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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001920-MR
AND
NO. 2010-CA-001987-MR

MARCEL WASHINGTON — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 09-CI-06037

JESSICA L. DELAFIELD — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

VANMETER, JUDGE: The Appellant, Marcel Washington, appeals from the Fayette Circuit Court judgment which directed a verdict against Appellee and Cross-Appellant, Jessica Delafield, following a jury trial in this motor vehicle collision case. Despite the directed verdict, the jury awarded no damages to

Washington. On appeal, Washington argues that the trial court erred in permitting improper closing arguments, allowing photos showing vehicular damage into evidence, and allowing impeachment with collateral matters. Delafield cross-appeals the trial court's order directing a verdict on the issue of her liability, as well as bench rulings excluding mention of Washington's prior personal injury claims and lawsuits. Upon review of the arguments of the parties, the record, and the applicable law, we affirm.

On April 27, 2008, Washington was driving her son and daughter to the hospital to have her son's leg evaluated. She stopped at a red light after having exited from New Circle Road. When the light turned green, she proceeded into the intersection following the vehicle in front of her, turning left onto Nicholasville Road, heading north towards Central Baptist Hospital. As she proceeded through the intersection, Washington's car was struck in the front left panel and wheel by a car driven by Jessica Delafield. The impact caused Washington to strike her head against the interior left side of the vehicle, and also caused the steering wheel to spin wildly while in her hands. Washington asserts that this spinning motion caused her to suffer burns and abrasions on her hands.

Following the collision, the cars were moved and the parties waited until the police arrived and cleared the scene. Washington did not report any injuries to Delafield or to the responding officer immediately following the accident, and in fact affirmatively responded that she was not hurt each time she was questioned. Afterwards, Washington went to the hospital with her children,

and had her son examined. Washington did not report any injuries to the staff at the hospital, or seek treatment from the hospital at that time. During the course of trial, however, Washington's daughter, Nina, testified that after the collision she saw that her mother's hand had been cut and bruised and noticed that her mother was rubbing her left shoulder.

Washington states that two days later she sought treatment for her hands, back, neck, and left shoulder. Some time shortly after the collision, Washington also went to see her family physician, Dr. Susan Neil. Dr. Neil testified at trial that Washington had reported that her right hand hurt across her knuckles and thumb, and that she had a burn on her left hand from the steering wheel. Dr. Neil testified that Washington had reported that her shoulder hurt more after the accident involving Delafield, and that she had decreased range of motion in comparison to one month prior.[1] Dr. Neil diagnosed Washington as having a

[1] Washington had previously injured her left shoulder in a fall at work in 2000, and was also involved in at least three motor vehicle accidents from 1994 to 2007, prior to the accident caused by Delafield. Of note, Washington sustained a prior injury to her left shoulder when she was in an accident on February 2, 2007. That injury led to arthritis, impingement of the rotator cuff, and degradation of the labrum, which ultimately led to a left shoulder surgery performed by Dr. Michael Kirk. According to Washington, she had reached maximum medical improvement approximately one month prior to the accident that is the subject of the current litigation. Washington testified that her residual symptoms from the 2007 event included occasional days of pain for which she used ibuprofen and a heating pad. Washington did not have any permanent restrictions from that injury. The surgery performed by Dr. Kirk in August of 2007 included an acromioplasty and a partial resection, a procedure which Delafield claims violates the AC joint and can cause ongoing problems. Delafield asserts that following Washington's first surgery, the medical community at large determined that the aforementioned procedure was no longer an effective method of treating injuries of the type suffered by Washington. Delafield also asserts that despite being asked in interrogatories and during her deposition, Washington failed to disclose the 1994 accident, the 1997 accident, the 2000 fall, the February 2007 accident, and a fourth accident which occurred between February 2007 and April 2008.

low back strain with headaches, shoulder pain and hand contusions which she related to the April 2008 collision.

Ultimately, Dr. Kirk performed a second surgery on Washington's left shoulder, a surgery that Washington alleged was necessary as a consequence of the April 2008 collision. Delafield asserts, to the contrary, that the second surgery should have been performed following the 2007 accident in order to avoid further degradation and continued pain in the shoulder.

