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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002079-MR

VELDA GOSSETT AND
ANTHONY GOSSETT — APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 08-CI-00364

MERRILL CROCKETT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

COMBS, JUDGE: Anthony and Velda Gossett appeal the order of the Pulaski Circuit Court that denied their motion for a new trial. After reviewing the record and the law, we affirm.

On March 25, 2007, the Gossetts went motorcycle riding with their friends Steve and Christy Adams. The Gossetts shared a motorcycle, and the Adamses

rode a second motorcycle behind them. As the two couples traveled down a hill on Patterson Branch Road, Steve saw Anthony lose control of his motorcycle and crash. A few seconds later, the Adamses' motorcycle also went out of control and crashed.

Velda Gossett was thrown into the roadway and was struck by the Adams motorcycle. The collision knocked her into a pickup truck driven by James Meyers, which was stopped in the opposite lane.[1] Velda Gossett sustained multiple serious injuries. The other riders incurred only minor injuries.

All of the witnesses at the scene of the accident agreed that Steve and Anthony both lost control of their motorcycles due to a slick substance on the surface of the roadway. Several witnesses identified it as diesel fuel.

The following day, the Somerset Fire Department responded to a field fire at the accident scene. Merrill Crockett admitted that he had set the fire in order to burn off weeds as a routine element of his farm maintenance. The Gossetts believed that Crockett had used diesel fuel as an accelerant prior to setting the fire and that the diesel fuel was the slick substance in the roadway which caused the motorcycle accident. Consequently, in March 2008, the Gossetts filed a lawsuit against Crockett, alleging that he had negligently applied diesel fuel to the field and the road.

[1] Meyers testified that he had immediately stopped his vehicle when he observed the out-of-control motorcycles approaching.

A jury trial took place on August 2-4, 2010. Both parties produced witnesses and experts. The jury returned a verdict in Crockett's favor. This appeal follows.

Our standard of review is limited to the determination of whether the trial court abused its discretion. *McVey v. Berman*, 836 S.W.2d 445, 448 (Ky. App. 1992). The decision of a trial court enjoys a presumption of correctness, and we may only reverse if it was clearly erroneous. *Id*. A court's actions are clearly erroneous if they are not supported by substantial evidence. *Fugate v. Commonwealth*, 62 S.W.3d 15, 18 (Ky. 2001).

The Gossetts argue that the court erred in allowing the jury to hear the following statement of Crockett's counsel during closing arguments: "This matter has held the prospect of financial ruin over [Crockett's] head for over two years." At that point, the Gossetts' counsel interrupted the closing argument and objected. In a bench conference, the court agreed that the statement was improper. The Gossetts asked the court to inform the jury that Crockett had an insurance policy that would cover any damages. Instead, the court elected to cure the error by strongly admonishing each jury member that consideration of either party's financial condition was not permitted. The Gossetts now contend that the admonition was insufficient to cure the harm resulting from the statement of Crockett's counsel. We disagree.

It is "universally condemned" for counsel to refer to the financial condition of one of the parties for the purpose of persuading the jury. *Murphy v. Cordle*, 197

S.W.2d 242, 243 (Ky. 1946). But, it is also settled law in Kentucky that an admonition is deemed to cure the error created by an improper argument unless the argument "was so prejudicial, under the circumstances of the case, that an admonition could not cure it." *Price v. Commonwealth*, 59 S.W.3d 878, 881 (Ky. 2001). (Internal citations omitted). Furthermore, if an admonition was given, we must presume that the jury heeded and followed it. *Combs v. Commonwealth*, 198 S.W.3d 574, 581 (Ky. 2006).

In discussing improper arguments, our Court has held that we must determine:

> whether the probability of real prejudice is sufficient to warrant a reversal. In making this determination, each case must be judged on its unique facts. ***An isolated instance of improper argument, for example, is seldom deemed prejudicial.***

Rockwell Intern. Corp. v. Wilhite, 143 S.W.3d 604, 631 (Ky. 2003). (Emphasis added.)

Under the facts of this case, we cannot conclude that the statement was so prejudicial that it could not be cured by an admonition. The statement was isolated. Most of Crockett's closing argument was a summary of the factual evidence that had been presented. It pointed out inconsistencies among the testimonies of the Gossetts' witnesses. Crockett reminded the jury of his experts' evaluation of the accident scene that indicated that the motorcycles had encountered the slick substance in the roadway **before** they reached the area that had been burned. A state trooper had testified that the slick substance appeared to

be spillage from a vehicle. Eleven of the twelve jurors did not believe that Crockett was liable for the spillage. As distinguished from cases that have been reversed due to improper arguments, Crockett did not dwell on the subject of financial circumstances. The issue of damages *per se* was never even considered since no liability was found as a threshold matter. *See Rockwell*, *supra*; *Murphy*, *supra*.

Additionally, the court's admonition to the jury was emphatic and clear. It instructed the jury not to consider the financial condition of any party. It then asked the members of the jury if they understood; it did not permit counsel to resume until the jury had responded. Therefore, the court's denial of the Gossetts' motion for a new trial was based on substantial evidence and was not clearly erroneous.

The Gossetts also urge us to hold that the court erred in refusing to allow the jury to be informed of Crockett's insurance policy. However, they do not cite any Kentucky law to support this argument. This is an issue concerning damages, which the jury never considered. The Gossetts have not demonstrated that prejudice resulted from the decision of the court not to mention Crockett's insurance since its direct relevance to the damages alleged was never reached.

We conclude that the court's order denying the motion for a new trial was supported by substantial evidence. Therefore, we affirm the Pulaski Circuit Court.

TAYLOR, CHIEF JUDGE, CONCURS.

NICKELL, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

NICKELL, JUDGE, DISSENTING: Respectfully, I dissent.

In his closing statement to the jury, Crockett's trial counsel expressed sympathy for the Gossetts, but argued "this trial is not a measure of sympathy." Yet, in asserting that the Gossetts' lawsuit "has held the prospect of financial ruin over [Crockett's] head for over two years," he attempted to enlist the jury's sympathy on behalf of his own client's financial status, and strongly inferred that Crockett's finances were in peril, that Crockett was too poor to pay likely damages should he be found liable for the Gossetts' injuries, and that Crockett had no liability insurance to cover any portion of a damage award in the event liability was found. All three implications were legally improper, and the significant prejudice arising from trial counsel's erroneous argument was compounded by his knowledge that the latter inference was entirely false. Crockett was, in fact, covered by a policy of liability insurance. It is reasonable, therefore, to conclude that trial counsel's improper argument to the jury, and the strong inferences capable of being drawn from it, was intended to gain an illegitimate trial advantage. The resulting verdict in Crockett's favor tends to indicate that the strategy was effective and calls into question whether the jury considered extraneous matters in reaching its deliberations concerning the merits of causation, liability, and damages.

The trial court correctly chastised trial counsel and characterized his "financial ruin" argument as "a serious misstep." However, rather than sustaining the Gossetts' objections and motions for a more pronounced, specific, and corrective admonition or a new trial, the trial court chose merely to provide the jury with the very general admonition that it was to consider neither party's financial condition when reaching its verdict. Though the majority recognizes that trial counsel's improper trial tactic of referencing his client's dire financial condition and falsely implying the absence of liability insurance has been "universally condemned" by our courts, *Murphy*, it deems the trial court's generalized admonition presumptively adequate to cure the significant prejudice arising from trial counsel's devastating singular utterance. *Price*; *Combs*. I disagree.

In *Combs*, a criminal case in which the defendant objected to improper prosecutorial testimony, our Supreme Court upheld the trial court's denial of a motion for a mistrial, holding that the particular erroneous testimony was "the type of error that is easily cured by an admonition," that "[a] jury is presumed to follow an admonition to disregard evidence," and concluding that "the admonition cure[d] any error." The Supreme Court stated:

> Whether to grant a mistrial is within the sound discretion of the trial court, and such a ruling will not be disturbed absent an abuse of that discretion. A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such

> an action or an urgent or real necessity. The error must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed no other way.

Id., at 581. Even so, the Supreme Court also recognized two exceptions to the general rule that admonitions are presumptively curative:

> There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

Id., at 581-82. Both circumstances are present here, thus negating the presumptive cure claimed by the majority and requiring a new trial.

In tort litigation, Kentucky courts have consistently held "parties may not present evidence or otherwise advise the jury of the financial condition of either side of the litigation," *Hardaway Management Co. v. Southerland*, 977 S.W.2d 910, 916 (Ky. 1998), and have recognized that "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." Kentucky Rules of Evidence (KRE) 411.

Kentucky courts have further held that "[a] defendant's ability or inability to pay a judgment is no more relevant to the issue of liability than is the fact of insurance," that "[a] case should be tried on the merits without reference to the wealth or poverty of the parties," and that the presence or absence of liability

insurance is irrelevant to the issues of fault and liability. *White v. Piles,* 589 S.W.2d 220, 222 (Ky. App. 1979) (citing *Southern-Harlan Coal Co. v. Gallaier*, 240 Ky. 106, 41 S.W.2d 661 (1931)). In a tort action, evidence or argument concerning a party's financial status or the availability of liability insurance is irrelevant to the merits concerning causation, liability, and damages. Even indirect references to these matters have been condemned. *Id.* (citing *Randle v. Mitchell*, 142 S.W.2d 124 (1940)); and *Earle v. Cobb*, 156 S.W.3d 257, 265 (Ky. 2004) (citing *Bybee v. Shanks,* 253 S.W.2d 257, 260 (Ky. 1952)).

