RENDERED: December 3, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002576-MR

JUDY REES AND
JIM REES[1] APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 02-CI-01202

GERALD L. STALEY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, and VANMETER, Judges.

VANMETER, JUDGE: Judy Rees appeals from an order of the Kenton Circuit Court, denying her motion for a new trial. Rees had unsuccessfully sued Gerald L. Staley for negligence connected with a traffic accident. Rees contends that she was entitled to a new trial because of juror misconduct and insufficient evidence to sustain the verdict of the jury. We affirm.

[1] Although Jim Rees is named as an appellant in the Notice of Appeal filed on December 3, 2003, the record shows his claims were dismissed with prejudice by an agreed order entered on June 3, 2002.

On the morning of February 27, 2001, Gerald Staley was driving along DeCoursey Pike, a two-lane road, in a car he had borrowed from a coworker. He braked when he saw that a car ahead of him was slowing in order to turn left. According to Staley, his front brakes unexpectedly locked, causing him to lose control of the vehicle. He swerved left across the center line and struck an oncoming car driven by Judy Rees. When emergency workers arrived at the scene of the accident, Rees declined their offer to take her to the hospital. In the days immediately following the accident, she experienced increasingly pain in her neck and back. She consulted with several physicians and received physical therapy that helped to alleviate the pain.

On May 8, 2002, slightly more than a year after the accident, Rees and her husband Jim filed suit against Staley in Kenton Circuit Court. The complaint alleged negligence on Staley's part in operating his vehicle, leading to permanent bodily injuries to Judy. The Reeses claimed damages for past and future medical expenses, pain and suffering, loss of enjoyment of life, and lost income. Jim Rees' claims were subsequently dismissed by agreed order and are not pertinent to this appeal.

A jury trial was held on July 8, 2003. The jury found that Staley had not violated his duties of care in operating the

automobile.[2] The jury also found that Judy Rees had incurred charges in excess of $1,000 for medical care and treatment as a direct result of the accident, but that she had not sustained any permanent bodily injury. Rees' motion for a new trial was denied by an order entered on November 4, 2003. This appeal followed.

Under CR 59.01, a trial court may grant a new trial under certain circumstances described in the rule. Rees relies specifically on CR 59.01(b), which permits a new trial if there is proof of juror misconduct and CR 59.01(f) which permits a new trial if the verdict is not sustained by sufficient evidence.[3] "The decision of a trial court to overrule a motion for new trial will not be disturbed on appeal absent a manifest error or abuse of discretion." Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734, 741 (1996).

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[2] The jury instructions outlined the following specific duties:

a. to keep a lookout ahead for other persons and vehicles in front of him or so near his intended line of travel as to be in danger of collision;
b. to have his automobile under reasonable control; and
c. to exercise ordinary care generally to avoid collision with other persons or vehicles using the street.

[3] CR 59.01 states in pertinent part as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:
>
> (b) Misconduct of the jury, of the prevailing party, or of his attorney.
> . . .
> (f) That the verdict is not sustained by sufficient evidence, or is contrary to law.

We turn first to the question of juror misconduct. At trial, when the cross-examination of Judy Rees began, one of the jurors, Deborah Hughes, suddenly approached the bench, saying "I think I know these people." Hughes had not come forward with this information during voir dire, when potential jurors were asked whether they knew any of the parties. Hughes was very upset and explained that she had just realized that she might know Jim Rees. She said she had not seen him for about fifteen years. She also stated that she did not like him. Her statements were made in the presence of the judge and the attorneys for both parties. Hughes said that the Jim Rees she had known had a brother named Mike. Rees' attorney checked with Jim Rees, who confirmed that he has a brother named Mike. With the agreement of both attorneys, the judge excused Hughes from the jury, and asked the alternate juror to take her place. From our review of the record, it appears that this entire exchange took place at the bench, out of hearing of the jury.

The judge then explained to the remaining members of the jury that Hughes had just realized that she had previously known some of the parties, and that in order to be fair to her and to the parties, it would be better if she did not serve as a juror. Rees' attorney raised no objections at any time to the court's handling of the situation.

Rees alleges that this incident constituted juror misconduct warranting a new trial under the two part test outlined in Adkins v. Commonwealth, Ky., 96 S.W.3d 779 (2003). To meet the test, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then show that a correct response would have provided a valid basis for a challenge for cause." Id. at 796 (citations omitted).

No evidence, however, exists that Hughes dishonestly concealed her acquaintance with Jim Rees during voir dire. She came forward as soon as she realized that she might know him. She appeared genuinely distressed, and her explanation that she had not previously recognized him due to the passage of many years was perfectly plausible.

