IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 7, 2005 Session

BRENDA MYERS v. KENNETH MYERS, JR.

Appeal from the Circuit Court for Scott County
No. 5144 John D. McAfee, Judge

Filed June 27, 2005

No. E2004-02135-COA-R3-CV

Brenda Myers brought this action against her former husband, Kenneth Myers, Jr., alleging that he had assaulted her on December 21, 1998. The matter went to trial. The jury returned a verdict for the plaintiff and awarded her compensatory damages of $500,000 – the full amount she had sought in her complaint. The defendant filed a motion for a new trial. In response to the motion, the trial court reduced the jury's award to $150,000. The defendant appeals, raising an evidentiary issue as well as two procedural issues. In addition, the defendant contends that he should have been granted a new trial rather than being burdened with a remitted judgment. We hold that the trial court's decision to suggest a 70% remittitur effectively destroyed the verdict of the jury. Accordingly, we vacate the trial court's judgment and remand this case for a new trial, but solely on the issue of damages.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Sidney R. Seals, Oneida, Tennessee, for the appellant, Kenneth Myers, Jr.

Charles B. Sexton, Oneida, Tennessee, for the appellee, Brenda Myers.

OPINION

I.

The parties were married for approximately 23 years, during which time they had two sons. They were divorced in 1994; however, they continued to live together intermittently for the next several years. They were living together on December 21, 1998 – the date of the alleged assault.

The parties testified to very different scenarios as to what transpired on December 21 and 22, 1998. The plaintiff testified that problems started when she informed her husband that she wanted to visit her mother. The defendant allegedly told her that if she did, she could pack her bags and move in with her mother. According to the plaintiff, the defendant then turned the radio and TV up real loud and sent the parties' youngest son to his room. She testified that the defendant subsequently grabbed her by the shoulders and slammed her head against the wall several times before throwing her in a way that caused her back to strike a counter. She reported that he placed a gun against her head, and threatened to shoot both her and other family members. He also held a knife to her throat. At some point, he stopped and went to the son's room to tell him he could come out. The plaintiff then went to bed. The next morning, the plaintiff got up at approximately 4:15 a.m., as was her usual routine when she was due at work at 5 a.m. Instead of going to work, however, she drove to the hospital seeking treatment for the injuries she had suffered as a result of the assault on her person.

The defendant testified as follows. On the evening in question, the plaintiff went to bed at approximately 8:30 p.m., leaving the defendant and his son watching television. The defendant retired around 9:00 p.m. However, soon thereafter, he received a phone call from someone complaining about a tenant at a trailer park he owned. He testified that he went to the trailer park where an intoxicated individual was causing problems. He returned from the trailer park around 3:30 a.m., at which point he returned to bed.

The plaintiff typically called home from work at 7:00 every morning to make sure her son was up for school. However, when she did not call on the morning of December 22, 1998, the defendant and his son went to the plaintiff's place of work to see if she was there. Not seeing her car in the parking lot, they proceeded to the hospital. They found her in the emergency room.

In March, 1999, the plaintiff filed a complaint predicated on the defendant's alleged assault. She sought compensatory damages for her injuries, *i.e.*, headaches and back pain, medical bills, pain and suffering, the diminution in her earning capacity due to a permanent impairment, and lost wages. She sued for $500,000. She also sought punitive damages.

A jury trial was held on May 20, 2003. The plaintiff's case consisted of testimony from the plaintiff; her treating physician, Dr. Coffey; and Officer Robbie Carson. The latter introduced photographs of the plaintiff that he had taken when she was at the hospital on December 22, 1998. Both of the parties' sons testified on their father's behalf. The youngest son, who was present on the night in question, corroborated the defendant's version of events. The plaintiff testified that she believed the defendant and her son had plotted against her. At the close of the proof, the jury returned a verdict for compensatory damages of $500,000; it did not award any punitive damages. A judgment on the jury's verdict was entered on January 19, 2004.

The defendant subsequently filed a motion for a new trial. That motion was based, in part, upon the defendant's claim that the amount of the jury's verdict "exhibited passion, prejudice and caprice by the [j]ury." The defendant argued that since the medical bills amounted to somewhere

between $12,000 and $13,000, and since, according to him, there was no evidence of lost wages or permanent physical impairment, the verdict was "way outside the bounds of reasonableness which cannot be corrected by remittitur and is a clear indication that it was based on passion, prejudice and/or caprice." The trial court denied the motion for a new trial, but reduced the award to $150,000. The defendant appeals.

