IN THE COURT OF APPEALS 7/2/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00107 COA

W.R.M. & ASSOCIATES, d/b/a SERVICE MASTER BUILDING MAINTENANCE

APPELLANT

v.

LOU ELLA KNOX

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: LOWNDES COUINTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

DEWITT T. HICKS, JR. AND

P. NELSON SMITH, JR.

ATTORNEYS FOR APPELLEE:

BENNIE L. TURNER AND

RHONDA R. SAUL

NATURE OF THE CASE: CIVIL - SLIP AND FALL

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF PLAINTIFF IN THE AMOUNT OF $230,000

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

THOMAS, P.J., FOR THE COURT:

Lou Ella Knox filed a complaint against W.R.M. & Associates, Ltd., a company that performs commercial cleaning services, alleging that as she was walking across the floor of Sears & Roebuck Company she slipped and fell injuring herself. She alleged that the Defendant's employees had freshly waxed the floor and did not warn her of the dangerous condition. A trial was had upon the matter, at which time a jury returned a verdict in favor of Knox in the amount of $230,000.

From this verdict, W.R.M. appeals to this Court assigning six alleged errors. Finding that the trial court erred in allowing the testimony of Shull, we reverse and remand this case back to the trial court for a hearing on damages, consistent with this opinion. We find all remaining issues to be without merit.

RELEVANT FACTS

On February 19, 1991, Lou Ella Knox, an employee at Sears, was walking through the store when she slipped and fell on a part of the floor that had been freshly waxed by employees of W.R.M. Knox went to the emergency room where she was treated and released. Since her fall Knox has seen the following doctors: Dr. Thomas F. Adams, Dr. James Poche, Dr. Paul Veal, Dr. Michael D. Dulligan, Dr. Perry Wallace, Dr. William L. Hand, Dr. Gregory Nunex, Dr. John G. Gassaway, Dr. Albert Azordegen, Dr. Guy T. Vise, Jr., Dr. B.G. Spell, Dr. Mark A. Frioux, and Dr. Henry E. Irby.

Dr. Thomas Adams, who treated Knox from February to April of 1991, recommended that Knox return to work and stated that her prognosis for recovery was good based upon her progress. Dr. Adams referred Knox to Dr. James Poche who treated Knox with therapy. Knox then went to see Dr. Poche's partner, Dr. Michael D. Dulligan, who recommended that she start doing water aerobics. Knox then went to Meridian to see Dr. Perry Wallace and Dr. William Hand, who also recommened that she begin therapy. Both Dr. Wallace and Dr. Hand "encouraged [Knox] to return to work as soon as possible and told her that when the [therapy] was completed, it would be important for her to get back with her regular activities as well as her regular job." Knox then went back to Dr. Adams who again recommended that Knox return to work.

On July 8, 1991, Knox returned to work and worked until the fifth or sixth of September 1991, when she left complaining of pain. During the time that Knox was working, from July through September, she was receiving therapy and was under the care of Dr. John G. Gassaway. When she took a leave of absence from work, she began to see Dr. Albert Azordegen. In October of 1991, Knox's attorney referred Knox to Dr. Guy T. Vise, who recommened that she undergo surgery for a slipped disc. After surgery, Dr. Vise released Knox to return to work on "light duty." In his deposition, Dr. Vise stated that her recovery was good and that she would not need to see a physician on a regular basis. However, Knox told Vise that she could not return to work because she had already been fired. According to Knox, she could not meet the requirements for the job, such as being able to stand ninety-two percent of the time and lifting fifty pounds.

Knox's husband testified that she is in constant pain and that she has not been the same since she fell in 1991. However, Knox testified that she had the surgery "to relieve me of some of the pain that I

was in" which "it did." Knox stated that after surgery, "I did real well." However, Knox also stated that she cannot do her housework and her volunteer work with the church anymore on account of her pain, and furthermore, she stated that her attitude toward her family is not the same since she fell in 1991.

Knox stated that she has not seen any physician since her surgery in 1991, other than to get some pain medication. On September 1, 1992, Knox was released to go to work by Dr. Vise. On September 16, 1992, Knox filed suit against W.R.M. In February of 1993, Knox went to see Dr. Thomas D. Little who examined Knox. In his evaluation of Knox, Dr. Little stated that "I don't think this patient is able to work."

Prior to trial, a pre-trial order was signed by both parties and the trial judge wherein the parties stipulated to the fact that Knox "was released to go back to work but chose not to do so" and that Knox "was limited to light duty after her release from Dr. Vise, who agreed her position at Sears was 'light duty.'"

