IN THE COURT OF APPEALS OF TENNESSEE

CHARLES F. MOON and BARBARA L. MOON, both individually and as next friends of CHANEE MOON, a minor,	)	C/A NO. 03A01-9507-CV-00213
Plaintiffs-Appellants,	)	HAMILTON COUNTY CIRCUIT COURT
v.	)	HONORABLE ROBERT M SUMMITT, JUDGE
DENNIS G. FOX and NATIONAL TITLE INSURANCE AGENCY, INC.,	)	
Defendants-Appellees.	)	AFFIRMED AND REMANDED

ANDY D. LEWIS of GARNER, LEWIS & PRICKETT, Chattanooga, for Appellants.

W. B. LUTHER of LUTHER, ANDERSON & CLEARY, P.C., Chattanooga, for Appellees.

OPINION

Susano, J.

This tort action arose out of an automobile accident between vehicles driven by Barbara L. Moon (Mrs. Moon) and Dennis G. Fox (Fox). The plaintiffs alleged that Fox[1] rear-ended the vehicle driven by Mrs. Moon and occupied by the other plaintiffs. Fox admitted liability and this case was submitted to a jury on the issue of damages. The jury returned a verdict for the defendants. The plaintiffs appeal, raising the following issues for our review:

> 1. Did the trial judge fail to properly exercise his function as the thirteenth juror?
>
> 2. Was there material evidence to support the jury's verdict?

I

This accident occurred on a rainy morning in February, 1991. The Moons' vehicle was stopped due to congested traffic. Fox was driving behind the Moons, and he readily admitted that "in reacting [to the halted traffic] I did not stop in time." He rear-ended the Moons' automobile at a fairly slow rate of speed. Fox testified at trial that he was traveling five to ten miles per hour shortly before he started to stop; in his deposition, he stated traffic was moving ten to fifteen miles per hour immediately prior to the accident. In response to a question as to how fast his car was moving at the point of impact, Fox

[1]The defendant-appellee National Title Insurance Agency, Inc., was sued under the theory of respondeat superior.

testified, "I don't know that the speedometer would even register" such a slow speed.

Fox introduced photographs taken of the two vehicles after the accident. The pictures of the front of his vehicle show no discernible damage. The pictures of the Moons' automobile reveal no damage to the rear of the vehicle, but there are several dents on the left side in the area between the back tire and the rear of the car. The source of this damage was disputed at trial. Mrs. Moon testified that most of it was caused by the collision with Fox, although she conceded that a small part was a result of an earlier accident. Fox called Joe Richardson, an appraiser who took the photographs of the Moons' car as part of his damage appraisal. He testified that the damage depicted was "old damage." Richardson stated that at the time of his appraisal he could not perceive any "new damage" resulting from the accident with Fox.

Charles F. Moon (Mr. Moon) claimed a back injury as a result of the accident; he presented proof of medical expenses totaling $13,667.03. Mr. Moon also testified that he had missed 57 days of work, and had been forced to work approximately 30 half-days as a result of his injuries. Mrs. Moon claimed that

she suffered an ulnar nerve injury, and presented proof of medical expenses totalling $4,228.95. The Moons' daughter, Chanee Moon, who was then 11 or 12 years old, also claimed a back injury from the accident; her medical expenses totaled $6,669.20. Dr. Cornelius Mance, one of the physicians treating the Moons, gave each of them a permanent partial impairment rating to the whole body; he assessed Mr. Moon's impairment at 3-5%, Mrs. Moon's at 12-15%, and Chanee Moon's at approximately 5%.

At trial, the defendants' theory was that the Moons' injury claims were not credible, given the mildness of the impact between the vehicles, and that the medical expenses claimed were therefore excessive and unreasonable under the circumstances.

II

Following the jury's verdict, the Moons filed a motion for a new trial. At the hearing on the motion, the following colloquy occurred between the trial court and counsel for the Moons:

> THE COURT: Well, the question for the jury and for the court is, I believe, did the jury find sufficient evidence on which to base this verdict. They apparently went into it pretty thoroughly. They spent an hour and fifty-five minutes in deliberation before

> they returned a verdict for the defendant. I think there's evidence there for them to do that. Overrule the motion.
>
> MR. LEWIS: Your Honor, can I inquire of the court just to state how the court weighs the evidence in this case, not what the court thinks the jury did, but I want to hear--
>
> THE COURT: I think what I'm required to do is to determine if the jury had sufficient evidence on which to bring this verdict back, and I find there was.
>
> MR. LEWIS: All right, sir. Beyond that, you have not made any personal weighing of the evidence then. Is that correct?
>
> THE COURT: Well, I find that, what I've just said.

The Moons contend that the trial court's statements at the motion hearing demonstrate that he failed to properly discharge his duty as the thirteenth juror. This court, in ***Ridings v. Norfolk Southern Railway Co,*** 894 S.W.2d 281, 288-89 (Tenn.App. 1994), recently reiterated the principles applicable to the trial judge's role as the thirteenth juror:

> If a trial court is called upon to act as a thirteenth juror following the filing of a motion for a new trial, the trial court must be independently satisfied with the verdict of the jury. ***Cumberland Telephone & Telegraph Co. v. Smithwick***, 112 Tenn. 463, 79 S.W. 803 (1904); ***Holden v. Rannick***, 682 S.W.2d 903 (Tenn. 1984); ***Miller v. Doe***, 873 S.W.2d 346 (Tenn.App. 1993). In performing this function, the trial court must itself weigh the evidence heard by the jury. Id. If after weighing the evidence, the trial court is satisfied with the verdict, it is that court's responsibility to approve the verdict; on the other hand, if it is not satisfied with the verdict after weighing the

> evidence, the trial court must grant a new trial. The trial court's performance of its function as thirteenth juror must be performed without regard to and without deference being shown to the result reached by the jury. As the thirteenth juror, the trial court acts as a jury unto itself in evaluating and weighing the evidence presented at the trial.
>
> When "the trial judge simply approves a verdict without any comment, it is presumed by an appellate court that he [or she] has performed his [or her] function adequately." ***Miller*** at 347. ***James E. Strates Shows, Inc. v. Jakobik***, 554 S.W.2d 613, 615 (Tenn.1977). On the other hand, where, as here, the trial court makes comments on the record in the course of reviewing a motion for a new trial, we will review those comments; but we do not review those comments to see if we agree with the trial court's reasoning, but rather to determine "whether the trial court properly reviewed the evidence, and was satisfied or dissatisfied with the verdict." ***Miller*** at 347. If the trial court's comments indicate that it has misconstrued its duty as thirteenth juror, and has approved the verdict for some reason other than its own satisfaction with the verdict based upon an independent evaluation of the evidence, it is our responsibility to reverse and remand the case for a new trial. ***Miller*** at 347; ***Nelson v. Richardson***, 626 S.W.2d 702, 704 (Tenn.App.1981).

We find that the trial judge's statements indicate that he properly performed his role as the thirteenth juror. It is true that the court alluded to the length of time the jury deliberated which could be interpreted as giving some deference to the jury's decision; but we think that any hint of deference was dashed by the court's finding that the jury "had sufficient evidence to bring this verdict back." He explicitly stated that "*I find that*"--meaning sufficient evidence. (Emphasis added).

In the context of a civil case, "sufficient" means a preponderance of the evidence or greater--anything less would clearly not suffice since the jury is charged with judging the evidence and finding for the party in whose favor it preponderates. Thus, the trial judge's comment that he was satisfied the evidence was sufficient is functionally equivalent to a finding that the court weighed the evidence and found that it preponderated in favor of the defendants. We hold the trial court properly discharged its function as the thirteenth juror.

