IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED
July 14, 1999
Cecil Crowson, Jr.
Appellate Court
Clerk

HOWELL H. SHERROD, JR.	)	WASHINGTON CIRCUIT
	)	
Plaintiff/Appellant	)	NO. 03A01-9810-CV-00351
	)	
v.	)	HON. RICHARD E. LADD
	)	JUDGE
ANN MOONEYHAN, Executrix	)	
for the Estate of	)	
JERRY A. MOONEYHAN, and	)	
ANN MOONEYHAN, Individually,	)	
	)	
Defendant/Appellee	)	AFFIRMED

Thomas Jessee, Johnson City, for the Appellant.
Robert D. Arnold, Johnson City, for the Appellee.

O P I N I O N

_____INMAN, Senior Judge

This is an action tried to a jury for damages for breach of contract relating to the ownership and sale of capital stock in a corporation styled Quality Dental Products. Alternatively, the plaintiff alleged that the defendant negligently or intentionally induced him to execute an assignment of the plaintiff's interest in the company for the purpose of facilitating the financing of the business of the parties. The defendant filed a general denial of the material allegations of the complaint. He died May 28, 1997 and his Executrix was substituted as the defendant.

Following a four-day trial the jury returned a verdict for the defendant. His motion for a new trial being overruled, the plaintiff appeals and propounds eight issues for review which we reproduce verbatim:

1. The Trial Court erred in requiring the Plaintiff to read the deposition of the Defendant prior to the Plaintiff testifying which in essence reversed the burden of proof.

2. The Trial Court erred as a matter of law in failing to interpret the assignment entered into by the parties.

3. The Defendant failed to meet the burden of proof required to establish a modification of the original terms of the contract entered into by the parties; there being no material evidence to support a modification.

4. The Jury verdict is not supported by the evidence relating to the Plaintiff and Defendant's course of dealing in the involvement of the operation and ownership of Quality Dental Products after the Assignment (Exhibit 86) was signed.

5. The Trial Court erred as a matter of law by granting the Defendant's Motion in Limine preventing the Plaintiff from inquiring about the knowledge of Ann Mooneyhan concerning her husband's adoption for tax purposes.

6. The Trial Court erred [in] refusing to grant a new trial because of the inflammatory statements made by counsel for the Defendant in his closing argument.

7. The Trial Court erred as a matter of law in failing to modify the judgment in this matter to reflect those issues reserved by agreement of the parties during the trial of this matter.

8. The Trial Court erred as a matter of law in force (sic) the Plaintiff to make an election of remedies between fraudulent misrepresentation and negligent misrepresentation before the Court would allow Plaintiff to testify.

It is well established that when reviewing a judgment based on a jury verdict, appellate courts are limited to determining whether there is material evidence to support the verdict. *Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992).

In reviewing a judgment based upon a jury verdict, we are not at liberty to weigh the evidence or to decide where the preponderance lies, but are limited to determining whether there is material evidence to support the verdict; and in determining whether there is material evidence to support the verdict, the appellate court is required to take the strongest legitimate view of all the evidence in favor of the verdict, to assume the truth of all that tends to support it, allowing all

reasonable inferences to sustain the verdict, and to discard all to the contrary. Having thus examined the record, if there be any material evidence to support the verdict, it must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury. *Overton v. Davis,* 739 S.W.2d 2 (Tenn. App. 1987); *State v. Matthews,* 805 S.W.2d 776 (Tenn. Crim. App. 1990); *Smith County v. Eatherly,* 820 S.W.2d 366 (Tenn. App. 1991).

Appellate courts do not have the same ability to reconcile conflicting testimony or to evaluate credibility because they do not have the opportunity to observe the witnesses while they are testifying. Accordingly, it will not reweigh the evidence and it will not reevaluate the witness' credibility on appeal from a jury verdict. Instead, it will give the jury verdict great weight, and it will not set a verdict aside unless there is no material evidence to support it. *Grissom v. Metropolitan Gov't.* 817 S.W.2d 679 (Tenn. App. 1991).

Before the transaction occurred out of which this litigation arose, Sherrod and Mooneyhan were partners in four business transactions. They apparently functioned on a handshake basis; they had no formal contracts or partnership agreements.[1]

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[1] These transactions consisted of (1) a real estate endeavor called Movieland, (2) a shopping center complex referred to as Franklin Plaza, (3) an office building in Bristol, Tennessee, leased to the State of Tennessee, and (4) a business called World Tech Fibers.

The Movieland property was titled solely to Sherrod, but Mooneyhan signed the bank note and was equally responsible for the debt owed against this property. There was no documentation to show that Mooneyhan was a fifty-percent owner of the Movieland Property. Sherrod's accountant, Joe Wiseman, was not even aware of the identity of Sherrod's partner for a number of years.

The Franklin Plaza property was titled to Mooneyhan. The oral agreement between Sherrod and Mooneyhan provided that Mooneyhan would pay his portion of the investment in full and Sherrod would borrow his portion. The real estate stood as collateral for Sherrod's investment. Also, the note and Deed of Trust were signed solely by Mooneyhan.

The Bristol property was financed in the same manner. While both partners' names appeared on the deed, only Sherrod's part of the investment was financed and the Deed of Trust and Note securing this financing were signed by both Mooneyhan and Sherrod. Also, the property and Mooneyhan's equity in said property stood as collateral for Sherrod's loan.

The business known as World Tech Fibers, a manufacturing concern, was purchased in 1984 by Sherrod and Mooneyhan. Their indebtedness with reference to this business at one time reached $275,000.00, which was borrowed solely by Mooneyhan. Sherrod never signed

In 1989, Derek Heath consulted Sherrod about a business styled Quality Dental Products, Inc., [2] in which he owned a 20 percent interest. Sherrod became interested in QDP upon learning that it might be for sale and approached Mooneyhan to see if he would be interested in joining with him and Heath in the purchase of this business. Mooneyhan was interested and after prolonged negotiations an agreement was reached whereby Sherrod, Mooneyhan and Heath would purchase 80 percent of QDP. On May 8, 1989, a Stock Option Agreement was entered into whereby Sherrod and Mooneyhan acquired an option to buy eighty shares of QDP stock for the total consideration of $4,270,000.00. Two million dollars ($2,000,000.00) was to be paid upon the execution of the agreement and the remaining sum was to be paid on a monthly basis and the option was to be exercised on or before December 31, 1993. The $2,000,000.00 initial payment was funded by a $1.6 million loan obtained by Mooneyhan and an additional $400,000.00 leveraged from the QDP bank account.

A management agreement was entered into whereby Sherrod and Mooneyhan would manage QDP and receive as compensation therefrom all profits made by the company, which would fund the indebtedness. They consulted with Joe Wiseman, an accountant, who recommended that a partnership styled Mooneyhan Management be created through which the profits from QDP would be filtered and in return the debt service would be paid. The stock option was transferred to Mooneyhan Management and was carried on the books of

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a note evidencing this indebtedness, nor was there any other documentation that he was responsible for one-half the indebtedness. When pressed on cross-examination as to why there was no documentation prepared, Sherrod testified none was needed because Mooneyhan had his word.

[2]Sherrod is a practicing attorney. Mooneyhan was a dentist, and a client of Sherrod. Heath was also a client.

Mooneyhan Management, a partnership, as an asset. It was also agreed that Mrs. Mooneyhan would be a partner, in lieu of her husband, in Mooneyhan Management, so that it would not impact a disability income which he was receiving.

Initially, the business flourished and was quite successful, but it was destroyed by a fire in November 1990. Efforts were made to keep it afloat; Mooneyhan advanced $128,000.00 of his personal funds to service the debt.

During this period of time, QDP lost its main customer, Tulsa Dental Products, in a dispute over a price increase. Because of the financial crisis, the partners, Heath, Sherrod and Mooneyhan, began to disagree about management decisions. Fearful that the company was about to fail, Mooneyhan approached Sherrod and proposed that he (Sherrod) buy out Mooneyhan for the debt that was presently owed him or, in the alternative, Mooneyhan would buy out Sherrod and he could start streamlining management. Mooneyhan testified that it was his preference that Sherrod would buy him out. Mooneyhan further testified that Sherrod refused his offer.