II.

The central – but not the only – issue before us concerns the trial court's decision to reduce the jury verdict from $500,000 to $150,000. The defendant's motion for a new trial did not specifically seek a remittitur. It simply requested a new trial. The trial court, on its own volition, suggested the reduction to $150,000. On appeal, the defendant challenges the trial court's action. He contends that both the verdict of $500,000 and the verdict as remitted are outside the range of reasonableness; he says a new trial is the only appropriate remedy to correct the jury's verdict. The plaintiff, on the other hand, contends that the $500,000 verdict was not excessive; she argues that it should be reinstated.

The issue of damages is primarily for the jury. ***Bates v. Jackson***, 639 S.W.2d 925, 927 (Tenn. 1982). However, a trial court has the statutory authority to adjust the jury's award when necessary to accomplish justice between the parties and to avoid the expense of a new trial. ***Long v. Mattingly***, 797 S.W.2d 889, 896 (Tenn. Ct. App. 1990). This prerogative is codified in Tenn. Code Ann. § 20-10-102 (1994), which provides as follows:

> (a) In all jury trials had in civil actions, after the verdict has been rendered, and on motion for a new trial, when the trial judge is of the opinion that the verdict in favor of a party should be reduced, and a remittitur is suggested by the trial judge on that account, with the proviso that in case the party in whose favor the verdict has been rendered refuses to make the remittitur a new trial will be awarded, the party in whose favor such verdict has been rendered may make such remittitur under protest, and appeal from the action of the trial judge to the court of appeals.
>
> (b) The court of appeals shall review the action of the trial court suggesting a remittitur using the standard of review provided for in Rule 13(d) of the Tennessee Rules of Appellate Procedure applicable to decisions of the trial court sitting without a jury. If, in the opinion of the court of appeals, the verdict of the jury should not have been reduced, but the judgment of the trial court is correct in other respects, the case shall be reversed to that extent, and judgment shall be rendered in the court of appeals for the full amount originally awarded by the jury in the trial court.

The fact that the trial court denied the defendant's motion for a new trial and suggested a remittitur clearly indicates that the trial court agreed with the jury's verdict pertaining to liability. *See* ***Burlison v. Rose***, 701 S.W.2d 609, 611 (Tenn. 1985). It is obvious that the trial court's disagreement with the jury's verdict was only as to the amount of that verdict. ***Id***.

We must conduct a three-part inquiry to determine whether the trial court acted appropriately in reducing the verdict, "giving due credit to the jury's decision on the credibility of the witnesses and that of the trial judge in his capacity as thirteenth juror." ***Foster v. Amcon Int'l, Inc.***, 621 S.W.2d 142, 145 (Tenn. 1981). We first assess the trial court's reasons for suggesting a remittitur by determining if the evidence proffered at trial supported the jury's verdict or merited a reduction. *See* ***Burlison***, 701 S.W.2d at 611. Second, we examine the amount of the suggested adjustment, because an adjustment that "totally destroys" the jury's verdict is not permitted and must be vacated or modified. ***Foster***, 621 S.W.2d at 148; ***Guess v. Maury***, 726 S.W.2d 906, 913 (Tenn. Ct. App. 1986). Lastly, we review the proof adduced at trial to determine if the evidence preponderates against the trial court's adjustment. *See* Tenn. Code Ann. § 20-10-102(b).

At trial, the plaintiff testified about her injuries resulting from the incident and how those injuries continued to impact her life at the time of trial. As a result of the assault, she sustained a fracture to her face and two fractures in her back. She also suffered severe headaches and back pain. Approximately three months after the incident, she was hospitalized due to depression; she testified that, at the time, she was contemplating suicide. Dr. Coffey, her treating physician, testified that he made several referrals for the plaintiff, which included referrals to a physical therapist, a psychiatrist, an orthopedic specialist, and a neurosurgeon. Her medical bills amounted to approximately $13,000.

In his deposition, which was read to the jury, Dr. Coffey stated that it was his opinion that

> . . . she'll have permanent impairment in the spine as a result of the disc and the pain from the fractured vertebrae. The vertebrae usually heal, but you don't really suffer weakness or whatever, but you have a lot of pain. The disc will never heal.

Dr. Coffey was not asked by either side to rate the plaintiff's permanent impairment and he did not volunteer a percentage rating.