Such evidence or argument, even if singular, isolated, and inadvertent, is capable of being inflammatory and prejudicial because of the likelihood that jurors will be tempted to find causation and liability regardless of fault and award excessive damages if they believe the defendant to possess extensive financial resources or liability insurance, or find no causation or liability and award little or no damages if they believe the defendant has limited financial resources or no liability insurance. *Turpin v. Scrivner*, 178 S.W.2d 971, 974 (Ky. 1944). Thus, introduction of evidence or argument concerning a party's financial status or the availability or absence of liability insurance is presumed to be prejudicial, and, absent a showing of non-prejudice to the complaining party or legal excuse, represents reversible error requiring a mistrial. *White*, at 222; *Finch v. Conley*, 422 S.W.2d 128, 130 (Ky. 1967); *Struetker v. Neiser,* 290 S.W.2d 781, 782 (Ky. 1956);

and *Maddox v. Grauman*, 265 S.W.2d 939, 942 (Ky. 1954) (citing *Star Furniture Co. v. Holland*, 273 Ky. 617, 117 S.W.2d 603 (1938)).

While it may be generally presumed that a jury admonition will cure any prejudice arising from many less egregious improper arguments, introduction of improper evidence or argument referencing either party's financial status or the availability or absence of liability insurance is presumptively prejudicial and reversible error which no admonition will likely cure. After trial counsel has fired an improper and harmful, though solitary, isolated, and inadvertent, argumentative bullet, it is highly unlikely that a jury will be able to follow the trial court's admonition that it simply forget the wound. This is especially true in "close" or circumstantial cases, such as the one before us, where the testimony is evenly balanced or contradictory, and where it can fairly be said that "the question as to the proximate cause of the injury is so close that the slightest suggestion in the closing argument of any matter extraneous to the record might have been sufficient to tip the scales in favor of the offending party." *Walden v. Jones,* 289 Ky. 395, 158 S.W.2d 609, 612-13 (1942).

In short, there are erroneous argumentative matters so serious in nature that no admonition may reasonably be expected to cure the harm. In such cases, as here, the only reliable remedy is to declare a mistrial. In the present case, the presumptive prejudice arising from trial counsel's improper argument was prone to distract the jury's deliberations from the merits concerning causation, liability, and damages, and thereby tainted its ultimate verdict. Even if one were to

accept the majority's opinion that an admonition could have cured such a devastatingly inflammatory and prejudicial argument, to be truly remedial the admonition would have needed to have been so emphatic as to leave no doubt in juror's minds as to the unequivocal repudiation of the erroneous matter, and any false inference that Crockett possessed no liability insurance should have been specifically and forcefully addressed "to clear up any confusion in the minds of the jury." *White*, at 222.

Here, by "injecting the issue of his client's ability to pay into his closing argument," and thereby strongly inferring the absence of liability insurance, trial counsel "opened the door" for the trial court to have interposed an unequivocal and direct admonition, advising the jury to disregard the financial status of the parties in its deliberations and specifically correcting the false implication that Crockett had no liability insurance. *Id.* Only then would the admonition have truly re-leveled the playing field. Contrary to any legal fiction the majority may lend to the presumptively curative nature of jury admonitions under *Combs*, it is impossible to "unring the bell" and it is unreasonable to expect a juror to forget what has already been heard, or to remove from his or her mind a strong impression once firmly imprinted.

The proper legal analysis pertaining to the present case is on all fours with the holding in *Walden*, though that case involved the opposite situation wherein a plaintiff's trial counsel had made a singular improper comment in closing argument referencing the defendant's sound financial status and inferring

the availability of liability insurance. In *Walden*, our former Court of Appeals held:

> We have often condemned *any argument* or evidence being presented in a case *from which the jury could infer* that the defendant was indemnified by insurance, and *if counsel for plaintiff, either by evidence or by argument, injects any circumstance or statement from which an inference may be drawn that the defendant is indemnified, he must suffer the consequence of a reversal of any judgment which he might obtain.* We think that the jury in reason *could have inferred* from the statement made that the defendant was covered by insurance but if that were not true, the statement certainly related to the financial condition of the defendant which is improper argument in any case. There is no law applicable to the poor that is not likewise applicable to the rich, nor is any law applicable to the rich that is not likewise applicable to the poor, and an endeavor on the part of an attorney or litigant to inflame the minds of the jury by referring to the financial status of either of the parties is improper. *While such reference is not always prejudicial, we believe it to have been in this case, because the question as to the proximate cause of the injury is so close that the slightest suggestion in the closing argument of any matter extraneous to the record might have been sufficient to tip the scales in favor of the offending party.*

