REL: February 19, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190393

Lonas M. Goins

v.

Advanced Disposal Services Gulf Coast, LLC, and Franklin A. Pharr

Appeal from Mobile Circuit Court
(CV-16-902154)

MITCHELL, Justice.

Lonas M. Goins was injured when a train locomotive that he was operating collided with a garbage truck at a railroad intersection. Goins

sued the owner and the driver of the truck in the Mobile Circuit Court. After a five-day trial, a jury found in favor of Goins and awarded him damages. Dissatisfied with the jury's damages award, Goins appealed the judgment, arguing that the trial court committed multiple errors that warrant a new trial. We reject Goins's arguments and affirm the judgment.

Facts and Procedural History

In April 2016, Franklin A. Pharr, an employee of Advanced Disposal Services Gulf Coast, LLC ("Advanced"), was driving his garbage-truck route when his truck was struck by a Norfolk Southern Railroad Company train traveling through Saraland in Mobile County. Pharr apparently did not hear the horn of the train, proceeded across the railroad tracks, and was struck when the train hit the passenger side of the truck.

Goins, the train's conductor, and James Shanon Rigby, the train's engineer, operated the train on the day of the accident. The train was traveling at approximately 46 miles per hour with its horn and bells ringing as it passed through Saraland. Seeing Pharr's truck on the railroad tracks, Rigby manually applied the train's emergency brake, but

the 30-car train was unable to stop before hitting the truck. After applying the emergency brake, Rigby dove to the floor to protect himself, and Goins braced himself against the train's metal dashboard. The impact of the collision threw Goins into his seat, which was approximately two feet behind the train's dashboard, and he suffered injuries.

Goins sued Pharr and Advanced ("the defendants") in the Mobile Circuit Court, asserting claims of negligence and wantonness. He proceeded on a theory of negligence per se, alleging that Pharr had violated § 32-5A-150, Ala. Code 1975, a statute regulating vehicular crossings of railroad tracks. Rigby initiated a separate action against the defendants, and the two cases were consolidated and tried together.[1]

In a pretrial motion, Goins sought to exclude testimony that his counsel had referred him to Dr. Lauren Savage, an orthopedic surgeon in Trussville. He argued that this information was protected by the attorney-client privilege. The trial court disagreed and denied Goins's

[1]Rigby has not appealed. We therefore limit our discussion of the events at trial to those that affect Goins's appeal.

motion, thus permitting Goins to be cross-examined at trial about the referral.

A jury trial proceeded over five days. At the close of his case-in-chief, Goins moved for judgment as a matter of law on his negligence claim. The trial court denied his motion. The court did, however, enter judgment as a matter of law in favor of the defendants on Goins's wantonness claim, leaving only Goins's negligence claim to decide. After all the evidence was presented, Goins again moved for judgment as a matter of law on his negligence claim, which the trial court denied.

Before the jury retired to deliberate the case, the defendants sought jury instructions on contributory negligence and spoliation of evidence. Those requested instructions stemmed from Goins's possible cell-phone use leading up to the collision. The defendants contended that Goins's use of his phone before the accident would support a finding that he was contributorily negligent. To examine Goins's cell-phone activity near the time of the accident, Advanced had sought an inspection of Goins's cell phone in pretrial discovery. After that request had been made but before the inspection of the cell phone could take place, Goins wiped his phone

of its data because, he says, he had planned to give it to his son. Based on evidence of this conduct, the trial court, over Goins's objection, charged the jury on contributory negligence and spoliation.

After deliberating, the jury returned a verdict in favor of Goins and against the defendants for $175,000. Despite the favorable verdict, Goins moved for a new trial under Rule 59, Ala. R. Civ. P. The trial court denied that motion. Goins appealed.

Standard of Review

Goins argues on appeal that the trial court erred in denying his motions for judgment as a matter of law and his motion for a new trial. This Court's review of a trial court's denial of a motion for judgment as a matter of law is well settled:

> " 'When reviewing a ruling on a motion for a [judgment as a matter of law ("JML")], this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a JML. See § 12–21–12, Ala. Code 1975; West v. Founders Life

> Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992).' "

Youngblood v. Martin, 298 So. 3d 1056, 1058 (Ala. 2020) (citation omitted). Moreover, a trial court's denial of a motion for a new trial "is within the sound discretion of the trial court" and will not be reversed unless that discretion is exceeded. Acceptance Ins. Co. v. Brown, 832 So. 2d 1, 12 (Ala. 2001).