Her chief complaint at the time of trial was her back. With respect to the headaches resulting from the defendant's abuse, the plaintiff stated "I don't really have them but maybe every once in a while." She testified that, because of her back, she had difficulty sleeping and had to "watch what [she did]." On her claim of lost wages, the plaintiff testified that she missed some work, but was not sure of how much. She presented no evidence to substantiate her claim for damages as a result of lost wages.

In response, the defendant stated that the plaintiff had complained of back pain before the incident. He said she underwent breast reduction surgery to help alleviate that problem. The

plaintiff testified that her present pain is different from that which prompted her to undergo breast surgery. The defendant also testified that, prior to this incident, she experienced frequent headaches. In fact, two days prior to the incident, she was having severe headaches and went in for a CAT scan. The plaintiff testified that her earlier headaches were concentrated in the right side of her head, whereas those following the assault centered around her left eye.

In summary, the plaintiff's medical bills amounted to approximately $13,000; her problems, over time, had lessened but she still had problems with her back, and, by the plaintiff's own testimony, she did not miss many days of work. Dr. Coffey opined that she had a permanent back condition that would cause her pain, but he did not assign her a percentage impairment rating. Viewing the evidence with respect to the plaintiff's injuries and resulting problems in the manner prescribed in ***Foster***, *see* 621 S.W.2d at 145, we nevertheless conclude that the evidence does not preponderate against the trial court's decision that the verdict is excessive.

We must next decide if the remittitur "totally destroy[ed]" the jury's verdict. ***Foster***, 621 S.W.2d at 148; ***Guess***, 726 S.W.2d at 913. In ***Foster***, the Supreme Court noted that since "[a]dditurs and remittiturs were designed to correct the excessiveness or inadequacy of a jury's verdict as an alternative to the granting of a new trial," the trial court cannot suggest a substantial reduction such that it effectively destroys the jury's verdict. ***Foster***, 621 S.W.2d at 148. We do not have any set standard by which to determine if the remittitur destroyed the verdict, as the Supreme Court has shied away from setting numerical standards for reviewing additurs and remittiturs. *See* ***id.*** at 148, n.9. However, for the sake of comparison, this court has held that a remittitur that amounted to a 75% reduction in the jury's award effectively destroyed the verdict. *See* ***Guess***, 726 S.W.2d at 913.

In the instant case, the jury awarded the plaintiff $500,000 in compensatory damages. By reducing the verdict to $150,000, the trial court reduced the jury's award by 70%. In our judgment this reduction was so large as to destroy the jury's verdict. Accordingly, we find reversible error in the trial court's decision to remit the verdict to $150,000 rather than granting a new trial.

IV.

A.

The defendant raises several legal issues pertaining to alleged errors of the trial court in the conduct of the trial. We will address each in turn.

B.

The defendant charges that the trial court erred in receiving into evidence the testimony of the plaintiff pertaining to abuse suffered by her at the hands of the defendant – abuse that is not generally or specifically alleged in the complaint. As the defendant correctly points out, the gravamen of the plaintiff's complaint is the incident of December 21, 1998. No other incidents are alleged, generally or specifically, in the body of the complaint. Apparently anticipating that the

plaintiff might attempt to testify regarding other incidents of abuse, the defendant seasonably filed a pre-trial motion in limine, which, among other things, sought to prevent the introduction of evidence pertaining to incidents other than the one alleged in the complaint. The record before us does not reflect that the trial court ruled on the motion prior to the commencement of trial. The defendant states in his brief that the court deferred ruling on the motion, opting, instead, to rule when the evidence was offered at trial. There is, however, nothing in the record to substantiate this assertion.

Early on in the plaintiff's testimony on direct, the following exchange occurred:

> Q: What do you mean "this time"?
>
> A: Because he had – you know, he had abused me many, many times. But this time it was worse. It was worse this time.
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> Q: Up until this time did you admit or deny that he had assaulted you in the past, or abused you?
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> A: I lied to people when I had black eyes and things. I was ashamed of it. For many years, even my family, you know, everybody thought we had a perfect marriage, but it never was.

There was no objection to the question or to the plaintiff's response. Still later in the plaintiff's direct examination, the following question and answer are to be found:

> Q: Now, you had indicated prior to December 21st, he had assaulted you few or many times?
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> A: Many. It was every few days. It was either an argument where he would grab me by the shoulders, was his favorite way of doing it, and slam my head against the wall until I did – you know, if I didn't say exactly what he wanted to hear, or, you know, if I did something he didn't like. I was kept in isolation except for going to work.

Again, there was no objection.

