

IN THE COURT OF APPEALS 7/2/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00290 COA

DAVID CHILDERS

APPELLANT

v.

TIPPAH ELECTRIC POWER ASSOCIATION

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HENRY L. LACKEY

COURT FROM WHICH APPEALED: TIPPAH COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ANTHONY L. FARESE

ATTORNEYS FOR APPELLEE:

WILLIAM C. MURPHREE AND BO RUSSELL

NATURE OF THE CASE: NEGLIGENCE

TRIAL COURT DISPOSITION: JURY VERDICT IN FAVOR OF THE DEFENDANT

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

David Childers filed suit against Tippah Electric Power Association (Tippah Electric) alleging that Tippah Electric's employees negligently tore down a property- line fence resulting in personal injuries and property damage to Childers and the horse he was riding. Following a jury verdict in favor of

Tippah Electric, Childers appeals assigning the following as error: (1) the verdict was against the overwhelming weight of the evidence; and (2) the trial court erred in denying Childers' motion for a mistrial after Tippah Electric gave prejudicial false testimony, incorrectly referred to Tippah Electric as "Tippah County Electric" and referred to Tippah Electric as being owned by the individuals who receive power from the company. Finding no merit to these issues, we affirm.

FACTS

On the night of May 20, 1992, Childers was running cattle along a fence line separating the property he rented from the neighboring property. The barbed wire fence ran along the property line, through which Tippah Electric had a right of way and was responsible for clearing. Childers was unaware that the fence was down as he galloped along the property line attempting to round up his cattle. His horse got caught in the barbed wire, threw Childers and then fell on him. Both Childers and his horse were injured in the fall.

Childers testified that he could not see the fence because of darkness and that he was galloping his horse in an unfamiliar area. Childers testified that Tippah Electric's employees cleared the right of way with a tractor in February of 1992. Childers stated that, although he did not observe it, a Tippah Electric employee told him that Tippah Electric employees had taken the fence down in February of 1992 and failed to replace it. J.M. Hodum, testified that he built the fence during the early 1970's and that he knew that the fence was standing in 1987 or 1988 after Tippah Electric cleared the right of way.

The two Tippah Electric employees who cleared the right of way testified that they did not take the fence down in 1992 or at any time prior to 1992. They also stated that the fence was down and a number of the fence poles were rotten at least as early as 1988 when they previously cleared the right of way. The president of Tippah Electric testified that it was company policy to repair any fence damaged by its employees and that, to his knowledge, no Tippah Electric employee had ever damaged the fence.

ANALYSIS

I. DID THE TRIAL COURT ERR IN DENYING CHILDERS' MOTION FOR JNOV OR NEW TRIAL ?

Our scope of review on appeal of a challenge to the weight and sufficiency of the evidence supporting a jury verdict is very limited. The granting or denial of a motion for new trial is within the sound discretion of the trial court, and we will not reverse such a ruling absent a finding that the trial court abused his discretion. *American Fire Protection, Inc. v. Lewis*, 653 So. 2d 1387, 1390 (Miss. 1995) (alterations in original) (citations omitted). The denial of a judgment notwithstanding the verdict is analyzed as follows:

[The evidence is considered] 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, [then the Court is] 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.

Id. at 1390-91 (citations omitted). Applying this standard to the case at bar, we find that there was substantial credible evidence to support the jury verdict. This issue is without merit.

II. DID THE TRIAL COURT ERR IN DENYING CHILDERS' MOTION FOR MISTRIAL ?

Although Childers includes the following issues in one assignment of error, this Court will address them separately.

A. Did the trial court err in denying Childers' motion for mistrial after Tippah Electric gave prejudicial false testimony ?

Childers contends that Shakelford, the president of Tippah Electric, should not have been allowed to testify that Tippah Electric had previous payment problems with Childers, alleging that such statements were untrue. This testimony was admitted to show Childers' potential bias and interest in the lawsuit. The Mississippi Supreme Court has stated that "it is elementary that the fact of a witness' interest in an action, whether civil or criminal, may be shown for the purpose of affecting his credibility." *Milner v. State*, 68 So. 2d 865, 868 (Miss. 1954); *see also, Cantrell v. State*, 507 So. 2d 325, 330 (Miss. 1987); *Gunter v. Reeves*, 21 So. 2d 468, 470 (Miss. 1945). We will briefly address the issue. Although this Court questions the relevancy of such testimony, we will not reverse the trial court's admission of this type of evidence absent a finding that the trial court abused its discretion. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 260 (Miss. 1993). We refuse to find that there was an abuse of discretion in this case. There is no merit to this issue.

B. Did the trial court err in refusing to admit a summarized insurance investigation report for impeachment ?

Childers contends that the trial court erred in refusing to admit a summarized report of an investigation conducted by Tippah Electric's insurer for impeachment of Thomas Shackelford. The insurance report indicated that the insurance company contacted Hodum regarding the fence and that Hodum told the insurance investigator that the fence "had been up" at some point in time. Shackelford testified that no one from Tippah Electric had contacted Hodum. Childers asserts that the insurance report proves that Shackelford was lying.

Childers addresses this issue in only one paragraph in his brief and cites no authority in support of this

assignment. As a result, this Court is not compelled to address this issue. *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993). However, we will briefly address the issue. Under Mississippi Rule of Evidence 613, a statement must be inconsistent with a prior statement in order to be used for impeachment. A statement is inconsistent if "under any rational theory it might lead to any relevant conclusion different from any other relevant conclusion resulting from anything the witness said." *Sperry-New Holland*, 617 So. 2d at 260 (citation omitted). Shackelford clearly testified that no one from Tippah Electric contacted Hodum. Since the insurance report is not inconsistent with Shackelford's testimony, the trial court properly ruled that the report was not admissible.

C. Did the trial court err in denying Childer's motion for mistrial after defense counsel incorrectly referred to Tippah Electric as "Tippah County Electric" during closing argument and referred to Tippah Electric as publicly owned ?

Prior to closing argument, Childers moved ore tenus to prevent defense counsel from incorrectly referring to Tippah Electric Power Association as "Tippah County Electric." The trial court granted the motion and instructed defense counsel to try to refrain from this reference. During closing, defense counsel referred to Tippah Electric as "Tippah County" but then immediately corrected himself. Childers also complains because during closing defense counsel referred to Tippah Electric as a cooperative owned by the individuals who purchase electricity from the company.

Childers asserts that the trial court erred in denying his motion for mistrial because he was prejudiced by this reference. However, the record does not indicate that Childers made a motion for mistrial at this point or any subsequent point during the trial, and, in fact, Childers did not even object when either of these references were made.

Childers fails to cite any authority in support of this assignment and only addressed this issue in less than one page in his brief. The failure to cite any authority in support of this assignment of error precludes this Court from addressing this issue on appeal. *Estate of Mason*, 616 So. 2d at 327. Further, the Mississippi Supreme Court has repeatedly held that a trial judge will not be found in error on a matter not presented to him. *Bender v. North Meridian Mobile Home Park*, 636 So. 2d 385, 389 (Miss. 1994); *West, Cash & Carry Bldg. Materials, Inc. v. Palumbo*, 371 So. 2d 873, 875-76 (Miss. 1979). Childers is procedurally barred from raising this issue.

Even if he were not procedurally barred, there is no merit to this issue. Parties are given wide latitude in closing argument. *Ball v. Sloan*, 569 So. 2d 1177, 1179 (Miss. 1990). Tippah Electric did not exceed this latitude in its closing argument.

THE JUDGMENT OF THE TIPPDAH COUNTY CIRCUIT COURT IN FAVOR OF TIPPDAH ELECTRIC POWER ASSOCIATION IS AFFIRMED. ALL COSTS ARE ASSESSED AGAINST THE APPELLANT.

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