Id., 158 S.W.2d at 612-13 (emphases added). Likewise, in *Star Furniture Co.*, 117 S.W.2d at 606-607, our former Court of Appeals held the trial court's admonition ineffectual, concluding:

> It would be difficult - even beyond the power of overcoming - to conclude that such reference to the question of insurance did not have the desired effect to give the case *an "insurance" coating*, and to sprinkle it with *an "insurance" perfume* - all of which we have said in numerous cases was calculated to influence the jury in arriving at its verdict, *both upon the issue of culpable negligence, as well as the amount of remuneration*.

> [W]e, as well as all courts, have held that *the average juror is either unconsciously or otherwise influenced* by the fact that the alleged negligent actor carries insurance. Such *average juror, it has been found, is frequently led astray and returns an unauthorized verdict* because he concludes that the defendant against whom it is rendered will not be required to pay it out of his individual funds because of indemnity insurance carried by him. Knowing that fact counsel representing injured plaintiffs frequently seek to get before the jury the fact of such indemnity insurance being carried by the defendant in such tort actions, and *we, as well as other courts, have never failed to condemn it.* In a few cases we declined to reverse the judgment for such practices, but in each instance where we did so there were *qualifying facts furnishing a legal excuse* for the interjection of the insurance issue complained of. *In all other cases we have not hesitated to reverse the judgment containing the error, in the absence of the record showing a legitimate excuse therefor.* . . . In the last (Helton) case we approved and copied from the case of Blue Bar Taxicab & Transfer Company v. Hudspeth, 25 Ariz. 287, 216 P. 246, this excerpt (page 1124): *'The consequence of such information is well known, and is sufficient to require a new trial.* It is useless for counsel to talk of the innocuous character of this evidence, when they at the same time, in order to get the information before the jury, are willing to imperil any verdict which might be rendered. *All lawyers know the rule in regard to such evidence, and they must not expect the court to establish a rule, and then wink at its violation.*

Id., at 606-07 (emphases added). Trial counsel "should not need to be told that the scope of argument does not include matters outside the cause tried[,]" *Strother v. McClave*, 264 Ky. 121, 94 S.W.2d 310, 311 (1936), and those who embark on argumentative expeditions outside the record and beyond the merits exceed the

strict boundaries of allowable trial strategy and risk reversal of any tainted jury verdict.

This most basic rule of tort litigation, cited in *Walden* and *Star Furniture Co.,* protects and limits plaintiffs and defendants, alike. It is reciprocal in nature, and "[i]n cases which involve personal injury or wrongful death, it is generally improper for plaintiff to mention that the defendant is insured against liability or for the defendant to mention that he is not insured." *2 Lane Goldstein Trial Technique* § 11:194 (3d ed.). In laymen's terms, "what is fair for the goose is fair for the gander," and if plaintiffs are strictly precluded from mentioning or inferring the availability of liability insurance, defendants must likewise be strictly precluded from implying its absence.

In the present case, it cannot be fairly said that the jury's verdict did not at least partially rest upon the prejudice arising from trial counsel's improper argument and the inappropriate and false inferences likely to be drawn therefrom. Our caselaw clearly establishes that a trial counsel's improper injection of a party's financial status or access to liability insurance in tort litigation: is considered "a serious misstep" and a significant breach of our rules of trial practice; is presumed to be prejudicial absent a showing of non-prejudice by the offending party; and should, with few exceptions, result in a mistrial. *White*. It was, therefore, "manifestly improper" for Crockett's trial counsel to attempt to impact the jury's verdict by seeking sympathy for Crockett's alleged looming "financial ruin" and by falsely implying the unavailability of liability insurance; and the Gossetts were

entitled to have their case tried without the taint of passion and prejudice arising from such an improper argument and its false implications. *Southern-Harlan Coal Co*. Because Crockett has failed to cite any legal excuse for the improper argument or to clearly show non-prejudice to the Gossetts, his trial counsel's improper argument was presumptively prejudicial, the jury's verdict was incurably tainted, and the trial court erred by not declaring a mistrial.

Thus, I believe the matter should be reversed and remanded with instructions that the trial court set aside the judgment and schedule a new trial.

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