RENDERED: September 18, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-000085-MR

SEAN STALLINGS — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN MINTON, JR., JUDGE
ACTION NO. 96-CI-000195

MELVIN LOWREY and ATLANTA CASUALTY INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GARDNER, HUDDLESTON, and KNOX, JUDGES.

KNOX, JUDGE: Sean Stallings appeals from a judgment entered by the Warren Circuit Court upon a jury verdict in favor of defendant/appellee, Melvin Lowrey, in a personal injury case. We affirm the decision of the trial court.

This case arose out of a three-vehicle traffic accident involving appellant, Sean Stallings, appellee, Melvin Lowrey, and a third party, Sherrilyn Mutter. On February 11, 1993, appellant was traveling east on Highway 68 in Warren County. At the time, he was working for the Fraternal Order of Police and on that particular day, was picking up donations from individuals in the community who had pledged their support. Appellant was searching for a specific address when he realized he had missed his turn.

He continued down Highway 68 to find a place where he could turn around. Mr. Lowrey was traveling in a pick-up truck behind appellant, and Ms. Mutter was behind Mr. Lowrey. As the three vehicles rounded a sharp curve, appellant spotted a driveway to the right in which he could turn around, and proceeded to pull in. Thus began a series of events which ultimately ended in appellant's hitting a stone wall, only after he was rear-ended by Mr. Lowrey, who was rear-ended by Ms. Mutter. Both Melvin Lowrey and Sherrilyn Mutter testified they saw no brake lights on appellant's car prior to the accident, nor did they see a right turn signal (blinker).

Two (2) years after the accident, in February 1995, appellant discovered he had a herniated disk in his lower back. Several months later, in June 1995, he had back surgery. On February 20, 1996, appellant filed a complaint in Warren Circuit Court against Melvin Lowrey, Sherrilyn Mutter, and Atlanta Casualty Insurance Company, appellant's underinsured motorist insurance carrier. Appellant alleged negligence on the part of Mr. Lowrey and Ms. Mutter, eventually demanding damages totaling over one million dollars, half of which represented impairment of his power to earn money. Prior to trial, Ms. Mutter entered into a settlement agreement with appellant, after which the court dismissed appellant's claim against Ms. Mutter, leaving only his claim against Mr. Lowrey to be resolved.

On December 5 and 6, 1996, appellant's case was heard before a jury. At the close of Mr. Lowrey's evidence, appellant

moved for a directed verdict on the issue of liability, arguing the evidence established that Mr. Lowrey had breached his duties owed the appellant and was substantially at fault for causing the accident of February 11, 1993. The trial court overruled appellant's motion, and counsel proceeded with closing arguments. Appellant objected to two separate comments made by counsel for Mr. Lowrey during closing argument, and moved the court to admonish the jury on each occasion. The court overruled both of appellant's objections.

The court then submitted the case to the jury and instructed it on these issues: "ordinary care," the duties which each of the parties owed the other, causation, and apportionment of fault. The jury returned its verdict in favor of Mr. Lowrey, finding: (1) that Mr. Lowrey did not breach his duty to exercise ordinary care; (2) that Ms. Mutter did not breach her duty to exercise ordinary care; and, (3) that appellant, Sean Stallings, did, in fact, breach his duty to exercise ordinary care for his own safety and for the safety of others on the highway. The jury did not attribute any fault to either Mr. Lowrey or Ms. Mutter, but rather, attributed one hundred percent (100%) of the fault to appellant, and awarded him no damages. Appellant moved for judgment notwithstanding the verdict, relying upon the testimony of his witnesses.[1] The trial court denied appellant's motion.

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[1] Appellant's witnesses included Ms. Mutter, Dr. Phillip Singer (an orthopedic surgeon who treated appellant following the accident), Dr. Mark Woodward (a chiropractor who treated

(continued...)

On appeal, appellant argues the trial court erred in: (1) refusing to direct a verdict in favor of appellant on the issue of liability; (2) refusing to set aside the verdict as against the weight of the evidence; and, (3) refusing to admonish the jury when counsel for Mr. Lowrey engaged in improper argument.

Directed Verdict

Appellant argues that the evidence proving Mr. Lowrey's negligence was so overwhelming that reasonable minds could not differ on the question of whether he bore at least some responsibility for the accident of February 11, 1993. While appellant has offered no specific testimony or proof in support of his argument, we have viewed the videotape of the proceedings, and disagree with appellant's position.

Mr. Lowrey testified that on the straight stretch of Highway 68, he was traveling at approximately forty-five (45) to fifty (50) miles per hour, two to three carlengths behind appellant. He testified that as they neared a sharp curve in the road, he slowed down to approximately five (5) to ten (10) miles per hour. Although he noticed that appellant began turning into

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[1](...continued)
appellant from mid-1994 until April 1995), Dr. Timothy Schoettle (the doctor who performed appellant's back surgery in June 1995), Sharon Lane (a vocational rehabilitation consultant who performed a vocational assessment evaluation of appellant), and Dr. Robert Pulsinelli (an economic consultant who addressed appellant's impaired earning capacity). Mr. Lowrey's witnesses included Dr. Daniel Primm (an orthopedic surgeon who examined appellant in June 1996) and Donna Taylor (a vocational rehabilitation consultant who assessed appellant's occupational impairment).

a driveway on the right side of the road, he observed no brake lights on appellant's car which would indicate that appellant was slowing down, nor did he see a right turn signal on appellant's car. Nonetheless, aware that appellant was attempting a turn, he applied his brakes. Mr. Lowrey further testified that as he was bringing his car to a stop, Ms. Mutter hit him from behind and knocked his pick-up truck into the rear of appellant's car, which had not yet cleared the roadway.

Ms. Mutter testified that as she rounded a sharp curve in the road, she saw appellant's car "bow up," i.e. begin to make a sudden turn, and then observed Mr. Lowrey's brake lights, just in front of her, as he attempted to stop his car. Further, she testified that she could see a portion of the back of appellant's car and that she observed no brake lights on his car, nor did she see a right turn signal. She applied her brakes and swerved to the left, but she nonetheless struck the rear of Mr. Lowrey's pick-up truck. As to the sequence of events, however, she told police on the day of the accident that Mr. Lowrey hit appellant's car before she hit Mr. Lowrey's car, although later, during her deposition, she testified she did not know whether Mr. Lowrey hit appellant first.

Appellant testified that because he had been looking at mailboxes along the highway, he had been applying his brakes for "awhile" before he actually made the turn into the driveway. He testified he was "pretty sure" his brake lights were functioning properly, pointing to the fact that he had purchased new brakes

only two (2) weeks earlier. He went on to say, however, that he did not think the brake lights were actually checked at that time, and that he could not remember when he last checked them himself. As to whether appellant had activated his turn signal, he testified, "I always use my turn signal," although he stated he had never actually checked his right turn signal to make sure it was working.

Our review of the trial court's ruling on appellant's motion for directed verdict is to be conducted as follows:

> A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made. Upon such motion, the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved to the trier of fact. Moreover, the trial court should favor the party against whom the motion is made with all inferences which may reasonably be drawn from the evidence. Upon completion of the foregoing evidentiary review, the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." If the trial court concludes that such would be the case, a directed verdict should be given. Otherwise, the motion should be denied.

National Collegiate Athletic Ass'n v. Hornung, Ky., 754 S.W.2d 855, 860 (1988) (citations omitted).

Considering the above-referenced testimony as true, we do not believe the trial court erred in refusing to grant appellant's motion for directed verdict on the issue of

liability. At that point in time, a verdict rendered in favor of Mr. Lowrey, based upon the testimony presented on his behalf, would not have been "palpably or flagrantly" against the evidence. Mr. Lowrey presented ample proof in his favor on the issue of liability, and called into question certain factual issues upon which, we believe, reasonable minds could differ. As such, it was the responsibility of the jury to resolve any conflicts and to address the credibility of the witnesses. We are reminded:

> In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented. Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses.

Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18-19 (1998) (citation omitted). Under the facts and circumstances before us, we will not substitute our judgment for that of the trial court. "Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." Id. At 18. (Citation omitted).

Judgment Notwithstanding the Verdict

Appellant argues that the rear-end collision of February 11, 1993, could not have happened in the absence of "some" negligence on the part of appellee, Melvin Lowrey. However, we believe the evidence presented on behalf of Mr. Lowrey posed issues of fact which were properly resolved by the jury. We do not find the jury's verdict in favor of Mr. Lowrey to be inconsistent with the evidence, nor do we find the jury's apportionment of fault, 100% to appellant, to be against the weight of the evidence. Thus, for the same reasons we have enumerated above, and based upon the evidence presented in favor of appellee, we affirm the decision of the trial court denying appellant's motion for judgment notwithstanding the verdict.

