part of the record quoted in the majority opinion shows that the parties "agreed upon" the medical bills. The majority says, in effect, that this exchange between plaintiff's counsel and the court, with no verbalization from counsel for the defendant, is a stipulation to the following: (1) that the plaintiff incurred certain medical bills from certain health providers in specified amounts; (2) that the charges were both reasonable and necessary to treat a given condition or injury; and (3) that the condition or injury for which the plaintiff was treated and for which the bills were rendered was proximately caused by the accident. I do not find all of this in the quoted exchange.

I agree that it is reasonable to construe the imprecise stipulation to include the first two elements mentioned above. Furthermore, as to those elements, I agree that counsel's silence constitutes his client's concession that the jury can consider these elements as conclusively proven. However, I cannot stretch the announced stipulation to include proximate cause. In my judgment, the defendant in this case did not agree that the condition or injury for which plaintiff was treated and for which the bills were rendered was proximately caused by the accident. The plaintiff did not expressly include this third element when he announced the stipulation, and I do not believe causation can be reasonably inferred from the imprecise statement made to the trial court.

This is critical in this case because there is no expert testimony relating these bills to the accident.

The majority states, in support of its position in this matter, that "[i]t would be rare indeed for counsel to stipulate matters which are incompetent." I agree; but I believe the stipulation is as to competent matters even if it only encompasses the first two of these three elements. This is because these elements are two of a series of competent matters in a "chain" of facts necessary to show liability for medical expenses in the typical personal injury case.

Since, in this case, it was the plaintiff, and not the defendant, who had the burden of proof, it was incumbent upon her to make sure that a given element of her claim was clearly embodied in the stipulation. I do not believe that the defendant had any responsibility other than to agree or disagree with the stipulation as framed by the plaintiff. If, as formulated by the plaintiff, the stipulation was not precise, the plaintiff must suffer the consequences of that lack of precision. In this case, I believe, as previously indicated, that the defendant agreed to the "bare bones" stipulation as stated by the plaintiff's attorney, and nothing more. In my opinion, that stipulation does not include a concession as to proximate cause.

I agree with the majority's observation that Dr. Sykes' testimony was properly disregarded by the trial court, not for the reason given by the lower court, but because his testimony did not purport to show a causal connection between the accident and the injuries claimed by the plaintiff, and this nexus was not established by any other expert testimony.

I would affirm the judgment of the trial court.

Charles D. Susano, Jr., J.