IN THE COURT OF APPEALS OF MISSISSIPPI

CASE NO: 2009-CA-01147-COA

KAREN R. THOMPSON **APPELLANT**

VERSUS

DUNG THI HOANG NGUYEN **APPELLEE**

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2004-00162 (3)

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I. CLARIFICATION OF FACTS

As an initial matter, Appellee misrepresents facts in her Statement of Facts which should be clarified. First, Appellee states that when Ms. Nguyen was digging in her purse for Chapstick and hit Ms. Thompson, she rolled only a "few feet" and hit Ms. Thompson. Appellee Brief, p. 4. There is no testimony in the record as to what distance that Ms. Nguyen travelled from the time she stopped looking at the road until the time she crashed with Ms. Thompson. In fact, Appellee testified that she was not looking up, and did not even know how fast she was traveling when she caused the collision. Tr. 111-112.

Appellee next contends that Ms. Thompson stated to Ms. Nguyen at the police station immediately following the accident that she was not injured, and that such was "undisputed." Appellee Brief, p. 5. This also is blatantly untrue. Ms. Thompson specifically testified on cross-examination that Ms. Nguyen did *not* ask her how she was doing at the police station, and that they had no such discussion. Tr. 90-91.

Appellee then proceeds to misrepresent the testimony of Ms. Thompson's treating physicians. She first states that Dr. Martin, Ms. Thompson's general physician, opined only that Ms. Thompson had pre-existing conditions which were aggravated by the accident. Appellee Brief, p. 6. This is also misleading. The question to Dr. Martin was as follows:

> Q. All right. So that any problems that she may have developed after the accident, *at least that might be connected to the degenerative disc disease*, would probably at best be an aggravation, is that right?
>
> A. I think so.

Dep. Dr. Martin, p. 22 (emphasis added). The question was thus not posed as to her cervical injuries from the wreck, but only to problems that "might be connected to the degenerative disc disease."

Appellee moves next to Dr. Kesterson (whom she refers to as an orthopedic surgeon, when he is, in fact, a neurosurgeon). Appellee Brief, p. 6. While she is correct that Dr. Kesterson opined that the degenerative disc disease in general was not caused by the accident, there was no testimony or evidence whatsoever at trial that indicated even in the slightest that degenerative disc disease in any way caused Ms. Thompson's symptoms or necessitated any of the medical treatment whatsoever. In fact, Dr. Kesterson testified that probably everyone over thirty years of age has degenerative disc disease to some degree, including everyone in the courtroom. Dep. Dr. Kesterson, pp. . Dr. Kesterson testified as follows:

> Q. All right. Let me ask it another way, then. Assuming for a second, Doctor, that she had the degenerative disc disease that she had.
>
> A. Yes.
>
> Q. And assuming I got a jury of twelve people or six people, depending on how this jury is constituted by the judge, of all the people on that jury that would be of, say, an age thirty and above, what percentage of them would have some level of degenerative disc disease already?
>
> A. Thirty and above?
>
> Q. Yes, sir.
>
> A. Probably all of them.
>
> Q. And just looking around in the room, we've got a court reporter here, Doctor, and we've got me and we've got this nice younger attorney. How many of us, in terms of reasonable medical probability, would have degenerative disc disease?
>
> A. All of us.
>
> Q. Including you?
>
> A. Absolutely. Probably worse than most of you.
>
> Q. And you operate and you do your neurosurgery every day with degenerative disc disease?
>
> A. Yes.

Q. So what was it that made it come about that this lady had to have an operation of this nature?

A. She was debilitated and it was interfering with her life.

Q. Had she not had the wreck, just not had the wreck and gone along on a level that she had the degenerative disc disease with a normal progression, do you have any opinion in terms of reasonable medical probability as to whether or not, absent another wreck or trauma, she would have ever required disc surgery?

A. I couldn't give you a number, but she may never have needed it.

Dep. Dr. Kesterson, pp. 21-22. Appellee attempts to make a logical leap (that Ms. Thompson's surgery and medical treatment were necessitated by degenerative disc disease) without presenting any medical (or even lay) testimony or evidence to support her conclusion. Appellee misrepresents that Dr. Kesterson was somehow unclear in his testimony as to the symptomology, caused by the wreck, which necessitated the surgery. Appellee Brief, p. 7. This is untrue as well. Dr. Kesterson clearly states that Ms. Thompson was injured in the wreck, which caused the symptoms for which she was referred to him by Dr. Martin. Dep. Dr. Kesterson, p. 18. He further testified as follows:

Q. Dr. Kesterson, have you ever treated her for anything other than the matters relating to the wreck of March 14, 2002?

A. I don't think so. I don't recollect that.

Q. Okay. I mean, you never operated on her for any other purpose?

A. No, sir.

. . . .

