IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00856 COA

REBECCA PITTMAN

APPELLANT

v.

DR. WAYNE STURDIVANT

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. R. I. PRICHARD III

COURT FROM WHICH APPEALED: MARION COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

JOE C. GEWIN

KARL WIEDEMANN

ATTORNEYS FOR APPELLEE:

THOMAS D. MCNEESE

REBECCA LEE WIGGS

NATURE OF THE CASE: CIVIL: MALPRACTICE AND SEXUAL ASSAULT AND BATTERY

TRIAL COURT DISPOSITION: DIRECTED VERDICT IN FAVOR OF THE DEFENDANT AS TO MALPRACTICE AND JURY VERDICT IN FAVOR OF DEFENDANT AS TO SEXUAL ASSAULT AND BATTERY

BEFORE FRAISER, C.J., DIAZ, AND McMILLIN, JJ.

DIAZ, J., FOR THE COURT:

Rebecca Pittman (Pittman) filed a complaint against Dr. Wayne Sturdivant (Sturdivant) in the Circuit Court of Marion County alleging dental malpractice and sexual assault and battery. Following a jury trial, a directed verdict in favor of Sturdivant was granted by the trial judge on the malpractice claim, and the jury found in favor of Sturdivant on the sexual assault and battery claim. Feeling aggrieved, Pittman appeals to this court and cites five errors: (1) whether the trial court abused its discretion in admitting into evidence a written offer to settle Rebecca Pittman's claim of sexual battery in violation of Rule 408; (2) whether the admission of the offer to compromise was more prejudicial than probative; (3) whether the letter was relevant; (4) whether the letter, even if relevant, was more prejudicial than probative, and (5) whether the jury verdict is against all reasonable probability. Finding no error, we affirm.

FACTS

During the morning of January 29, 1992, Pittman had a dental appointment with Dr. Wayne Sturdivant, a dentist in Columbia, Mississippi. She had been experiencing pain in her lower left jaw for several days and had used Sturdivant for dental work in the past. Pittman arrived at her morning appointment and Sturdivant placed her under sedation. He proceeded to perform a root canal on her lower right jaw. When Pittman awoke she was still experiencing pain in her lower left jaw. Sturdivant made her another appointment for 4:00 P.M. that afternoon to correct the problem in her left jaw. Pittman arrived at Sturdivant's office at 4:00 P.M., but was not treated until approximately 6:00 P.M. She was again placed under sedation while Sturdivant performed a root canal on her left jaw. Pittman's mother, Sue Beets (Beets), arrived at Sturdivant's office at approximately 8:00 P.M. to pick up her daughter. When Beets arrived, the office was empty of all personnel. Beets walked into the back of the office, looking for her daughter. Beets testified that Pittman was unconscious and that her sweater was pulled up beneath her shoulders with her bra down, exposing her breasts. Beets further testified that Sturdivant was holding Pittman's right breast in his hand. Pittman also testified that Sturdivant improperly touched her breast while she was sedated. Subsequently, Pittman filed a complaint against Sturdivant alleging dental malpractice and sexual battery and assault.

A jury trial commenced in the circuit court of Marion county. At the close of the Plaintiff's case, the trial judge granted Sturdivant's motion for directed verdict as to the malpractice claim. The trial proceeded on the sexual assault and battery claims. Over objection, Sturdivant introduced into evidence a letter drafted by William M. Kulick, Pittman's former attorney, which contained factual allegations concerning the incident.

DISCUSSION

Although Pittman's complaint was two-pronged in that it alleged malpractice as well as sexual assault and battery, Pittman's only cited errors on appeal pertain to her sexual assault and battery claims. Thus, we will address the enumerated errors only as they apply to Pittman's claim of sexual assault and battery. We consider Pittman's first four assignments of error together.

ISSUES 1-4

Pittman argues that a letter written by her previous attorney was an offer to settle and the admission thereof violated Rule 408. Furthermore, Pittman contends that the letter was irrelevant and any probative value of the letter was outweighed by its prejudicial effect. Sturdivant counters that the letter was relevant and was introduced for impeachment purposes which is allowable under Rule 408. The disputed letter reads as follows:

> Dear Dr. Sturdivant:
>
> I have been retained to pursue legal action against you for an incident which occurred back in February of 1992.
>
> As I understand the facts, you allegedly, intentionally "bumped" Mrs. Rebecca Pittman until she was the last patient of the day and everyone else had gone home. You then allegedly insisted that your nurse go home, in spite of the fact you were going to place Mrs. Pittman under general anesthesia. Then after or during treatment, and while Mrs. Pittman was sedated, you exposed Mrs. Pittman's breasts. At the moment you were about to pull down Mrs. Pittman's pants, Mrs. Pittman's mother walked into the room and witnessed her daughter half disrobed.
>
> Mrs. Pittman, who was aware of your actions but unable to respond, and her mother were in such shock that the police were not contacted.
>
> I am presently preparing a complaint to be filed against you for this act of grossly unprofessional conduct and moral turpitude. I will seek no less than 2.5 million dollars in actual and punitive damages if this matter goes to court.

I have no doubt that with Mrs. Pittman's mother as an eye witness, and Mrs. Pittman's psychologist who will describe how this incident has caused Mrs. Pittman extreme mental anguish, that we will be successful in our suit.

If you wish to avoid litigation in this matter, please call or have your insurer contact me immediately as I can not delay filing suit beyond the end of January.

Sincerely,

William M. Kulick

As a general rule, the admissibility of evidence is within the discretion of the trial judge. *Baine v. State*, 606 So. 2d 1076, 1078 (Miss. 1992). We will not disturb the trial court's ruling unless there has been an abuse of discretion. *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990); *Hentz v. State*, 542 So. 2d 914, 917 (Miss. 1989); *Ivy v. State*, 522 So. 2d 740, 742 (Miss. 1988). Pittman asserts that this letter was strictly an offer to settle and inadmissible under Rule 408. The record reveals that the trial judge determined the correspondence to be a demand letter rather than an offer to settle or compromise. Additionally, the record reveals that Sturdivant used the letter to show inconsistencies between Pittman's testimony and the allegations contained in the letter.

Rule 408 specifically carves an exception for evidence which is otherwise inadmissible. The letter at issue was admissible for impeachment purposes, and it was used in that context. Although the letter was admitted into evidence containing the demand for 2.5 million dollars in damages, Pittman did not request that this figure be omitted. She merely mentioned to the trial judge that she regarded the figure as a settlement offer. Thus, she cannot complain that the trial court erred by not omitting this portion of the letter. Sturdivant, however, did request that the last paragraph of the letter be deleted due to the reference to his insurance carrier, and the trial judge correctly allowed this. Consequently, we find that the trial judge did not abuse his discretion in allowing the letter into evidence.

Pittman's next two issues concern the relevancy of the letter and prejudicial effect of the letter. She argues that the letter was irrelevant to the issues and, therefore, inadmissible. Furthermore, she contends that even if relevant, the prejudicial effect of the letter outweighed any probative value under Rule 403. According to Pittman, this letter was introduced to distort the jury's perception of her and persuade the jury into believing that the lawsuit was simply an attempt to extort money from Sturdivant.

Relevancy of evidence is largely within the discretion of the trial judge and will be disturbed only where that discretion has been abused. *Johnston*, 567 So. 2d at 238. Rule 401 of the Mississippi Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. According to Sturdivant, this letter was introduced to attack Pittman's credibility. The letter provided the jury with relevant evidence of inconsistent statements made by Pittman through her attorney during the early stages of litigation. This impeachment evidence introduced by Sturdivant meets the relevancy requirements set out in Rule 401, and the trial judge did not abuse his discretion in admitting the letter.

The remaining question is whether the admittance of this letter was substantially more prejudicial than probative under Rule 403. This rule will only operate to exclude evidence in the most extreme cases. *Hans Construction Co. v. Drummond*, 653 So. 2d 253, 265 (Miss. 1995). The record reveals that Pittman received a copy of the letter after it was drafted and mailed to Sturdivant. The trial judge performed an on-the-record analysis of the prejudicial weight of the evidence and found that the letter contained subject matter which had been previously testified to by Pittman and allowed her to explain any inconsistencies resulting therefrom. The probative value of the contents of the letter did not outweigh its prejudicial effect and was properly admitted by the trial judge.

ISSUE 5

Lastly, Pittman 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 Sturdivant, we find that there was substantial evidence introduced at trial to support the jury's verdict. Thus, this assignment of error is without merit.

CONCLUSION

We find that the trial judge did not abuse his discretion in admitting the letter into evidence.

Therefore, the judgment of the Circuit Court of Marion County is affirmed.

THE JUDGMENT OF THE CIRCUIT COURT OF MARION COUNTY IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.

PAYNE, J., NOT PARTICIPATING.