During trial, Knox was allowed to admit the testimony of Dr. Stanley Cabel Shull, an economist, who testified as to the net cash value of Knox's earning capacity, predicated upon the inability of Knox to work at all. W.R.M. objected to Shull's testimony, arguing that Knox had stipulated in the pre-trial order that she was told she could return to work but chose not to do so, which would be contrary to the basis of Shull's testimony.

The trial court denied W.R.M's motion, noting that the pre-trial order was not entered because the court felt that the stipulations "did not comport with what [the court] anticipated the plaintiff's contentions to be . . . ." Shull testified that the present net cash value of Knox's earning capacity, considering that Knox was totally disabled, was $366,191.

DISCUSSION

I.

In the case *sub judice*, the jury, after hearing all of the evidence, determined that W.R.M. was negligent in waxing the floor and failing to warn Knox of the danger. W.R.M. argues that this finding was against the overwhelming weight of the evidence. They also argue that the sole proximate cause of Knox's injury was her failure to look where she was walking, not their act of waxing the floor.

Our standard of review in determining whether there was sufficient evidence to support a jury's finding of negligence has been stated many times.

[The evidence is considered] in the light most favorable to the appellee, giving that party the benefit of all favorable inference 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.

American Fire Protection v. Lewis, 653 So. 2d 1387, 1390-91 (Miss. 1995).

With this standard in mind, our focus turns on whether there was substantial evidence in the record for the jury to find that W.R.M. was the sole proximate cause of Knox's injury. Witnesses testified that W.R.M. normally set up banners or ropes when they begin waxing the floors, and on the day in question, W.R.M. did not put up the banners in the store. Randy McCall, president of W.R.M., testified that the employees should set up banners when the floors are being waxed and if he had walked in and seen that the employees were waxing the floor without the banners, he would have told them "Let's get these banners up."

Knox testified that while she knew that W.R.M. employee's were in the store cleaning the floors, she stated that she saw no indication that the floors, where she slipped and fell, had just been freshly waxed. Knox stated that she saw no signs to warn her of the danger. Furthermore, other Sears employee's testified that the aisle on which Knox fell, they did not see signs, buckets, or banners which would normally indicate that the store aisle had been freshly waxed.

Under our standard of review there was sufficient evidence for the jury to find that W.R.M. was negligent in properly warning Knox of the danger. It was for the jury to determine whether W.R.M. had properly warned Knox that the floors were slippery. We will not invade the province of the jury.

II.

W.R.M. next argues that the trial court erred in failing to grant a mistrial when Knox's attorney solicited a response which mentioned insurance. At trial, Knox's attorney asked the following:

Q. Mr. Ferguson, I've given you or shown you a copy of a statement that you gave back in April of nineteen ninety-one. Is that correct?

A. Yes.

Q. And does it--reviewing that statement help you remember a little bit what you said back then?

A. Yes.

Q. Down at the bottom of the page that I had you looking at, there's a question on there that says, "Had you spoken to her this day that she slipped and fell? Had you spoken to her or did you just see her?" Do you--you see that question?

A. Uh-huh.

Q. Now you've--

A. Yes.

Q. --told us here just a moment ago that just before she fell you spoke to her over in the shoe department. Is that right?

A. Yes.

Q. Now your statement says that you didn't speak to her, isn't that correct?

BY MR. HICKS: We object to the question, your Honor, and in the fairness rule, uh, I--I think it's only right that the witness be allowed to--to--to give the response that--that was given because it's very clear that he saw her. That's what he said.

BY THE COURT: The objection is overruled. You can answer.

Q. Do you understand the question?

A. You know, had I spoken to her?

Q. Yeah. over in the--in the shoe department that's what you were asked about on your statement back in April of nineteen ninety-one, isn't it?

Q. Uh, yes.

A. And when you gave this statement which was just what, two months after this injury occurred? That’s about right, isn’t it?

A. I really don't know.

Q. From February to April of ninety-one, that's about two months, isn't it?

A. Uh, yes.

Q. Two--two and a half months maybe.

A. Well see--

Q. That's when you gave the statement, wasn't it?

A. Yes.

Q. And when you were asked then did you speak to her over in the shoe department you said no, but you say, I'm sure she saw me or seen me, but you didn't speak to her and you were asked that a couple of times. Isn't that right?

A. Well I remember speaking to her, but I might have not re--recorded it when 1 was being questioned, but I remember speaking to her.

Q. You remember it now?

A. Yes.

Q. Today?

A. Because well see the on--the only time I been notified about this deposition is now.

Q. You never talked to me about this case before the lunch break, isn't that right, today.

A. Yeah, I talked with you.

Q. About this case.

A. Yes.

Q. Today was the first time.

A. Yes.

Q. But you talked to the person that you gave this statement some two and a half months right after it happened, isn't that right?

