FILED

February 16, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE

DOROTHY HUNTER	:	ANDERSON CIRCUIT
	:	CA No. 03A01-9510-CV-00336
Plaintiff-Appellee	:	
	:	
vs.	:	
	:	
REGIS HAIRSTYLISTS and REGIS CORPORATION	:	
	:	
Defendants-Appellants	:	
ERNESTINE JOHNSON	:	
	:	
Plaintiff-Appellee	:	
	:	
vs.	:	
	:	
REGIS HAIRSTYLISTS and REGIS CORPORATION	:	HON. JAMES B. SCOTT, JR. JUDGE
	:	
Defendants-Appellants	:	
ELVIRA OLIVER	:	
	:	
Plaintiff-Appellee	:	
	:	
vs.	:	
	:	
REGIS HAIRSTYLISTS and REGIS CORPORATION	:	
	:	
Defendants-Appellants	:	REVERSED AND REMANDED

LINDA J. HAMILTON MOWLES, WITH LEWIS, KING, KRIEG, WALDROP & CATRON, OF KNOXVILLE, TENNESSEE, FOR APPELLANTS

BRUCE D. FOX, WITH RIDENOUR, RIDENOUR & FOX, OF CLINTON, TENNESSEE, FOR APPELLEES

O P I N I O N

Sanders, Sr.J.

The pivotal issue on this appeal is whether or not the trial court was in error in denying Defendants' motion for a new trial based on newly discovered evidence. We hold it was, and reverse for the reasons hereinafter stated.

The three Plaintiffs-Appellees, Dorothy Hunter, Ernestine Johnson, and Elvira Oliver, filed separate suits against Defendants Regis Hairstylists and Regis Corporation for personal injuries. They each alleged the same negligence on behalf of the Defendants and their employees and they each alleged the same type of injuries resulting from the alleged negligence. The cases were consolidated for trial and have been consolidated on this appeal. They will be treated as one case in this opinion.

The Defendant-Appellant, Regis Corporation, is a Minnesota corporation authorized to do business in Tennessee and operates a beauty salon in Oak Ridge under the trade name of Regis Hairstylists.

Each of the complainants alleged in her complaint that on October 15, 1992, she went to Regis Hairstylists (Regis) to receive a permanent, as she had previously done. Her health and hair were in good condition at that time. On that occasion an employee by the name of Phyllis Walker applied chemicals to Plaintiff's hair and performed the services of giving her a permanent. She believed the chemical

used was Fabulaxer, which had been used on her hair on previous occasions. Within three days after the permanent, Plaintiffs's hair began coming out in great quantities. Plaintiff's attempts to stop her hair from coming out were to no avail. She alleged her scalp was burned and she sought medical treatment. She said she suffered emotional distress and embarrassment.

Plaintiff alleged Defendants, through their agent and employee, were negligent in the application process or in the choice of products in the treatment of Plaintiff's hair. As a result of Defendants' negligence, Plaintiff had suffered personal injuries and emotional distress for which she sought damages.

The Defendants, for answer in each of the cases, admitted the Plaintiff had received a permanent at its salon but denied any acts of negligence by it or its employee. They denied the Plaintiff was injured as a result of the manner in which the permanent was given or the products used, and demanded strict proof of the Plaintiff's allegations.

Upon the trial of the case, the proof showed each of the Plaintiffs is a black woman who has kinky hair. Beauty salons such as Regis use a special chemical solution called Fabulaxer to take the kinks out of the hair and make it straight. It is referred to as a "relaxer." Because it is a chemical and can be damaging to the hair, heat should not be applied to the hair while the relaxer is on it and the relaxer should not remain on the hair for more than 10 to 15 minutes, depending to some extent on whether the hair is course or

fine. The application of the relaxer, straightening the hair and styling the hair is referred to as a "perm." To keep the hair in good condition, it is necessary for a woman to get a perm every three or four months to straighten the new growth of hair following her last perm.

