

Commonwealth Of Kentucky
Court of Appeals

NO. 2015-CA-000968-MR

GREGORY HUGHES, SR.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 13-CI-00227

ABIGAIL E. MARTIN; AND
GEICO INDEMNITY CO.

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: J. LAMBERT, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Gregory Hughes, Sr. appeals from a judgment of the Kenton Circuit Court confirming an adverse jury verdict in favor of Abigail F. Martin and her liability insurance carrier, GEICO Indemnity Company. He argues that the trial was tainted by misconduct by Martin's counsel, introduction of hearsay and improper evidence, and jury misconduct. He further alleges that he was entitled to

a directed verdict. Most of the allegations of trial error are not adequately preserved, and we cannot find that any of the allegations amounted to error, reversible or otherwise. Furthermore, the trial court properly submitted the disputed factual issues to the jury. Hence, we affirm.

The matter arises from an automobile accident that took place on Greenup Street between Second and Third Streets in downtown Covington. Due to the unique geography of the area, some explanation is necessary to understand the accident. South of Third Street, Greenup Street is a two-lane street that is one-way northbound. At Third Street, the right lane continues northbound, while the left lane bears left onto Roebling Way, which serves as an approach to the Roebling Bridge.

Greenup Street continues as a one-way street bounded on the left by a traffic island for 56 feet. Past the traffic island, the width of the street returns to two lanes, but the left lane is occupied by fifteen perpendicular parking spaces. Just beyond those parking spaces, there is an entrance to an off-street parking lot. And past that entrance, the left lane resumes as a driving lane northbound. There are parallel parking spaces on the left past the parking lot entrance. From Third Street to the parking lot entrance, there are no markings on the street showing the boundaries of the right lane. There are no parking spaces on the right side of the street, but there is room for parallel parking spaces for the entire length of the block.

On April 5, 2012, Martin was driving her vehicle on Greenup Street in the right lane. Hughes was driving a motorized scooter behind her vehicle. When the light at Third Street turned green, both proceeded through the intersection to continue on Greenup Street. Once past the traffic island, Martin slowed her vehicle, looking for a parking space. Hughes attempted to pass Martin on the left in the space between the occupied parking spaces and the driving lane. However, Martin had spotted an available space in the off-street parking lot, and turned left into the lot just as Hughes was attempting to pass. Hughes managed to avoid a collision, but he lost control of his scooter and fell to the ground. Hughes suffered significant injuries and was transported to the hospital following the accident.

Thereafter, Hughes brought this action against Martin and her liability insurance carrier, GEICO, seeking to recover damages for past and future medical expenses, lost wages, destruction of his earning capacity, and pain and suffering. The matter proceeded to a jury trial beginning April 28, 2015. At the close of proof, the trial court submitted the matter to the jury. The jury found that Martin's actions were not a substantial factor in causing the accident. Based on this verdict, the trial court entered a judgment for Martin and dismissed Hughes's complaint. This appeal followed.

Hughes first alleges that he was prejudiced by errors and misconduct by Martin's counsel during trial. Hughes primarily complains that Martin's counsel made a number of improper comments or references to inadmissible evidence, and that the trial court should have granted his motion for a mistrial

based on this misconduct. We review evidentiary rulings for abuse of discretion. “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000), citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Likewise, the standard of review of denial of a mistrial is abuse of discretion. *Grimes v. McAnulty*, 957 S.W.2d 223, 225 (Ky. 1997). 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. *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005).

In particular, Hughes challenges three comments made by Martin’s counsel during his opening statement. First, Martin’s counsel told the jury that Martin, “is a struggling college student.” Hughes argues that this was an improper attempt to gain sympathy for Martin by suggesting that she lacked the ability to pay a judgment.