III

The Moons also contend that there is no material evidence in the record to support the jury's verdict and urge us to vacate the trial court's judgment for that reason. The guidelines for review of a jury verdict are set forth in the case of ***Southern Railway Co. v. Sloan,*** 407 S.W.2d 205 (Tenn.App. 1965):

> We have pointed out repeatedly that in reviewing a case on appeal, where the appeal is from a judgment based on a jury's verdict, we do not weigh the evidence to determine the preponderance thereof, nor do we decide the credibility of witnesses. ***McAmis v. Carlisle***, 42 Tenn.App. 195, 300 S.W.2d 59. Our review is limited to a determination of whether there is any material evidence to support the verdict, and "it [our review] must be governed by the rule, safeguarding the constitutional right of trial by jury, which requires us to take the strongest legitimate view of all the evidence to uphold the verdict, to assume the truth of all that

> tends to support it, to discard all to the contrary, and to allow all reasonable inferences to sustain the verdict." ***D. M Rose & Co. v. Snyder***, 185 Tenn. 499, 206 S.W.2d 897. And if there is material evidence to support the verdict it must be affirmed. ***City of Chattanooga v. Ballew***, 49 Tenn. App. 310, 354 S.W.2d 806, and numerous cases there cited.

Id. at 209. Applying this standard to the facts of the present case, we find there was material evidence to support the jury's verdict. The cause and extent of the Moons' injuries were almost entirely questions of credibility. Those were questions for the jury. ***Reynolds v. Ozark Motor Lines, Inc.***, 887 S.W.2d 822, 823 (Tenn. 1994). The proof in this case was such that the jury could have reasonably concluded the Moons were not injured as a result of the accident.

The uncontradicted testimony of Fox was that at the point of impact he was traveling so slowly his speedometer would likely not have registered his speed. He further testified that if his wheels could have made another half-rotation, his car would not have touched the Moons' vehicle. More significantly, the photographs of the vehicles reveal not even a scratch or dent to the front of Fox's car or the rear of the Moons' car. Regarding the damage that the photographs of the Moons' car do reflect, the jury could conclude, based upon the testimony of Richardson and Mrs. Moon, that no "new damage" resulted from the accident with Fox.

The jury could also have reasonably inferred from Mr. Moon's testimony that there was little or no physical effect inside the Moons' vehicle from the impact:

> Q: But you don't even know, do you, sir, whether or not your body made any movement, at all?
>
> A: I felt something when that car hit me. I felt it right here.
>
> Q: The question is: Do you know whether or not your body made any movement, at all?
>
> A: I did like this when the car hit me. I moved. I did like this, said, oh, I felt something.
>
> Q: I'm talking about movement as a result of the impact, not something that you may have done after the impact, sir.
>
> A: I felt something when the car hit me. That's all I can say, Mr. Luther.
>
> Q: But you don't know whether or not your body made any movement at impact, do you, sir?
>
> A: I just felt something when the car hit me.

The proof also reveals that at some point before he saw Dr. Mance, the physician who gave him an impairment rating, Mr. Moon saw an orthopedic surgeon, Dr. Chandra. Dr. Chandra's report indicates as follows:

> On examination: The patient is a healthy adult. HEENT examination is negative. Range of motion of the cervical spine, lumbar spine, thoracic spine are completely normal. There are no tender spots in any of the

> places, there are no muscle spasms that I can identify or muscle abnormalities. X-ray reports of the bone scan as well as the X-rays and the MR scan are completely normal, except for a small bone spur at the T2-3 area.

The medical testimony regarding the Moons' alleged injuries indicates that most of the symptoms the treating doctors relied upon were subjective complaints of pain. Dr. Mance's medical tests of Chanee Moon apparently yielded negative results. Although a nerve conduction test revealed that Mrs. Moon had slowed motor conduction across the elbow, indicating an ulnar nerve injury, there was evidence that she had previously suffered some injury to her elbow in an earlier accident. Further, Mrs. Moon testified that it was "some months" after the accident before she had any problems with her arm. It is true that all three of the Moons received an anatomical impairment rating from Dr. Mance; however, "juries are not bound to accept expert medical opinion as to the nature or extent of a permanent disability . . ." ***Poole v. Kroger Co.,*** 604 S.W.2d 52, 55 (Tenn. 1980). This is particularly true when the expert's evaluation is based largely upon subjective complaints.

For the foregoing reasons, the judgment of the trial court is affirmed and this case is remanded for the collection of costs assessed there, pursuant to applicable law. Costs on appeal are taxed and assessed to the appellants.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.