In The

Supreme Court of Virginia

RECORD NO. 151944

NANCY MAE GILLIAM,

Appellant,

v.

JACOB THOMAS IMMEL,

Appellee.

BRIEF OF APPELLEE

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I. STATEMENT OF THE CASE

The Appellant testified at trial she sustained personal injuries as a result of Defendant's negligence. The Appellee conceded liability. At the close of evidence, the jury deliberated and returned a verdict of $0 in favor of the Plaintiff. The Plaintiff moved to set aside the verdict and for a new trial on the grounds that the jury's verdict was insufficient as a matter of law. The motion was briefed and argued to the trial Court. The Appellant's Motion was denied and the trial Court entered a Final Order on the jury's verdict. The Appellant is seeking a review by this Court.

II. STATEMENT OF FACTS

Jacob Immel, the Appellee, agrees with the Appellant's Statement of the Facts to the extent the case involved an automobile accident, the trial was one of admitted liability and the issue was one of what damages, if any, occurred as the result of the automobile accident. The below referenced facts are salient as to the issues raised by the Appellant's Petition for Appeal.

First, the case at bar involved a minimal impact automobile accident. No evidence of property damage was offered to the jury and no law-enforcement officer or any other witness testified about any damage to either parties' vehicles. (J.A. 104, 114)

Second, while the Appellant claims that she immediately suffered pain to her neck and back in the moments after the impact, she conceded that she did not have any cuts, bruises, scratches, bleeding or swelling to any part of her body as a result of the crash. (J.A. 113, 115)

Third, the parties submitted several agreed-upon instructions, and these instructions informed the jury that damages were not presumed and that the Plaintiff bore the burden of proof on the various elements of damages. It is noteworthy that all of the instructions were taken verbatim from the Virginia Model Jury Instructions. In particular, the jury was instructed:

- **Instruction No. 1**: "You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all of the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper. You are entitled to use your common sense in judging any testimony." (J.A. 160).

- **Instruction No. 3**: "In considering the weight to be given to the testimony of an expert witness, you should consider the basis for his opinion and the manner by which he has arrived at it and the underlying facts and data upon which he relied." (J.A. 161).

- **Instruction No. 5**: "The defendant has admitted that he is liable for any injury the plaintiff received from the accident. Therefore, the only issue that you have to decide is the amount of damages, if any, the plaintiff is entitled to recover. An admission of liability should not influence you in any way in considering the issue of damages." (J.A. 161).

- **Instruction No. 6**: "The burden is on the plaintiff to prove by the greater weight of the evidence each item of damage she claims and

> to prove that each item was caused by the defendant. ... If the plaintiff fails to do so, then she cannot recover for that item." (J.A. 162).

Notably, the jury was not instructed that they had to return a verdict of at least some damages in favor of the Plaintiff. To the contrary, when the judge explained the verdict form, he stated:

> *"In order to preclude any misunderstanding of your verdict, when your foreperson completes the verdict form you may and are requested please to write in the dollar amount that you decide to award in your deliberations. And that is a specific number. That number can be zero. That number can be some number other than zero …. The verdict form is how you report the results of your deliberations to the Court and to the Parties."* (J.A. 165, 166)

When the judge finished giving the instructions to the jury, but before closing arguments, there were no objections to the instructions as given.[1] The Plaintiff did not move for judgment as a matter of law on any of his damages claimed. Rather, the jury was instructed that they had to decide what damages, "if any," to award.

Finally, prior to trial, counsel for the Appellee moved the court to exclude any alleged reference the Appellee made calling the Appellant a "black bitch" in the moments after the accident. After hearing argument from both sides, the trial court found that this evidence was not relevant to

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[1] The presiding judge in this matter also confirmed with both plaintiff's and defendant's counsel that the instructions were correct. "THE COURT: All right. Mr. Lief, any objection to the instructions as given? MR. LIEF: No, Your Honor. THE COURT: Mr. Hauck? MR. HAUCK: No, sir." (J.A. 166).

any injuries sustained by the plaintiff, and furthermore, any probative value that such a comment might have would be outweighed by the prejudicial effect upon the jury.

