IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01049 COA

WAL-MART STORES, INC. APPELLANT

v.

NELVIN W. KING APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT G. EVANS

COURT FROM WHICH APPEALED: JASPER COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT: ROBERT J. DAMBRINO III

VICTOR A. DUBOSE

ATTORNEY FOR APPELLEE: THOMAS L. TULLOS

NATURE OF THE CASE: CIVIL: PERSONAL INJURY

TRIAL COURT DISPOSITION: FOUND KINGS DAMAGES TO BE $150,000 BUT FOUND HIM 50% CONTRIBUTORILY NEGLIGENT SO AWARD WAS $75,000.

MANDATE ISSUED: 9/30/97

BEFORE McMILLIN, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This is an appeal from the Circuit Court of Jasper County wherein Nelvin W. King sought damages for losses suffered as a result of injury. King was injured in Wal-Mart when a cooler fell from a display on to King's arm. The jury returned a verdict in favor of King, finding King fifty percent responsible. The jury found King's damages to total $150,000 but based on a theory of contributory negligence, awarded King $75,000. The trial court denied Wal-Mart's motion for JNOV or, in the alternative, a new trial. Feeling aggrieved, Wal-Mart appeals arguing that the trial court erred in failing to grant its motion for JNOV/new trial. Finding no error, we affirm.

FACTS

On April 5, 1994, Nelvin King and his wife went shopping at Wal-Mart. Because of a bad back, King required the use of a motorized "Mart-Cart." King, while traveling down an aisle, indicated that he heard a noise and saw a cooler falling from the top of a display. The cooler struck King in the right arm as he threw up his arm to deflect the cooler. King indicated that the display was stacked four or five coolers high, and the coolers were not in boxes. King also claims that the coolers were stacked on top of a table.

Cheryl Dixon, a Wal-Mart employee, testified that she heard King's encounter with the display but did not see it. Dixon testified that she immediately proceeded to the area where the incident occurred and found King's Mart-Cart touching the display at an angle. Dixon stated that King had to back up the Mart-Cart in order to proceed down the aisle. Dixon also testified that the coolers were stacked three high on top of a wooden "stack-base" that is only six inches high. Dixon stated further that the coolers were in boxes.

Six days after this incident, King visited a doctor who determined that King had a rotator cuff tear in his right shoulder. Surgery was performed to repair the injury. King indicates that he has a thirty percent permanent impairment to his right upper extremity. Medical bills totaled $11,000.

King sued Wal-Mart for negligence, and the jury returned a verdict in favor of King finding his damages to total $150,000. The jury, however, found King to have been fifty percent contributorily negligent and awarded him $75,000. Feeling aggrieved, Wal-Mart filed this appeal asserting two issues. We find Wal-Mart's arguments to be without merit and therefore affirm the decision of the lower court.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN DENYING WAL-MART'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, IN THAT KING FAILED TO PRODUCE EVIDENCE OF ANY NEGLIGENCE BY WAL-MART, AND THAT THE PROOF WAS SO LACKING ON BREACH OF DUTY THAT A REASONABLE JURY COULD NOT HAVE FOUND FOR NELVIN W. KING.

Wal-Mart contends that King failed to produce evidence of a breach of duty toward him. Wal-Mart argues that a duty owed to an invitee is to exercise reasonable care to keep the premises in a reasonably safe condition and to warn invitees of a dangerous condition that may not be readily apparent to the invitee. Wal-Mart contends that there was no evidence that the display was dangerous. Wal-Mart argues further that the fact that one was injured does not constitute negligence.

Wal-Mart points out that they provided testimony from Wal-Mart employee Cheryl Dixon that she had checked the area not ten minutes prior to the accident and that the coolers were stacked three coolers high on a six inch wooden base. Dixon indicated that she assumed that King had run into the display due to the position of the Mart-Cart, and that was the reason the cooler fell. A Wal-Mart manager testified that they had never had any problems or complaints about the display prior to this incident.

Wal-Mart submits that the jury's verdict was based on unreasonable speculation as the evidence was not sufficient to support a finding of negligence.

King concedes that this case is based on circumstantial evidence but argues that there was sufficient evidence for the case to be submitted to the jury. King argues that the following facts justified the verdict of the jury:

(1) King noticed two employees on an adjacent aisle facing the coolers who were apparently taking inventory.

(2) There were no other persons in the immediate area other than King and the two Wal-Mart employees.

(3) The coolers were stacked on a table two and one-half feet high, making the top cooler eighty-nine inches above the floor.

(4) There were no restraints holding the coolers.

(5) Dixon testified that, at the time of the incident, she was on the opposite side of the coolers standing either on a ladder or the bottom shelf of the display attempting to straighten up the higher

shelves. (Wal-mart denies that Dixon testified as King claims. The record, however, reveals that Dixon stated that she might have been standing on a bottom shelf but really could not recall.)

