

**Jerry BONNER and Jerry Bonner, Administrator Ad Litem for Gale Bonner,
v.
Andrew BILLEN and Risk Enterprise Management Limited, Inc., on behalf of Belk
Department Store of Chattanooga, TN, Inc.**

Nov. 5, 2007

Court of Appeals of Tennessee
No. E2005-01901-COA-R3-CV.
Aug. 13, 2007 Session.

2007 WL 3245436 (Tenn.Ct.App.)

Direct Appeal from the Circuit Court for Hamilton County, Division IV, No. 97 CV 1376;
Hon. W. Neil Thomas, III., Circuit Judge.

OPINION

HERSCHEL PICKENS FRANKS, P.J.

***1** In this action for damages for personal injuries sustained in an automobile accident, plaintiff obtained a Judgment against defendant driver, an underinsured motorist, and the intervener who had paid plaintiff's workers compensation benefits, was awarded a lien against the Judgment entered on behalf of the plaintiff. On appeal, we affirm the Judgment of the Trial Court.

Background

Jerry Bonner brought this action against Andrew Billen, alleging the parties were involved in an automobile accident, that plaintiff was injured at the fault of Billen, and for damages for personal injury and property damage. The original summons to Billen was returned with a notation that Billen could not be found, and had moved from that address, and CUNA, plaintiff's UM carrier, Answered, stating that Bonner had a UM policy with them, with limits of \$100,000 per person and \$300,000 per occurrence.

An alias summons was issued to Billen, which was returned marked "refused" and/or "unclaimed". Subsequently, on January 7, 2001, service was obtained on Billen at his residence, and Billen then filed an Answer, and denied the accident could have caused injury to plaintiff.

Risk Enterprise Management Limited, Inc., ("REM") on behalf of Belk Department Store, was allowed to intervene and asserted its subrogation rights. REM stated that it was the third-party administrator of workers' compensation risk for Belk Department Stores of Chattanooga, and that Belk was plaintiff's employer at the time of the accident, which occurred during the course and scope of plaintiff's employment. REM stated that it had paid benefits to plaintiff under the workers' compensation laws for his injuries from the accident, and sought to recover any benefits it had paid from any damages that plaintiff recovered in this action.

Plaintiff's discovery revealed that Billen was insured by Direct Insurance at the time of the accident, with limits of liability on his policy of \$25,000/ \$50,000.

Billen filed a Motion to Dismiss which was treated as a Summary Judgment, and responding, the Court determined that Billen had insurance limits of \$25,000/ \$50,000, and that plaintiff's UM coverage was \$100,000/300,000. The Court concluded that since Billen was underinsured, plaintiff could rely on the provisions of Tenn.Code Ann. § 56-7-1206(e) regarding service of process, and then denied Billen's motion. On February 16, 2004, the Court ordered Billen to comply with discovery within 30 days. The plaintiff subsequently filed a Third Motion to Compel and/or for Contempt and/or for Default Judgment, asserting that Billen had still not responded to discovery. The Court then entered an Order giving Billen 30 more days to respond, stating that if he did not, his Answer would be stricken and a default judgment would be entered.

Billen sought an extraordinary appeal on the issue, but his application was denied. The Trial Court then entered an Order finding that the defendant had failed to comply with discovery, and ordering that he be declared in default, and the case set for hearing on damages.

*2 Plaintiff filed an Exhibit List and Witness List, and Billen responded with a Motion asserting that plaintiff should be prohibited from presenting the testimony of Ken Johnson and Donna Poole, who were listed, because plaintiff failed to name them in his interrogatory responses or his deposition. Billen admitted that plaintiff had attempted to supplement his interrogatory responses on the same date the witness list was filed.

A jury trial was held, and the Court entered a Judgment on the verdict, awarding plaintiff \$40,000 in damages against Billen, and \$500.00 for property damage. The Verdict form stated that \$36,500.00 was awarded for "medical care/services", and \$3,000 for loss of earning capacity.

REM then filed a Motion asserting the subrogation, and that in a Final Decree entered in the underlying workers' compensation action filed by the plaintiff against Belk, Belk was given a subrogation interest of \$53,011.86 against "any recovery of the employee from any third parties liable to the employee for the expenses for the injuries alleged herein."

