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OPINION OF JUNE 9, 2006 WITHDRAWN

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002350-MR

TIM MORGAN — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 03-CI-01352

CANDRIA SCOTT and
JAMES E. SCOTT, JR. — APPELLEES

AND NO. 2004-CA-002363-MR

MOORE PONTIAC, BUICK
GMC, INC. — APPELLANT

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 03-CI-01352

CANDRIA SCOTT and
JAMES E. SCOTT, JR. — APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER,[1] SENIOR JUDGE.

POTTER, SENIOR JUDGE: Appellant Tim Morgan was test driving a pickup truck Moore Pontiac had for sale when he struck a car driven by appellee Candria Scott. Moore Pontiac and Morgan appeal from a $4 million jury verdict in favor of Scott and her husband. The jury apportioned its verdict between Morgan and Moore Pontiac equally.

Many of the facts, and virtually all of the significant ones, are not in dispute. On the rainy morning of October 10, 2002, Morgan, his wife and daughter went to the Moore Pontiac dealership in South Williamson, Kentucky to investigate purchasing a 1998 Silverado he had previously seen on the lot. Morgan was familiar with pickup trucks. He was a mechanic and was then employed at a tire and lube express. After Mr. Cox, a Moore salesman, talked to him about the truck, Morgan took the truck for a test drive. Before allowing the truck to be taken on the test drive, Cox got a copy of Morgan's driver's license and had him fill out some paperwork associated with the test drive. Shortly after commencing the test drive, Morgan noticed the truck was low on gas and he returned to the dealership to fill the tank before resuming the test drive without Cox. There is some dispute surrounding how Morgan came

[1] Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to be driving without Cox on this second drive. Moore had a company policy requiring a salesman to accompany customers taking their vehicles on a test drive. Cox testified that he accompanied Morgan on the first drive but while he was away from the truck Morgan simply took the truck for a test drive, but stated that he was not concerned because Morgan's car was on the lot. Morgan testified that Cox knew he was taking the truck for a test drive.

After going about four miles, Morgan lost control of the truck when it hydroplaned as he was going around a curve. The truck crossed three lanes of traffic and struck the front of a car driven by Scott, who was seriously injured.

In September 2003, Scott and her husband sued Morgan on the theory that he was at fault in causing the accident. They also sued Moore Pontiac on the theory it had a duty to insure that the truck was operated in a safe manner. They also sued a related entity on the theory that the truck was not properly maintained. At trial, the jury found that the truck had been maintained in a safe condition and that finding has not been appealed. In addition, prior to trial Morgan admitted liability for the accident.

At trial, the jury imposed liability based upon a finding that Moore Pontiac's violation of its in-house policy to have a salesman accompany Morgan was a substantial factor in

causing the accident. On appeal, Moore asserts that it was error to base liability upon its failure to follow this policy. Morgan's appeal focuses upon issues related to the assessment of damages.

Moore Pontiac's Appeal

Moore Pontiac owned the truck involved in the accident. Because under the law of bailment such ownership alone will not make Moore liable for Morgan's accident,[2] Moore Pontiac's liability must rest upon some independent act of negligence. There was no proof at trial that Moore was negligent in entrusting the truck to Morgan. Scott premised her claim on Moore's failure to follow its in-house policy requiring a salesman to accompany every customer taking a test drive.

The trial court instructed the jury as follows:

> [Moore Pontiac] voluntarily assumed a duty to exercise ordinary care to third parities, including [Mrs. Scott], by establishing policies regarding the test driving of vehicles, including the 1998 Chevrolet truck in question.
>
> Do you believe from the evidence that [Moore Pontiac] failed to comply with this duty and that this failure was a substantial factor in causing the accident . . . ?

The jury answered this question in the affirmative and assessed $4 million in damages, which it apportioned equally between Morgan and Moore Pontiac.

[2] Wayne's Adm'x v. Woods, 275 Ky. 477, 121 S.W.2d 957 (1938).

The question on appeal is whether by voluntarily enacting its in-house rule Moore Pontiac could become liable, and if it could become liable, did the Court properly conclude as a matter of law that it was liable for the damages resulting from its failure to follow that policy. The Restatement's position on the issue of a voluntarily assumed duty, which has been endorsed by our Supreme Court,[3] states as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.[4]

Even assuming that Scott could show that Moore Pontiac should have "recognized" that sending a salesman on test drives was "necessary" for the protection of others on the road and that it failed to exercise "reasonable care," she must also establish one of three additional elements.

Addressing the three elements in the reverse order, it is clear that as to "c," no one relied on Moore Pontiac's

[3] Ostendorf v. Clark Equip. Co., 122 S.W.3d 530, 538 (Ky. 2003).
[4] Restatement (Second) of Torts, §324A.

policy. Indeed Scott was unaware it even existed. As to "b," Moore Pontiac was not undertaking a duty owed by someone else. As to "a," the failure to observe the in-house policy did not increase the risk of harm to Scott. As noted, absent the internal policy Moore Pontiac could have lent its cars to responsible drivers without making itself liable for the damages caused by their negligence. The existence and subsequent non-observance of the in-house rule did nothing to increase this risk. The situation is exactly what it would have been had Moore Pontiac not instituted the policy.

Having held that Moore Pontiac's adoption of the internal policy in issue here does not expose it to liability to Scott, the issue of apportionment should not have been presented to the jury. Accordingly, the judgment as to Moore Pontiac must be reversed and the case remanded with directions that Morgan be designated as liable for 100% of the assessed damages. It is not necessary to address other issues raised by Moore Pontiac.

Morgan's Appeal

Morgan advances six arguments in support of his contention that the judgment against him must be reversed. Morgan's first two arguments center on his contention that the trial judge erred in permitting appellees to introduce into evidence an edited version of video depositions and to utilize

an abbreviated portion of the video during closing argument without first conducting a hearing. He also argues that the trial judge erred in refusing a requested instruction on Scott's failure to mitigate her damages and in directing a verdict on Scott's past medical bills. Finally, Morgan argues that he was entitled to a new trial because the verdict was excessive and that he was entitled to a reduction on the interest rate on the judgments awarded the appellees. We find no reversible error in any of these contentions.

First, it is clear that CR 32.01(d) provides for the utilization of a portion of a deposition and establishes safeguards for its introduction:

> If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness be considered with the other part introduced, and any party may introduce any other parts.

This Court observed in Davenport By and Through Davenport v. Ephraim McDowell Memorial Hospital, Inc.[5] that the burden is upon the party objecting to the use of an edited portion of testimony to supply omitted portions which they believe paint a fairer picture of the substance of the deponent's testimony:

> CR 32.01 permits the reading of a portion of a deposition, and subpart (d) of the rule allows the opposing party the opportunity to require any other parts to be introduced for

[5] 769 S.W.2d 56, 61 (Ky.App. 1988).

> the sake of fairness. The right to require such additional portions to be introduced belongs to opposing counsel, and it is their responsibility to avail themselves to the right.

It was therefore Morgan's responsibility to supply any additional portions of the testimony he desired or to offer the testimony in its entirety.

Morgan also complains that supplementing video testimony is more difficult than when using testimony that has been stenographically transcribed. We disagree. The Scotts provided all parties and the trial judge with an index describing the specific portions of the video testimony to be presented at trial and referencing the location of that testimony in the stenographic transcript. Thus Morgan had at his disposal the means to specifically identify and locate the portions of the video testimony being presented in order to determine whether additional portions of the testimony would assist the jury in understanding his theory of the case. Under these circumstances, we find no error in the introduction of edited video testimony.

Morgan also objects to the trial court's failure to conduct a hearing prior to allowing edited portions of the video testimony to be played during closing argument. The use of edited video trial testimony during closing argument was addressed by this Court in Owensboro Mercy Health System v.

