BEFORE THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN THE COURT OF APPEALS
No. 2006-CA-01552

DAVID LEE WASHINGTON — APPELLANT

vs.

MARIAN L. KELSEY — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LEAKE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE MARIAN L. KELSEY

ORAL ARGUMENT IS REQUESTED

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July, 2007

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. David Lee Washington, (Plaintiff/Appellant)
2. Marian L. Kelsey, (Defendant/Appellee)
3. James C. Patton, Jr., (Attorney for Appellant)
4. William M. Dalehite, Jr., (Counsel for Appellee)
5. J. Seth McCoy, (Counsel for Appellee)
6. Honorable Marcus J. Gordon, (presided over Circuit Court proceedings)

By: _____

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STATEMENT OF THE ISSUE

Whether the trial court was correct in denying the Plaintiff/Appellant David L. Washington's Motion for a New Trial.

STATEMENT OF THE CASE

This matter arises from an automobile accident that occurred on August 16, 1999 on Pickens Road in Leake County, Mississippi. The vehicle driven by the Defendant/Appellee, Kelsey, was struck by the Plaintiff/Appellant, Washington, while Appellee Kelsey was attempting to make a lawful left turn into the driveway of her home.

The Complaint in this matter was filed by Plaintiff/Appellant Washington on February 28, 2000 in the Circuit Court of Leake County alleging negligence on the part of Defendant/Appellee Kelsey. (R.4-5/X. 1-2). Kelsey answered the Complaint on June 20, 2001, denying the allegations of the Complaint and averring that the negligence of Washington was the sole and proximate cause of the accident in question. (R.16-18/X.3-5).

Discovery was conducted in the case and the deposition of Kelsey's neighbor, Gene Harmon, was taken on October 29, 2003, pursuant to notice by both Appellant Washington and Appellee Kelsey. (R.68-71/X.6-9). During the deposition of Mr. Harmon, defense counsel stated on the record that the deposition of Mr. Harmon was for evidentiary purposes and that all objections must be noted. (R.157/X.10). Counsel for Appellant Washington did not object to taking the deposition and did not make any objections during the deposition. Harmon testified that he lived near the spot where the accident occurred and met with Plaintiff/Appellant Washington on several occasions and advised him to slow down when driving through the area. Harmon further stated that he frequently observed Washington driving on the same road prior to

the accident at issue and was of the opinion that Washington exceeded the speed limit. (R.164-169/X.11-16).

Prior to the first trial of this matter, Washington filed a Motion to Exclude the Testimony of Gene Harmon on the grounds that it was prejudicial to Plaintiff's case. (R.73-74/X.17-18). Washington's motion was denied and the testimony of Gene Harmon was allowed at the first trial of this matter on May 3, 2004. A mistrial was ordered by the Court due to an unrelated issue involving the Court's instructions to the jury.

On April 20, 2006, prior to the second trial of this matter, Washington filed a Motion in Limine, again attempting to exclude the testimony of Gene Harmon based on the grounds that Harmon's testimony was more prejudicial than probative. (R.100-102/X.19-21). On April 27, 2006, Kelsey filed a response to Washington's Motion in Limine asserting that the testimony of Gene Harmon was probative as to the driving habits of Washington. (R.114-115/X.22-23). Plaintiff/Appellant Washington's motion was denied prior to trial of this matter on May 10, 2006.

The second trial of this matter took place on May 10 and 11, 2006 in the Leake County Circuit Court in front of Judge Gordon. (T.1/X.65). Both parties were present along with their attorneys and a duly sworn and empaneled jury heard the evidence of the parties. The jury deliberated and returned a verdict for Defendant/Appellee Kelsey. A final judgment was signed by Judge Gordon on May 23, 2006 and filed on May 25, 2006. (R.144/X.24).

Plaintiff/Appellant Washington filed a Motion for New Trial on June 5, 2006, said Motion was not received by counsel for Defendant Appellee Kelsey until June 12, 2006. In the Motion for New Trial, Washington asserted that Judge Gordon's denial of Washington's Motion

in Limine was prejudicial error and that Judge Gordon's rulings on Plaintiff's hearsay objections were improper. (R.145-147/X.25-27). Defendant/Appellee Kelsey filed a Response to Plaintiff's Motion for New Trial on June 22, 2006. (R.148-182/X.28-62). The motion was heard on August 4, 2006, and the Court denied Washington's Motion for New Trial. (R.187/X.63).

Washington filed his notice of appeal on September 8, 2006, appealing the order from the Circuit Court of Leake County, denying Washington's Motion for New Trial. (R.188/X.64).

SUMMARY OF THE ARGUMENT

The Leake County Circuit Court was correct in denying Washington's Motion for New Trial. The testimony of Gene Harmon was properly admitted at trial and the verdict of the jury was not against the overwhelming weight of the evidence.

ARGUMENT

A. Standard of Review

This appeal arises from the Leake County Circuit Court's denial of Plaintiff/Appellant Washington's Motion for a New Trial. In determining whether a trial court erred in denying a Motion for New Trial, the Court must accept as true the evidence which supports the verdict and will only reverse when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will the Court disturb it on appeal. *Jenkins v. State*, 947 So.2d 270, 278 (Miss.2006).

B. The Verdict of the Jury Was Not Against the Overwhelming Weight of the Evidence.

As stated earlier, a new trial will not be ordered unless the appellate court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand

would be to sanction an unconscionable injustice. *Townsend v. Skelton*, 911 So.2d 639 (Miss.App.2005). The present case clearly does not present such as situation.

The Plaintiff/Appellant Washington relies heavily on the testimony of Defendant Appellee Kelsey's expert, Cecilia Kazery, during a confusing cross examination at trial in support of his contention that a reasonable jury could not reach the verdict in this case. Kazery testified that she was a certified accident reconstructionist and was accepted as an expert in that field at the trial of this matter. (T.102-103/X.74-75).

Kazery's testimony was clear that in forming her opinions about the case, she visited the accident scene, reviewed the accident report, reviewed all depositions, reviewed photographs that were taken of the vehicles after impact, and reviewed photographs of the accident scene. (T.104/X.76). Kazery testified that based on her observations and calculations, and review of the physical evidence, Washington was traveling in excess of sixty miles per hour when he topped the hill roughly 300 feet from Mrs. Kelsey's driveway. Testimony at trial established that the speed limit for that section of the road is 45 miles per hour. (T.76X.69). Evidence of Washington's excessive speed at the time of the accident was clearly presented to the jury through calculations and observations made by Kazery. Evidence of Washington's excessive speed was also put forth through the distance Washington's vehicle traveled after initially hitting his brakes. (T.109-111/X.77-79).

Despite this evidence of Washington's excessive speed, Washington asserts in his brief that evidence to support the jury's verdict is nonexistent. Nothing could be further from the truth. The testimony of David Washington himself indicated that he came over the top of a small hill and saw Kelsey's vehicle approaching in the westbound lane. (T.51/X.67). Washington testified

from his past knowledge that he knew it was Kelsey's vehicle, knew that she lived at that residence, and knew that she was going to turn left into her driveway. (T.50/X.66) and (T.51/X.67).

Further, Defendant/Appellant Marian Kelsey testified that she never took her eyes off the road before she made her turn into her home. (T. 76/X.69). She testified that she did not see any other vehicles on the road prior to starting her turn. (T.78/X.70). She testified that as she was pulling into her driveway, she heard the roar of Mr. Washington's truck. She then looked over and all she could see was the front grill of Washington's truck. (T.78/X.70). Kelsey testified that the impact occurred in her driveway with the vehicle driven by Washington on the shoulder of the road. (T.78/X.70).

Clearly, sufficient evidence exists to support the jury's finding that Washington was negligent in causing the accident in question. At the very least, the jury verdict could not be seen as being against the overwhelming weight of the evidence. The jury is the trier of fact and determines the weight and credibility of the witnesses at trial. *Quinn v. President Broadwater Hotel, LLC*, 2007 WL 1247983.

In the present case, witnesses for both sides testified and it was up to the jury to decide which witnesses were the most credible. It is not the place of the Plaintiff/Appellant to require a jury to rely strictly on his interpretation of the facts in order to reach their verdict.