Dr. Kirk testified that he treated Washington for two shoulder injuries caused by separate events in February 2007 and April 2008. Dr. Kirk testified that each time he treated Washington with physical therapy, injections, and surgery. Dr. Kirk stated that Washington's first injury was a SLAP tear with bursitis and impingement, and that by December 2007, she had recovered to approximately 100%. Dr. Kirk testified that at that time, Washington had full range of motion in the shoulder, a negative drop sign, and was not complaining of any significant pain. She returned to Dr. Kirk on May 2, 2008, complaining of left shoulder pain due to a motor vehicle accident the month before. Dr. Kirk testified that an MRI taken at that time suggested possible partial thickness rotator cuff tear. He also stated that Washington had decreased range of motion and tenderness over the joint. Again, Dr. Kirk treated her with injections and physical therapy. At that time, Dr. Kirk diagnosed Washington with problems involving overhead activities.

Eventually, Dr. Kirk performed the aforementioned second surgery. Dr. Kirk's operative record indicated new tendon damage, as well as fluid build-up

with fraying of the rotator cuff. Dr. Kirk took Washington off work for that surgery from December 4, 2009, through January 26, 2009, and assigned permanent restrictions of no lifting over 20 pounds and no overhead work. Dr. Kirk also testified that the burns on Washington's hands were consistent with the steering wheel spinning during a car wreck and that the mechanism of injury to her shoulder was consistent with same. Dr. Kirk related the aforementioned treatment to the accident of April 2008 based upon Washington's complaints of pain.

Dr. Philip Corbett testified on behalf of Delafield. He opined that he did not believe that the collision of April 2008 caused a pathologic change to Washington. In the opinion of Dr. Corbett, Washington's second shoulder surgery was necessitated by the fact that Dr. Kirk performed an improper surgery the first time.

Washington called Dr. Ralph Crystal to testify, who opined that based upon the restrictions assigned by Dr. Kirk, Washington's power to earn money in the future was diminished somewhere between $500,000 and $700,000. In response, Delafield called Dr. Howard L. Caston, who testified in rebuttal to Dr. Crystal that he did not believe Washington suffered any diminishment of her power to earn money in the future as a result of the 2008 accident.

Washington now asserts that she is in constant pain for most of each day, which affects her ability to sleep. Washington has a restriction of lifting no more than twenty pounds, which she argues prevents her from doing the clinical nursing work for which she was formerly employed. Washington testified that her

medical bills totaled $34,926.25 and that these bills had been sent to her health insurer. Washington also testified that she suffered lost wages for the period of time when she was healing from her surgery and that she has since continued to work as a nurse with assistance and accommodation.

During the course of the trial, the court issued a ruling excluding evidence of Washington's prior personal injury claims and lawsuit arising from injury to her left shoulder in the February 2007 accident. At the close of trial, Washington objected to Delafield's closing alleging that it violated the aforementioned ruling excluding evidence of litigation. The trial court revisited its earlier ruling, determined that Delafield had not violated the ruling, and overruled the objection. The jury returned a verdict awarding zero damages to Washington. Both parties now appeal to this Court.

As her first basis for appeal, Washington argues that the trial court erred in overruling her objection during Delafield's closing argument. During the course of the closing, Delafield's counsel made the following statements:

> Delafield's Counsel: Well here is what I'm gonna ask you to do. I'm gonna ask you to go back to the jury room … Elect a foreperson. Look at the evidence and write in, zero for medical expenses, zero for lost wages, zero for pain and suffering, and zero for loss of earning capacity claim; that's what I think you should do. Because at the beginning of this trial I asked, in the days before Jessica Delafield was born, people used to get in accidents like this and say, "Well, no one was hurt." In today's litigation-driven society, with the T.V. commercials …
>
> Washington's Counsel: Objection. Objection.

Judge: Approach, please.

Washington's Counsel: He was told not to do that. Litigation society, litigiousness, commercials … I objected to all of that earlier and you told him not to do it.

Delafield's Counsel: No.

Washington's Counsel: And if this is his big closing, he's using stuff you told him not to do. I mean, it's not about a lesson to society.