III. STANDARD OF REVIEW

The Appellee agrees with the Appellant that the standard of review by this Court is one of "abuse of the trial court's discretion" with regard to the admission or exclusion of evidence. With regard to the sanctity of the jury verdict, the standard of review is also abuse of discretion, with the caveat that all the evidence shall be viewed in a light most favorable to the prevailing party, the Appellee. Additionally, in a personal injury case where a jury returns a $0 verdict, the issue is "whether [the plaintiff] introduced sufficient evidence to *require* the jury to award [her] damages." *Mastin v. Theirjung*, 238 Va. 434, 438, 384 S.E.2d 86, 88 (1989) (emphasis in original). This Court has long held that "the verdict of a jury in personal injury cases will not be set aside as inadequate or excessive unless it is made to appear that the jury has been actuated by prejudice, partiality or corruption, or that it has been misled by some mistaken view of the merits of the case." *Glass v. David Pender Grocery Co.*, 174 Va. 196, 201, 5 S.E.2d 478, 480 (1939).

IV. PRINCIPLES OF LAW AND ARGUMENT

A. The trial court was correct in affirming the jury's verdict of $0 and by not granting the appellant a new trial.

B. The trial court did not err by excluding alleged inflammatory statements by the defendant to the Appellant.

Summary

The Appellant waived her objection to the "zero verdict" by her failure to object to the trial court's instructions to the jury that included within the purview of the jury the right to return a zero verdict, if they deemed it to be warranted. The Court specifically gave counsel a final opportunity to object to any instructions to the jury by the court before allowing the jury to retire to deliberate and the Appellant's counsel made no objection.

In addition, "[it] is for the jury … to determine the weight to be given the testimony of expert witnesses." *Martin v. Penn*, 204 Va. 822, 826, 134 S.E.2d 305, 307 (1964). While Virginia courts have held that expert testimony "should be scrutinized with care," its weight is for the jury. Id at 825. In essence, a jury is free to accept or disregard any or all of the evidence presented by an expert who testifies at trial.

As to the alleged "black bitch" comment, the Court correctly refused to allow any reference to this statement made by the defendant to the Appellant for three reasons. First, the statement was highly inflammatory

and any potential probative value was greatly outweighed by the incendiary nature of the statement. Second, the alleged statement had no probative value since the specific "mental anguish" claim alleged to have occurred as the result of a statement by the defendant was not proven to be related to a physical injury incurred by the plaintiff as a result of the subject motor vehicle accident as required by Virginia law. There was no proffer at trial of any additional or extraordinary injury related to the statement allegedly made after the motor vehicle accident that is the subject of the original suit. Third, to recover for emotional distress for this comment would be a separate and distinct cause of action—either for the negligent or intentional infliction of emotional distress. The intentional infliction of emotional distress is disfavored in Virginia and has to be pled and proven by clear and convincing evidence. In the case at bar, the appellant is attempting to improperly mix a personal injury case with the intentional infliction of emotional distress.

A. The trial court did not err by overruling the Appellant's Motion to set aside the jury's verdict.

i. The Appellant waived her objection to the "zero verdict" by her failure to object to the trial court's instructions.

During trial, the jury was instructed that damages were not presumed. The agreed upon instructions informed the jury that the issue for them to

decide was "that amount of damages, if any, the plaintiff is entitled to recover." The jury instructions are the law of the case. "Instructions given without objection become the law of the case and thereby bind the parties in the trial court and [the Supreme] Court on review." *Ulloa v. QSP, Inc.*, 271 Va. 72, 80, 624 S.E.2d 43 (2006). These instructions informed the jury that they had the option to not award any damages, if they so chose. Having waived the objection to the possibility of a zero verdict, the Appellant cannot now request this Honorable Court to correct a matter that the Appellant did not allow the trial Court to consider below. *Ragsdale v. Jones*, 202 Va. 278, 117 S.E.2d 114 (1960); *Ferguson v. Ferguson*, 169 Va. 77, 192 S.E. 774 (1934).

ii. It was the province of the jury to determine the weight to be given the testimony of the expert witnesses at trial.

It is the law of the Commonwealth that that while expert testimony should be scrutinized with care, its weight is for the jury. Juries are instructed that "in considering the weight to be given to the testimony of any expert witness, you should consider the basis for his opinion and the manner by which he arrived at it and the underlying facts and data upon which he relied." Va. Model Jury Instruction, 2.040. However, juries are also instructed that "you may not arbitrarily disregard believable testimony," but "after you have considered all of the evidence in the case, then you

may accept or discard all or part of the testimony of a witness you think proper." Id.

In this case, the jury heard from the Appellant and expert witnesses from both sides who testified regarding the plaintiff's medical condition after the accident. The facts of this case show that this was a minimal impact car accident, with no evidence of any property damage done to either car involved. Furthermore, there were no visible signs of injuries including cuts or scratches. The jury in this case was free to accept or discard all or part of each witnesses' testimony. There is no indication in the record that the jury was "influenced by passion or prejudice or [was] in some way misconceived or misinterpreted the facts or law" as is insinuated by the Appellant. *Downer v. CSX Transp.*, 256 Va. 590, 507 S.E.2d 612 (1998). Rather, the jury free to accept or discard the testimony of the witnesses and award a zero verdict based upon the evidence they heard and saw at trial.

B. The trial court did not err by excluding alleged inflammatory statements by the defendant to the Appellant.

There is no evidence that the trial Court abused its discretion by refusing to allow evidence of comments allegedly made by the defendant after the subject motor vehicle accident occurred. *Wjla-Tv v. Levin*, 264 Va. 140, 564 S.E.2d 383 (2002). It is uncontroverted that the statement

allegedly made by the defendant to the Appellant was inflammatory. In fact, in the Appellant's brief it is not argued that the statement is not inflammatory; merely that it is probative of some issue in the case.

Counsel for the Appellant misstates Virginia law. The case law in Virginia is clear that in order for a plaintiff to recover mental anguish, the anguish alleged must be directly related to the physical injury incurred as the result of the negligent act. In *Bruce v. Madden*, 208 Va. 636, 160 S.E.2d 137 (1968), this Court found, "Thus, it is well settled in this jurisdiction that mental anguish may be inferred in those instances where such would be the natural and probable consequence of bodily injury . . .." In this case, the mental anguish alleged did not come from anguish associated with her alleged physical injury, but was alleged to have occurred independently of the accident and without a proffer to the trial Court. Lastly, there was no proffer of evidence at any time to the trial Court regarding the evidence Appellant intended to offer to support the mental anguish associated with the alleged statement after the accident. In *Smith v. Hylton*, 14 Va. App. 353, 416 S.E.2d 712, 714 (1992) that Court held that "(w)hen a party's evidence is ruled inadmissible, the party must proffer or avouch the evidence for the record in order to preserve the ruling for

appeal; otherwise, the appellate court has no basis to decide whether the evidence is admissible."

The Appellant in this case is improperly attempting to mix a personal injury case with a cause of action for the intentional infliction of emotional distress. The seminal case in Virginia on negligent infliction of emotional distress is *Hughes v. Moore*, 214 Va. 27 (1973). In *Hughes*, a driver ran his car off the road and crashed into the house of the plaintiff, who was inside the house, and who witnessed the accident. The victim then sued the driver to recover for personal injuries sustained as a consequence of her fright and shock at the plaintiff crashing into the front porch of her home. *Hughes*, 214 Va. at 28. The *Hughes* Court ultimately allowed the plaintiff to recover, whereas there was evidence that she sustained actual physical injuries as a result of the fright and shock that she felt because of the accident, and those physical injuries included menstrual irregularity, an inability to breast feed her child and a diminished breast size. *Hughes* 214 Va. at 28. Thereby, the Court held, "where the claim is for emotional disturbance and physical injury resulting therefrom, there may be a recovery…provided the injured party properly pleads and proves by clear and convincing evidence **that his physical injury was the natural result of fright or shock proximately caused by the defendant's negligence**."