As Hughes correctly notes, it is generally improper for counsel to refer to the financial condition of a party or their ability or inability to pay a verdict. *Morgan v. Scott*, 291 S.W.3d 622, 639 (Ky. 2009). See also *Walden v. Jones*, 289 Ky. 395, 158 S.W.2d 609, 612 (1942). However, such a reference may not necessarily be prejudicial. *Jones v. City of Bowling Green*, 354 S.W.2d 749, 751 (Ky. 1962). Here, Martin’s counsel was not specifically referring to her ability to pay a judgment, but only to the fact that Martin was trying to find a space

where she would not have to pay to park. Under the circumstances, we cannot find that the brief reference was either improper or unfairly prejudicial.

Second, Hughes complains that Martin's counsel improperly vouched for his client's character and credibility. During opening statement, counsel told the jury, "I believe in her and I believe in the truthfulness of her situation." As a general rule, it is improper for counsel to state a personal opinion as to the justness of a cause or the credibility of a witness. SCR¹ 3.1310, Rule 3.4(e). However, immediately after making the statement at issue, Martin's counsel pointed to evidence which supported her position that she was not negligent. Like the trial court, we find no basis to conclude that the brief comment was improper, much less that it was unfairly prejudicial to Hughes.

And third, Hughes contends that the opening statement by Martin's counsel improperly referred to undisclosed evidence. After her deposition, Martin modified her testimony regarding her estimate of distances and where she activated her turn signal. Hughes does not contend that the trial court should have excluded the altered testimony. Furthermore, Martin testified at trial, and she was subject to cross-examination about the change in her testimony. Hughes makes no showing that the reference to the testimony was so unfairly prejudicial as to require an admonition or a mistrial.

Hughes next raises a number of trial errors, many of which are also based on allegations of misconduct by Martin's counsel. Most of these arguments

¹ Kentucky Rules of the Supreme Court.

are raised in a very cursory fashion and are not well-developed in Hughes's brief. We would remind Hughes's counsel that arguments in appellate briefs must include "ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." CR² 76.12(c)(v). It is not the role of this court to flesh out arguments on appeal. Likewise, this Court is not obligated to search the record to find where it may provide support for Hughes's contentions. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006). Nevertheless, we will address the arguments to the extent that they are properly presented on appeal.

Hughes first argues that Martin's counsel engaged in "frivolous and abusive" motion practice. At the close of the first day of trial, Martin's counsel made a motion to exclude testimony by one of Hughes's expert witnesses regarding the cost of his future medical treatment. The trial court denied the motion on the following day after Hughes's counsel provided documentation that the substance of the testimony had been provided in pre-trial disclosures. Hughes prevailed on the motion and there is no indication that he asked the trial court for any other relief, such as the imposition of sanctions under CR 11. In the absence of any preservation or showing of prejudice, we decline to address the matter further.

² Kentucky Rules of Civil Procedure.

Turning to more substantive matters, Hughes asserts that Martin's counsel engaged an improper cross-examination of him. Hughes does not identify the specific point in the video record where he objected to the comment or requested any relief from the trial court. However, we have reviewed the record to determine the extent of the questioning.

At the beginning of his cross-examination, Martin's counsel asked Hughes about his work as an attorney. Hughes responded that he had worked as a plaintiff's attorney for 36 years, mostly representing clients in cases involving injuries to railroad employees and on Social Security Disability applications. Hughes stated that he had also represented some conventional personal-injury clients, but that was not a major part of his practice. Martin's counsel then asked if part of Hughes's role as a personal-injury attorney was to maximize his client's recovery. Hughes responded that his role was to thoroughly and vigorously represent his client's interests. Hughes's counsel then objected, arguing that the line of questioning was not relevant to the issues presented in the case. The trial court overruled the objection, concluding that the questions were reasonably within the scope of cross-examination. Martin's counsel briefly continued on this line of questioning, but then moved on to other matters.