Judge: My recollection is that your objections were, and I sustained, as far as the argument that this specific defendant [sic], based upon prior accidents and prior claims and prior lawsuits was a litigious individual, which was the reason why she is pursuing this claim. I don't recall any discussion as far as generic general statements in the form of closing arguments as far as prohibiting that.

Washington's Counsel: Isn't that calling her litigious?

Delafield's Counsel: No. I'm saying that society is litigious.

Washington's Counsel: Well, in what way does that logic lead toward a conclusion in a car wreck case involving Marcel Washington?

Delafield's Counsel: You were gonna hear it in about ten seconds.

Judge: I'll overrule the objection. I don't think it violates the court's previous ruling.

Delafield's Counsel [Returning to closing argument]: You are gonna get a chance to answer the question, "Are those days gone forever when in accidents like this, where people get out and say, 'Thank goodness no one was hurt?'" Because people are watching, lawyers are watching this case. It has a big impact on the Jessica

> Delafields of the world. I ask that you put down zero on every line and come back. Thank you.

Washington now argues that the court erred in overruling her objection to this portion of the closing, arguing, in reliance upon *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 628 (Ky.App. 2003), that the statements were "send-a-message" speech, which is forbidden in both civil and criminal cases. Washington argues that the comments were intended to put community pressure on the decisions of the jurors by calling Washington litigious, and asking the jury to make a statement as to the litigiousness of society in general by denying Washington compensation in this case.

In response, Delafield argues that the trial court correctly overruled Washington's objections during the closing argument. First, Delafield argues that Washington failed to properly preserve this issue. While acknowledging that Washington did object during the closing arguments, Delafield asserts that Washington offered insufficient grounds for the objection, which were totally unrelated to the issue that she is now raising on appeal. Noting that during the course of the objection Washington's counsel stated: "[Defense Counsel] was told not to do that. Litigation society, litigiousness, commercials. . . . I objected to all of that earlier and [the trial court] told [Defense Counsel] not to do it." Thus, Delafield argues that Washington's argument was not that Delafield's closing was improper, but rather that the closing violated an earlier ruling of the court that excluded evidence of Washington's litigiousness, noting that the court

itself stated, "I'll overrule the objection. I don't think it violates the Court's previous ruling." Accordingly, Delafield asserts that the only basis offered for objection by Washington was that counsel was implying that she was litigious and thereby violated a previous ruling. Delafield argues, therefore, that Washington's current, "send-a-message" argument was not properly before, nor ruled upon, by the trial court, and should not now be reviewed on appeal.[2]

Alternatively, Delafield argues that the trial court did not abuse its discretion in overruling Washington's objection, because Delafield's closing was not improper. Delafield asserts that a review of cases dealing with "send-a-message" speech during closing arguments reveals a trend towards upholding jury verdicts absent extraordinary conduct on the part of counsel. Delafield argues that her counsel's reference to lawyers watching this case was permissible and non-prejudicial, and placed no community pressure upon the jury.

In reviewing the arguments of the parties on this issue, we note that the applicable standard of review is for abuse of discretion. Matters pertaining to closing arguments lie within the discretion of the trial court. *Hawkins v.*

[2] In her reply brief to this Court, Washington disputes Delafield's argument that this issue was unpreserved, noting that counsel stated to the court during the course of his objection that, "I mean, it's not about a lesson to society." Washington argues that this was a clear objection to "send-a-message" speech. Having reviewed the record, we agree that the objection was preserved. While Washington certainly referred to her prior objection and the court's ruling, she simultaneously supplemented her prior objection with the words "litigation society" and "It's not about a lesson to society." This Court finds the language used by Washington in the course of her objection to be sufficient not only to indicate that she objected to being personally referred to as litigious, but also to the use of "send-a-message" language designed to influence the jury to vote against her for the purpose of sending a message to society-at-large. The trial court overruled the objection on the basis that the statements were acceptable as long as counsel was not directly calling Washington litigious.

Rosenbloom, 17 S.W.3d 116, 120 (Ky.App. 1999) (citing *Reed v. Craig*, 244 S.W.2d 733 (Ky. 1951)). Accordingly, we are compelled to affirm the decision of the trial court if the decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Certain Teed Corp. v. Dexter*, 330 S.W.3d 64, 72 (Ky. 2010) (citation omitted). Further, in determining whether the probability of real prejudice from an improper closing argument is sufficient to warrant a reversal, each case must be judged on its unique facts. *Rockwell Int'l Corp.*, 143 S.W.3d at 631.

In this case, the evidence showed that the parties were involved in a low-speed, two-vehicle accident caused by Delafield. The impact was such that Washington was able to drive away in her vehicle and Washington initially professed no injuries. The evidence also established that Washington had previously been involved in a number of vehicle accidents, the most recent of which, February 2007, had resulted in Washington having shoulder surgery. Against this background, the parties presented conflicting evidence in terms of medical and vocational opinions as to damages suffered by Washington. Under the circumstances, our view is that Delafield's closing argument was not improper. At most, Delafield made a passing reference to the fact that our society has become increasingly litigious, a fact of which most jurors should be aware.

For her second claim of error, Washington argues that the trial court erred in denying her motion *in limine* to prevent Delafield from arguing that minimal car damage caused by the collision allowed the inference that Washington

was uninjured. Washington asserted that any such inference was the province of expert opinion. The court denied the motion. Washington now asserts that making such an argument required impermissible speculation from the jury in addition to being subject matter appropriate only for an expert.

In response, Delafield first disputes ever stating that "minor vehicle damage equates to no injury."[3] Delafield argues that, in fact, no discussion occurred during closing of any connection between the severity of the damage to Washington's vehicle and lack of a physical injury. In the alternative, Delafield argues that Washington failed to preserve this issue since she never actually objected to statements made during the course of Delafield's closing argument. While acknowledging that a pretrial motion *in limine* is sufficient to preserve an evidentiary issue for appeal, Delafield argues that a pretrial motion is insufficient to preserve an issue for closing arguments since the arguments would be based on what transpired during the trial itself. Regardless, Delafield asserts that the trial court did not abuse its discretion in denying the motion, arguing that Washington had no factual or legal support for her argument on this issue.

Upon review, we agree with Delafield that this issue was not properly preserved for our review. A review of the record reveals that while Washington made a motion *in limine* requesting that the defense not be permitted to argue that the amount of damage to the vehicle was proof of the severity of the impact that

[3] The record indicates that Delafield's counsel pointed to a poster-sized photograph of the damage to the vehicle, and asked aloud whether Washington had proven that the accident caused $34,000 in medical expenses.

occurred, that motion was denied by the court. As our Kentucky Supreme Court has previously held, a motion *in limine* is essentially a pretrial tool, aimed at "heading off at the pass" the introduction of evidence. *See Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky. 2005). By contrast and for our purposes, KRE[4] 103(a)(1) allows for a general contemporaneous objection during trial to preserve an error for review. *Id.* In this case, Washington made no objections during the course of closing arguments to the statements she now complains of on appeal. Accordingly, the trial court had no opportunity to rule on the propriety of the statements, and we decline to do so now for the first time on appeal.

As her final basis for appeal, Washington argues that the trial court erred in permitting impeachment on collateral matters regarding prior motor vehicle accidents and falls. Washington asserts that Delafield's counsel should not have been allowed to question her concerning these events because they were both collateral and irrelevant and did not result in any permanent injury.

In response, Delafield argues that Washington was not impeached on collateral matters, or with extrinsic evidence of collateral facts. Delafield argues that, to the contrary, Washington was impeached only with her own sworn statements, given both during her own deposition and in her Answers to Interrogatories regarding general issues that were material to the case.

Alternatively, Delafield argues that even if Washington was impeached on a collateral matter, the trial court did not abuse its discretion by

[4] Kentucky Rules of Evidence.

allowing the questioning because Washington opened the door to the questions during direct examination. Specifically, Delafield asserts that Washington's counsel questioned her directly concerning whether or not she had any other injuries prior to the 2007 motor vehicle accident, at which time Washington acknowledged having previously fallen. Delafield also asserts that thereafter Washington's counsel again opened the door to discussion of prior motor vehicle accidents by specifically asking her about her previous 1994 accident.[5,6]

