IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 15, 2015 Session

**LARRY BACHAR v. MIKE PARTIN, ET AL.**

**Appeal from the Circuit Court for Franklin County**
**No. 18355CV J. Curtis Smith, Judge**

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**No. M2015-00724-COA-R3-CV – Filed May 27, 2016**

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In suit arising out of a motor vehicle accident, Defendants appeal the jury's finding that Defendant driver was 60 percent liable for the accident, the award of damages for lost past and future income, and the failure of the trial court to hold a hearing on alleged juror misconduct. Finding that the jury's apportionment of liability and award of damages are supported by material evidence and that there is no factual basis for a hearing on jury misconduct, we affirm the judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and THOMAS R. FRIERSON, II, J., joined.

Stuart F. James, Chattanooga, Tennessee, for the appellants, Mike Partin and Mike Partin Trucking.

Floyd D. Davis, Winchester, Tennessee, for the appellee, Larry Bachar.

## OPINION

### I. FACTUAL BACKGROUND

On the morning of November 6, 2010, Larry Bachar was involved in an accident at the intersection of Industrial Drive and Baxter Lane in Franklin County, Tennessee. Mr. Bachar filed suit against Mike Partin and Mike Partin Trucking on July 26, 2011, alleging that Mike Partin, while driving a truck owned by Mike Partin Trucking, (hereinafter collectively "Mr. Partin") failed to stop in obedience to a stop sign and drove his truck into the intersection,

causing Mr. Bachar, who had the right-of-way, to swerve and collide with another automobile.[1] Mr. Partin answered, denying the allegations of negligence and raising the defense of comparative fault on the part of Mr. Bachar.

The case was tried to a jury on August 13 and 14, 2014. The jury returned a verdict finding Mr. Bachar to be 40 percent at fault and Mr. Partin to be 60 percent at fault and assessed damages at $333,000. The court entered judgment on the verdict, awarding damages against Mr. Partin in the amount of $199,800. Mr. Partin filed a motion for new trial or remittitur and, following the denial of same, a motion seeking reconsideration of remittitur and seeking an evidentiary hearing on the jury's deliberations; both motions were denied.

Mr. Partin appeals, contending that the evidence does not support the jury verdict on liability, the apportionment of fault, or the award of damages for loss of earning capacity, and that the court should have held a hearing on juror misconduct.

## II. DISCUSSION

### A. Liability and Apportionment of Fault

Mr. Partin asserts that the judgments on liability and damages "were simply not supported by the evidence at trial" and that "the law and the facts demonstrate that the parties were at least 50% at fault, with the facts showing that Bachar is probably 60% or more at fault due to speed."

When reviewing a jury's verdict, our task is to determine whether there is any material evidence in support of the verdict. *Harper v. Watkins*, 670 S.W.2d 611, 631 (Tenn. Ct. App. 1983); *Lassetter v. Henson*, 588 S.W.2d 315, 317 (Tenn. Ct. App. 1979); *see also* Tenn. R. App. P. 13(d). We "must take the strongest legitimate view of all the evidence to uphold the verdict, assume the truth of all that tends to support it and discard all to the contrary. We are bound to allow all reasonable inferences to sustain the verdict, and, if there is any material evidence to support the verdict, we must affirm." *Harper*, 670 S.W.2d at 631. We do not reweigh the evidence. *See Electric Power Bd. v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn. 1985).

[1] The vehicles being driven by Mr. Bachar and Mr. Partin did not collide. The automobile with which Mr. Bachar collided was being driven by a Mr. Curtis, who is not a party to this action.

In support of his contention that the proof established that Mr. Bachar's speed was at least a 50 percent cause of the accident, Mr. Partin cites to the testimony of Glenn Summers, a police officer with the City of Decherd, who investigated the accident. Officer Summers testified that the posted speed limit for traffic on Baxter Lane was 30 miles per hour and that, based on the length of skid marks left by Mr. Bachar's vehicle, he calculated that Mr. Bachar was traveling on Baxter Lane at 43 miles per hour when it approached the Interstate Drive intersection. Mr. Partin also cites his testimony that he was driving his truck on Interstate Drive crossing Baxter Lane and first saw Mr. Bachar when Mr. Bachar was 60 feet from the intersection.

In response, Mr. Bachar cites his testimony as well as that of Mr. Partin, Officer Summers, and Michael Smith, eye witness to the accident, in support of his argument that the jury verdict is supported by material evidence. The pertinent testimony cited by both parties is that Mr. Bachar, traveling on Baxter Lane, had the right of way; that Mr. Partin, traveling on Interstate Drive, had proceeded into Baxter Lane as Mr. Bachar approached the intersection in excess of the speed limit; that Mr. Partin did not stop or attempt to stop; and that Mr. Bachar swerved to avoid colliding with Mr. Partin and hit the automobile being driven by Mr. Curtis.

