

IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN SECTION AT JACKSON

---

**BILLIE J. METCALFE, ET AL,**

Plaintiffs-Appellees,

Shelby Circuit No. 58018

Vs.

C.A. No. 02A01-9510-CV-00236

**LARRY J. WATERS and CHARLES  
W. PRUITT,**

Defendants-Appellants.

---

FROM THE CIRCUIT COURT OF SHELBY COUNTY  
THE HONORABLE J. STEVEN STAFFORD, JUDGE BY DESIGNATION

C. Philip M. Campbell and R. Sadler Bailey  
Law Offices of Bailey & Associates of Memphis  
For Appellees

Paul E. Lewis of Millington  
For Appellant, Waters

Robert C. Rosenbush of Millington  
For Appellant, Pruitt

**FILED**

**October 29, 1996**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

***AFFIRMED IN PART, VACATED IN PART AND REMANDED***

Opinion filed:

**W. FRANK CRAWFORD,  
PRESIDING JUDGE, W.S.**

**CONCUR:**

**ALAN E. HIGHERS, JUDGE**

**HOLLY KIRBY LILLARD, JUDGE**

This is a legal malpractice case. Defendants, Larry J. Waters and Charles W. Pruitt, appeal from the judgment of the trial court on a jury verdict awarding plaintiffs, Billie J.

Metcalfe, Julia M. Metcalfe, and Johnny D. Metcalfe,<sup>1</sup> compensatory and punitive damages.

The Metcalfes retained Waters, an attorney in Tipton County, Tennessee, to represent them in an action stemming from an automobile accident which occurred on September 19, 1986. On September 18, 1987, Waters filed a tort action on behalf of the Metcalfes in the Circuit Court of Tipton County against various defendants (hereinafter referred to as the underlying case) and subsequently started the discovery process. On March 15, 1990, Waters voluntarily non-suited the underlying case. On March 6, 1991, Waters refiled the underlying case, but failed to have service of process issued properly. On December 16, 1992, the trial court granted summary judgment in favor of some of the defendants because the statute of limitations barred the claim. The underlying case against the remaining defendants was dismissed on May 14, 1993 for lack of prosecution because Waters failed to appear at trial. Waters did not inform the Metcalfes that the underlying case had been dismissed until a New Year's Eve party, seven months later. When Waters told Johnny Metcalfe that the underlying case had been dismissed, Waters did not tell him the reason, but instead told him that it was not worth appealing.

Waters practiced law with defendant, Charles W. Pruitt, in a shared office with a sign in the window that said Pruitt and Waters, Attorneys. Waters and Pruitt did not have a written partnership agreement but agreed to share the office. Pruitt provided the office and the secretary, and Waters gave half of his income to Pruitt. Pruitt and Waters advertised in the Yellow Pages of the telephone directory together under the name of "Pruitt & Waters." They shared a joint checking account, with "Pruitt and Waters, Attorneys at Law" printed on the checks. In addition, they had letterhead legal stationary listing both names, but listing Waters as "Associate, Larry Waters." Waters admitted at trial that he was an associate of Pruitt, however, they never filed a partnership tax return. Pruitt never filed a W-2 federal tax form on Waters. Waters did not discuss the underlying case with Pruitt except to tell him generally that he had a personal injury case.

The Metcalfes filed a legal malpractice suit against Waters and Pruitt, individually, and against the Law Office of Pruitt and Waters. The complaint alleged that Waters deviated from

---

<sup>1</sup> Julia and Johnny Metcalfe are the parents of Billie Metcalfe. Billie Metcalfe was 16 years old at the time of the accident in question, and her parents filed suit in their own right, and on behalf of their daughter. They will be referred to collectively as "the Metcalfes" and individually by their own names.

the standard of care required of attorneys practicing in Tennessee and, as a result of his negligence, Billie Metcalfe's cause of action was dismissed and forever barred. The complaint avers that Waters's actions were egregious enough to warrant punitive damages. The complaint also alleged that Pruitt was liable for Waters's actions under the laws of partnership, agency and respondeat superior. The complaint avers that Billie Metcalfe was injured in an automobile accident and suffered permanent injuries and disfigurement, physical and emotional pain and suffering, lost wages, loss of earning capacity and loss of enjoyment of life. Finally, the complaint avers that Julia and Johnny Metcalfe were injured as a result of Waters's negligence because they were unable to recover in the original tort action.

In his initial Answer, filed February 3, 1994, Waters neither admitted nor denied that the underlying case had been dismissed and denied that he was liable. However, in an Amended Answer filed June 19, 1994, Waters admitted that the case had been dismissed and admitted that he was negligent and was directly liable. However, he denied that any of his actions justified punitive damages. Waters filed the Amended Answer after the Metcalfes' attorney threatened to file sanctions against him. At trial, Waters admitted that he lied in his initial Answer. Finally, in another Amended Answer filed March 22, 1995, Waters asserted an affirmative defense claiming that as to the underlying case Billie Metcalfe was also negligent.

In his Answer, Pruitt denied the existence of a partnership, denied any knowledge of the underlying case, and denied that he was liable in any way.

In an action for malpractice against an attorney for negligently handling or failure to timely file a suit, plaintiff is required to prove that recovery could have been made in the original action which the attorney was employed to handle. *Commercial Truck and Trailer Sales, Inc. v. McCampbell*, 580 S.W.2d 765 (Tenn. 1979); *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980) *cert. denied* 449 U.S. 888, 101 S.Ct. 246, 66 L.Ed.2d 114 (1980). In essence, the trial is conducted as a case within a case.

A jury trial was held on March 27 - 29, 1995, and the only witness to testify concerning the facts of the underlying case was plaintiff, Billie Metcalfe. She testified that she was riding as a passenger in a truck driven by Keith Cullum and owned by his father's construction company. At the time of the accident, Cullum was fifteen years old and only possessed a learner's permit to drive a motor vehicle. In addition, Cullum had been "grounded" by his father

and was not supposed to be driving the truck. Just prior to the accident, Keith Cullum and Billie visited a friend's house trailer where both had one drink of whiskey and coke. They left going to meet some other friends at the river, and she and a girlfriend were passengers in the vehicle. As they were proceeding along the highway, Cullum pulled out to pass another vehicle in an area with speed limit of 45 m.p.h. As he was passing, he reached a speed in Billie's estimation of approximately 50 m.p.h., and she noticed that it did seem to take a long time to pass, but she was looking at the car they were passing. As they were driving on the left side of the highway, they were involved in a head-on collision.

The proof concerning Billie Metcalfe's injuries and damages was provided by Billie; her mother, plaintiff Julia Metcalfe; and her father, plaintiff Johnnie Metcalfe. The cumulative testimony concerning the injuries and damages is as follows:

Billie was taken initially to the emergency room at the Naval Hospital in Millington and then moved to Methodist Central in Memphis. She had some superficial lacerations on her face and a cut on her chin that required plastic surgery. She had a concussion, and she also had a broken leg, but there is no testimony concerning the specific bone that was broken. She was initially placed in traction and then had surgery for insertion of a pin somewhere in the area of her hip. She stayed in the hospital thirteen days and apparently was ambulatory on crutches when she was discharged. The record does not indicate that she had a cast placed on her leg as the testimony reveals she was able to take showers while recuperating at home. She also had two broken teeth, which she later had crowned, but the exact teeth were not specified. She was quite upset and hysterical during the time that she was in the hospital shortly after the accident. She also had nightmares concerning the accident for some time. Because she was unable to immediately return for her senior year in high school, she had a homebound teacher for the first few months and was unable to participate in her major activity of cheerleading and was unable to play recreational softball. She completed her senior year apparently without difficulty, but she did not enroll in college in the fall as previously planned because she needed to remain at home for the surgery to remove the pin. She testified that she has made a good recovery and did not exhibit any permanent effects from her injury except what she described as a scar on her hip where the pin had been removed. The medical bills were stipulated by counsel to be a total of \$14,803.01. There was no medical proof introduced in the case, nor was there any itemization

of the various medical bills.