Finally, in reviewing an appeal from a judgment entered on a jury verdict, "we presume that the verdict was correct .... We will not overturn a jury verdict unless the evidence against the verdict is so much more credible and convincing to the mind than the evidence supporting the verdict that it clearly indicates that the jury's verdict was wrong and unjust." Campbell v. Burns, 512 So. 2d 1341, 1343 (Ala. 1987).

Analysis

Goins argues that the trial court committed multiple errors, and he says those alleged errors warrant reversal of the judgment and a new trial. Specifically, he argues that the trial court erred by (1) failing to grant his motions for judgment as a matter of law on the issue of negligence per se; (2) failing to grant his motion for a new trial on the basis that the damages awarded were inadequate; (3) excluding parts of Dr. Savage's testimony about future damages; (4) allowing the defendants to cross-examine Goins about what he says is information protected by the attorney-client privilege; and (5) giving jury instructions on contributory negligence and spoliation. Goins makes a final argument that he is entitled to reversal of the judgment and a new trial based on "multiple errors by the trial court." We address each of these arguments in turn.

A. The trial court did not err by denying Goins's motions for judgment as a matter of law on the issue of negligence per se

Goins argues that the trial court erred by denying his motions for judgment as a matter of law on the issue of negligence per se.[2] In particular, he argues that the only relevant evidence presented at trial demonstrates that Pharr was negligent per se by failing to stop at the railroad crossing, in violation of § 32-5A-150, Ala. Code 1975. This argument fails because the defendants presented sufficient evidence of both contributory negligence and spoliation of evidence.

For a party to survive a motion for judgment as a matter of law on a claim after the moving party has met its burden of production, it must present substantial evidence necessitating submission of the claim to a

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[2]In his brief to this Court, Goins argues that the trial court erred in denying his pretrial motion for summary judgment on his negligence claim. Regardless of the merits of that argument, we cannot review that ruling on direct appeal. See Mitchell v. Folmar & Assocs., LLP, 854 So. 2d 1115, 1116 (Ala. 2003) (holding that this Court does "not review a trial court's denial of a summary-judgment motion following a trial on the merits"). But Goins did move for judgment as a matter of law concerning his negligence claim both at the close of his case-in-chief and at the close of the evidence at trial; those motions were also denied by the trial court. In his reply brief, Goins has re-framed his argument around the denial of those motions -- an issue that we may properly decide. Therefore, in this opinion, we analyze Goins's claim only with respect to his motions for judgment as a matter of law.

jury for resolution. See Beddingfield v. Linam, 127 So. 3d 1178 (Ala. 2013). "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). Here, the defendants sought to prove that Goins was contributorily negligent and that he had spoliated evidence -- the former of which, if proven, would completely bar Goins's recovery. See Brown v. Turner, 497 So. 2d 1119, 1119 (Ala. 1986) (holding that contributory negligence is a complete bar to a negligence action). Courts applying Alabama law have also considered evidence of spoliation as a factor in upholding trial-court denials of motions for judgment as a matter of law. See, e.g., Southeast Env't Infrastructure, L.L.C. v. Rivers, 12 So. 3d 33, 44-45 (Ala. 2008); Stanton v. National R.R. Passenger Corp., 849 F. Supp. 1524 (M.D. Ala. 1994).

Essentially, Goins argues that (1) because he proved that Pharr, the garbage-truck driver, violated the restrictions of a railroad-crossing statute, § 32-5A-150, and (2) because he satisfied the other elements

necessary to prove a claim of negligence per se, the defendants' affirmative defenses should not have been considered because, he says, negligence was conclusively proven. But such a strict approach would undermine our fault-based liability system and conflict with our past willingness to consider the facts of a given case. See Norfolk S. Ry. Co. v. Johnson, 75 So. 3d 624, 641 (Ala. 2011) (" ' " 'What is, or is not, ordinary care often depends upon the facts of the particular case. The rule, "stop, look, and listen," is not arbitrary or invariable as to time and place.' " ' " (citations omitted)). While we have imposed a duty on motorists to "stop, look, and listen" when crossing railroad tracks, see Ridgeway v. CSX Transp., Inc., 723 So. 2d 600, 605 (Ala. 1998), and have been willing to deem a party contributorily negligent as a matter of law in some instances when that duty was breached, we have not expanded that rule to establish negligence as a matter of law that would bar a defendant from presenting an affirmative defense. To create such a rule would limit the ability of defendants to appropriately defend themselves when the facts, as a whole, may show that the plaintiff bears responsibility.