B. The Deposition Testimony of Gene Harmon Was Properly Admitted Into Evidence.

Plaintiff/Appellant Washington argues that he was prejudiced by the trial court's ruling on certain hearsay objections. The suppression or admission of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of discretion. *Haggerty v. Foster*, 838

So.2d 948, 958 (Miss. 2002). In the present case, Judge Gordon clearly did not abuse discretion in his rulings on Washington's objections.

Washington alleges that the jury was prejudiced by the introduction of testimony concerning prior incidents of speeding claimed against Washington. Initially, Washington asserts that Kelsey was allowed to testify that she overheard her neighbor, Gene Harmon, having a conversation with Washington regarding his excessive speed on the area of the road at issue in the lawsuit. (T.82- 83/X.71-72).

The trial court properly allowed the testimony because Kelsey was testifying as to what she heard as she witnessed the conversation between the Plaintiff/Appellant Washington and Gene Harmon at the accident scene. Previously in the trial, Washington testified that he and Mr. Harmon did not have any conversations at the scene of the accident. (T. 70/X.68). Kelsey's testimony as to that conversation served to impeach Washington's denial that the conversation with Mr. Harmon at the accident scene took place. Clearly, Judge Gordon was correct and did not abuse any discretion in his ruling. Regardless, this ruling did not prejudice Washington's case as evidence of Washington's excessive speed was presented to the jury by other means, including the testimony of Cecilia Kazery.

Washington's second allegation is that his case was prejudiced by the introduction of Gene Harmon's deposition as a whole and as it relates to conversations with Washington regarding Washington's speeding. The deposition transcript was introduced at trial *without* objection by counsel for Washington and thus, is not a proper issue to be heard on appeal. (T.92/X.73) However, in any event, the deposition of Gene Harmon was noticed by counsel for *both* Washington and Kelsey. (R.68-71/X. 6-9). During Harmon's deposition, counsel for Kelsey

stated on the record that the deposition was for evidentiary purposes and that all objections must be noted. Counsel for Plaintiff/Appellant Washington did not make any objections at the time the deposition was taken.

Under Mississippi Rule of Evidence 406, evidence of habit or routine practice can be used as circumstantial evidence. A party may introduce evidence of a person's habit to imply that he probably acted in the present instance in conformity with his habit. *See comments to M.R.E. 406.* Admission of the testimony of Gene Harmon regarding Washingtons' habit of speeding in the area where the accident occurred was not reversible error. *See Ideal Cement Co. v. Killingsworth* 198 So.2d 248, 251 (Miss.1967)(holding that admission of testimony regarding the observed speed of a driver was inadmissible when the observation did not occur immediately prior to the accident; however, admission of this testimony does not constitute reversible error where other evidence of speed at the time of the accident was given).

Washington was not prejudiced by the introduction of the testimony of Gene Harmon because the jury was presented with other evidence of Washington's speed at the time of the accident. This information was put forth through the expert testimony of accident reconstructionist Cecilia Kazery and thus, the introduction of Harmon's testimony was proper and, at the very least, not reversible error.

CONCLUSION

The verdict reached in this case by the properly empaneled jury was reasonable and not against the overwhelming weight of the evidence. Evidence of Washington's excessive speed was put forth to the jury through several sources, not the least of which being expert Cecilia Kazery. Further, the testimony of the parties involved in the accident presented to the jury an

opportunity to evaluate each individual's credibility and determine which version of the facts to believe. This is the most important and basic function of a jury. The jury's verdict in this case did not constitute an unconscionable injustice and thus, should not be disturbed.

Furthermore, Judge Gordon's rulings on Washington's hearsay objections during the trial were proper and did not constitute an abuse of discretion based on the evidence presented.

Respectfully submitted,

MARIAN L. KELSEY, Defendant

By: _____

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CERTIFICATE OF SERVICE

I, hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the foregoing to:

J. C. Patton, Jr.,Esq.
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107 E. Lampkin Street
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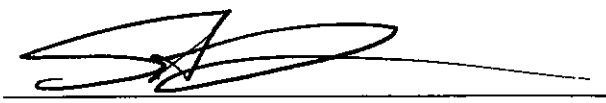
Honorable Marcus D. Gordon
P. O. Box 220
Decatur, MS 39327

This the 5th day of July, 2007.



WILLIAM M. DALEHITE, JR.
J. SETH McCOY