Hughes contends that Martin's counsel was engaging in "character assassination," implying that Hughes's claim of damages should not be believed because, as a personal-injury attorney, he knew how to manipulate evidence to maximize a recovery. However, Hughes never objected to the questions on this

ground, nor did he ask the trial court to admonish the jury to disregard any such implication. Furthermore, the line of questioning comprised a brief portion of the cross-examination, and we cannot find that it was specifically intended to appeal to the passions and prejudices of the jury. While we do not necessarily endorse this line of questioning, we cannot find that it was so improper or unfairly prejudicial as to compel a mistrial.³

Hughes also complains that Martin improperly elicited expert testimony from Officer Jeff Cook, the police officer who responded to the accident. In particular, he objects to Officer Cook's testimony that Greenup Street is a one-lane road at the point where the accident occurred, and consequently, that Hughes's attempt to overtake Martin was impermissible and illegal. But again, Hughes does not identify where in the record he objected to this testimony. In the absence of any proper preservation of the issue, we cannot review the matter further. For the same reasons, we cannot review Hughes's objection to the reference to this testimony in Martin's closing argument.

In a related matter, Hughes contends that Martin improperly offered hearsay testimony during her direct examination. Specifically, she testified that Officer Cook had told her she had done nothing wrong and was free to leave the scene of the accident. The trial court sustained Hughes's objection and admonished the jury to disregard the testimony. As a general rule, "if the attention

³ Likewise, Hughes failed to object to a similar statement in the closing argument by Martin's counsel. Again, we do not approve of the argument, but we also cannot find that the brief reference amounted to misconduct warranting a new trial.

of the court is called to an improper argument and if the jury is admonished in regard to it, a reversal will not be had unless it appears that the argument was so prejudicial under the circumstances that the admonition of the court would not cure it.” *Mason v. Stengell*, 441 S.W.2d 412, 416 (Ky. 1969). See also *Risen v. Pierce*, 807 S.W.2d 945 (Ky. 1991). Hughes does not attempt to explain why the trial court’s admonition was insufficient under these circumstances.⁴

Hughes also objects to allegedly leading questions asked during Martin’s direct examination. Hughes does not include a citation to the record showing where the leading questions occurred or where he objected to the questions. Again, we are not obligated to search the record to determine where the issue was preserved for review.

Hughes next contends that Martin’s counsel improperly cross-examined him about the availability of future collateral source payments, such as health insurance, which would cover his anticipated future medical expenses. The trial court sustained Hughes’s objection to the question, concluding that the inquiry was beyond the scope of cross-examination and likely misleading to the jury. However, the court declined to give an admonition, noting that the scope of damages would be covered in the jury instructions. We cannot conclude that the trial court abused its discretion by declining to give an admonition.

⁴ Hughes also argues that Martin’s counsel referred to this evidence during his closing argument. The record reflects that Hughes’s counsel initially objected to the comment, then withdrew the objection, concluding that counsel was not referring to the previously excluded hearsay. Therefore, Hughes did not preserve this argument for appeal

In the alternative, Hughes argues that this Court should allow the parties to introduce evidence of liability insurance coverage. This argument is not preserved for review. Moreover, it is well-settled that a defendant's insurance is inadmissible to imply liability. KRE⁵ 411. See also *Woolum v. Hillman*, 329 S.W.3d 283, 287 (Ky. 2010). We have no authority to alter this rule.

In his last argument regarding errors which occurred during the trial, Hughes complains that Martin's counsel made improper arguments during his closing. Hughes does not include a citation to the record showing that he made a contemporaneous objection to most of the allegedly improper comments. Furthermore, it is well-established that counsel has wide latitude while making closing statements. *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006). Under the circumstances, we cannot find that Hughes was unfairly prejudiced by the comments by Martin's counsel during closing arguments.

Hughes next argues that he was entitled to a directed verdict on the issue of Martin's liability. A reviewing court is under a duty to consider the evidence in a light most favorable to the party opposing a motion for directed verdict. *Previs v. Daily*, 180 S.W.3d 435 (Ky. 2000). Furthermore, the trial judge may not enter a directed verdict unless there is a complete absence of proof on a material issue or no disputed issues of fact upon which reasonable minds could differ. *Bierman v. Klapheke*, 967 S.W.2d 16 (Ky. 1998). Moreover, we will only

⁵ Kentucky Rules of Evidence.

substitute our judgment if the trial court's ruling was "clearly erroneous." *Davis v. Graviss*, 672 S.W.2d 928 (Ky.1984).