Each of the Plaintiffs was a regular customer of Regis and had received perms there before and Phyllis Walker had given them perms before October 15, 1992, which had been satisfactory. They each testified, however, that on October 15, when Phyllis Walker gave her a perm, Ms. Walker applied the relaxer to her hair, then put her under a hair dryer and left her there approximately 25 to 40 minutes before removing the dryer. They each testified that about three days after receiving the perm her hair began falling out. They each testified that after the hair stopped falling out, the new growth of hair would break off when it got about an inch long. They each testified they could not now get a satisfactory perm.

Phyllis Walker had left the employ of Regis more than two years prior to the trial of the case and could not be located by the Defendants as a witness.

Ms. Janet Brant, manager of Regis at the Oak Ridge salon, testified the placing of a person under a hair dryer with relaxant on her hair would be an improper procedure and a departure from the procedure which Phyllis Walker had been trained to use. The Defendants' defense of the case was based on the theory Ms. Walker was not acting within the scope of her authority at Regis when she placed Plaintiffs under hair

dryers with relaxer solution on their hair. It insisted Ms. Walker had grossly deviated from the usual business procedure of Regis.

The trial court did not accept Defendants' theory of defense and directed a verdict as to liability in favor of each of the Plaintiffs. The jury fixed the damages of Dorothy Hunter at $15,000. They found the Defendants to be 95% at fault and Plaintiff 5% at fault. The jury fixed the damages of Ernestine Johnson at $32,000. The court declined to charge the jury on comparative fault in her case. The jury fixed the damages of Elvira Oliver (Moore) at $15,000. They found the Defendants 90% at fault and Plaintiff 10% at fault.

Judgments were entered in keeping with the jury's verdict, after which the Defendants filed a motion for a new trial. The motion was overruled and Defendants have appealed and presented the following issues for review: (1) The court erred in denying Defendants' motion for a new trial based on newly discovered evidence; (2) The court erred in admitting into evidence statements made by Phyllis Walker to the Plaintiffs; (3) The court erred in not allowing the jury to consider comparative negligence of Plaintiffs for failing to remover the hair dryer when they felt their scalp burning from the hair dryer; and (4) The court erred in directing a verdict on the issue of liability of Defendants.

We find the Defendants' first issue to be controlling. We also find the court was in error in denying the Defendants' motion for a new trial.

In the case of **Seay v. City of Knoxville**, 654 S.W.2d 397, 401 (Tenn.App.1983) this court quoted with approval the following fundamental rules to be considered in granting or denying a new trial based on newly discovered evidence:

> "There are well settled rules for granting of new trials, by which the present case must be governed. 1. If a party omits to procure evidence which with ordinary diligence he might have procured, in relation to those points, on the first trial, his motion for a new trial for the purpose of introducing such testimony shall be denied. 2. If the newly discovered evidence consists merely of additional facts and circumstances, going to establish the same points which were principally controverted before, or of additional witnesses to the same facts, such evidence is cumulative, and a new trial shall not be granted. In cases to which these principles clearly and unquestionably apply, the granting or refusal of a new trial is not a matter of discretion. The parties have a legal right to a decision conformable to those principles. Where there is doubt about the point of negligence, or as to its materiality, it becomes a matter of discretion; and the Court will not - perhaps cannot - rightfully interfere."

The only one of these rules addressed by the trial court in denying the Defendants' motion for a new trial was the requirement of ordinary diligence in procuring the information prior to trial. The court said, as pertinent, in his order denying the motion: "[T]he court finds that the defendant did not exercise reasonable diligence in attempting to locate Phyllis Walker prior to the trial of the case...."

We find the evidence in the record preponderates against this holding. In support of the motion for a new trial, Regis filed the affidavits of its attorney, Mr. Harry P. Ogden, its salon manager, Ms. Janet Brant, and the special investigator, Mr.Rockwell Dukes, who was hired by the Defendants to try to locate Ms. Walker. The affidavits set

forth the efforts which were made to locate Ms. Walker prior to trial.