A. Yes.

Q. And when that person asked you did you speak to Mrs. Knox over in the shoe department, you said no, I didn't, but you come here today and you tell us, yes, I spoke to her and she spoke to me. Isn't that--isn't that what you said?

A. Yes. But, uh--

Q. You remember it better today than you did back in nineteen ninety-one in April, is that what you're telling us?

A. Uh, yes, but, oh, like I'm saying I--I spoke to her, but I, you know, I didn't--when we, uh, got--when he made the statement from me to take the statement down, I--I, you know, I just I didn't know--I forgot to tell him that I spoke with her.

Q. Well you said you didn't speak to her, didn't you'?

A. I'm saying I forgot--when they was making--when I was making the statement to the insurance man I--I--like I say, I forgot to tell him that I had spoke to her.

Q. But you remember it today?

BY MR. HICKS: If it please the Court, we have a motion we'd like to make.

BY THE COURT: Ladies and gentlemen, I'm going to ask you to step back into the jury room.

BY MR. HICKS: Comes now the defendant and moves the Court for a mistrial. Mr. Ferguson in response to repeated questions by plaintiff's counsel eliciting an answer about a statement to an-- an-- the insurance man, and, uh, prior to, as the Court well knows, uh, the use of this statement, uh we respectfully requested that insurance not be injected into the case; it has now been injected as a result

of solicitation. Mr. Ferguson is no longer an employee of this defendant and he was called by the plaintiff, uh not by the defendant, and we respectfully submit it's highly prejudicial to mention insurance.

. . . .

BY THE COURT: The witness was an employee of the defendant in this case who I understand is no longer employed with the defendant, but employed elsewhere; however, this Court has noticed that since being called as a witness by plaintiff this witness has seemed to be reluctant to testify and reluctant to answer the questions propounded to him by plaintiff, that some leading has been had of the witness in an attempt to even get the witness to respond to the questions attempted to be elicited by counsel for the plaintiff. I had no opportunity to rule on whether or not the -- it was objectionable because no objecton was made to that leading; however, had an objection been made I would have pobably have overruled it because it is obivous tht this witness is intentionlly or unintentionally being evasive in his answers to your questions. *The problem comes when unsolicited he mentions that this is a statement he gave to an insurance man. I do not feel that that is sufficient grounds for a mistrial, but I am going to admonish the jury to disregard the last statement made by this witness continue the case, and the motion for mistrial is overruled.*

We hold this issue to be without merit. It is clear from a reading of the record that the question which elicited the mentioning of insurance was not asked for the purpose of eliciting such a response. It appears, as the trial court stated, that the mentioning of insurance was unsolicited by Knox's attorney.

We look at the trial court's denial or grant of a mistrial under our abuse of discretion standard. *Miles v. Catchings Clinic*, 601 So. 2d 47, 49 (Miss. 1992). As our supreme court has stated "large discretion has been indulged the trial courts in ruling upon comments concerning insurance arising during a trial." *West Cash & Carry Bldg. Materials v. Palumbo*, 371 So. 2d 873, 876 (Miss. 1979); *see also Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108, 1114 (Miss. 1992). "The trial judge whose duty it is to be attuned to the trial as it progresses is in the most advantageous position to correctly rule whether prejudice, or the lack of it, has emanated from the comment of a witness." *Palumbo*, 371 So. 2d at 876. We do not think that the trial court abused its discretion in denying the motion for mistrial.

III.

W.R.M. next argues that the trial court erred when it allowed Knox to amend stipulations that were made in the pre-trial order. The pre-trial order, which was never filed by the trial court, was signed by the attorneys for both parties and by the trial judge. In the order it was stipulated that Knox "was released to go back to work but chose not to do so" and that Knox "was limited to light duty after her release from Dr. Vise, who agreed her position at Sears was 'light duty.'"

Prior to the testimony of the economist, Dr. Shull, W.R.M. objected to Shull's testimony, arguing that the basis of his testimony was the fact that Knox was unable to work, which was contrary to the stipulations in the pre-trial order. Knox countered the argument by stating that she did not intend to

sign those stipulations. The trial court denied W.R.M.'s objection, noting that the parties's pre-trial stipulations were never filed because it felt that the stipulations "did not comport with what [the court] anticipated the plaintiff's contention to be . . . ."

W.R.M. argues that the trial court should not have allowed Shull to testify. We agree with W.R.M and find the trial court in error in admitting the testimony of Dr. Shull.

