REL: 12/16/2016

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

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Valerie A. Taylor n/k/a Valerie Backus

v.

Lindsey V. Wheeler n/k/a Lindsey Woodard

Appeal from St. Clair Circuit Court
(CV-09-900227)

THOMAS, Judge.

On the night of December 6, 2007, an automobile driven by Valerie A. Taylor, now known as Valerie Backus, collided with an automobile driven by Lindsey V. Wheeler, now known as Lindsey Woodard. Lindsey and Valerie were injured. On

December 2, 2009, Lindsey filed in the St. Clair Circuit Court a complaint against Valerie and against Lindsey's uninsured-motorist carrier in which Lindsey requested an award of damages resulting from, she alleged, Valerie's negligent, wanton, reckless, and willful conduct. Lindsey requested a jury trial. Valerie filed an answer in which she asserted that the accident had resulted from her inability to respond to a sudden emergency.

A jury trial was held.[1] On February 9, 2016, the jury returned a verdict in favor of Valerie, and, that same day, the circuit court entered a judgment on the verdict. On February 15, 2016, Lindsey filed a postjudgment motion, seeking a new trial. After a postjudgment hearing, the circuit court entered an order ("the postjudgment order") determining, among other things, that Lindsey had waived the right to complain about any alleged confusion caused by a jury instruction regarding the sudden-emergency doctrine. The postjudgment order reads, in pertinent part:

[1]On September 5, 2014, the circuit court granted Lindsey's uninsured-motorist carrier's motion to opt out of the litigation.

"[Lindsey]'s last ground is that the jury's verdict was against, and inconsistent with, the great weight of the evidence presented at trial. [Valerie] counters that 'there was more than enough "evidence which if believed justified the verdict" in this case.' A review of the transcript of [Valerie]'s trial testimony ... shows the following:

"(i) the accident made the basis of this lawsuit was a rear-end collision ...;

"(ii) [Valerie]'s vehicle struck [Lindsey]'s vehicle from the rear ...[;]

"(iii) [Valerie] saw [Lindsey]'s brake lights but was unable to stop in time or avoid the accident ...;

"(iv) [Lindsey]'s memory of the accident was not entirely clear ...;

"(v) [Lindsey] did not stop in emergency fashion ...; and

"(vi) [Valerie] testified as follows:

"'Q. But you can see, and you would agree that [the accident] is your fault?

"[']A. I hit her, yes sir.

"[']Q. Okay. Did [Lindsey] do anything wrong?

"[']A. No sir.'

"In reviewing the Transcript, the only evidence to support a finding of a sudden emergency was the following testimony elicited from [Valerie] by her counsel on redirect examination:

"'Q. When [Lindsey's attorney] was taking your deposition he asked you do you remember seeing [Lindsey] in front of you and you said I do, she stopped suddenly, and I hit her. Is that what happened?

"[']A. Yes sir.

"[']Q. Okay. She stopped suddenly, and you couldn't?

"[']A. Yes sir.'

"....

"This Court is aware that jury verdicts are presumed to be correct and that a motion for new trial on the ground that a verdict is against the weight of the evidence should be carefully scrutinized.... However, the rule that jury verdicts are presumed to be correct does not override the rule that allows a trial court to grant a new trial if justice requires in cases where the verdict is wholly wrong. Clinton v. Hanson, 435 So. 2d 48 (Ala. 1983). See also Glanton v. Huff[,] 404 So. 2d 11 (Ala. 1981), and Gribble v. Cox, 349 So. 2d 1141 (Ala. 1977). Clinton, Glanton and Gribble all involved rear-end collisions.

"....

"Based upon the filings, the arguments of counsel, a review of the transcript of the trial testimony of [Valerie], and the application of the foregoing, this Court is of the opinion that the verdict rendered herein was against the weight and preponderance of the evidence and, therefore,

> [Lindsey]'s Motion for [a new trial] is due to be granted. Accordingly, it is hereby ORDERED as follows:
>
> > "1. [Lindsey]'s Motion for New Trial is hereby GRANTED."

Valerie filed a timely notice of appeal to this court on June 10, 2016. We transferred the appeal to our supreme court for lack of subject-matter jurisdiction; the appeal was transferred back to this court pursuant to § 12-2-7(6), Ala. Code 1975. Valerie seeks our review of whether the circuit court erred by granting Lindsey's motion for a new trial.