Taking the strongest view of the evidence in support of the verdict and affording reasonable inferences to sustain it, the evidence supports the finding that Mr. Partin was 60 percent at fault for the accident and Mr. Bachar 40 percent at fault. *See Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994) (noting that questions of negligence, contributory negligence and proximate cause remain questions for the jury after the adoption of comparative negligence).

## B. Damages

Mr. Partin contends that the verdict for past and future lost wages is "against the great weight of the evidence offered at trial."[2] In support of this contention, Mr. Partin cites to one

[2] The jury reported the damage award on the verdict form as follows:

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|---|---|
| Non-Economic Damages: | |
| a. Pain and suffering — past | $ 25,000.00 |
| b. Pain and suffering — future | $ 25,000.00 |
| c. Permanent Impairment/disfig. | $ 31,000.00 |
| d. Loss of ability to enjoy life — past | $ 25,000.00 |
| e. Loss of ability to enjoy life — future | $ 25,000.00 |
| Economic Damages: | |
| f. Medical Care/Services — past | $ 70,000.00 |
| g. Medical Care/ Service — future | $ 10,000.00 |

question and answer in the testimony of Mr. Bachar, the testimony of Dr. Lloyd Brown, an orthopedic doctor who performed an independent medical examination on Mr. Bachar following the accident, and Mr. Bachar's testimony that he earned $400-500 dollars per week.

The testimony of Mr. Bachar cited by Mr. Partin occurred in an exchange between Mr. Bachar and his counsel and is the first question and answer quoted below:

> Q. Okay. Now, do you know how much lost wages you have lost as a result of this collision?
>
> A. I have never really added it up.

The next question and answer were:

> Q. Okay. How much were you making per week the week before this collision occurred?
>
> A. About 400. Four or 500 a week.

The second answer gives completeness and context to the first and taken together are competent evidence of Mr. Bachar's earnings. Mr. Bachar also testified that he worked for 33 years doing siding, tin roofs, and gutters; that his worked required him to climb ladders, carry materials and tools, and work with both hands; and that he worked 10 hours a day 4 to 5 days per week at $10 dollars per hour.

With respect to the impact of his injuries on his ability to work, Mr. Bachar testified that following the accident he has a lack of mobility in his left arm, can only lift 3 pounds with the arm, and cannot work in his physical state. Dr. Brown, who examined Mr. Bachar on April 8, 2014, testified at some length to his evaluation of the injuries sustained by Mr. Bachar and rendered the following diagnosis:

> Q. Okay. Do you have an opinion based upon your examination of him, the history that you received, and the diagnosis that you made as to what was the origin or what was the cause of the injury that you diagnosed?

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|---|---|
| h. Loss of earning capacity — past | $ 40,000.00 |
| i. Loss of earning capacity — future | $ 80,000.00 |
| j. Property Damages | $ 2,000.00 |

> A. I believe based on the history given by Mr. Bachar, the review of his medical records, and my examination, that he sustained an acute left brachial plexopathy, or brachial plexus injury, as a direct relation to the motor vehicle accident he described.[3]

On the basis of that diagnosis, Dr. Brown assigned Mr. Bachar a 28 percent whole person impairment rating.[4]

The foregoing is material evidence to support the award of damages for past and future lost earnings.

### C. New Trial and Remittitur

In the order overruling Mr. Partin's motion for a new trial, the court stated "After considering the motion, response thereto, and the record as a whole the Court is of the opinion the verdict is supported by the evidence received at trial." Mr. Partin asserts that the trial court failed to act as the thirteenth juror when it denied his motion for new trial and that the court erred in denying remittitur. We consider these matters together.

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[3] Dr. Brown explained his diagnosis:

> Q. And what was that diagnosis?
>
> A. Based on a review -- the history given by Mr. Bachar, and a review of the medical records provided as well as my complete examination of Mr. Bachar, what I found was that he had an underlying degenerative cervical disc disease that was aggravated by, related to the accident, from an injury to what's called the brachial plexus. . . . And his diagnosis was a traction injury to his brachial plexus. In other words, it was pulled. The nerves were damaged and the nerves don't heal normally. It's very difficult to have this type of nerve injury healed. . . . An injury to the brachial plexus is almost never going to heal. It acts more like an injury to the nerves within the cervical cord.
> . . .
> The only thing I failed to mention earlier was he also had an aggravation of arthritis, an injury to his foot, which I did not find anything specific to do for that.