Mr. Ogden stated in his affidavit that he realized the importance of contacting Ms. Walker and getting her version of the allegations in the complaints from the very beginning of the lawsuits. He contacted Ms. Brant, the manager of Regis, and learned Ms. Walker had been terminated by Regis approximately a year earlier, and Ms. Brant had talked to her about a month after her termination but had not seen or heard from her after that date. Ms. Brant told him she understood Ms. Walker was still living in the Oak Ridge Community. Mr. Ogden contacted Ms. Brant from time-to-time to learn whether or not Ms. Walker had been located. In October, 1994, some four months before trial, Mr. Ogden employed a special investigator, Mr. Rockwell Dukes, of Gay & Taylor, Inc., to locate Ms. Walker.

In December, 1994, Mr. Bruce Fox, counsel for the Plaintiffs, told Mr. Ogden one of his clients had told him Ms. Walker was or had recently been incarcerated in the Anderson County jail. Mr. Ogden's office immediately contacted the Anderson County jail and was informed Ms. Walker had been incarcerated there. They were given her last-known address and also the name and address and telephone number of Ms. Walker's "next of kin," Sherry Bohannan, who was Ms. Walker's daughter. This information was, in turn, given to the special investigator, Mr. Dukes. Mr. Ogden further stated that up to the date of trial, which was February 2, 1995, he had been unable to locate Ms. Walker and had no knowledge of what her testimony would be until after the trial had been completed.

Mr. Rockwell Dukes, the special investigator employed by Regis to locate Ms. Walker, filed an affidavit enumerating the numerous efforts he made to locate Ms. Walker, her daughter, Sherry Bohannan, and her son, Mr. Hazard. He left messages asking them to return his calls; he wrote letters asking them to contact him; he made numerous house calls, all without success. Everything had led him to believe Ms. Walker was in the Oak Ridge Community until February 1, 1995. On February 1, 1995, the day before the case was set for trial, Sherry Bohannan, Mrs. Walker's daughter, called Mr. Duke's office and left a telephone message saying "that her mother was currently living in Greeneville and was not interested in talking to me." Mr. Dukes returned Ms. Bohannan's telephone call that same day and she reiterated her original telephone message to him. He asked her for her mother's address and telephone number in Greeneville but she refused to give them to him, saying, "My mother is not interested in talking to you."

Ms. Janet Brant, who was the manager of the Regis salon in Oak Ridge from the date it opened in 1991, stated in her affidavit that Phyllis Walker was a black hair stylist employed by Regis from February to October, 1992. She was aware of the importance of locating Phyllis Walker at all times after learning of the filing of the lawsuits. Ms. Walker was discharged by Regis approximately one year before the lawsuits were filed. She had only one conversation with Ms. Walker since her discharge and that occurred about a month after her termination. At that time Ms. Brant was not aware of any claims against Regis and had no reason to question Ms. Walker about them until after suit was filed. She stated that

from time-to-time pending the cases, she inquired of her employees and particularly her black hair stylists, if they had any idea of Ms. Walker's whereabouts. On all occasions she was told they believed she was still living in the Oak Ridge community but no one knew where she lived. She gave all of her information to Mr. Ogden and the special investigator, Mr. Dukes. She stated she did not know where Ms. Walker was at the time of trial and had not had any contact with her since 1992. Ms. Brant further stated Ms. Walker contacted her by telephone on February 16, 1995, which was two weeks after the trial. Ms. Walker stated she had just learned they (Regis) were looking for her. She stated she had heard what happened at the trial and said, "It didn't happen." She felt she had been "slandered" at the trial and in the media's reporting of the trial. She stated she never put the Plaintiffs under the hair dryer with relaxer on their hair.

In further support of its motion for a new trial, Regis filed a sworn statement in response to questions by counsel in which Ms. Walker denied and contradicted most of the relevant testimony of the Plaintiffs. The sworn statement contains some 42 pages and to summarize the statement would serve only to lengthen this opinion. Suffice to say, if Ms. Walker's testimony is accepted by the jury, it more probably than not, will affect the judgment on a new trial.

We find the Defendant has met the rules set out above for a new trial based on newly discovered evidence. In view of our ruling on this issue, the other issues are pretermitted.

The judgment of the trial court is reversed and the case is remanded to the trial court for a new trial. The cost of this appeal is taxed to the Appellees.

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Clifford E. Sanders, Sr.J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.