Indeed, the Adkins test has questionable applicability to this case at all, since Hughes never took part in the jury deliberations. She was immediately removed as a juror, with the full consent of the attorneys for both parties. As the trial court noted in denying the motion for a new trial, "[a]n unqualified juror must participate in the verdict before a party's right of due process . . . has been violated." The trial court relied on Sanders v. Commonwealth, Ky., 801 S.W. 2d 665, 669(1990), in which the court stated that "[i]t is elementary logic and sound law that a defendant's right to be

tried by an impartial jury is infringed if and only if an unqualified juror participates in the decision of the case." We agree with the trial court's statement that "Ms. Hughes did not participate in the jury verdict. Ms. Hughes was excused by the Court, with agreement of the parties, prior to the jury deliberating and deciding the case. Hence, Plaintiffs' case was tried by an impartial jury."

Rees also argues that the fact that Hughes was visibly upset and interrupted the cross examination of Judy Rees might have placed the thought in the jurors' minds that there was "something wrong" with Jim or Judy Rees. The Kentucky Supreme Court has vested the trial judge with broad discretion in assessing the prejudicial impact of such information, and in determining the remedy. "Whether removal of prejudice can be accomplished by a curative admonition or whether a mistrial is necessitated is a matter within the sound discretion of the trial court." Gould, 929 S.W.2d at 740. Although we do not believe that Hughes' conduct prejudiced the jury, the judge's comments to the remaining jurors were more than adequate to erase any negative impressions the incident may have created. The trial court did not abuse its discretion in refusing to grant a new trial on the basis of this incident with juror Hughes.

Rees next argues that she was entitled to a new trial because the evidence overwhelmingly showed that Staley's negligence caused the accident. Specifically, Staley admitted that his car had crossed the center line; there were skid marks on the road; he stated at the scene that he had caused the accident and he apologized to Rees for having done so; and he testified that Rees "helped tremendously" by driving into the ditch as far as she could.

The only evidence supporting Staley's version of the events was his own testimony. He stated that he had borrowed the car from a coworker; that he was not speeding at the time of the accident; that he was familiar with the road; that the car had been operating normally; and that the front brakes locked when he tried to slow down behind the car that was turning.

Rees maintains that the jury wrongly believed Staley's testimony that the brakes malfunctioned, particularly as Staley did not produce any evidence or expert testimony relating to the condition of the car or its brakes.

Staley's own testimony constituted sufficient evidence, however, to create a question of fact for the jury.

> A defendant always runs the risk of a directed verdict against him if he fails to come forward with defensive proof; it depends simply on how strong a showing has been made by the plaintiff's evidence, standing unexplained – would it be clearly unreasonable for the jury not to be

> convinced by it? If so, what is to all intents and purposes a "rebuttable presumption" has been created. But **if the defendant goes forward with the evidence, and injects enough doubt into the case that it may no longer be said that there is but one conclusion to be drawn by reasonable men, then what was provisionally a matter of law becomes an issue of fact for the jury**, in that he has rendered unclear that which appeared clear and uncertain [sic] before he introduced his evidence. It is for the jury to assess the effect of his "rebuttal" (unless, of course, it is so clear and conclusive as to entitle the defendant himself to a directed verdict.)

Lee v. Tucker, Ky., 365 S.W.2d 849, 851-52 (1963)(emphasis added).

No authority requires that Staley produce expert testimony or other evidence regarding the condition of the brakes beyond his own testimony.

> It is the function of the jury to determine questions of credibility and issues of fact where the evidence is conflicting. While the trial court has a broad judicial discretion in granting or refusing a new trial, it may not set aside a verdict of a jury because it does not agree with the verdict if there was sufficient evidence to support it.

Woods v. Asher, Ky., 324 S.W.2d 809, 811 (1959).

The trial court found that the following elements of Staley's testimony provided sufficient evidence to support the verdict of the jury:

> Defendant testified he slowed down the vehicle to less than 45 m.p.h. in a 55 m.p.h. speed zone because other drivers

> pulled out frequently onto Decoursey Pike; Defendant testified he applied the vehicle's brakes approximately 200-300 feet prior to the vehicle turning left in front of him; Defendant testified the brakes on the car he was driving locked up after normal braking pressure was applied; Defendant testified he could not steer away from Plaintiff's vehicle after the brakes locked up[.]

The jury simply weighed the credibility of the testifying parties and chose to believe Staley's version of the events.

Rees also argues that the jury erred in failing to award her damages for her injuries because Staley produced no evidence to controvert that of the two medical experts who testified for Rees. Since we have already determined that there was sufficient evidence for the jury to have found no negligence on Staley's part in causing the accident, the issue of any damages owed by Staley is moot.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Scott A. Best Cincinnati, Ohio	Robert B. Cetrulo Edgewood, Kentucky