> The purpose of a motion for judgment N.O.V. is the same as that of a motion for directed verdict.... When either motion is made the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify. On appeal the appellate court considers the evidence in the same light.

Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991) (citations omitted).

Closing Argument

Appellant argues that counsel for Mr. Lowrey, on two (2) separate occasions, made improper comments during his closing argument. Appellant characterizes these comments as "golden-rule type arguments" which appealed to the prejudices of the jury members, and encouraged them to disregard clear and unequivocal

evidence in favor of appellant in order to keep the cost of their own automobile insurance premiums down.

The first of such comments was made in the context of reviewing the credibility of two (2) of appellant's witnesses, Karen Lane, a vocational rehabilitation consultant, and Robert Pulsinelli, an economist:

> Let's talk about the **really** hired witnesses in this case, Karen Lane in Louisville and Robert Pulsinelli. Neither one of them has a medical degree. Neither one of them ever conferred with Dr. Primm, the back specialist who did the only up-to-date examination. Neither one of them ever conferred with Mrs. Donna Taylor, the only board-certified vocational expert in this case. So, I submit to you, ladies and gentlemen, that we cannot rely on these hired witnesses because, if we let them pull the wool over our eyes in this case, they'll smile, and they'll move on to the next lawsuit, and you and I will be the only losers."

Counsel for appellant objected to this remark, and asked the trial court to admonish the jury. The court overruled appellant's objection.

The second remark alleged by appellant to have been improper was made during a commentary, of sorts, about personal injury plaintiffs, in general: "In the law business, we see a lot of lawsuits just like this one, where somebody's involved in an accident, and they hire a lawyer and they start building up the case and, you know, right after the lawsuit's over, they always make a miraculous recovery." At this point, counsel for appellant objected to the remark, and asked the court to admonish

the jury. The trial court overruled appellant's objection. Counsel for Mr. Lowrey continued:

> This is just another example of all the lawsuits that we see in the law business. They're involved in an accident, they hire a lawyer, they start to build up the case, and claim injuries. In every occasion, over and over again, right after it's all over, they make a miraculous recovery. Could it be that's what's gonna happen in this case? I would tend to think so, but that's for you folks to decide when you go back to reach a verdict.

Appellant argues that these remarks, on both occasions, constitute reversible error under Stanley v. Ellegood, Ky., 382 S.W.2d 572 (1964), a personal injury case involving a fourteen-year-old child who was injured in an automobile accident. During closing argument, counsel for the child made several remarks literally inviting jury members to put themselves in either the shoes of the child or in the shoes of the parents of the child, commonly known as the "golden rule" argument. The court in Stanley held that such remarks were improper and prejudicial, requiring reversal.

Stanley, however, is distinguishable from the case we now review. There was no invitation to jury members to put themselves in the shoes of Mr. Lowrey, or anyone else, for that matter. Further, we do not discern in the remarks any references, either express or implied, to increased insurance premiums in the event appellant prevailed. Nor did counsel for Mr. Lowrey argue excluded testimony as occurred in Risen v. Pierce, Ky., 807 S.W.2d 945 (1991), another case upon which

appellant relies. Certainly, as concerns the first remark, counsel for Mr. Lowrey is justified in questioning the credibility of appellant's witnesses during his closing argument.

As for counsel's commentary on personal injury plaintiffs in general, and their "miraculous" recoveries, we do not condone counsel's method or manner. While these remarks may very well have exceeded the bounds of propriety, we nonetheless examine them under the standard set out in Stanley: "Granted that an argument was improper, the difficult question nearly always is whether the probability of real prejudice from [the remarks] is sufficient to warrant a reversal, and in this respect each case must be judged on its own unique facts." Stanley, 382 S.W.2d at 575. We believe the comments about appellant's potential recovery were aimed directly at the damages issue of this negligence action. The jury, however, never reached that issue, having decided that Mr. Lowrey was simply not at fault for the accident on February 11, 1993. The remarks do not appear to impact the issue of whether Mr. Lowrey breached any duties owed appellant, the real focus of the jury's analysis. For that reason, we do not believe the probability of prejudice was sufficient to warrant a reversal in this case.

Conclusion

We find no error in the trial court's decisions denying appellant's motions for directed verdict and for judgment notwithstanding the verdict. Further, we do not believe the remarks made by counsel for Mr. Lowrey during closing argument

were sufficiently prejudicial to warrant reversal. As such, we affirm the order of the Warren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR MELVIN LOWREY:

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