Q. [By Mrs. McNeel] . . . . Based on a reasonable degree of medical probability, can you tell definitively whether – or can you state today whether the condition of Mrs. Thompson's cervical spine was caused by a wreck that occurred on March 14th of 2002?

[Mr. Denham objects to form]

> A. Certainly she had degenerative disc disease prior to that, I suspect. And you know, given the information that we have, that she developed these symptoms subsequent to that accident. That's all I know. And so, relying on that, I have to say with reasonable medical probability that it is related to the wreck.

Dep. Dr. Kesterson, pp. 32, 42-43.

With these clarifications of fact, Ms. Thompson responds to Appellee's brief as follows.

II. ARGUMENT

A. The trial court improperly overruled Plaintiff's Motion for Directed Verdict.

Appellee, citing *Holloway v. Holloway*, 631 So. 2d 127, 132-33 (Miss. 1993), argues that in this case, the black letter rule that "uncontradicted evidence must be taken as true" (which Appellee admits is a correct statement of the law – Appellee's Brief, p. 12) should not be applied because the evidence at trial was "so improbable and incomplete under the circumstances as to be bereft of credibility." The uncontradicted evidence at trial was that Appellee's negligence caused the wreck, that Ms. Thompson never had any symptoms prior to the wreck, and that three treating medical providers testified that the symptoms necessitating the surgery were caused by the wreck (with the fourth testifying that Ms. Thompson's injuries were consistent with a rear-end collision, but simply refusing to render a causation opinion one way or the other). The *Appellee herself*, testifying on cross-examination, admitted that she did not disagree with the medical providers.[1] Hence, there was *nothing* put on to rebut Plaintiff's prima facie case. The *only person at trial* who ever even attempted to state that Ms. Thompson's injuries were not caused by the accident was the defense attorney in his opening and closing arguments. Of course, arguments of counsel may not be considered as evidence. Appellee was under a duty to put on evidence of such a "quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment could differ as to the verdict" in order

[1] This admission by the Appellee herself surely has some legal weight and, absence any evidence to the contrary, should have allowed Ms. Thompson a directed verdict such that the jury should have gone out on damages only.

to rebut Ms. Thompson's prima facie case and avoid a directed verdict, but simply failed to do so. *Rosson v. McFarland,* 962 So. 2d 1279, 1284 (¶20) (Miss. 2007) (quoting *Collins v. Ringwald,* 502 So. 2d 677, 678 (Miss. 1987)). Accordingly, a directed verdict was proper under the circumstances.

B. Ms. Thompson is entitled to an additur or a new trial on damages only.

Appellee asks the Court to ignore the obvious, and to make no correlation whatsoever between the amount of the verdict and the amount of Ms. Thompson's physical therapy bills, which are exactly the same number, down to the dollar: **$9,131.00**. Certainly, there is no question that if the jury awarded *any* of Ms. Thompson's medical bills for the treatment related to her cervical injuries, the law obligates it to award *all* medical bills related to her cervical injuries, as those were the *only* injuries at issue in the trial. As pointed out to the Court in Appellant's initial Brief, this is a statutory command. Because Ms. Thompson's physical therapy bills would not have been necessary but for the surgery and treatment by Dr. Kesterson and Dr. Martin, Defendant desperately wants the Court to ignore this obvious correlation. Ms. Thompson simply asks the Court to make this obvious and legitimate inference, and to accordingly award her an additur as is proper under the law.[2]

Predictably, Appellee attempts to make the argument about causation when the jury clearly decided against it on that issue. Because Appellee cannot argue with the fact that the case law cited by Ms. Thompson is not on point, she attempts to argue instead the dissent from *Boggs v. Hawks*, and criticizes the majority opinion. Clearly, the dissent is not the law.

[2] Contradictingly enough, Appellee admits a few pages later (Appellee's Brief, p.26) that if the jury had awarded the *total* exact amount of the medical bills, Ms. Thompson *would* have been entitled to an additur. There is simply no logic in such paradoxical reasoning.

Not only that, but Appellee affirmatively misrepresents the opinion in *Boggs*, by stating, "It would seem in *Boggs* that causation was admitted at trial, although this glaring omission of causation by the majority opinion was squarely caught and addressed by [the dissent]." See Appellee's Brief, p 20-21. There is no question that causation was at issue in the trial of *Boggs*, so Appellee is obviously mistaken. In fact, the Court of Appeals even discussed the testimony of the expert physician put on by the defendant in *Boggs* to attempt to *rebut* causation.[3] *Boggs v. Hawks*, 772 So. 2d 1082, 1087-88.