Hughes 214 Va. at 34. (Emphasis added). To clarify, and to limit its holding, however, the Court added:

> Under the rule adopted today **we are not saying** that a plaintiff, in an action for negligence, may recover damages for physical injuries resulting from fright or shock caused by witnessing injury to another, allegedly occasioned by the negligence of a defendant toward a third person, or caused by seeing the resulting injury to a third person after it has been inflicted through defendant's negligence. In the case at bar, there was evidence that plaintiff suffered physical injuries which were the natural result of the fright and shock proximately caused by defendant's tortious conduct. Thus we hold that plaintiff had the right to maintain this action against defendant.

Hughes 214 Va. at 34-5.

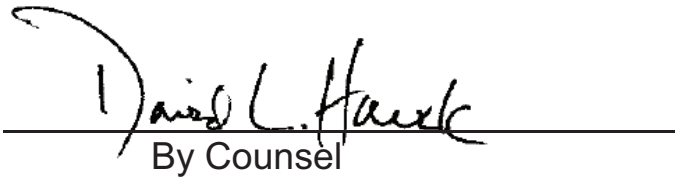
In the case currently before the Court, there are absolutely no allegations in the pleadings nor is there any evidence in the record to suggest that the plaintiff suffered physical injuries which were the natural result of the fright and shock of the Appellee allegedly calling her a "black bitch." This statement is irrelevant to any injuries that the Appellant may have suffered, and would more likely inflame the passions of the jury. Any probative value offered by the introduction of this comment would be highly outweighed by its prejudicial effect upon the jury.

V. CONCLUSION

For the reasons and argument contained herein, the Appellee requests that this Court affirm the decision of the trial court to not set aside the jury verdict and award a new trial when the jury returned a zero verdict.

Furthermore, the Appellee requests that this Court affirm the decision of the trial court in excluding evidence of the alleged “black bitch” statement.

JACOB IMMEL



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CERTIFICATE

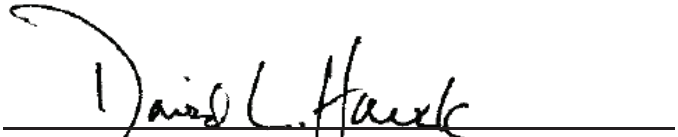
Jacob Immel, by counsel, hereby certifies the following:

1. Appellee is Jacob Immel, whose counsel is David L. Hauck, Esquire (VSB # 20565), Justin S. Gravatt, Esquire (VSB # 65506), David S. Galeski, Esquire (VSB # 76756), Duane, Hauck, Davis & Gravatt, P.C., 100 West Franklin Street, Richmond, Virginia 23220, Telephone (804) 644-7400, Facsimile (804) 303-8911; Email dhauck@dhdglaw.com

2. Appellant is Nancy Mae Gilliam, whose counsel are Justin M. Sheldon, Esquire (VSB # 82632), and Jeremiah White, Esquire (VSB # 86488) Geoff McDonald & Associates PC 3315 W. Broad Street, Richmond, Virginia 23451, Telephone (804) 888-888; Facsimile (804) 359-5426, Email jsheldon@mcdonaldinjurylaw.com, jwhite@mcdonaldinjurylaw.com.

3. That on this 27th day of June, 2016, 10 copies of this Brief of Appellee have been hand-delivered to the Supreme Court of Virginia and an electronic copies has been filed, via VACES. An electronic copy has been served, via email, to the other attorneys.

4. Excluding the portions exempted under Rule 5:26, this Brief contains 2,751 words, exclusive of those parts that by rule do not count toward the word limit.



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