Upon review of the record, we agree with Delafield that Washington was not impeached on collateral matters. Indeed, Washington herself opened the door to questioning on the issues concerning that which she now claims to have been collaterally impeached on. Washington's counsel specifically questioned her regarding any other motor vehicle accidents in which she had been involved prior to the 2007 motor vehicle accident. Further, her counsel specifically questioned her about a 1994 motor vehicle accident in which she had previously been involved. While Washington's counsel did not specifically refer to the 1997 motor vehicle accident, or the accident which occurred subsequent to 2007, this court is of the opinion that the instigation by Washington's counsel of a discussion of prior

[5] While acknowledging that counsel did not question Washington concerning the 1997 accident, or the accident which occurred following the February 2007 accident, Delafield asserts that the discussion of the 1994 accident was sufficient to open the door to these accidents, particularly because discussing the oldest accident and not the other two would be misleading to the jury.

[6] Washington disputes Delafield's argument that she opened the door to questioning concerning these other events, arguing that they were non-relevant, and were unrelated to the issue at trial concerning whether or not she injured her shoulder in the accident with Delafield.

accidents was sufficient to open the door to the questioning that subsequently occurred.

Moreover, we note that in each of the instances concerning that which Washington now appeals, she was impeached with her own prior sworn statements. We disagree with Washington's characterization of these additional accidents and falls as "collateral," since each bore directly upon the sole issue before the jury, namely, whether the April 2008 accident caused her injuries. Certainly, the occurrence of other falls and accidents which could have contributed to Washington's current condition is not "collateral" to the issue to be determined. Finally, we note that even if the issues were "collateral," as our Kentucky Supreme Court recently held, the trial court has discretion to determine whether or not to permit impeachment on collateral issues when a party has opened the door to such issues by raising them in direct testimony. *See Commonwealth v. Prater*, 324 S.W.3d 393, 397-98 (Ky. 2010). In this case, the trial court decided to permit questioning on these issues, and we find that it did not abuse its discretion in doing so. Accordingly, we decline to reverse on this basis.

Because we affirm on all issues raised by Washington in her direct appeal, Delafield's cross-appeal issues, the trial court's claimed error in directing a verdict on the issue of liability and excluding mention of Washington's prior personal injury claims and lawsuits, are rendered moot. The Fayette Circuit Court's judgment is affirmed.

ACREE, CHIEF JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the result reached by the majority on all issues on appeal but for the issue concerning the "send-a-message" language used by Delafield's counsel during closing argument; on that sole issue, I dissent. During the closing argument the trial court, over objection by Washington's counsel, allowed Delafield's counsel to continue and say:

> You are gonna get a chance to answer the question, "Are those days gone forever when in accidents like this, where people get out and say, 'Thank goodness no one was hurt?'" Because people are watching, lawyers are watching this case. It has a big impact on the Jessica Delafields of the world. I ask that you put down zero on every line and come back. Thank you.

Upon review of the closing argument itself as contained in the record, and the applicable law, I agree with Washington that Delafield's closing argument fell within the confines of that which is prohibited as a "send-a-message" speech under the law of this Commonwealth. Our courts have clearly held that commentary during closing is improper when it is designed to put community pressure on the decisions made by jurors. *See Cantrell v. Commonwealth,* 288 S.W.3d 291, 299 (Ky. 2009). Delafield's argument was designed to appeal to both the prejudice and passion of the jurors, which is clearly prohibited commentary. *See, e.g., Rockwell International* v. *Wilhite*, 143 S.W. 3d 604, 628-631(Ky. App. 2003).

By advising the jury that "people are watching this case, lawyers are watching …" counsel was appealing to the jury to issue a decision that would send a clear message to both society and "litigious" lawyers that such litigiousness would not be tolerated by the juries of this Commonwealth. The comments made by counsel were crafted to indicate to the jury that Washington was a litigious malingerer, and that by refusing to award her compensation, the jury would be sending a clear message to society that such litigiousness would not be rewarded in our courts. I fail to see the relevance of this commentary as it pertains to Washington and her case, other than for the purpose of making the aforementioned inferences. Accordingly, I believe reversal is both warranted and compelled by the law of this Commonwealth. *See, e.g., Risen v. Pierce*, 807 S.W.2d 945 (Ky. 1991).

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