Appellee attempts to argue that *Cassibry v. Schlautman*, 816 So. 2d 398 (Miss. Ct. App. 2001) is more on point than *Boggs v. Hawks*, but even a cursory review of that case makes clear that Appellee is utterly mistaken and simply grasping at straws. In *Cassibry*, the plaintiff got in a wreck with the defendant on April 2, 1996, but was in another wreck on August 18, 1996, before she ever saw her orthopedic surgeon seven months later. *Cassibry*, 816 So. 2d at 399-400 (¶¶2-6). The plaintiff in *Cassibry* then essentially asked her doctor to change his opinion as to which wreck caused the accident. *Id.* at 400 (¶6). She then admitted on the stand that her back injuries were caused by yet a third accident in 1999. *Id.* at 400 (¶8). Accordingly, *Cassibry* is about as off-point as a case can get. Here, however, there is no intervening, superseding cause even suggested (this is one of the few areas where even Appellee's counsel did not provide a speculative guess), and Ms. Thompson's doctors never changed their opinions, by request or otherwise.

Appellee then tosses out another case cite, *Kent v. Baptist Memorial Hospital*, 853 So. 2d 873 (Miss. Ct. App. 2003), completely without discussion. A brief review of this case makes clear the reasons Appellee chose not to discuss it. *Kent* dealt with (1) a directed verdict

[3] This is in contrast with the case here, where Dung Thi Hoang Nguyen put on *no* medical experts of her own at all.

granted on behalf of the defendant hospital[4] in a medical malpractice claim, and (2) a jury verdict against the plaintiff and in favor of the doctor where the plaintiff child's mother sought damages for the allegedly negligent intubation of her infant. *Kent*, 853 So. 2d at 875-76 (¶¶1-2). In that case, which could not be more dissimilar to *Thompson v. Nguyen*, the trial court **excluded** medical bills the plaintiff sought to introduce on the basis that they were related to her **diabetes**. The Court of Appeals stated,

> In this case, Candice was diabetic, and she came to Baptist as a result of complications from her diabetes. Every doctor who was a witness at this trial testified that because of Candice's diabetic seizure and resulting coma, hospitalization was the only option for her care. The record indicates that Candice received treatment for a variety of other medical conditions at Vanderbilt unrelated to the alleged negligent intubation, including (1) diabetic renal failure, (2) diagnosis and treatment of a subsequent diabetic seizure at Vanderbilt, and (3) other treatment and management of her diabetic condition and related medical complications. The evidence shows that Candice would have incurred medical bills regardless of the injury to her throat. Dr. Mansel did not cause Candice's diabetes, her seizure or the complications that resulted therefrom. Accordingly, Candice's only recoverable damages were those which resulted because of or due to Dr. Mansel's alleged negligence. Any medical expenses relating to her other treatment were inadmissable and non-recoverable.

Kent, 853 So. 2d at 881 (¶30). One wonders why Appellee exhausts this Court's time with this citation to such dissimilar case.

Not only did the Appellee in the case at bar completely fail to rebut (even in its brief) the reasonableness and necessity of the medical bills incurred by Karen Thompson in relation to her cervical injuries, but she offered no evidence whatsoever to rebut the testimony of Karen Thompson's medical providers (all four of them) as to *causation*.

Appellee next tries to save herself by citing *Fleming v. Floyd*, 969 So. 2d 868 (Miss. 2007). *Fleming* is not remotely on point either. *Fleming* involved a case where **liability** was contested, whereas liability was admitted in the case at bar. Further, there was three times as

[4] The directed verdict dealt with vicarious liability, no less. Clearly, it is a wonder Appellee even bothers to cite this case at all other than to exhaust the Court's time.

much evidence rebutting the expert opinion in *Fleming* as there was supporting it, whereas there was no rebuttal evidence in the case at bar.

Fleming testified that she was pulling out of her driveway, and Floyd came "flying" down the road so that Fleming could not even see Floyd until she was partially out of her driveway. *Fleming*, 969 So. 2d at 870 (¶4). She then put on an accident reconstructionist, who testified that Floyd was traveling on a "moist" roadway that day (purportedly due to rain earlier in the week), though the evidence was undisputed that the weather was clear on the day of the accident. *Id.* at 870 (¶¶4-5), Because of the moist roadway, the expert calculated his speed estimates based on a wet road. *Id.* at (¶5).

However, Floyd testified that as she came up on the curve in the road preceding Fleming's driveway, she could clearly see Fleming's driveway. *Id.* at 872 (¶11). She testified that Fleming's vehicle was at a dead stop in the driveway, with her bumper partially extending into the roadway. Floyd testified that she was traveling within the speed limit. *Id.* at 872 (¶11). Floyd then veered slightly left to avoid the protruding bumper, but she saw Fleming looking in the opposite direction (and not towards her). *Id.* Fleming then proceeded to pull out onto the road without ever looking in the direction from which Floyd's vehicle was traveling. *Id.* Floyd slammed on her brakes, but was unable to avoid Fleming. *Id.*

Accordingly, there was ample lay evidence to rebut the issue of whether Floyd's negligence caused the accident. Further, there was ample evidence and testimony to rebut the opinion of the accident reconstructionist put on by Fleming, including evidence in areas that were not even within his expertise. Unlike the present case, in *Fleming*, there was **rebuttal evidence** not only through Floyd's testimony, but through a police report.[5] The police officer

[5] Though the officer did not testify, the parties stipulated to the admission of the police report in its entirety.

wrote in his report that (1) Fleming's brake's were defective,[6] (2) Fleming did not yield the right-of-way, (3) Floyd had no fault in the accident, and (4) the road was dry, unlike the wet road in the expert's calculations. Accordingly, Fleming's entire theory of the case was rebutted by lay evidence. Further, Fleming's own testimony conflicted with that of her expert witness. The Mississippi Supreme Court stated, "Not only did the testimony of Floyd conflict with that of Fleming, and not only did the testimony of Floyd conflict with that of Bowman, but also Fleming's testimony conflicted with that of her own expert, Bowman, the accident reconstructionist." *Id.* at 877 (¶24). The court went on to state,

> It can be reasonably inferred that the jury, by its verdict, obviously chose to believe Floyd when she testified, contrary to Bowman's testimony, that immediately prior to the collision, she was driving within the posted speed limit.[FN7] It can be reasonably inferred that the jury, by its verdict, obviously chose to believe Floyd when she testified, contrary to Fleming's testimony, that Fleming did not look back in Floyd's direction prior to pulling out of her driveway and onto Old Spanish Trail. It can be reasonably inferred that the jury, by its verdict, chose to believe Bowman when he testified, contrary to Fleming's testimony, that Fleming's vehicle was not totally in the westbound lane of travel when the collision occurred.

Id. at 879 (¶28). The court even explicitly noted that its decision was based on the fact that **conflicting** testimony existed as to the issue of liability, stating

> Certainly, when we consider the totality of the record, **classic jury issues were created by the conflicting testimony of the witnesses**, and thus it became the responsibility of the properly-instructed jury to determine what weight and credibility it wished to assign to the testimony of the various witnesses.

Id. at (¶30) (emphasis added). In the case at bar, there was **no** conflicting testimony or evidence.

Perhaps, if liability were at issue in the case at bar, and if the Appellee had put on any evidence at all, she might have a leg to stand on. Unfortunately for Appellee, liability is not at issue, and Appellee put on no evidence other than her own testimony, during which she *agreed*

[6] Fleming's expert was not admitted as an expert in brakes or mechanics, but as an expert in accident reconstruction.

with Ms. Thompson's physicians. In the case at bar, there was no evidence whatsoever put on to rebut the expert opinions of Karen Thompson's physicians and the lay testimony of Karen Thompson and her mother. Accordingly, the overwhelming weight of the evidence is in Karen Thompson's favor, and the jury correctly found for her on the issue of causation. It simply failed to properly award the full amount of medical bills reasonably and necessarily incurred, as well as a reasonable award for pain and suffering.

C. Jury instructions.

Appellee contends that the issue of the improper jury instructions is moot because the jury ruled for Ms. Thompson. This is not true. As jury deliberations involve heavy and intensive compromise, the fact that the jury believed it had the option of ruling for Appellee certainly served to prejudice Ms. Thompson. Had the jury been instructed that it must rule for Ms. Thompson but instead simply award damages, it likely would not have had to compromise and award only the physical therapy bills instead of the full total of her medicals. As Appellee brought nothing else forward to rebut Ms. Thompson's arguments in Appellant's Brief regarding the jury instructions, Ms. Thompson rests on the arguments therein.

Respectfully submitted on this the 12 day of May, 2010.

KAREN R. THOMPSON

BY: DENHAM LAW FIRM, PLLC

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KRISTOPHER W. CARTER

CERTIFICATE OF FILING AND SERVICE

I, KRISTOPHER W. CARTER of DENHAM LAW FIRM, PLLC, do hereby certify that I have mailed this day, first-class postage prepaid, true and correct copies of the *Reply Brief for Appellant* to the following at their usual mailing address:

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SO CERTIFIED that I have deposited the Reply Brief for Appellant in the United States mail on this the 12 day May, 2010.

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