

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002451-MR

MICHAEL STEWART, PH.D

APPELLANT

v.

APPEAL FROM GARRARD CIRCUIT COURT  
HONORABLE HUNTER DAUGHERTY, JUDGE  
CIVIL ACTION NO. 95-CI-00167

FAST FORWARD VIDEO, INC.

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.<sup>1</sup>

PAISLEY, SENIOR JUDGE: On the evening of December 16, 1994, Michael Stewart, who was in his early fifties at the time, went to a small video store in Lancaster, Kentucky, Fast Forward Video, Inc., to rent a movie. According to Fast Forward's former employees, Stewart frequently visited the store, and he often chatted with the young women who worked there. That evening, Heidi Whitehouse and Tiffany Merrill were working at the video store. Jamie Molen, Merrill's friend and a former

---

<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

employee of the store, was there as well. Soon after Stewart arrived, he began talking to the girls, who were all in their late teens at the time. Subsequently, Lamont Hocker and his friend, Dion McPherson, came into the video store. Hocker, who was in his early twenties, knew Molen since he had graduated from high school with Molen's older brother. Soon Hocker and McPherson were socializing with the girls as well. Eventually, either Hocker or McPherson grabbed Molen's bra strap and snapped it. This horseplay offended Stewart.

Shortly thereafter, Stewart confronted Hocker and asked why Hocker was bothering the girls since they were not interested. Hocker told Stewart that the incident was not Stewart's concern. Later at trial, Whitehouse alleged that Stewart used racial epithets when he addressed Hocker, a young black man. The exchange between Stewart and Hocker escalated, and Hocker suggested that he and Stewart go outside to fight. Stewart then told Hocker that he would not fight Hocker unless a lawyer drafted a contract stating that Hocker would not sue him. At trial, Stewart testified that he told Hocker this to indicate that he had no intentions of fighting. According to the girls' testimony, Stewart repeatedly asked for a piece of paper. Stewart denied this as well. Eventually, Whitehouse gave a piece of paper and a pen to Hocker. But, before Hocker could write anything, according to the testimony of Hocker and the

girls, Stewart made a comment that Hocker was unable to write. Stewart also denied having said this. According to Stewart, Hocker then shoved him and they fought. According to Hocker, Stewart rushed him and they fought. Either way, the two fought briefly, and Hocker seriously injured Stewart by breaking the orbit of Stewart's left eye. After the fight, Stewart drove to a local hospital for medical treatment.

On December 15, 1995, in Garrard Circuit Court, Stewart filed a civil complaint against Fast Forward in which he alleged that one of its employees, Whitehouse, provoked the fight, alleged that Fast Forward and its employees knew that a dangerous condition existed in the store and alleged that Fast Forward negligently created this hazardous condition. When Stewart's claim went to trial in Garrard Circuit Court, the jury, after deliberating for approximately thirteen minutes, returned a verdict in favor of Fast Forward. Now, Stewart appeals to this Court seeking relief from the adverse judgment.

On appeal, Stewart insists that the jury's verdict was flagrantly against the evidence. According to Stewart, when Whitehouse produced the paper and pen, she provoked an escalation of the tensions between Stewart and Hocker that directly lead to the fight and Stewart's subsequent injuries. Furthermore, while Stewart denied and continues to deny that he was the aggressor, he argues that, even if he had been,

Whitehouse should have taken reasonable steps to prevent the fight instead of provoking it. We note that Stewart does not explain what reasonable steps Whitehouse could have taken in order to protect Stewart from his own actions.

In the alternative, Stewart points out that, at trial, Whitehouse testified that he used racial epithets. According to Stewart, Whitehouse's testimony inflamed the passions of the jury, thereby prejudicing him.

When we review the evidence supporting a judgment entered upon a jury verdict, our role is strictly limited to determining if the trial court erred when it failed to grant a directed verdict in favor of the losing party. Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998). Moreover, we must treat all the evidence which favors the prevailing party, in this case, Fast Forward, as true since we are prohibited from determining the weight and the credibility of the evidence. Id. Only the jury has the responsibility and duty to weigh the probative value of the evidence and to choose which testimony it finds most convincing. Commonwealth, Dep't of Highways v. Dehart, 465 S.W.2d 720, 722 (Ky. 1971). The jury is not bound to accept the testimony of any witness as true. Dunn v. Commonwealth, 151 S.W.2d 763, 764-765 (Ky. 1941). Thus, the jury may believe all of a witness's testimony, part of a witness's testimony or none of it. Gillispie v. Commonwealth,

279 S.W. 671, 672 (Ky. 1926). We will reverse only if the jury verdict was so flagrantly against the evidence that it indicates that the jury reached the verdict as a result of passion or prejudice. Bierman v. Klapheke, supra at 19. Otherwise, we will affirm. Id.

In this case, the record contains ample evidence for the jury to believe that Stewart, not Whitehouse, provoked the fight with Hocker. Given this, the jury's verdict was not the result of passion or prejudice nor was it flagrantly against the evidence.

The judgment of Garrard Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cullen C. Gault  
Gault Law Office  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Barry Miller  
Fowler, Measle & Bell, LLP  
Lexington, Kentucky