(6) Dixon testified that the coolers were not supposed to be stacked more than three high.

(7) King testified that neither he nor his cart touched the coolers.

(8) The cooler which fell on King dropped some thirty inches, and the impact was hard enough to make a terrible sound.

Wal-Mart argues that the evidence was not sufficient to support the verdict and that the trial court should have granted its motion for JNOV. The standard for reviewing the denial of motion for JNOV is well established. Speaking to this issue, the supreme court has stated as follows:

When reviewing the denial of a motion for a JNOV, this Court is bound to

consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [we are] required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. A trial court judge should set aside a jury verdict only when it is apparent that the verdict is against the overwhelming weight of the evidence, and a trial court judge's decision must stand unless there is a showing of an abuse of discretion.

Luther McGill, Inc. v. Bradley, 674 So. 2d 11, 14 (Miss. 1996) (citations omitted).

Looking, as we must, at the evidence in a light most favorable to King, we find that there is ample evidence--as well as inferences that may be drawn therefrom--to support the jury's verdict. We agree with King that the facts stated above were sufficient to support the jury's verdict. Specifically, King's testimony indicated that he did not do anything to cause the cooler to fall. Cheryl Dixon's testimony, however, was enough to allow the jury to draw the inference that she, by standing on the bottom shelf of the cooler display, was somewhat responsible for King's injury. It is the jury's prerogative to weigh the testimony and believe whichever witness it chooses. *Id.* In the present case, the jury apparently believed portions of each party's testimony as is indicated by a finding of contributory negligence.

Having reviewed the record, we find that the trial court did not err in denying Wal-Mart's motion for JNOV.

II. WHETHER WAL-MART SHOULD BE GRANTED A NEW TRIAL ON ALL ISSUES.

Wal-Mart argues that the jury became confused during deliberations and that the verdict amounts to a quotient or compromise verdict. Wal-Mart contends that this is evidenced by the jury's submission of a note to the court indicating that it needed help in completing the verdict form. However, according

to Wal-Mart, before the trial court could respond, the jury announced that it had reached a verdict. Initially, the jury found King's total damages to be $75,000 and found King to be seventy percent negligent. The jury then awarded King $75,000. The trial court sent the jury back and instructed it to recalculate its verdict in light of the contributory negligence instruction. The jury then returned a verdict finding that King's damages totaled $150,000 but that King was fifty percent negligent. The jury awarded King $75,000. The jury was polled, and it was established that this was their unanimous verdict. However, Wal-Mart contends that after the jury was dismissed, a juror approached Wal-Mart's attorney and told him that the jury had become confused and did not see that Wal-Mart had done anything wrong. Wal-Mart submits that it was entitled to a new trial.

King argues that there is nothing in the record to indicate that a quotient verdict was reached. King also contends that one juror's dissatisfaction with the result does not nullify the verdict. King argues further that Wal-Mart waived its right to complain about a quotient verdict because it did not request an instruction on this point. Finally, King argues that the verdict was not against the weight of the evidence.

We agree with King that the record contains nothing that would support Wal-Mart's theory that the jury reached a quotient or compromise verdict. Wal-Mart has the burden of affirmatively showing that the jurors agreed in advance to return a quotient verdict. *Index Drilling Co. v. Williams*, 137 So. 2d 525, 530 (Miss. 1962); *see also Dunn v. Jack Walker's Audio Visual Ctr.*, 544 So. 2d 829, 832 (Miss. 1989) (holding that before a verdict will be overturned on appeal, "the complaining party must establish that the verdict was indeed a compromise verdict."). It is well established that an appellate court "may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record." *Ditto v. Hinds County*, 665 So. 2d 878, 880 (Miss. 1995). As the record is silent as to any concerns regarding a quotient or compromise verdict, we find that Wal-Mart's argument is without merit.

We find further that the record does not support Wal-Mart's contention that the verdict was not the intended verdict by the jury. The fact that one juror may have been dissatisfied with the verdict is not sufficient to nullify the jury's verdict. *See Stanley, Inc. v. Cason*, 614 So. 2d 942, 949 (Miss. 1992) (stating that "jurors will not be heard to impeach their own verdict").

Lastly, Wal-Mart argues that the jury verdict is against the overwhelming weight of the evidence. This Court gives great deference and weight to the jury on findings of fact and will not set aside the jury verdict unless it is against the overwhelming weight of the evidence. *Gifford v. Four-County Elec. Power Ass'n*, 615 So. 2d 1166, 1171 (Miss. 1992). Considering the evidence in the light most favorable to King, we find that there was substantial evidence introduced at trial to support the jury's verdict. Thus, this assignment of error is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF JASPER COUNTY IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR.