

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 19, 2007

ROSEMARY CARTER v. JOHN RALPH BELL, ET AL.

**Appeal from the Circuit Court for Anderson County
No. A4LA0363 Donald R. Elledge, Judge**

No. E2006-02671-COA-R3-CV - FILED AUGUST 15, 2007

This personal injury case arose after a licensed pharmacist initiated a romantic relationship with the plaintiff, one of his customers. The pharmacist assured the plaintiff that he was not married, but this was not true. On one occasion, when the plaintiff was at his house, the pharmacist's wife came home unexpectedly, discovered the plaintiff reclining on the guest bed, and assaulted her by repeatedly beating her head against the floor. The plaintiff sued the pharmacist and his wife for damages. A jury awarded the plaintiff compensatory damages for injuries and medical expenses she sustained as a result of the assault. On appeal, the pharmacist contends that he owed the plaintiff no duty of care, that he breached no duty, and that the plaintiff failed to establish that her expenses and condition were caused by the actions of his wife. We affirm the judgment of the trial court based upon the jury's verdict because we determine that the pharmacist owed the plaintiff a duty of ordinary care as the owner or occupier of premises, that there was material evidence that the pharmacist breached this duty, and that there was material evidence that the negligence of the pharmacist and the actions of his wife caused the expenses and injuries for which the plaintiff was awarded compensation.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Wendell K. Hall, Sevierville, Tennessee, for the appellant, John Ralph Bell.

A. Philip Lomonaco, Knoxville, Tennessee, for the appellee, Rosemary Carter.

OPINION

I. Background

In September of 2003, the appellee, