IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

WACKENHUT SECURITY (INCORRECTLY IDENTIFIED AS WACKENHUT SECURITY) AND ROZIVITO HOSKINS — APPELLANTS

VS. — CASE NO.: 2010-CA-00480-COA

ERNIE FORTUNE — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS, WACKENHUT SECURITY AND ROZIVITO HOSKINS, INDIVIDUALLY AND AS AN EMPLOYEE OF WACKENHUT SECURITY

ORAL ARGUMENT REQUESTED

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I. The Probative Value of Evidence of Plaintiff's Alcohol Use Outweighs any Prejudice to Plaintiff Due to its Relevancy to His Claims for Damages

While Plaintiff urges this Court that the probative value of evidence of his alcohol use is substantially outweighed by the danger of unfair prejudice, Plaintiff fails to address the specific relevancy of the evidence to his claims for past and future medical treatment and expenses and lost wages/loss of earning capacity. Simply stated, Plaintiff's damages are tied to his lifelong consumption of alcohol, the toll which his alcohol use has taken on his health and his ability to maintain gainful employment. His damages cannot be separated from his alcohol use.

By the admission of Plaintiff's own medical expert witness, Dr. Howard Katz, the medical records proffered at trial (Exhibit D-3 For Identification) are relevant to his medical history, as his medical history is replete with references to alcohol abuse. (Tr. 412:10-15). The trial court's error in prohibiting cross examination of Dr. Katz as to the administration of alcohol to the Plaintiff as part of a detoxification procedure during his treatment at University Medical Center resulted in Defendants' inability to present a defense to Plaintiff's claim for past and future medical treatment and expenses. As noted in *Carrol v. Morgan*, 17 F.3d 787 (5th Cir. 1994), medical records which provide evidence that a plaintiff is not a healthy person and that substance abuse might have resulted in a reduced life expectancy is relevant to the issue of damages.

II. Defendants Should Have Been Allowed Full Cross Examination on All Issues Related to Plaintiff's Alcohol Use

Plaintiff asserts that Defendants suffered no prejudice by the trial court excluding any testimony related to a $145 bill for beer which was given to the Plaintiff for alcohol detoxification at University of Mississippi Medical Center. Plaintiff further states that "if the

door had been opened by Plaintiff mentioning that the hospital gave him alcohol while in the hospital Defendants would have been allowed to develop the facts through cross examination". (Supplemental Brief of Appellee at 10). Plaintiffs are correct that cross examination on the issue should have been allowed, as Plaintiff clearly opened the door to the inquiry by including the reference to the bill in their medical summary and bills placed into evidence. The trial court erred in not allowing the cross examination.

This case is identical to the scenario at trial presented in *Blake v. Clein*, 903 So.2d 710, 726 (Miss. 2005). There, medical records were introduced into evidence *by the plaintiff* which contained entries referencing words which were prohibited by the trial judge. *Id.* There is no distinction which can be drawn in this case. The records were introduced without redaction. Therefore, the door to the inquiry was opened by Plaintiff, himself. Defendants did not violate the trial court's ruling, in limine, to exclude reference to Plaintiff's alcohol use. No cross examination or reference to the evidence was made by Defendants until after Plaintiff introduced his own documents into evidence in violation of the trial court's ruling.

III. Defendants Were Prejudiced by Allowing Substitution of Plaintiff's Expert Witness Economist at Trial

Plaintiff urges that no prejudice was created in allowing the substitution of Dr. Glenda Glover during trial. However, Plaintiff ignores the procedural problem which resulted from Plaintiff's failure to preserve the witness' testimony, via deposition, prior to trial. Defendants requested the deposition of Dr. Glover during discovery, but their request was denied. (R.E. 8). There is no relief afforded to Plaintiff under Mississippi law for the unavailability of Dr. Glover at trial. By not preserving the testimony for trial, Plaintiff ran the risk of not having her testimony available in the event that she could not appear for trial. The sole protection of a party

in preserving a witness' testimony, including, in the event that the witness is unavailable for trial, rests with the availability of deposition transcripts. This procedure has no distinction between lay witnesses and experts. *See Smith v. City of Gulfport*, 949 So.2d 844, 848 (Miss. 2007).

IV. The Trial Court Erred in Refusing Proposed Jury Instruction D-26 Regarding Use of Reasonable Force

Plaintiff asserts that there was not adequate foundation in the evidence to support a jury instruction on reasonable force. However, the testimony elicited at trial clearly demonstrates that the instruction should have been given.