At the conclusion of all the proof, the trial court determined that there was no material dispute as to the facts concerning the automobile accident involved in the underlying case, and on motion of the Metcalfes, determined as a matter of law that the defendants in the underlying case were guilty of negligence that directly and proximately caused the collision and any resulting losses and damages to the Metcalfes. The trial court also determined that the plaintiff, Billie Metcalfe, was guilty of no negligence which was a proximate cause of the accident and any resulting injuries. In essence, the trial court directed a verdict for the plaintiff as to liability in the underlying case. The trial court also directed a verdict in favor of defendant Pruitt on the issue of punitive damages. The jury, in response to interrogatories, found that the defendants, Waters and Pruitt, were partners, and that they were jointly and severally liable for compensatory damages in the amount of \$450,000.00. The jury also found that defendant Waters was liable for \$100,000.00 punitive damages.

Although the jury returned a joint verdict for the Metcalfes, contrary to the provisions of T.C.A. § 25-1-104 (1980), the parties acquiesced in this procedure and have not and, in fact, cannot now complain. *Henry County Bd. of Educ. v. Burton*, 538 S.W.2d 394 (Tenn. 1976); *Pridemark Custom Plating v. Upjohn Co.*, 702 S.W.2d 566 (Tenn. App. 1985).

Both Waters and Pruitt filed notices of appeal. Waters presents the following issues for review: (1) whether the trial court erred in granting the Metcalfes' Motion for Directed Verdict in the underlying tort case; (2) whether the trial court erred in approving the amount of compensatory damages awarded and in denying Waters's Motion for New Trial, Remittitur and Protective Order; and (3) whether the trial court erred in failing to dismiss the Metcalfes' claim for punitive damages.

Pruitt presents the same three issues as Waters and also the following issues: (1) whether the trial court erred in refusing to charge the definition of "associate" as requested; and (2) whether the trial court erred in not directing a verdict for Pruitt upon the Metcalfes' failure to allege reliance upon Pruitt or to file a motion to make the pleadings conform to the proof.

We will first deal with Pruitt's appeal. T.R.A.P. 3(e) provides in pertinent part:

[T]hat in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of

jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

The record on appeal contains no motion for new trial filed by Pruitt, and accordingly Pruitt's issues presented for review are waived.

We will now consider Waters's issues. Waters first argues that the trial court erred in directing a verdict in favor of the Metcalfes. Waters asserted the affirmative defense of comparative fault in his second Amended Answer. He maintains that the jury should have decided if Billie Metcalfe's actions were negligent. Waters asserts that Billie Metcalfe knew that Cullum was only 15 years old and only had a learner's permit; that she knew he was not supposed to be driving the truck because he was grounded; that she knew Cullum had been drinking, that she knew he was speeding but did not protest; and that she did not exercise ordinary care for her own safety. However, Billie Metcalfe testified that she did not observe anything wrong with Cullum's driving; that she did not know he had been grounded; and that she thought that Cullum was not intoxicated.

The trial court determined that Billie Metcalfe did not contribute to the accident and was not at fault, and directed a verdict in her favor.<sup>2</sup> The trial court stated, "I just don't see her (Billie Metcalfe's) actions in any way being the proximate cause of the accident." When deciding a motion for a directed verdict, both the trial court and the reviewing court on appeal must look to all the evidence, take the strongest legitimate view of the evidence in favor of the opponent of the motion, and allow all reasonable inferences in favor of that party. The court must discard all countervailing evidence, and if there is then any dispute as to any material fact, or any doubt as to the conclusions to be drawn from the whole evidence, the motion must be denied. *Hurley v. Tennessee Farmers Mut. Ins. Co.*, 922 S.W.2d 887, 891 (Tenn. App. 1995). A directed verdict cannot be sustained if there is material evidence in the record which would support a verdict for the defendant under any of the theories the defendant had advanced. *Id.*

Waters asserts that the trial court applied a wrong standard concerning negligence. Waters argues that *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992) requires that the court

---

<sup>2</sup> The trial court also directed a verdict in favor of the Metcalfes on the issue of Cullum's negligence. That decision is not at issue in this appeal.

find that Billie Metcalfe did not “contribute to her injuries or damages,” not that she did not “cause or contribute to the accident.” We do not see that *McIntyre* requires the use of such magic language. However, we must still determine if the directed verdict should have been granted.