Eventually, an agreement was reached and according to the testimony of Mooneyhan, Sherrod assigned to Mooneyhan all of his right and interest in and to the option agreement, for which Sherrod received Mooneyhan's interest in the Movieland building and Mooneyhan received Sherrod's interest in the Franklin Plaza. It was also Mooneyhan's understanding that the transaction was to be as tax-neutral as possible. Heath basically corroborated Mooneyhan's version of the agreement. Sherrod disputed Mooneyhan's version of the agreement and likewise disputed Heath's version of what happened.

Shortly thereafter, Mooneyhan informed Joe Wiseman, the accountant, that Sherrod was out of the business. Wiseman immediately called Sherrod to inform him of his instructions from Mooneyhan. Wiseman testified that Sherrod responded "do whatever Moon wants to do and we'll work it out."

Wiseman testified that in handling the buyout from an accounting standpoint, he had Jerry Mooneyhan assume all liabilities and that Sherrod was released from any further liability with reference to the stock option purchase. In addition, Sherrod received $87,000.00 for his interest in the partnership and a capital loss carryover of $328,700.00 which resulted in $100,000.00 tax savings. Significantly, according to Sherrod's 1992 income tax return, he was the sole owner of the Movieland property, and he did not claim an interest in Franklin Plaza on his 1992 income tax return. Wiseman testified that Sherrod's personal tax return, as well as the partnership return of Mooneyhan Management, revealed that he had given up his interest in Mooneyhan Management. Continuing in this vein, Sherrod's 1992 tax return contained an attached Schedule D which read as follows:

> "Mr. Sherrod was a fifty-percent partner in Mooneyhan Management, 62-1430657. Effective January 1, 1992, his interest was purchased and Mr. Sherrod relinquished all interest in assets of the partnership."

Sherrod's 1992 tax return was sworn to by Sherrod. It contained the following language:

> "Under penalties of perjury, I declare that I have examined this return and the accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete."

Taking advantage of the capital loss carryover he had received as a part of the consideration for transferring his interest in the stock option to Mooneyhan, Sherrod offset a capital gain in 1995 of $68,000.00 from the sale of some stock against the capital loss carryover. Moreover, in 1995 Sherrod sold his interest in

HMS Real Properties realizing another capital gain of $50,586.00 that was likewise offset by the capital loss carryover. Furthermore, he sold a part of the Movieland property in 1995 which he had received from Mooneyhan as a part of the consideration for the transfer of the stock option agreement, and this resulted in a capital gain of $164,000.00 for Sherrod. The proceeds from the sale of that portion of Movieland property was not shared in any way with the Mooneyhans and Sherrod's gain was offset again by the capital loss carryover. According to Joe Wiseman, Sherrod was still receiving benefits in 1995 from the sale of his interest in Mooneyhan Management back in 1992.

In 1996, Sherrod sold the remainder of the Movieland property for $447,000.00. In connection with that sale Sherrod had a capital gain of $231,000.00, a portion of which was offset by the remaining balance left in the capital loss carryover from 1992. None of the proceeds from this sale was shared with Mooneyhan.

On November 2, 1992, Sherrod prepared and gave to Mooneyhan a legal document titled "Assignment":

> "FOR VALUE RECEIVED, I hereby assign and transfer to JERRY A. MOONEYHAN, Johnson City, Tennessee, all of my interest in the "Stock Option Agreement" entered into on May 8, 1990, by and among BRASSELER U.S.A., INC., HOWELL H. SHERROD, JR., and JERRY A. MOONEYHAN (optionees), QUALITY DENTAL PRODUCTS, INC. (corporation), and DEREK HEATH and wife, JACQUELINE HEATH (shareholders), and do irrevocably constitute and appoint JERRY A. MOONEYHAN my true and lawful attorney-in-fact for me and in my name, place, and stead to act for me in any and all matters relative to any rights I have or could acquire in the future directly and/or indirectly as a result of the existence of the aforementioned document, as fully as I could do if personally present.
>
> It is my specific intention that this shall be a durable power of attorney and shall survive any incapacity on my part.
>
> IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of November, 1992.

