IN THE COURT OF APPEALS OF TENNESSEE

FILED

December 24, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

RICHARD McCONKEY and wife TAMMIE McCONKEY	:	MONROE CIRCUIT
	:	CA No. 03A01-9608-CV-00250
Plaintiffs-Appellants	:	
vs.	:	HON. EARLE G. MURPHY JUDGE
BEATRICE H. LANEY	:	
Defendant-Appellee	:	AFFIRMED AND REMANDED

VAN R. MICHAEL, WITH MICHAEL & MICHAEL, OF SWEETWATER, TENNESSEE, FOR APPELLANT

DAVID F. HARROD, WITH CARTER, HARROD & CUNNINGHAM, OF ATHENS, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sp.J.

The Plaintiffs appeal from a jury verdict awarding them damages in their suit for personal injuries. They insist the award of the jury was inadequate to compensate them for the injuries sustained. We affirm.

On January 23, 1993, the Plaintiff-Appellant, Tammie McConkey, was operating her automobile in a westerly direction on State Highway 39 in Monroe County near its intersection with Gamble Gap Road. At the same time, Defendant-Appellee Beatrice Laney was operating her automobile in a southerly direction on Gamble Gap Road near its intersection with State Highway 39. There was a stop sign on Gamble Gap Road requiring drivers of vehicles on Gamble Gap Road to stop before entering onto Highway 39. Highway 39 makes a sharp curve as it approaches the intersection with Gamble Gap Road, limiting the visual distance for drivers on Gamble Gap Road. Defendant Laney stopped her car at the intersection. Not seeing Plaintiff's, Mrs. McConkey's, automobile approaching the intersection, Ms. Laney pulled out onto Gamble Gap Road in front of Mrs. McConkey's car and was making a left turn when the two cars collided. There were no apparent serious injuries to either party but they were both taken by ambulance to Woods Memorial Hospital in Etowah, where they were both treated for their injuries and released.

Plaintiff McConkey filed suit against Defendant Laney for personal injuries. She alleged the Defendant was guilty of both statutory and common law negligence which was the proximate cause of her injuries. Plaintiff alleged she had incurred approximately $2,300 in medical expenses as a result of her injuries, her earning capacity had been substantially reduced, and she had sustained permanent injuries. She asked for damages in the amount of $100,000 and demanded a jury to try the cause. Her husband, Plaintiff Richard McConkey, joined in the complaint, asking for $10,000 for the loss of consortium.

The Defendant, for answer, denied she was guilty of acts of negligence which were the proximate cause of Plaintiff's injuries or that she was liable for any damages.

Upon the trial of the case, the proof showed the Plaintiff was unemployed and had suffered no loss of income as a result of her injuries.

Defendant moved for a directed verdict as to the husband's claim for damages for loss of consortium, which was granted by the court.

The Defendant conceded she was responsible for the accident.

The court directed a verdict as to liability and the case was submitted to the jury on the question of the damages for Mrs. McConkey. The jury returned a verdict in favor of Mrs. McConkey for $872.70.

The Plaintiffs' motion for a new trial, or in the alternative an additur, was overruled and they have appealed.

Although both Plaintiffs have appealed, Mr. McConkey presents no issue relating to the trial court's directing a verdict on his claim for loss of consortium.

The thrust of the issues presented for review are: (a) The verdict of the jury in awarding damages was contradictory to the evidence; and (b) Counsel for the Defendant made an inappropriate argument to the jury in saying the chiropractic

physician who treated the Plaintiff had not taken X rays of her neck when the proof showed such X rays had, in fact, been taken.

We find no error by the trial court, and affirm for the reasons hereinafter stated.

The verdict of the jury was sufficient to cover all of Mrs. McConkey's medical expenses resulting from the accident except approximately $3,300 she had incurred as a result of some 92 visits she had voluntarily made to her chiropractic physician, Dr. Price, between the date of the accident in January, 1993, and the date of trial in November, 1995. The proof showed Mrs. McConkey had been a patient of Dr. Price's for some time prior to the accident and he had been treating her for the same complaints he treated her for after the accident.

It has been pointed out in numerous cases that the amount of the verdict in a personal injury case is primarily for the jury to determine and, next to the jury, the most competent person to pass upon the matter is the judge who presided at the trial and heard the evidence. **Reeves v. Catignani**, 157 Tenn. 173, 7 S.W.2d 38 (1928). When the trial judge denies a request for an additur and approves the verdict in his or her role as "thirteenth juror," we must affirm if there is any material evidence to support the verdict. **Coffey v. Fayette Tubular Products**, 929 S.W.2d 326, 331 (Tenn.1996).

In the case of **Campbell v. Campbell**, 29 Tenn.App. 651, 199 S.W.2d 931, the court said:

> "The amount of damages is primarily a question for the jury, and their verdict, approved by the trial judge, is entitled to great weight in this court, if there is no claim of corruption or dishonesty. **Phillips v. Newport**, 28 Tenn.App. 187, 187 S.W.2d 965."

In the case of **Karas v. Thorne**, 531 S.W.2d 315 (Tenn.App.1975) this court held "there is no fixed rule in this state that the amount of damages awarded in a personal lawsuit must equal or exceed the proven medical expenses incurred." Id. 316.

The Appellant's second issue is that the Defendant's counsel inappropriately argued to the jury that Dr. Price, the chiropractic physician who treated the Plaintiff and testified in her behalf, had not taken X rays of her neck and this argument adversely affected the jury's verdict. Appellant says she objected to this argument and the court was in error in not sustaining her objection.

Appellant fails to cite us to the record where such objection and the ruling of the court were made, See Rule 6(1) Rules of the Court of Appeals. Nor do we find such objection in the record before us. Any objection to the remarks or conduct of counsel must be made at trial and a ruling had thereon, or it will not be considered on appeal. See **Morgan v. Duffy**, 94 Tenn. 686, 30 S.W. 735 (1895). Since Appellant's counsel made no objection at the time of the argument and since he did not request the trial judge to instruct the jury to disregard the argument, we find no error in counsel's remarks. See **Miller v. Alman Construction Co.**, 666 S.W.2d 466, 469 (Tenn.App.1983).

Appellants insist the record shows Dr. Price did make X rays of Plaintiff's neck. In support of her argument, her counsel relies upon the following testimony of Dr. Price:

"A. I saw Ms. McConkey as of January the 25th, of '93 following a motor vehicle accident.

"Q. Did you examine her on that occasion?

"A. Yes, I did.

"Q. And what did your examination reveal?

"A. Examination of x-rays [sic] from the hospital, Woods Hospital, and the x-rays [sic], it showed a flexion malposition of C5, which in terminology means the neck had been slung forward with one of the vertebrae going in that position and not returning back to its normal position compared to the one above and the one below." (Emphasis ours.)

The record shows the X rays from Woods Hospital were made the night of the accident. None of the X rays taken at the hospital, however, were of Mrs. McConkey's neck.

Dr. Price did not testify he took any X rays of Mrs. McConkey's neck after the accident. Appellant argues that the statement "and the x-rays" mentioned in the testimony quoted above refers to X rays Dr. Price did make after the accident. Appellant also argues that the following written notation on Dr. Price's "Invoice for Services" filed as an exhibit to his deposition, supports her contention that such X rays were made: "1-26-93...Taking A.P.LAX Cervical x-rays [sic] not in Woods file". Although this written statement appears on the "Invoice for Services," there is no other supportive evidence for the statement in the record nor does the record show this document was introduced into evidence on the trial of the case.

It is a recognized rule in this jurisdiction that the trial court, in its sound discretion, shall determine what is proper argument in a particular case and the appellate courts will not review the action of the trial court except for palpable abuse of that discretion, nor can error be predicated on the failure of the court to give an instruction to the jury which was not requested.

In the case of J. **Avery Bryan, Inc., v. Hubbard**, 32 Tenn.App. 648, 1949, 225 S.W.2d 282 (1949) the court said:

> In general, control over the argument of counsel is lodged with the trial court which exercises a sound judicial discretion as to what shall and shall not be permitted in argument. **Ferguson v. Moore**, 98 Tenn. 342, 39 S.W. 341; **Kizer v. State**, 80 Tenn. 564; **East Tennessee, V. & G. R. Co. v. Gurley**, 80 Tenn. 46; **Stone v. O'Neal**, 19 Tenn.App. 512, 90 S.W.2d 548.

In the case of **Klein v. Elliott**, 59 Tenn.App. 1 (1968), 436 S.W.2d 867, the court said:

> The allowance or denial of mistrial (new trial) on grounds of misconduct of counsel is discretionary with the trial judge, and that discretion will be reviewed only in exceptional cases. **Prewitt-Spurr Mfg. Co. v. Woodall**, 115 Tenn. 605, 90 S.W. 623 (1905). In view of the harmless error statute, T.C.A. Sec. 27-117, and the lack of showing that the misconduct actually affected the outcome of the trial, there can be no reversal on this ground.

In the case of **Jenkins v. Perry**, 52 Tenn.App. 576 (1964), 376 S.W.2d 726, the court said:

> It should be pointed out that the trial Judge has considerable discretion in a matter of this kind and that the Appellate Courts will not review such action except for palpable abuse of this discretion. **Crews v. Gould**, 6 Tenn.Civ.App. 620. And if the trial Judge failed to instruct the jury on such a point it was the duty of counsel to call this to his attention by special request. **Crews v. Gould**, supra. Error cannot be predicated on the failure of the Court to give an instruction which was not asked for. **Bridges v. Vick**, 21 Tenn. 516; **Womac v. Casteel**, 200 Tenn. 588, 292

S.W.2d 782 and **Howell v. Accident & Cas. Ins. Co.**, 32 Tenn.App. 83, 221 S.W.2d 901.

We find no abuse of discretion in the court's allowing the argument even if a timely objection were made.

The issues are found in favor of the Appellee. The judgment of the trial court is affirmed and the cost of this appeal is taxed to the Appellants. The case is remanded to the trial court for any further, necessary proceedings.

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Clifford E. Sanders, Sp.J.

CONCUR:

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Houston M. Goddard, P.J.

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Charles D. Susano, Jr., J.