Payne[6] which concluded that the decision whether to permit counsel to utilize such testimony falls within the discretion of the trial court. The Court admonished trial judges, however, that certain "pitfalls" must be avoided including allowing the replay of lengthy portions of video testimony or the use of editing which misstates or takes statements out of context so as to confuse or mislead the jury. Morgan's claim that the trial court should have conducted a hearing prior to allowing the use of the video is predicated upon the Payne court's citation to the following language from an opinion of the New Jersey Superior Court in Condella v. Cumberland Farms, Inc, 298 N.J.Super. 531, 689 A.2d 872, 875 (1996):

> In order to eliminate this problem · · · a hearing should be conducted. The court, out of the jury's presence, should therefore view the proposed portions of the videotape testimony in open court on the record to make sure that it accurately reflects the evidence.

While this Court plainly approved the use of a hearing and a preview of the video to be shown to the jury, the Payne court stops short of holding that the failure to take these steps is reversible error. What is essential is that the trial court exercise its discretion with respect to the utilization of the video in closing. It is clear from a review of the record that that discretion was not abused in this case.

[6] 24 S.W.3d 675 (Ky.App. 2000).

Morgan next argues that he was entitled to an instruction on Scott's failure to mitigate her damages by not following the recommendations of her treating physician. He submits that Scott's failure to lose weight, stop smoking and use a bone stimulator as directed by her treating physician entitle him to an instruction on failure to mitigate. The problem with this contention is the lack of direct testimony to support a mitigation instruction.

While there was some testimony that excess weight and smoking *may* contribute to the failure of bone fractures to properly heal, nothing in the expert testimony directly connects any complications in the healing process to these factors or would support an instruction allowing the jury to conclude that Scott *unreasonably* failed to mitigate her damages. Kentucky subscribes to the well-settled premise that a tortfeasor takes his victim as he finds him. The victim in this case testified that she had in fact lost weight and cut back on her smoking and she disputed failing to adequately use the bone stimulator. On this state of the evidence, the refusal to instruct on failure to mitigate damages was not error.

Morgan's fourth assignment of error focuses upon the granting of a directed verdict on Scott's past medical expenses. Morgan admits that past medical bills amounting to $274,339.28 were admitted into evidence without objection and that there was

no testimony indicating that the bills were unreasonable or were not connected to the injuries she sustained in the collision. Morgan simply posits that the granting of the directed verdict on these expenses impermissibly invaded the province of the jury. Absent proof to the contrary, we find no basis upon which the jury could have concluded that these expenses were unreasonable or were not causally related to the accident in question. It was therefore well-within the trial judge's prerogative to grant the motion for a directed verdict as to these expenses.

In support of his contention that it was error to refuse to set aside the verdict as excessive, Morgan argues that the case was really about punishing the dealership for allowing him to test drive the vehicle without a salesman and that he was merely "caught in the cross-fire" of the victim's attempt to inflame the jury "to make a statement to dealerships across the country." He suggests that the award of $2,000,000 in pain and suffering damages was the result of the jury's desire to punish the dealership and did not relate to Scott's injuries. Given the medical testimony as to the extent of Scott's injuries, that she has undergone seven major surgical procedures for the injuries sustained in the accident, that due to infection her left femur is unlikely to ever heal and the fact that she will likely suffer pain from these severe and debilitating injuries

for the rest of her life, we cannot say that the trial court's refusal to set aside the verdict as excessive was clearly erroneous.

Finally, Morgan argues that his right to appeal the judgment is at odds with the statute allowing interest at the rate of 12% to accrue while his appeal of a $2,000,000 verdict is pending. Although KRS 360.040 provides a mechanism for reducing the statutory rate if the trial court is satisfied that the equities require a reduction, Owensboro Mercy Health System, *supra*, makes clear that the decision is entrusted to the trial judge's discretion. No abuse of that discretion has been demonstrated.

The judgment as to Moore Pontiac in Appeal No. 2004-CA-002363-MR is hereby reversed and the case remanded for entry of a judgment consistent with this opinion. The judgment as to Timothy Morgan in Appeal No. 2004-CA-002350-MR is affirmed.

ALL CONCUR.

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