A trial court may grant a new trial when it "believes that justice demands that a new trial be granted on the weight and preponderance ground." Jawad v. Granade, 497 So. 2d 471, 477 (Ala. 1986).

> "In the landmark case Jawad v. Granade, 497 So. 2d 471 (Ala. 1986), this Court established the standard of review it would apply in cases where a party appeals from an order granting a motion for a new trial on the basis that the jury's verdict was 'against the great weight or preponderance of the evidence':
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> > "'[A]n order granting a motion for new trial on the sole ground that the verdict is against the great weight or preponderance of the evidence will be reversed for abuse of discretion where on review it is easily perceivable from the

> record that the jury verdict is supported by the evidence.'
>
> "Id. at 477."

Scott v. Farnell, 775 So. 2d 789, 791 (Ala. 2000).

Before the jury entered the courtroom, Lindsey's attorney informed the circuit court that he neither intended to present any arguments nor expected to offer any jury instructions on the claims of wantonness or willfulness. The majority of the testimony at the trial focused on damages for Lindsey's injuries. Regarding the claim for damages based on negligence, Lindsey, who admitted more than once that she had an incomplete memory of the accident,[2] testified that, on the night of the accident, she had been completely stopped in "a pretty heavy amount of traffic," waiting for the vehicle in front of her to turn left into a shopping-center entrance when the accident occurred. Valerie testified that she had seen Lindsey's brake lights but that she had been unable to stop in time to avoid the accident. Valerie said: "I tried to stop, but it wasn't successful[,] and I hit her." In her deposition

[2]One of Lindsey's injuries appears to have been a blow to her head that had caused a concussion and, possibly, a short-term loss of consciousness upon impact.

testimony, which she read aloud to the jury, Valerie testified that Lindsey had not stopped in an "emergency fashion," that she had not heard Lindsey's tires squeal, and that Lindsey had done nothing wrong. However, as noted in the postjudgment order, Valerie replied "Yes, sir" to her attorney's question: "[Lindsey] stopped suddenly, and you couldn't?"

The circuit-court judge instructed the jury regarding the burden of proof, provided a definition for and listed the elements of the tort of negligence, and said that, if the accident had been caused by a sudden emergency, then the "verdict must be in favor of [Valerie]."

In this appeal -- admittedly it is a close call -- we conclude that the circuit court plainly and palpably erred in granting Lindsey's motion for a new trial. In reaching our conclusion, we have considered the fact that the jury verdict is supported by some evidence of a sudden emergency; however, we are unconvinced that the jury's verdict rested exclusively on that determination. It is equally plausible that the jury determined, based on the instructions given, that Valerie had not been negligent.

A review of the jury charge reveals that the circuit-court judge said:

> "In order for you to decide whether or not [Valerie] is responsible, you must decide three issues: Number 1, whether [Valerie] was negligent; Number 2, whether [Lindsey] was harmed; and Number 3, whether or not [Valerie] is responsible for the harm that [Lindsey] suffered.
>
> "....
>
> "If ... you do not find all three of these issues, then you must find for [Valerie].
>
> "....
>
> If you are reasonably satisfied from the evidence that the accident that is made the basis of this lawsuit was proximately caused by a sudden emergency, which was not the fault of [Valerie], then your verdict must be in favor of [Valerie].
>
> "....
>
> "Let's talk about negligence. Negligence is the failure to use reasonable care to prevent harm to oneself or to others. So negligence is the failure to use reasonable care. A person's conduct is negligent when he or she does something that a reasonably prudent person would not do in a similar situation, or if he or she fails to do something that a reasonably prudent person would have done in that particular situation. The reasonably prudent person that we are talking about is the reasonably prudent person that will be the twelve of you sitting as a jury.
>
> "Now, you must decide if [Valerie] was negligent in this case. There is no presumption of negligence

arising out of the fact that an accident occurred."

The circuit-court judge also substantially quoted Alabama Pattern Jury Instruction -- Civil ("the APJI") § 26.04 (3d ed. 2015), saying:

> "A driver must keep a lookout for others, and he or she must use reasonable care to anticipate the presence of others. A driver is negligent if he or she fails to see what was there to be seen, or otherwise fails to discover a vehicle or other person that he or she should have discovered in time to avoid hitting it."