Thus, the dispositive question becomes whether the defendants presented sufficient evidence of contributory negligence and spoliation of evidence. They clearly did. As to contributory negligence, the defendants presented evidence that Goins did not maintain a constant lookout as the train approached the crossing; that Goins talked to the engineer as the train approached the crossing, with his head turned away from the tracks; that Goins did not see the truck until he finished talking to the engineer; and that Goins did not immediately pull the emergency brake when he noticed the truck cross onto the tracks.

Further, the defendants presented evidence that Goins spoliated important evidence that could have hurt his case. Spoliation of evidence occurs when one party hides or harms material evidence that might be favorable to an adverse party. See Vesta Fire Ins. Corp. v. Milam & Co. Constr., Inc., 901 So. 2d 84, 93 (Ala. 2004). A jury may then permissibly draw "an inference of guilt or negligence" from that party's spoliation of evidence. Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d 166, 176 (Ala. 2000). Here, Goins wiped the data from the cell phone that he had at the time of the accident when he knew that the defendants had asked to

inspect the phone. Under our caselaw, the jury was permitted to draw an inference of contributory negligence from Goins's spoliation of the cell-phone data, so we cannot hold that Goins's negligence claim was established as a matter of law. The trial court therefore correctly sent the case to the jury.

B. The trial court did not err by denying Goins's motion for a new trial based on the alleged inadequacy of the jury award

Goins argues that the trial court erred in denying his motion for a new trial because, he says, the jury award was "clearly erroneous considering the facts." An examination of the facts presented to the jury shows that is not the case.

The assessment of damages is a matter within a jury's discretion. See Carter v. Reid, 540 So. 2d 57, 60 (Ala. 1989) (affirming a judgment entered on a jury verdict in favor of a plaintiff following an appeal by the plaintiff challenging the adequacy of the damages award). As noted by the Court of Civil Appeals, "the jury is not bound to award medical expenses merely because they were incurred." Brannon v. Webster, 562 So. 2d 1337, 1339 (Ala. Civ. App. 1990). It is permissible for a jury to conclude

that some of the plaintiff's costs were unnecessary or unrelated to the defendant's negligence. See Wells v. Mohammed, 879 So. 2d 1188, 1193 (Ala. Civ. App. 2003). But there are limits to a jury's discretion in this area. "[A] jury verdict is presumed to be correct and will not be set aside for an inadequate award of damages unless the amount awarded is so inadequate as to indicate that the verdict is the result of passion, prejudice, or other improper motive." Helena Chem. Co. v. Ahern, 496 So. 2d 12, 14 (Ala. 1986) (emphasis added).

At its core, Goins's argument on appeal is that because he presented uncontroverted evidence of damages, he was entitled to all the damages he requested. But the jury had ample evidence before it to doubt both Goins's credibility and the assumptions on which his damages claims were based.

For the jury to accept Goins's assessment of damages, it had to believe his underlying assertion that he could not work in the future. And it is clear from the verdict that it did not. The jury heard evidence that Goins was less than accurate or complete in some disclosures about his injury history. For example, the jury heard that Goins had failed to

disclose a prior back injury on a medical questionnaire given to him by a treating physician; that he had traveled for leisure internationally despite representing that he could not work; that he had engaged in physical activity, such as kayaking, after the accident; and that his assessments by physicians who treated him after the accident were based on his subjective complaints of pain.[3]

The premise that Goins was permanently disabled served as the foundational assumption for the evidence he presented regarding damages. But a rating of permanent disability was not even assigned by his treating physician, Dr. Savage. Nevertheless, Goins's testifying economist and vocational expert both based their calculations on the

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[3]An exchange between defense counsel and Goins on cross-examination illustrates this final point on credibility:

> "Q: ... And you're telling Dr. Savage [treating physician] and others that you have this pain that prevents you from working; correct?
>
> "A: That's correct.
>
> "Q: There's no test to determine whether and to what extent you have pain; correct?
>
> "A: Not that I am aware of."

assumption that Goins was unable to return to work. So, if the jury did not believe that Goins could not return to work, his damages argument would collapse.

The jury sits through a trial to assess the credibility of the witnesses -- especially when the parties testify. Without passing our own judgment on Goins's credibility, it was reasonable for the jury to have questions about his assertions given the facts that emerged at trial. With the doubts about Goins's credibility and the resulting uncertainty about the true amount of his damages, this Court cannot say that the jury acted out of "passion, prejudice, or other improper motive" so as to merit a reversal of the judgment entered on its verdict. Helena Chem., 496 So. 2d at 14.