Passengers in motor vehicles have a duty to exercise reasonable care for their own safety. They are expected to warn the driver of unseen dangers, to protest excessive speeds, and to refrain from riding in an automobile operated by an intoxicated or reckless driver. *Mansfield v. Colonial Freight Sys.*, 862 S.W.2d 527, 531 (Tenn. App. 1993).

In the case *sub judice*, there is evidence in the record that Billie Metcalfe did not believe that Cullum was intoxicated, and that she thought there was nothing wrong with his driving. The record is devoid of any proof that Cullum was intoxicated. When passing, Cullum reached speeds of fifty miles an hour in a forty-five miles an hour speed zone. While we do not condone exceeding the speed limit, a reasonable person would not realize that this is excessive speed nor would she protest it. Billie Metcalfe testified that she did not know that Cullum was grounded. While she realized Cullum was only 15 years old, she testified that she had ridden with him before and considered him to be a good driver. Finally, while Cullum was passing the other car, Billie Metcalfe stated that she thought it was taking a long time to pass the car. However, she testified that she did not protest because she didn’t see anything wrong with his driving.

We believe that the trial court properly analyzed Billie Metcalfe’s actions to determine if she was negligent. We hold that the trial court properly directed a verdict on the issue of Billie Metcalfe’s negligence.

Waters next argues that the trial court erred by approving the amount of the compensatory damages award and by denying his Motion for Remittitur. The jury returned a verdict against Waters and Pruitt, jointly and severally, in the amount of \$450,000.00, and the trial judge approved the verdict. Waters argues that there is no material evidence to support the verdict, and that it is excessive because of passion or prejudice of the jury.

Waters presented no proof of jury misconduct other than the amount of the award. *See Pitts v. Exxon Corp.*, 596 S.W.2d 830 (Tenn. 1980). He contends that the jury verdict is unsupported by the evidence and beyond the range of reasonableness. In the case before us, the trial judge approved the jury verdict and denied Waters’s motion for remittitur. In *Ellis v. White*

*Freightliner Corp.*, 603 S.W.2d 125 (Tenn. 1980), our Supreme Court said:

The trial judge's approval of a jury verdict invokes the material evidence rule with respect to all other issues of fact and we know of no reason why that rule should not have the same effect when that approval includes the amount of the award. That action by the trial judge means that he has accredited the testimony of the witnesses on the issue of damages and has evaluated the evidence as supporting the amount awarded. Nevertheless, when the question of remittitur is raised, the Court of Appeals has the duty to review the proof of damages and the authority to reduce an excessive award. But when the trial judge has approved the verdict, the review in the Court of Appeals is subject to the rule that if there is any material evidence to support the award, it should not be disturbed.

603 S.W.2d at 129.

To determine whether the jury verdict is excessive, we are required to determine whether the jury verdict is within the range of reasonableness as established by the credible proof. *Smith v. Shelton*, 569 S.W.2d 421 (Tenn. 1978). Since the issue involves remittitur, we need only determine the upper level of the range of reasonableness. *See Ellis*, 603 S.W.2d at 129. *Guess v. Maury*, 726 S.W.2d 906, 912 (Tenn. App. 1986).