The record indicates that, during its deliberations, the jury requested a clarification of the definition of "negligence." The circuit-court judge offered the language provided by the APJI § 28.01:

> "Negligence is the failure to use reasonable care to prevent harm to oneself or others.
>
> "A person's conduct is negligent when (he/she) either does something that a reasonably prudent person would not do in a similar situation, or (he/she) she fails to do something that a reasonably prudent person would have done in a similar situation."

It appears likely that, based on that language and the scant testimony provided, the jury of lay persons could have determined that Valerie had not been negligent.

Furthermore, there were conflicting statements regarding the circumstances of the accident: (1) Lindsey's statement that she was completely stopped, (2) Valerie's statement that Lindsey had not stopped in an "emergency fashion," and (3) Valerie's statement that Lindsey had stopped suddenly. The resolution of conflicts in the evidence rests solely with the trier of fact, in this case, the jury. See Sharrief v. Gerlach, 798 So. 2d 646, 651 (Ala. 2001) (citing Jones v. Baltazar, 658 So. 2d 420, 422 (Ala. 1995), citing in turn James v. Woolley, 523 So. 2d 110, 112 (Ala. 1988)). We conclude that the jury properly exercised its duty to resolve conflicts, find the facts, and express its findings in its verdict.

Thus, the verdict was not against the great weight or preponderance of the evidence; therefore, we conclude that the circuit court abused its discretion by granting Lindsey's motion for a new trial. The May 6, 2016, order of the circuit court granting a new trial is reversed, and the cause is remanded for the circuit court to vacate the May 6, 2016, order and to reinstate the February 9, 2016, judgment entered on the verdict.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Pittman, J., concurs.

Donaldson, J., concurs specially.

Thompson, P.J., dissents, with writing, which Moore, J., joins.

DONALDSON, Judge, concurring specially.

I concur. The Alabama Supreme Court has held that "[d]enying, and to a more limited extent granting, a motion for new trial is within the sound discretion of the trial court." Carter v. Henderson, 598 So. 2d 1350, 1354 (Ala. 1992). When a motion for a new trial is based on the trial judge's perception of the weight of the evidence and not on procedural or substantive errors or irregularities, the trial court's discretion is more limited, and, if such a motion is granted, our greatest deference should be in favor of the jury's verdict.

In Shows v. Jamison Bedding, Inc., 671 F.2d 927, 930 (5th Cir. 1982), the United States Court of Appeals for the Fifth Circuit explained the scope of the trial court's discretion in deciding whether to set aside a jury's verdict and grant a new trial:

> "Th[e] deferential standard of review has largely arisen from the consideration of cases in which motions for new trials have been denied. ... When the trial judge has refused to disturb a jury verdict, all the factors that govern our review of [the trial judge's] decision favor affirmance. Deference to the trial judge, who has had an opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record, operates in harmony with deference to the jury's determination of the weight

> of the evidence and the constitutional allocation to the jury of questions of fact. ... When the trial judge sets aside a jury verdict and orders a new trial, however, our deference to [the trial judge] is in opposition to the deference due the jury. Consequently, in this circuit as in several others, we apply a broader review to orders granting new trials than to orders denying them. ... And where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise particularly close scrutiny, to protect the litigants' right to a jury trial."

In Redd v. City of Phenix City, 934 F.2d 1211, 1215 (11th Cir. 1991), the United States Court of Appeals for the Eleventh Circuit noted:

> "When a [trial] court grants a new trial because the verdict is against the weight of the evidence, [the appellate] court's review will be extremely stringent to protect a party's right to a jury trial. ... This is particularly true when the new trial is premised upon sufficiency of the evidence as opposed to some factor which may have infected the evidence itself. ... When there is some support for a jury's verdict, it is irrelevant what we or the [trial] judge would have concluded."

In Lind v. Schenley Industries, Inc., 278 F.2d 79, 90 (3d Cir. 1960), the United States Court of Appeals for the Third Circuit observed:

> "[W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the

> witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial."