C. The trial court did not err by excluding part of Dr. Savage's video testimony about the possible need for future surgery

Goins argues that the trial court erred in excluding portions of video-deposition testimony from one of his treating physicians, Dr. Savage, about Goins's possible need for future spine-fusion surgery. The trial court excluded this portion of Dr. Savage's testimony on the ground that it stated a conclusion not based on a sufficient degree of medical certainty.

But Goins, without citing any specific part of the record, argues that Dr. Savage did meet the medical-certainty standard, even though, Goins notes in his brief, Dr. Savage did not use the "magic words" of "reasonable degree of medical certainty." Regardless of what words Dr. Savage used, his testimony falls short of the requirements that must be met for a medical conclusion to be admitted.

Evidence of a party's future need for medical treatment and the attendant costs must not be speculative. See, e.g., Owens-Corning Fiberglass Corp. v. James, 646 So. 2d 669, 672 (Ala. 1994). Here, the proffered evidence was clearly speculative. At the time of Dr. Savage's deposition, Goins had not been treated by Dr. Savage in over a year and a half. And at that most recent visit, Dr. Savage had said that Goins did not need any more back surgeries. In any event, Dr. Savage was specifically asked in his deposition about Goins's need for future surgeries as a result of the accident, and Dr. Savage did not testify that, to a reasonable degree of medical certainty, Goins would need future surgeries.

Nevertheless, Goins asks us to make an inference based on Dr. Savage's testimony. We cannot do that. Without more, any implication

that Goins would need surgery in the future as a result of his injuries from the accident is speculative at best. Trial courts have wide latitude in making evidentiary rulings, and those rulings "will not be disturbed on appeal in the absence of a gross abuse of discretion." Russellville Flower Craft, Inc. v. Searcy, 452 So. 2d 478, 480 (Ala. 1984). The trial court did not exceed its discretion here.

D. The trial court did not err by permitting the defendants to cross-examine Goins about his referral to Dr. Savage

Goins argues that the trial court erred in permitting the defendants to elicit testimony from him that his counsel had referred him to Dr. Savage. Specifically, Goins contends that this information was protected by the attorney-client privilege. Rule 502, Ala. R. Evid., governs the attorney-client privilege:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client ...."

Rule 502(b). This privilege, however, may be waived by the client if he or she "voluntarily discloses ... any significant part of the privileged matter." Rule 510(a), Ala. R. Evid. That is what happened here. Both at his

deposition and at trial on direct examination, Goins revealed that he had been referred to Dr. Savage as a result of his conversations with his counsel. During his deposition, Goins responded as follows to questioning by Pharr's counsel:

> "Q: How was it you went from seeing Dr. Howard in Mobile to Dr. Savage in Birmingham?
>
> "A: He was referred to me.
>
> "Q: Okay. Who referred him?
>
> "A: Mike Blalock did.
>
> "Q: Okay. Your attorney?
>
> "A: Yes."

Goins's counsel did not object to this line of questioning or otherwise attempt to shield Goins's testimony. Moreover, on direct examination at trial by his own counsel, the following exchange occurred:

> "Q: What did you do next in order to get some treatment?
>
> "A: I called my union representative.
>
> "Q: Who is that?
>
> "A: That was Cliff Deer.

"Q: Based on the conversation with him, what did you do next?

"A: He said --

"Q: Not what he said.

"A: I'm sorry. I was directed to my legal counsel.

"Q: That would be who?

"A: You.

"Q: And through that did you at some point in time contact someone about doing some further medical treatment?

"A: Yes, I talked to Dr. Savage."

Thus, both at his deposition and at trial, Goins disclosed that he had visited Dr. Savage as a direct result of his conversations with his counsel. Accordingly, we need not determine whether the underlying conversation was privileged because it was voluntarily disclosed by Goins.

E. The trial court did not improperly instruct the jury

Goins argues that the trial court erred by instructing the jury on contributory negligence and spoliation of evidence based on the inference created by the alleged spoliation of his cell-phone data. Specifically, Goins asserts that those instructions were unsupported by the evidence. It is

well settled that "an incorrect or misleading charge may be the basis for the granting of a new trial." Nunn v. Whitworth, 545 So. 2d 766, 767 (Ala. 1989). Reversal of a judgment on the basis of the trial court's giving such an instruction, however, is warranted only when the error is prejudicial. See Underwriters Nat'l Assurance Co. v. Posey, 333 So. 2d 815, 818 (Ala. 1976).