It is well established that a stipulated fact is a fact that both parties agree to be true, and furthermore, it is well established that a trial court has the discretion to enter or not to enter an order presented to it for approval. However, does the trial court have the discretion to refuse to enter stipulations of fact?

In *Wilbourn v. Hobson*, 608 So. 2d 1187, 1189-90 (Miss. 1992), our supreme court stated:

> Where the parties file and gain court approval of a formal stipulation agreement as Wilbourn and Hobson have done, the factual issues addressed in the agreement are forever settled and excluded from controversy. Neither party can later change positions. *Johnston v. Stinson*, 434 So. 2d 715 (Miss. 1983); *Vance v. Vance*, 216 Miss. 816, 63 So. 2d 214 (1953); *Stone v. Reichman-Crosby Co.*, 43 So. 2d 184 (Miss. 1949). Furthermore, factual stipulations set boundaries beyond which this Court cannot stray. As stated in *Corpus Juris Secundum*:
>
>> In the absence of grounds which will authorize a party to a stipulation to rescind or withdraw from it, . . . the courts, both trial and appellate . . . are bound by stipulations in respect of matters which may validly be made the subject of stipulations. Courts are bound to enforce stipulations which parties may validly be made, where they are not unreasonable or against good morals or sound public policy. Ordinarily they have no power to . . . go beyond the terms [of such stipulations] . . . or to made findings contrary to the terms of a stipulation, or render a judgment not authorized by its terms.

Wilbourn, 608 So. 2d at 1189-90.

The language contained in this case appears to mean that once the parties gain court approval, the parties are bound by the stipulations which cannot later be change or altered. In this case, the trial court signed the pre-trial order, but chose not to enter it without letting the parties know of its intentions. Does the signing of the pre-trial order constitute court approval? In this case, we think that it does, and find that the trial court should not have allowed Knox to alter the agreed upon factual stipulations.

Even if we were to hold that the trial court did not approve of the stipulations by filing the same, we hold that the trial court could not wait until the end of the Plaintiff's case in chief to let the parties know of its intentions to allow Knox to strike out portions of the agreed stipulations. The trial court's actions severely prejudiced W.R.M's case. W.R.M., believing, up until the end of the

Plaintiff's case in chief, that Knox was not going to call Shull to testify because of the agreed stipulations, did not call its own expert to rebut Shull's testimony. This unfair surprise was obviously detrimental to W.R.M., and is grounds for reversal.

CONCLUSION

This Court affirms the jury's determination that W.R.M. was negligent in failing to warn Knox that the floor was slippery. However, we reverse and remand the case back to the trial court for a hearing on damages consistent with this opinion.

THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT IS AFFIRMED AS TO LIABILITY; THE AMOUNT OF DAMAGES IS REVERSED AND REMANDED FOR A HEARING CONSISTENT WITH THIS OPINION. COSTS ARE TAXED EQUALLY TO APPELLANT AND APPELLEE.

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

BRIDGES, P.J., DISSENTS IN PART, WITH SEPARATE WRITTEN OPINION JOINED BY PAYNE, J.

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BRIDGES, P.J., DISSENTING IN PART:

I respectfully dissent to the majority's reversal of the trial court's allowance of Knox to amend stipulations in the executed, but not entered, pre-trial order. While I recognize that Knox's support for her opposition to W.R.M.'s enumeration of error is mainly factual, I disagree with the majority's application of the *Wilbourn* case in light of the instant facts.

The majority correctly cites *Wilbourn* for its adherence to the absolute finality of the stipulations contained in a formal stipulation agreement, but I am troubled by the law, as used by the majority, when it is held against the backdrop of the facts of our case. The pertinent part of the *Wilbourn* case that is used by the majority in its opinion is as follows:

> [W]here the parties file and gain court approval of a formal stipulation agreement as Wilbourn and Hobson have done, the factual issues addressed in the agreement are forever settled and excluded from controversy. Neither party can later change positions.

Wilbourn v. Hobson, 608 So. 2d 1187, 1189 (Miss. 1992).

The record does not indicate that there was court approval of W.R.M.'s proposed pre-trial order. It is Knox's position that due to the tardiness of W.R.M.'s filing its final proposed pre-trial order, she could not satisfactorily examine W.R.M.'s proposed order. Furthermore, the trial judge did not see fit to enter the pre-trial order because of the impropriety of the content of W.R.M.'s proposed order. These facts beg the conclusion that the stipulations sought by W.R.M. clearly did not involve settled issues and, therefore, should not be excluded from controversy.

PAYNE, J., JOINS THIS SEPARATE WRITTEN OPINION.