

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

January 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

CHARLES F. MOON and)
BARBARA L. MOON, both)
individually and as next)
friends of CHANEE MOON, a minor)
Plaintiffs - Appellants)
v.)
DENNIS G. FOX and NATIONAL)
TITLE INSURANCE AGENCY, INC.)
Defendants - Appellees)

HAMILTON COUNTY
03A01-9507-CV-00213

OPINION CONCURRING IN PART AND DISSENTING IN PART

Goddard, P. J.

I concur with the majority opinion's resolution of issue two relative to whether there is material evidence to support the jury's verdict. I do, however, find under the record presented that the Trial Judge did not exercise his responsibility as thirteenth juror by independently weighing the evidence, which encompasses his assessment of the credibility of the witnesses.

In addition to the quotation of Ridings v. Norfolk Southern Railway Co., in the majority opinion, which accurately deals with the thirteenth juror question, Judge McAnis, former Presiding Judge of this Court, in Sherlin v. Roberson, 551 S.W2d 700, 701 (Tenn. App. 1976), pointedly articulates the significant rule trial judges play in jury cases:

The . . . remarks of the judge make it appear he disassociated himself from the deliberative process which is the peculiar and exclusive province of the jury of which the presiding judge is as much a member as jurors sitting in the jury box. Indeed, it must be said that, by reason of his training as a lawyer and his experience in weighing testimony, he is the most important member of the jury.

To say, as the trial judge did in this case, that before the trial judge, acting as the thirteenth juror, should set aside a verdict it would have to be a verdict that he could not live with would be to adopt a standard relieving the judge of the duty to take an unbiased and dispassionate view of the evidence, weigh it and determine whether the evidence preponderates in favor of the plaintiff or defendant or is equally balanced.

If the trial judge abdicates this important duty justice could often miscarry. On appeal the evidence cannot be weighed as in the trial court. As has been said so often, a verdict in a civil case approved by the trial judge cannot be overturned if there is any credible material evidence to support it. In view of the finality of his determination of the weight of the evidence as the thirteenth juror, it will not do to weaken the rule by implying approval by the trial judge from countervailing and irreconcilable remarks. To do so would be to strike at the very foundation of our judicial system as it pertains to jury trials.

The question is not, as suggested by the Trial Court, whether the jury had sufficient evidence to return the verdict it did, but whether the Trial Judge, upon his independently

evaluating the evidence, approved the verdict. My reading of his remarks convinces me that he did not perform his duty as thirteenth juror by making an independent evaluation of the evidence.

For the foregoing reason I would reverse as to issue one and remand the case for a new trial.

Houston M Goddard, P. J.