/S/Howell H. Sherrod, Jr.

STATE OF TENNESSEE
COUNTY OF WASHINGTON

On this 2nd day of November, 1992, before me personally appeared Howell H. Sherrod, Jr., to me known to be the person described in (or proved to be on the basis of satisfactory evidence) and executed in the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/S/Patsy K. Edmiston
Notary Public

My Commission Expires:
1-2-94"

Although Mooneyhan believed that this document transferred Sherrod's interest in the stock option to him, he had it reviewed by another attorney in Johnson City, Sam Miller. According to Mooneyhan, Miller advised him that it was "not a good document."

Attorney Miller testified essentially that he had grave reservations about the sufficiency of the purported assignment and consequently drafted another assignment purporting to transfer Sherrod's interest in the stock option to Mooneyhan. The assignment prepared by attorney Miller reads as follows:

"FOR VALUE RECEIVED, the undersigned, HOWELL H. SHERROD, JR., does hereby assign and transfer to JERRY A. MOONEYHAN, Johnson City, Tennessee, all of my right, title and interest in and to the "Stock Option Agreement" and all the benefits and emoluments attached thereto, entered into on May 8, 1990, by and among BRASSELER U.S.A., HOWELL SHERROD, JR., and JERRY A. MOONEYHAN (Optionees), QUALITY DENTAL PRODUCTS, INC. (Corporation) and DEREK HEATH and wife, JACQUELINE HEATH (Shareholders) and all right, title and interest in and to any profits, issue, and income that may arise thereunder at any time, whether accrued or unaccrued, and I direct that the Assignee mentioned herein above shall have and possess any and all rights and obligations heretofore owned by me in and to said "Stock Option Agreement."

DATED this the 2nd day of November, 1992.

/S/Howell H. Sherrod, Jr.

STATE OF TENNESSEE
COUNTY OF WASHINGTON

On this the 12th day of January, 1993, before me personally appeared HOWELL H. SHERROD, JR., to me known to be the person described in (or proved to me on the basis of satisfactory evidence) and executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/S/Patricia M. McQueen
Notary Public

My Commission expires:
April 28, 1993"

After obtaining the redrafted assignment from attorney Miller, Mooneyhan contracted Sherrod and told him the first assignment was unsatisfactory and he would have to execute another one. Sherrod executed the new assignment on January 12, 1993.

After the execution of the second assignment, Sherrod had nothing further to do with the day-to-day management of the company. Heath testified that after the second assignment he had no further meetings with Sherrod. He testified also that Sherrod made no inquiries about the business itself and how it was doing. According to Heath, Sherrod never requested any financials about the company. He testified that during the period of time after the execution of the second assignment he considered his primary partner to be Mooneyhan and that each owned fifty percent of the business.

The 1993 corporate tax return of QDP represented that Derek Heath owned 20 shares of stock and that Jerry and Ann Mooneyhan jointly owned the other 20 shares of stock. This return was filed by accountant Wiseman on behalf of QDP. He was also Sherrod's personal accountant and not aware at that time that Sherrod was claiming any interest in QDP.

After an agreement was reached between Sherrod and Mooneyhan that Mooneyhan would purchase Sherrod's interest in the Stock Option Agreement, Mooneyhan began working full time at QDP. The business began gradually to recover. Tulsa Dental again became a customer. The company had a profit in 1993 of $23,864.00.

Business improved during 1994. In 1995 negotiations began for a merger between Tulsa Dental Supply and Quality Dental Products. Part of the reason for the comeback of QDP was the development of endodontic instruments using a substance called "nickel titanium." The negotiations for the merger on behalf of QDP were carried on by Heath and Mooneyhan. Sherrod was never consulted at any time about this merger, which was finally effectuated in early 1995.

In September of 1995 negotiations began with a corporation called Dentsply concerning a buyout of the new company created by the merger of QDP and Tulsa. An agreement was finally reached and a closing held in early January, 1996. Mooneyhan and Heath each received $12,365,000.00 net for their interest.

Sherrod was not involved in the negotiations in any way pertaining to this sale, nor was he consulted. It was after reading about the sale in the newspaper that he called Mooneyhan to inquire as to when the profits could be split up. Mooneyhan immediately advised Sherrod that he was not entitled to any of the profits.