[4] Dr. Brown explained his calculation of the rating as follows:

> Q. What is that impairment, please, sir?
>
> A. The total impairment that he sustained is 28 percent whole person impairment. I can break that down. Using the tables, there are classes, he has a Class 3 impairment, a fairly significant impairment, of the dorsal suprascapular nerve with atrophy of the scapular regional muscles. Class 3 impairment of the brachial plexus moderate motor deficiency with a 38 percent upper extremity impairment. All these things are added up. Cervical impairment is 6 percent.

The thirteenth juror rule requires the trial court to weigh the evidence independently, determine the issues, and to decide whether the jury's verdict is supported by the evidence. *See Ladd by Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 105 (Tenn. Ct. App. 1996). Where the trial court simply approves the jury verdict without comment, the appellate court presumes that the trial court preformed its thirteenth juror function adequately. *Holden v. Rannick*, 682 S.W.2d 903, 905 (Tenn. 1984).

The court approved the verdict without comment. As we have held, there is material evidence to support the apportionment of fault and the award of damages; upon this basis, the court correctly performed its function as thirteenth juror and approved the verdict.

Remittitur is appropriate when the trial court disagrees with the jury's damage award. *See Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 718 (Tenn. Ct. App. 1999). As stated above, the court did not disagree with the jury's award, which is supported by material evidence; the court did not err in denying remittitur.

**D. Jury Misconduct**

As one ground of his motion for a new trial, Mr. Partin asserted that "[t]here are indications that at least one juror knew Floyd Don Davis [counsel for Mr. Bachar] but did not reveal the fact he knew Mr. Davis or had personal contact with him." In support of this ground, Mr. Partin filed the affidavit of Vicki James, an employee in the office of his counsel, who conducted phone interviews with six of the jurors; attached to her affidavit were notes of her interviews.[5] Mr. Partin argues that the trial court should have allowed him to present evidence on juror misconduct.

As an initial matter, Mr. Partin has not cited to any portion of the transcript of *voir dire*, and upon our review we have not discovered where the entire jury panel or any juror was asked if she or he knew counsel for either party. We do note that Mr. Davis conducted his examination of the prospective jurors first and, in his remarks stated "I practice law here in Winchester and have for many years. Some of you I know, some of you I do not know. . . ." During examination of the panel, Mr. Partin's counsel did not interrogate any prospective juror as to whether that juror knew Mr. Davis; neither did counsel otherwise seek to exclude any juror because that juror knew Mr. Davis. Consequently, there is no basis for us to determine, even if we were to give credit to the statement in Vicki James' notes that one juror told her that "at least two of the men on the jury spoke of Floyd Don Davis as though they

[5] Affidavits of the jurors themselves were not filed. We agree with Mr. Bachar that the notes attached to the affidavit contain inadmissible hearsay, inasmuch as the notes were offered as proof of the matters stated therein.

knew him well," that the juror's acquaintance with Mr. David would in any way invalidate the verdict.

Further, in considering this issue, we look to the authority set forth in *Caldararo by Caldararo v. Vanderbilt Univ.*:

> Parties seeking a new trial because of alleged jury misconduct must at the outset satisfy the court that they have admissible evidence on the issue. When the evidence comes from the jurors themselves, its admissibility, prior to January 1, 1990, is governed by Fed. R .Evid. 606(b) which was incorporated into Tennessee law in *State v. Blackwell*, 664 S.W.2d 686, 688 (Tenn. 1984).

*Caldararo*, 794 S.W.2d 738, 741 (Tenn. Ct. App. 1990) (internal footnotes omitted). In a footnote, the court in *Caldararo* noted that, after January 1, 1990, the admissibility of juror's statements concerning the validity of a verdict is governed by Tenn. R. Evid. 606(b), which reads:

> (b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Again, were we to give credit to Ms. James' affidavit, none of the statements attributable to the jurors contained therein would be admissible, inasmuch as each speaks of statements purportedly made in the course of deliberations. The trial court did not err in not holding a hearing on the issue of juror misconduct.

### E. Timely Filing of the Notice of Appeal

Mr. Bachar raises as an issue on appeal whether the notice of appeal was timely filed. This matter was first presented to the court by Mr. Bachar's motion to dismiss the appeal,

which was denied by order entered May 15, 2015. We have considered the argument raised by Mr. Bachar and decline to reconsider our denial of the motion.

## III. CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed in all respects. The case will be remanded to the trial court for calculation of interest in accordance with Tenn. Code Ann. § 47-14-122, the collection of costs, and for such other proceedings as may be necessary.

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RICHARD H. DINKINS, JUDGE