Billen filed a Motion for Judgment Notwithstanding the Verdict or, alternatively, Motion for New Trial, asserting that the Court erred in denying his Motion for Summary Judgment based on the statute of limitations, and that the court erred in allowing Ken Johnson to testify. Further, that the court erred in denying Billen's motion for a mistrial after plaintiff stated in his testimony about Billen having been in jail. Billen also deposited funds of \$25,500 with the Court in partial satisfaction of the judgment.

The Trial Court entered an Order Allowing Lien Against Judgment, and imposed a lien against plaintiff's recovery in the amount of \$53,011.86, in favor of REM. After ruling on several motions, the Court entered Judgment and appeals by Billen and the plaintiff ensued.

Issues on Appeal

1. Did the Trial Court err in overruling Billen's Motion for Summary Judgment based upon plaintiff's failure to comply with Tenn. R. Civ. P. 3?
2. Did the Trial Court err in denying Billen's Motion for New Trial on August 29, 2005, after the Court overruled Billen's motion for a mistrial, allowed a key witness to testify in violation of local rules, and upheld a verdict which is inconsistent?
3. Did the Trial Court err in denying Billen's motion for sanctions against REM and its attorneys?

4. If this Court finds in Billen's favor on issues 1 or 2, did the Trial Court err in awarding discretionary costs to Bonner and REM?

5. Would REM be entitled to a subrogation lien against that portion of Bonner's judgment that represents future medical expenses?

Discussion

Billen argues that he should never have had to defend this action, because plaintiff did not comply with the requirements of Tenn. R. Civ. P. 3 by having process reissued in a timely fashion. He argues that Tenn.Code Ann. § 56-7-1206 does not change this result, because it is part of the uninsured motorist statute, and he was not an uninsured motorist.

***3** Pursuant to the wording of the UM statute, it is clear that underinsured is considered the same as uninsured for the purposes of the statute. Tenn.Code Ann. § 56-7-1202(a) expressly defines an uninsured motor vehicle as one that is underinsured, i.e. one for "which the sum of the limits of liability available to the insured under all valid and collectible insurance policies, bonds, and securities applicable to the bodily injury, death, or damage to property is less than the applicable limits of uninsured motorist coverage provided to the insured under the policy against which the claim is made."

In this case, since Billen's policy limits were less than plaintiff's, he is uninsured and the UM statutes apply. Application of Tenn.Code Ann. § 56-7-1206(d) establishes that since service was timely made upon the UM carrier, and service was attempted but returned "not found" against the other motorist, the case can proceed with the UM carrier as defendant. Tenn.Code Ann. § 56-7-1206(e) provides:

In the event the uninsured motorist's whereabouts is discovered during the pendency of the proceedings, an alias process may issue against the uninsured motorist. In such a case, the uninsured motorist shall be allowed a reasonable time within which to plead to the original process and then the case may proceed against uninsured motorist as if he was served with process in the first instance.

In this regard, see Lady v. Kregger, 747 S.W.2d 342 (Tenn.Ct.App.1987). This case held that T.C.A. § 56-7-1206 superceded T.R.C.P. 3 in this situation. *Id.* Billen's argument that the action against him should be barred due to the statute of limitations fails, because plaintiff complied with T.C.A. § 56-7-1206.

Finally, Billen argues that underinsured is not the same as uninsured, and relies on the cases of Estate of Kirk v. Lowe, 70 S.W.3d 77 (Tenn.Ct.App.2001), Carr v. Borchers, 815 S.W.2d 528 (Tenn.Ct.App.1991), Carlton v. Davis, 2003 WL 1923825 (Tenn.Ct.App. Apr. 24, 2003), and Lasher v. Robertson, 1994 WL 579972 (Tenn.Ct.App. Oct. 24, 1994). However, none of these cases is applicable to the issue before us. In *Kirk*, the uninsured v. underinsured issue was never addressed, and in *Carr* and *Davis*, the defendants were explicitly found by the court to be "fully" insured, such that the UM statute would not apply. Finally, in *Lasher*, the Court ruled that plaintiff could not rely on Tenn.Code Ann. § 56-7-1206 because the UM carrier had not been properly served, as required by that statute. These cases are inapposite to the ruling herein.

Billen also argues that the Trial Court erred in failing to grant his motion for new trial, because the Court denied his motion for a mistrial after Bonner made a statement from the stand that he thought Billen had been in jail.