This litigation followed, with Sherrod alleging that he entered into an agreement with Mooneyhan assigning his interest in and to the Stock Option Agreement in consideration of which Mooneyhan agreed to pay him an amount based upon the ultimate value of the Quality Dental Products, Inc., stock or the sales price of the same. During the course of the proceedings Sherrod relied on his

alternative theory to allege that he executed an assignment of the Stock Option Agreement because Mooneyhan told him that he needed it to effectuate the financing for the purchase of the stock.

ISSUE #1

The appellant argues that the trial judge erred in requiring him to read the deposition of Mooneyhan before the plaintiff testified, "which in essence reversed the burden of proof." We do not understand the court's ruling as having the effect argued by the appellant.

The issue arose owing to the death of Mooneyhan, whose discovery deposition was on file. See, Rule 32.01(3). The defendant contended that T.C.A. § 24-1-203 [Dead Man's Statute], prevented the plaintiff from testifying as to any transaction or statement by Mooneyhan. The trial court ruled that the taking of Mooneyhan's discovery deposition constituted a waiver of the statute [*see, Ingram v. Phillips*, 684 S.W.2d 954 (Tenn. App. 1984) holding to the contrary] and that if the plaintiff desired to read Mooneyhan's deposition he would be required to read any portion requested by the defendant. Rule 32.01(4) so provides. We see no error here.

ISSUE # 2

Appellant argues that the court erred in failing to interpret the assignment. We do not precisely grasp the thrust of this argument. A thorough examination of the record does not reveal that Mooneyhan contradicted the terms of the assignment; rather, the plaintiff contradicted it. He testified that he transferred his interest in the Stock Option Agreement to Mooneyhan so that Mooneyhan could effectuate the necessary financing. This issue is without merit.

ISSUE # 3

Appellant argues that the defendant failed to "meet the burden of proof required to establish a modification of the original terms of the contract, there being no material evidence to support a modification."

Neither the complaint nor the amended complaint alleges a modification of the assignment. The defendant, as we read the record, never alleged a modification. This theory was neither presented nor pursued at trial, and under familiar appellate rules, cannot be raised for the first time on appeal. *Smith v. City of Pigeon Forge*, 600 S.W.2d 231 (Tenn. 1980).

ISSUE # 4

_____The plaintiff argues that the verdict "is not supported by the evidence relating to the plaintiff's and defendant's course of dealing in the involvement of the operation and ownership of QDP after the assignment was signed." This issue has reference to the plaintiff's theory that the assignment was solely to effectuate [facilitate] the necessary financing. This is a fact-based argument which the jury decided adversely to the plaintiff. Since there was abundant material evidence to support the verdict, we are not at liberty to disturb it.

ISSUE # 5

_____Appellant argues that the trial court erred by granting the defendant's Motion in Limine to "prevent the plaintiff from enquiring about the knowledge of Ann Mooneyhan, Executrix, concerning her husband's adoption for tax purposes."

Mrs. Mooneyhan testified about her husband's business affairs at some length. As significant here, she testified that the plaintiff was not involved with QDP after he executed the assignment. To test her credibility, the plaintiff wanted to ask her if she was aware that her Aunt had adopted her husband. By brief,

appellant tells us that he wanted to show the extremes to which Mooneyhan would go in order to avoid taxes, and that he did not reveal all of his schemes to his wife as she testified. Appellant argues that Rule 607 of the Tennessee Rules of Evidence allows him to attack the credibility of Mrs. Mooneyhan.

A short answer to this argument is simply that the record does not reveal that Mooneyhan had been adopted by his wife's aunt. There was no proof offered or proffered on the point which clearly delineated it. The plaintiff offered, as an Exhibit, an inter-office memo which referred to a Chancery file in the name of Mary C. Hill. In any event, we think any error in excluding enquiry into whether Mooneyhan was adopted by his wife's aunt was harmless.

ISSUE # 6

_____Appellant next argues that a new trial should have been awarded because of inflammatory statements of counsel in his closing argument. We reproduce the allegedly inflammatory statements:

> (1) "Look at the Work Tech Fibers deal. They owed two hundred -- borrowed $250,000; went down to the bank and borrowed it. Whose name was it in? It was in Dr. Mooneyhan's name. Mr. Sherrod's name was not on that note, was never placed on that note at any time. And I ask you now, is that the type of dealings that you want to deal with somebody?
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> If you're going to go into a business deal with somebody and the two of you are going to go out and buy two hundred -- borrow $250,000. do you want your partner's name on that note with you? Or do you just say, I'm going down there and sign that myself. I think if you'll think about that, you'll see the direction I'm heading.
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> The Bristol Building. Now it's no -- it's true that the business -- the building is in both of their names; it's true that they both signed the mortgage, but the unusual situation here is that although both are signed on the mortgage, Dr. Mooneyhan didn't owe any money. He put up his money up front. He signed the mortgage so that Mr. Sherrod could borrow his part.
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> Is that fair? Is that how you want to do it? Do you want to -- do you want to go into business with me? You put up your half, and then we go down to the bank and borrow the money so that I can put

up my half and we're both responsible on it? That's exactly what -- what's going on here. Now is that fair? Is that the way you want to do business? Advantage Sherrod.

Movieland. The deal was -- the property was purchased and put in Sherrod's name solely. Go down to the bank, borrow the money; Mooneyhan signs the -- signs the note. His name's not on the deed. He doesn't have anything; the bank doesn't have anything to show that he owns that property. He doesn't have anything to show that he owns it other than the word of Mr. Sherrod. Fair?

Is that the way you want to do business? Do you want to buy a building with me? Do you want to put it in my name, go down to the bank and borrow the money; we both sign it, and your name not be on the deed? Do you want to do it that way? I don't think you do. I consider the advantage for Sherrod.

Now let's go on to the Franklin Plaza property. Here we've got a situation where the property's in Dr. Mooneyhan's name. Okay? Just kind of the opposite of Movieland. It's a little bit different situation here. They borrow the money. Mooneyhan puts up his share of the money. They go borrow Sherrod's share of the money and put it in. But Sherrod don't even sign the note this time. He don't even sign the note. Whose advantage is this?

Do you want to do business with me like that? You want you and I to own a building and you have a half interest and it be in my name? Do you want me to buy it for you and it be in your name and then put the note in your name also?

Now ladies and gentlemen, you folks, I'm sure, over the years have had certain business dealings, and you have a, hopefully, a sense of fairness, of what's wrong and what's right. Now there's red flags go up on every one of these situations.

And I guess the thing that bothers me most about it and it ought to bother you is that we're not dealing with just two lay people here. We're dealing here with one of them who is a professional and a lawyer who knows better, who's been to law school, who knows how to write contracts, who never brought to you or showed you one semblance of any type of contract or partnership agreement.

It's a little bit different situation. It's not quite like two of you people out there doing some business, and one of them is a lawyer. And I think that you ought to expect more from that person as far as detail work is concerned.

(2) "If somebody told you -- if you were a businessman and somebody came to you and said, I'm going to raise prices, and you asked, Well, why? we thought prices were going down. And you said, Because you can afford it. We're selling this to you for 90 and you're selling it -- 90 cents and you're selling it for six dollars. They didn't offer any proof as to what the profit margin was in connection with that. I don't know.

But that -- is that the type of person that you would deal with?

(3) "I never intended to sell Mooneyhan my interest in Movieland. The man of his word. Yet his tax returns don't say that. And if you -- if you don't tell the truth on your tax returns, you're defrauding the federal government. And when you defraud the federal government, you're defrauding me and you're defrauding you, as citizens of this country.

(4) "This is a lawyer. And I -- I'm really concerned, ladies and gentlemen, and you ought to be concerned about the fact and it ought to really weigh heavily on you when you decide whether I'm going to believe that story or not.

Why would a lawyer advise his client and his business partner and why would he become a part of a, quote, conspiracy, to defraud the bank if the bank's not in on this? We're doctoring up Mooneyhan's financial report so that he can get this money. Now that really, really, really bothers me. And he's saying, I was defrauded. I had no reason to know that. Yet, at the same time, I was doing things to help doctor up his financial statement.