In Tyler v. Davis, 196 So. 3d 258 (Ala. Civ. App. 2015), a motor-vehicle-accident case, the jury returned a verdict for the plaintiff but awarded only $100 in damages. The trial judge granted the plaintiff's motion for a new trial because the trial judge determined that the damages "'were so inadequate as to indicate that the verdict [was] the result of passion, prejudice, or other improper motives such as the injection of [inadmissible evidence] and inapplicable defenses ....'" Id. at 259. The trial judge specifically listed the reasons why the verdict was tainted. This court reversed and ordered the jury verdict to be reinstated. I dissented and stated: "The trial judge personally observed and heard the statements of counsel and the testimony of the witnesses, and the trial judge personally observed the reactions of the jurors. Because of the trial judge's decidedly superior

vantage point to make a finding as to whether those events improperly tainted the jury verdict, I would affirm." Id. at 265 (Donaldson, J., dissenting). The trial judge's determination that the jury verdict was tainted because of "undesirable or pernicious element[s]" both perceived and articulated by the trial judge was due our greatest deference. See Redd, 934 F.2d at 1215 n.3 ("If a trial judge grants a new trial because of prejudice ..., then this court's review will not be as rigorous. This pays tribute to our jury system. Our system of justice seeks a jury verdict arising from a trial free of impropriety.").

In contrast, the jury verdict in this case was not found to be tainted but was set aside based on a judicial perception of the weight of the evidence to support it. Our standard of review is that "an order granting a motion for new trial on the sole ground that the verdict is against the great weight or preponderance of the evidence will be reversed for abuse of discretion where on review it is easily perceivable from the record that the jury verdict is supported by the evidence." Jawad v. Granade, 497 So. 2d 471, 477 (Ala. 1986). The trial court charged the jury that "[t]here is no presumption of negligence arising out of the fact that an accident occurred."

The jury was told that it was entitled to weigh the evidence and to assess the credibility of the witnesses. As noted by the main opinion, the trial court instructed the jury that the plaintiff had to prove that the defendant was negligent before it could return a verdict for the plaintiff. The jury apparently was not, as charged by the trial judge, "reasonably satisfied from the evidence" that the defendant did "something that a reasonably prudent person would not do in a similar situation, or ... fail[ed] to do something that a reasonably prudent person would have done in a similar situation." That decision was for the jury to make. See Jones v. Baltazar, 658 So. 2d 420 (Ala. 1995) (holding that whether motorist whose vehicle struck another vehicle from the rear was negligent was a question for the jury). Accordingly, applying the standard of review established in Jawad v. Granade, 497 So. 2d at 477, it is "easily perceivable" that the verdict was supported by the evidence cited in the main opinion, even though the verdict is certainly subject to earnest disagreement.

THOMPSON, Presiding Judge, dissenting.

I would affirm the trial court's order granting Lindsey Wheeler's motion for a new trial on the ground that the verdict was against the great weight or preponderance of the evidence.

"'The decision whether to grant or to deny a motion for a new trial rests within the sound discretion of the trial court.' CSX Transp., Inc. v. Miller, 46 So. 3d 434, 446 (Ala. 2010) (citing Jordan v. Calloway, 7 So. 3d 310, 313 (Ala. 2008))." CNH America, LLC v. Ligon Capital, LLC, 160 So. 3d 1195, 1209 (Ala. 2013). Regarding the propriety of the granting of a new trial based on the sufficiency of the evidence, our supreme court has explained:

> "In Jawad v. Granade, 497 So. 2d 471 (Ala. 1986), this Court established the standard of review it would apply when a party appeals from an order granting a motion for a new trial on the basis that the jury's verdict was 'against the great weight or preponderance of the evidence':
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> > "'[A]n order granting a motion for a new trial on the sole ground that the verdict is against the great weight or preponderance of the evidence will be reversed for abuse of discretion where on review it is easily perceivable from the record that the jury verdict is supported by the evidence.'
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> "497 So. 2d at 477."

Beauchamp v. Coastal Boat Storage, LLC, 4 So. 3d 443, 449 (Ala. 2008).

In granting Wheeler's motion for a new trial, the trial court found that "the verdict [in favor of the defendant, Valerie Taylor,] was against the great weight and preponderance of the evidence." In reviewing the record in this case, I conclude that it is not "'easily perceivable from the record that the jury verdict is supported by the evidence.'" Id. (quoting Jawad v. Granade, 497 So. 2d 471, 477 (Ala. 1986)). Accordingly, I believe that the trial court did not abuse its discretion in granting a new trial.

I would affirm the judgment of the trial court; therefore, I respectfully dissent.

Moore, J., concurs.