As discussed, spoliation occurs when one party suppresses or destroys material evidence that is favorable to the other party. Wal-Mart Stores, 789 So. 2d at 176. Spoliation can be proven "by showing that a party purposefully or wrongfully destroyed a [piece of evidence] that the party knew supported the interest of the party's opponent." Id. Put another way, spoliation involves an "active attempt to suppress or destroy evidence." Joseph L. Lester, Alabama Evidence § 4:18 (Thomson Reuters 2020). Once proven, spoliation "will support an inference of guilt or negligence." Wal-Mart Stores, 789 So. 2d at 176.

This Court in Campbell v. Kennedy, 275 So. 3d 507 (Ala. 2018), addressed the amount of evidence necessary to support a spoliation instruction. In that case, the car driven by the plaintiff collided with a

motor grader driven by the defendant employee. Id. at 509. The plaintiff sued the defendant employee and the construction company that employed him. Id. As a result of the collision, the front axle of the motor grader was damaged, and the defendant construction company sent the motor grader to a tractor repair shop for repairs. Id. at 510. The defendants were made aware by plaintiff's counsel that the damaged front axle was an important part of the plaintiff's investigation, and the parties agreed that no repairs would be made to the front axle until the plaintiff had an opportunity to inspect it. Id. But when plaintiff's counsel arrived to inspect the damage, the front axle had already been repaired. Id. As a result, the trial court instructed the jury, over the defendants' objection, on proof of spoliation permitting an inference of guilt or negligence. Id.

On appeal, the defendants argued that the trial court had committed reversible error by instructing the jury on spoliation because, they asserted, there was no evidence that the defendants had "intentionally tampered with or actively concealed the damaged front axle of the motor grader or that [they] should have either anticipated litigation or known that the front axle was essential to [the plaintiff's] claims." Id. at 513.

This Court disagreed, noting that the defendant construction company had been informed of the threat of litigation and of the importance of the front axle to the litigation in the communications between the parties' counsel. Id. at 514. The Court went on to note that the defendants had made no effort to halt the repairs and had offered an inspection date that would be after repairs had been made to the front axle. Id. at 514-15. Based on that evidence, the Court concluded that sufficient evidence supported the jury charge on spoliation. Id. at 515 (contrasting Campbell with Russell v. East Ala. Health Care Auth., 192 So. 3d 1170, 1177 (Ala. Civ. App. 2015), in which the Court of Civil Appeals determined that there was insufficient evidence to support a spoliation charge because the "defendant lacked knowledge that there was a threat of litigation when it recorded over video surveillance of the plaintiff's fall on its premises").

Here, as in Campbell, Goins was aware of the presence of litigation and of the importance of his cell-phone data to the defendants' case. He was made aware through Advanced's discovery request to inspect his phone and through the parties' dispute over the production of the phone. Moreover, Goins initiated a factory reset of his phone five days after his

attorney requested a hearing on Advanced's motion to compel, thus wiping his phone of its data. Based on that evidence, the trial court had a sufficient basis to instruct the jury on spoliation of evidence. See Campbell, 275 So. 3d at 515. And even if the trial court had erred in instructing the jury on spoliation, any error would have been harmless because the jury found for Goins. See White v. Searcy, 634 So. 2d 577, 579 (Ala. Civ. App. 1994) ("Similarly, even if the trial court erred in instructing the jury on contributory negligence, the error was harmless. Alabama law bars recovery if a party is found to have been contributorily negligent. In this case, however, the jury found for [the plaintiff] and awarded her damages; it apparently found that she had not been contributorily negligent." (internal citation omitted)).

F. The multiple-errors ground for reversal is inapplicable

Goins finally argues that, based on "numerous prejudicial errors by the trial court," he is entitled to a new trial. In support of this argument, he cites this Court's decisions in Ex parte Bryant, 951 So. 2d 724 (Ala. 2003), and Ex parte Woods, 789 So. 2d 941 (Ala. 2001). Because we find no error in the grounds presented by Goins on appeal, this argument is

inapplicable. See Woods, 789 So. 2d at 943 n.1 ("[W]hen no one instance amounts to error at all ..., the cumulative effect cannot warrant reversal. In other words, multiple nonerrors obviously do not require reversal.").

Conclusion

Goins has asserted six grounds for reversing the trial court's judgment. Each of his arguments fails. We therefore affirm the judgment.

AFFIRMED.

Parker, C.J., concurs.

Shaw, Bryan, and Mendheim, JJ., concur in the result.