Something don't jive here, and somebody's not being completely and totally honest. And you ought to have difficulty; you ought to have great, great difficulty with a statement that's taken by a person, anybody, but especially by a lawyer, with reference to something like that.

(5) "Ann Mooneyhan didn't say much. Bless her heart; she don't know much. No disrespect intended, Ms. Mooneyhan. I didn't mean it quite that way. But she didn't know much that she could testify to in this lawsuit. She did tell you and the one thing that I put her on for and the one thing I wanted her to tell you and the one thing I wanted you to hear from her is the fact that she did know what business her husband was in. And he never, at any time, gave her any indication that he had an ongoing deal with Hal Sherrod. His own wife he didn't tell."

Appellant argues that the verdict was the result of passion and prejudice since the jury took only 45 minutes to decide a case involving 100 exhibits and four days of testimony. He argues that counsel for the defendant inappropriately exhorted the jury and thus deprived the plaintiff of a fair trial.

The appellee responds that Tennessee law is clear on the point: that objection must be made to the argument or conduct of counsel at the trial, and a ruling pronounced, or the matter cannot be considered on appeal, citing *Morgan*

v. Duffy, 30 S.W. 735, 94 Tenn. 686 (1895). In more recent times, this Court has addressed the issue in *Lee v. Lee*, 719 S.W.2d 295 (Tenn. App. 1986):

> "Counsel for Defendant did not object to the remarks of Plaintiffs' counsel at the time of trial. An objection to the remarks or conduct of counsel must be made at the trial and a ruling had thereon, or they will not be considered on appeal. *See Morgan v. Duffy*, 94 Tenn. 686, 30 S.W. 735 (1895). Since Appellant's counsel made no objection at the time of the argument, and since she did not request the trial judge to ask the jury to disregard the argument, we find no error. *See Miller v. Alman Construction Co.*, 666 S.W.2d 466, 469 (Tenn. App. 1983).

This issue is without merit.

ISSUE # 7

Appellant claims the trial court erred in "failure to modify the judgment to reflect the issues reserved by the agreement of the parties." These issues apparently involved attorney fees. We see no prejudice resulting to the plaintiff as a result of the refusal of the court to declare, by way of the judgment, that the entitlement of the plaintiff to fees for services to Mooneyhan or to the corporations involved in this litigation was not an issue. Whether or not Sherrod was entitled to fees was never an issue in this case, and the fact that the judgment did not so recite is of no legal consequence. This issue is without merit.

ISSUE # 8

Finally, the appellant argues that the trial court erred in requiring him to make an election of remedies between fraudulent misrepresentation and negligent misrepresentation as a condition to testifying.

Before the plaintiff testified, a protracted colloquy transpired between counsel and the trial judge, who was concerned about the potential evidentiary problem posed by the parol evidence rule, the genesis of which was the death of Mooneyhan. Counsel for the plaintiff stated to the court that the plaintiff would testify that Mooneyhan told him to "sign the documents to put QDP in his name for

purposes of effectuating the financing to close that option out." The court then enquired "where's the negligence involved?" Counsel replied, "I don't know what Mooneyhan sincerely thought, so negligent misrepresentation. He was just careless in what he believed the bank needed. . . ." The court then ruled that "If you allege fraud I'm going to let it in. If you're not, I'm not . . . .you've got to choose one or the other . . . ."

On the morning of the day following, the matter was rehashed, with the trial judge stating "my understanding, the theory of negligent misrepresentation has been abandoned by the plaintiff. Is that correct?" Counsel replied, "correct."

As we read the record, a serious evidentiary problem for the plaintiff was thus averted. He was allowed to testify fully. The jury was not instructed on the question of negligent misrepresentation, and there is no issue presented for the review of this omission. In any event it clearly does not appear that the refusal of the trial judge to allow the plaintiff to proceed on the theory of negligent misrepresentation was an error involving a substantial right or that it more probably than not affected the verdict. Rule 36(b), T.R.A.P.

The judgment is affirmed at the cost of the appellant.

_____

William H. Inman, Senior Judge

CONCUR:

_____

Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., Judge