The central question on liability was whether Hughes could safely and legally attempt to pass Martin's vehicle on the left. Hughes maintains that the first half of that block of Greenup Street was wide enough to safely accommodate two automobiles side by side, even with the perpendicular parking spaces fully occupied on the left. He further alleged that he had seen vehicles, including police cruisers, passing other vehicles on this portion of Greenup Street. Hughes also notes that there were no markings on the street which designated only a single driving lane. As a result, he contends that he fully complied with his duties when attempting to overtake Martin's vehicle on the left. He also contends that Martin was negligent as a matter of law by failing to keep a proper lookout and by turning left in front of him from the "right" lane of the street.

However, we agree with Martin and the trial court that the issues of liability all involved disputed issues of fact and were properly submitted to the jury. Officer Cook testified that the City of Covington considers the first half of the block of Greenup Street to be a one-lane road, notwithstanding its unusual width. He further added that this interpretation is borne out by the clear markings of the right and left lanes in the second half of the block. The jury was shown numerous photographs of the area, allowing them to assess whether the street could safely and legally accommodate both vehicles.

Given the ambiguities of the area, a jury could find that Hughes's attempt to overtake Martin's vehicle was not clearly illegal. But given the same evidence, the jury could also find that it was not safe to attempt the maneuver given the circumstances as they existed on that day. Likewise, the jury could find that Martin reasonably believed she was occupying the sole driving lane and could safely turn left from that lane without crossing another lane of traffic.

This evidence supported the trial court's threshold assessment that reasonable jurors could determine that either Martin or Hughes was at fault. *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467, 471 (Ky. 2001). Upon making this determination, the trial court properly submitted any issues of comparative fault to the jury. *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 804 (Ky. 2005). Therefore, the trial court did not clearly err by denying Hughes's motion for a directed verdict.

Finally, Hughes argues that the trial court erred by denying his post-trial motion for an evidentiary hearing on alleged juror misconduct. On the second day of trial, Juror No. 155 advised the court that his wife had been a previous client of Martin's counsel. The juror had previously stated that he had a family member who had been involved in a car accident injury lawsuit. However, Juror No. 155 stated that he did not recognize Martin's counsel until after the trial had started. Juror No. 155 added that he believed he could still be impartial and base his verdict solely on the evidence presented. Hughes's counsel did not object to Juror No. 155's continued participation in the case.

Following the jury verdict, Hughes filed a motion to stay the judgment and for an evidentiary hearing. He alleged that Martin's counsel failed to disclose the extent of the prior relationship with the juror. He further alleged that Martin's counsel failed to correct the juror's incorrect statement about when the prior representation occurred. The trial court denied the motion, concluding that the record clearly refuted the allegations of misconduct by either the juror or Martin's counsel.

CR 59.01(b) allows for a new trial based upon misconduct by the jury, the prevailing party, or her attorney. "A trial court may grant a new trial based on juror misconduct upon demonstration that a juror failed to answer honestly a material question on *voir dire*, and that a correct response would have provided a valid basis for a challenge for cause." *Gibson v. Fuel Transp., Inc.*, 410 S.W.3d 56, 62 (Ky. 2013) (citations and internal quotations omitted). Hughes fails to make either showing.

Hughes does not allege that Juror No. 155 intentionally failed to disclose the extent of his prior relationship with Martin's counsel. Rather, he contends that Martin's counsel failed to fully disclose the full extent of that prior relationship, thus breaching his obligation of candor toward the court. But as the trial court noted, Hughes's counsel had a full opportunity to inquire into that relationship, but failed to do so. In his post-trial motion, Hughes's counsel admitted that he simply misunderstood what Juror No. 155 was saying. Hughes's counsel insinuates bias on the part of Juror No. 155 and misconduct by Martin's

counsel without any factual basis to support those allegations. We agree with the trial court that this argument is not well-taken.

Accordingly, we affirm the judgment of the Kenton Circuit Court.

ALL CONCUR.

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