During cross-examination, Bonner was asked about the length of time the lawsuit had been pending, and he stated that it had been hard to serve Billen, because he understood Billen had spent some time in jail. Responding to an objection, the Trial Court gave a curative instruction to the jury, telling them that any reference made to Billen having been incarcerated was hearsay, that there was no proof of it, and that they should disregard it. The Trial Court's ruling was correct. See, Willis v. Settle, 162 S.W.3d 169, 188-189 (Tenn.Ct.App.2004). As our Supreme Court has explained, "If every statement of this type that creep into lawsuits were prejudicial or had the effect of such prejudicial injury to the person being tried that it could not be corrected by a proper admonition from the trial judge, there would be few trials that could ever be conducted to an end. Jurors are intelligent persons, and, when properly instructed at the proper time when things like this come about, we do not think that such is prejudicial." Brown v. State, 423 S.W.2d 493, 496 (Tenn.1968). The Trial Court did not abuse its discretion in denying Billen's motion for a new trial, after giving a proper curative instruction.

*4 Next, Billen argues that the Trial Court erred in refusing to exclude Ken Johnson as a witness, on the ground that Johnson's identity was not disclosed (despite prior discovery) until six days before trial, and that the local rule requires witnesses to be disclosed ten days before trial. Bonner's response is that while Johnson was not identified by name until six days before trial, he had listed in the discovery responses that other "Belk store employees" had information about the case, and that Johnson is a Belk store employee and Bonner's co-worker. Bonner also points out that he supplemented his discovery responses as soon as he found out that Johnson was a fact witness, and that Billen was given the opportunity to depose Johnson prior to trial, but declined to do so. Further, Billen was offered a continuance to give him the opportunity to investigate this witness, but he declined.

The Local Rules relied upon by Billen, state that the judge has the discretion to suspend the same in the interest of justice. Moreover, trial courts are given wide discretion regarding admissibility of evidence, and we will not interfere with their judgment, absent a clear abuse of discretion. Tire Shredders, Inc. v. ERM, 15 S.W.3d 849 (Tenn.Ct.App.1999). This issue is without merit.

Further, Billen argues the Trial Court erred in upholding the jury's verdict because it is "inconsistent and cannot be rationally explained". He argues that the jury found that plaintiff suffered no injury, yet still awarded damages for medical expenses.

A review of the jury form demonstrates otherwise. The jury clearly found that defendant was at fault and caused damage to plaintiff, and then the jury was asked to award damages based on various categories, including medical expenses, property damage, permanent impairment, and personal injury. The jury made an award of damages for medical expenses, property damage, and loss of earning capacity. Thus, the jury found that plaintiff suffered injury, and simply awarded damages based on the provided categories that they deemed appropriate.

As we have held:

It is the duty of the court in construing verdicts to give them the most favorable interpretation and to give effect to the intention of the jurors if that intention be permissible under the law and ascertainable from the phraseology of the verdict. If after an examination of the terms of the verdict the court is able to place a construction thereon that will uphold it, it is incumbent upon the court to do so.

Templeton v. Quarles, 374 S.W.2d 654, 660 (Tenn.Ct.App.1963). In this case, the jury's verdict is not so unintelligible or inconsistent as to show "caprice or whim on the part of

the jury" or disregard for the court's instructions. See Hogan v. Doyle, 768 S.W.2d 259 (Tenn.Ct.App.1988). This issue is without merit.

Finally, Billen argues the Trial Court abused its discretion in failing to sanction REM and its attorneys for the "factually and legally frivolous motion" seeking to disqualify Billen's counsel.

***5** Our Supreme Court has explained the proper Rule 11 analysis as follows:

The test to be applied in deciding whether an attorney's conduct is sanctionable, is one of objective reasonableness under all the circumstances, and the reasonableness of the attorney's belief must be assessed in light of the circumstances existing at the time the document in question was signed. The Advisory Committee notes to the federal version of Rule 11 state that "[t]he Court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time [of signing]." One of the clearest and most succinct explanations of the principles associated with a proper Rule 11 analysis was set forth in Whittington v. Ohio River Co., 115 F.R.D. 201, 209 (E.D. Ky.1987):

1. An attorney must READ every paper before signing it.
2. He must make a reasonable pre-filing investigation of the FACTS.
3. He must research the LAW, unless he is certain he knows it.
4. The law as applied to the facts must REASONABLY WARRANT the legal positions and steps he takes. If existing law does not warrant these positions, a plausible argument for the extension of the law to the facts of the case is required.
5. It must be demonstrated, as the basis of pre-filing investigation and research, that there is a REASONABLE BASIS to name each defendant named, and to support each claim asserted. The shotgun complaint or answer, filed in the hope that discovery will produce the justification for it, is improper.
6. The adequacy of an attorney's investigation, research and legal analysis will be evaluated by the court under an OBJECTIVE STANDARD, namely, whether the attorney acted as a reasonably competent attorney admitted to ... practice. Except as to improper purpose, subjective good faith is not a defense to Rule 11 sanctions. A pure heart but an empty head is of no avail.