In the record before us, there is absolutely no medical proof to establish the nature and extent of the injury sustained. The proof that is in the record is that there was a thirteen-day hospital stay and recuperative time at home, all of which necessitated some pain, suffering, and inconvenience. However, from the proof, the pain, suffering and inconvenience was somewhat minimal when considered in light of the jury award. Considering the medical expenses involved, the lack of lost wages, the meager proof concerning the nature and extent of the injuries sustained, and the absence of any permanent disability, we are constrained to find that the upper range of reasonableness in this case should not exceed \$100,000.00. While we recognize that the court should strive to use the remedy of remittitur and avoid the necessity of a new trial, *Thrailkill v. Patterson*, 879 S.W.2d 836, 840 (Tenn. 1994), we are also aware that a remittitur cannot be of such magnitude that it would totally destroy a jury's verdict. *Foster v. Amcon Int'l*, 621 S.W.2d 142 (Tenn. 1981); *Guess v. Maury*, 726 S.W.2d 906 (Tenn. 1986). If we were to suggest a remittitur on a \$450,000.00 verdict to \$100,000.00, we would, in effect, destroy the jury verdict. Under these circumstances, the judgment of the trial court on the jury verdict for compensatory damages should be vacated and the case remanded for a new trial on the issue of damages.

Finally, Waters argues that the trial court erred in failing to dismiss the Metcalfes' claim for punitive damages. The jury awarded the Metcalfes \$100,000.00 in punitive damages against Waters individually. Waters claims that there was no proof at trial that he acted intentionally, fraudulently, maliciously, or recklessly. In Tennessee, punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that the defendant has acted intentionally, fraudulently, maliciously, or recklessly. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992). Waters admitted professional malpractice. While his failure to prosecute the underlying case cannot be condoned and must be soundly renounced, his actions constitute simple negligence and do not rise to the level of intentional, fraudulent, malicious and reckless conduct.

The Metcalfes assert that Waters's failure to disclose that the case was dismissed and his representation that an appeal was not warranted was an affirmative and intentional act which merits an award of punitive damages. By order entered June 8, 1995, the court specifically found that Waters's lying about the dismissal of the Metcalfe suit constituted "the gravamen of the punitive damage award." Certainly, Waters's attempt to cover up his negligent conduct was an egregious act for which he was duly punished by the Supreme Court's Board of Professional Responsibility. However, we do not believe that an award of punitive damages is proper under our law.

The general rule in Tennessee is that to sustain an award of punitive damages, actual damages must have been awarded. *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964); *Liberty Mut. Ins. Co. v. Stevenson*, 212 Tenn. 178, 368 S.W.2d 760 (1963); *Emerson v. Garner*, 732 S.W.2d 613 (Tenn. App. 1987). Implicit in this rule is that an award of punitive damages must be made on the basis of the same conduct that warrants an award of compensatory damages. In the case before us, compensatory damages were awarded for the negligent conduct of Waters in allowing the dismissal of the underlying case. Subsequent to this negligent conduct, Waters committed the egregious act of lying to the Metcalfes about the dismissal of the case. Certainly, his conduct after the dismissal of the case cannot be condoned, but at the same time it is conduct that was not included in the negligent act or acts that resulted in the award of compensatory damages. We believe our conclusion is fortified by the opinion in *Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992), wherein the Supreme

Court listed the factors to consider in determining the amount of damages. It is significant that the Court listed attempted concealment of the conduct as a factor for consideration only after the liability for punitive damages had been established. *Id.* at 901. Under the proof in the record before us, the trial court should have granted a directed verdict on the issue of punitive damages in favor of Waters.

In summary, we affirm the judgment of the trial court on the jury verdict finding that Waters was guilty of legal malpractice and that Waters and Pruitt are jointly and severally liable to the plaintiffs. The judgment of the trial court on the jury verdict for punitive damages is vacated, and judgment is entered in favor of defendant, Waters, on the issue of punitive damages. The judgment of the trial court awarding compensatory damages is vacated, and the case is remanded to the trial court for retrial on the issue of compensatory damages only. Costs of the appeal are assessed one-half to defendants-appellants and one-half to plaintiffs-appellees.

---

**W. FRANK CRAWFORD,  
PRESIDING JUDGE, W.S.**

**CONCUR:**

---

**ALAN E. HIGHERS, JUDGE**

---

**HOLLY KIRBY LILLARD, JUDGE**