The following exchange took place some seven pages later in the transcript:

> A: I've probably had spells of depression because of the life I lived, and the pressures was put on me. You know, I was like – you would have to be there to understand it. You walk on egg shells.

> [Defendant's attorney]: Your Honor, I've been pretty liberal here. This complaint is for allegations on December the 21st, 1998. I think it was filed in March of [1999]. Anything within a year of March of 1999, I think was fair game, if it's alleged in the complaint. Otherwise, it's irrelevant testimony.
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> THE COURT: Overruled.
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> Q: Go ahead.
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> A: It was the life I lived. We all, me and my kids, we were walking on egg shells. You're scared. You're scared all the time. And you're scared to – whatever you do, if he's in a bad mood, it's not right, and you'll just get the fire knocked out of you, or you'll get something throwed at you, or whatever.

These three references to unalleged abuse are the extent of the times when the plaintiff's testimony went beyond the allegation of abuse in the complaint.

Our rules of appellate procedure prescribe that relief may not be afforded to "a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). Consequently, a party's failure to object to evidence in a seasonable and specific manner precludes this court from finding error in the admission of the evidence. *See* ***Pyle v. Morrison***, 716 S.W.2d 930, 936 (Tenn. Ct. App. 1986).

With respect to the first two exchanges set forth above, we hold that the defendant waived any objection he had to the introduction of the testimony. His reference to "I've been pretty liberal here," indicates that he *consciously* did not object to any of the prior testimony. In fact, he seems to have acquiesced in a "time" expansion of the very precise allegation in the complaint by stating that "[a]nything within a year of [the date of the filing of the complaint], I think was fair game, ..." Furthermore, the defendant cannot rely upon the fact that he filed a motion in limine. As previously noted, that motion was not ruled upon by the trial court prior to trial. As the Supreme Court has said in the case of ***Grandstaff v.Hawks***, 36 S.W.3d 482, 488 (Tenn. Ct. App. 2000),

> [i]f . . .the trial court has not "clearly and definitively" acted on the motion [in limine], the moving party must renew the motion contemporaneously with the introduction of the objectionable evidence. Failure to renew the motion will preclude the moving party from taking issue on appeal with the admission of the evidence.

Therefore, the defendant did not seasonably object to the first two exchanges and, hence, cannot take issue with the introduction of this evidence at trial.

With respect to the third group of questions and answers, we do not believe that this evidence significantly differs from other unobjected-to testimony of the plaintiff expressing the fact that she and their children were scared of the defendant.

In any event, even if we were to find that any of this testimony had been improperly admitted into evidence, we are unable to say that the admission of the evidence, limited as set forth above, involved "a substantial right [that] more probably than not affected the judgment." Tenn. R. App. P. 36(b). This issue is found adverse to the defendant.

C.

The defendant also claims that he was prejudiced by the fact that a uniformed domestic violence officer was permitted to sit at the plaintiff's table during the trial. The defendant, in his brief, contends that during the course of the trial, his attorney became aware that the officer was sitting at the table while a witness was being examined. His attorney also noticed that the officer was "conversing with [p]laintiff and [p]laintiff's counsel in a jovial manner . . . in the presence of jurors who were returning from the recess." According to the defendant, his counsel subsequently asked the court bailiff to remove her from counsel table, which the bailiff did. This matter, while not being reflected in the transcript of the trial, is set forth in the affidavit of the bailiff filed in support of the defendant's motion for a new trial. The plaintiff does not contest the accuracy of the defendant's assertion in this matter.

We find this issue adverse to the defendant. Once defense counsel brought this matter to the attention of the bailiff, the bailiff asked the officer to move and she complied with his request. Thus, it is clear that the perceived problem was immediately remedied. This being the case, there is nothing before us to indicate that the defendant was prejudiced by the temporary location of the officer at the plaintiff's table. In any event, we do not find that this situation arises to the level of the type of error contemplated by Tenn. R. App. P. 36(b).

D.

Lastly, the defendant argues that he was prejudiced by the plaintiff's use of a uniformed deputy sheriff to introduce photographs of the plaintiff taken on December 22, 1998. However, we agree with the plaintiff that where the deputy sheriff was the photographer, it was appropriate to call him to the stand as an authenticating witness. This issue is found to be without merit.

V.

The judgment of the trial court is vacated. This matter is hereby remanded for a new trial, but solely on the issue of damages. Exercising our discretion, we tax the costs on appeal to the appellant, Kenneth Myers, Jr.

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CHARLES D. SUSANO, JR., JUDGE