During trial, Rozivito Hoskins testified as follows:

Q. Now, the gist of this whole thing is you claim that Ernie Fortune lunged at you with a knife and you were so threatened you had to use force to put him down. Is that correct?

A. I wouldn't say lunged at me. When I approached him, that's when I recognized the threat.

Q. Okay. Let me give you a chance, to make this real short. He really didn't have a knife at that point, did he?

A. That's not correct.

Q. Okay. Did he have a knife that was sizable enough that you thought was a threat to you?

A. Yes sir.

Q. And was there any other thing you could have done besides touch him to resolve that problem?

A. It was a split second decision I made. It was either I engage or disengage at that point.

Q. From the time you got up from the one side of the building to cross all the way to the other side of the building, did you not think Wackenhut's policy is I can't touch this guy, so maybe I should try to talk to him?

A. Like I said before, it was a split second decision I made.

(Tr. 551:28 to 552:21).

Robert Williams, Wackenhut Regional Manager testified as follows:

Q. But if Ernie actually had a knife, then the amount of force you think would have been reasonable under the circumstances?

A. Yes sir.

(Tr. 477:14 to17).

Plaintiff insists that "[n]o reasonable person, viewing the video of the incident (Exhibit "P-1") and considering all relevant eyewitness testimony, could find that Hoskins actions were reasonable or justified..." This is not the legal standard for the proposed instruction. The testimony supports the use of force jury instruction DH-26.

V. The Trial Court Erred in Excluding Evidence of Plaintiff's Prior Bad Acts

As noted by Plaintiff, abuse of discretion may be defined as creating a prejudice to a party's case. *Edwards v. State*, 737 So.2d 275 (Miss. 1999). Plaintiff sought damages for future lost wages/loss of earning capacity. Of the verdict rendered, the jury assessed nearly twenty percent (20%) of the total compensatory damages award to lost earnings, past and future. Clearly then, Defendants were prejudiced by not being allowed full cross examination on an element of damages which goes directly to assumptions utilized by Dr. Glover in her calculation of lost wages. Additionally, Plaintiff's numerous arrests/convictions for alcohol related offenses are probative of his alcohol abuse/dependence and, thus, relevant to his claim for damages.

VI. The Trial Court Erred in Excluding References to Plaintiff's Status as "Homeless"

Like evidence of Plaintiff's prior acts, evidence of his homelessness is relevant to the issue of damages, and the trial court's refusal to allow such testimony resulted in manifest prejudice to Defendants. Plaintiff insists that the evidence has no probative value and is not

admissible. (Supplemental Brief at 16). However, as evidenced by the jury's apportionment of a substantial percentage of the verdict to lost wages, Plaintiff's socioeconomic status is relevant not only to his damages asserted, but the actual compensatory damages award received at trial. Any alleged prejudicial effect is substantially outweighed by the probative value of the evidence and Defendants are prejudiced by not being allowed even offer any evidence to rebut the claim for damages.

CONCLUSION

As Plaintiff correctly states, the standard of review for evidentiary rulings by the trial court is abuse of discretion. *Debrow v. State*, 972 So.2d 550 (Miss. 2007). Such abuse of discretion is defined as creating a prejudice to the party's case. *Edwards v. State*, 737 So.2d 275 (Miss. 1999). The elements of damages which Plaintiff alleged at trial, including past and future medical expenses, past and future medical treatment, and past and future lost wages cannot be separated from his lifelong dependence upon alcohol, his prior conduct and actions and his socioeconomic status. The trial court's exclusion of such evidence not only resulted in prejudice to the Defendants, but prevented them from the ability to even rebut Plaintiffs claims for damages. These evidentiary rulings by the trial court, along with the separate errors enumerated on appeal warrant a remand for a new trial on the merits.

Based upon the errors of the trial court presented herein and the arguments and authorities cited, Appellants respectfully request that this Honorable Court address and provide a ruling on each issue on appeal and remand the case to the trial court for a new trial on the merits.

RESPECTFULLY submitted this the 23rd day of August, 2011.

WACKENHUT SECURITY AND
ROZIVITO HOSKINS, INDIVIDUALLY
AND AS AN EMPLOYEE OF WACKENHUT
SECURITY, APPELLANTS

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CERTIFICATE OF SERVICE

I, Matthew A. Taylor, one of the counsel of record for Appellants, Wackenhut Security and Rozivito Hoskins, individually and as an employee of Wackenhut Security, do hereby certify that I have this date caused to be delivered, via hand delivery, a true and correct copy of the above and foregoing *Appellants' Reply Brief* to the following:

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THIS the 23rd day of August, 2011.

Matthew A. Taylor