* * *

8. An attorney must not have an IMPROPER PURPOSE, such as harassment or intimidation, in naming any defendant, asserting any legal position or taking any legal step.

9. If an attorney violates Rule 11 the imposition of some sanction is MANDATORY, although the nature and extent of the sanction is discretionary with the [trial] court.

Andrews v. Bible, 812 S.W.2d 284, 288 (Tenn.1991) (citations omitted).

As the above reflects, "[w]hether an attorney has made sufficient inquiries in light of the circumstances is a factual determination. 'The issues involved in determining whether an attorney has violated Rule 11 likewise involve 'fact-intensive, close calls'.' For this reason, appellate courts review Rule 11 under the 'abuse of discretion' and 'deferential' standard.

Krug v. Krug, 838 S.W.2d 197, 205 (Tenn.Ct.App.1992) (citations omitted). In this case, we are unable to say the Trial Court abused its discretion in refusing to award sanctions, given the facts and circumstances surrounding this litigation. REM's attorneys gave a reasonable explanation for their actions in filing the motion, and we conclude this issue is without merit.

*6 Bonner has also appealed, and raises the issue of whether REM is entitled to a subrogation lien against that portion of Bonner's judgment that represents future medical expenses. He argues that it would be improper to allow REM to recover the amount it paid him in a lump sum settlement of the workers' compensation action by getting funds earmarked for "future medical expenses" that were awarded in the third party action. REM's response is that the Final Decree in the workers' compensation action provided that REM would have a lien against "any" recovery Bonner might obtain in his third party action, and did not exempt out amounts awarded for future medical expenses.

The Trial Court found that Bonner agreed in the settlement (that was incorporated into the Final Decree) that REM would have a lien against "any recovery of the employee from any third parties liable to the employee for the expenses for the injuries alleged herein." This provision was not only agreed to by Bonner, but also received the sanction of the Court. Bonner has not directed this Court to any provision of the workers compensation statute that would prohibit such an agreement. In fact, Tenn.Code Ann. § 50-6-112(c)(1) provides for such a lien, when an employee recovers against a third party, and when the employer's liability for workers' comp has been "fully or partially paid and discharged", as in this case.

The cases relied upon by Bonner deal with credit for an employer's future liability and are distinguishable from this case because the employer has already paid the full amount of its liability, and there is no "credit" for "future liability" involved, as any future liability was foreclosed by Bonner and REM in their settlement. Thus, there is no issue regarding credits or finality of judgments as was present in those cases. *See Hickman v. Continental Baking Co.*, 143 S.W.2d 72 (Tenn.2004); *Graves v. Cocke County*, 24 S.W.3d 285 (Tenn.2000). REM has already paid the full amount of workers compensation benefits to plaintiff, and has the statutory right, as well as the contractual right based upon the parties' settlement, to seek to recover those amounts from any recovery plaintiff gets from a third party regarding his injuries. Plaintiff's argument that he will be, in effect, getting "no recovery" for his future medical expenses is disingenuous, since plaintiff knew he would have future medical expenses when he entered into the settlement with REM, and thus part of that settlement amount was to compensate plaintiff for the same. Plaintiff also argues that REM is getting a "double credit" by recovering the amount he received from a third party to pay his future medicals, and also by being relieved of its obligation pursuant to the settlement to pay future medicals, but this argument ignores the fact that REM compensated plaintiff for his agreement to release REM from any liability for future medicals. Thus, if REM was not allowed to recover the amount it has already paid, plaintiff, plaintiff would in effect enjoy a "double" recovery, which the workers' compensation statutes do not permit. *See Tenn.Code Ann. § 50-6-112* and *Graves*.

*7 For the foregoing reasons we affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Andrew Billen.

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Bonner v. Billen

Slip Copy, 2007 WL 3245436 (Tenn.Ct.App.)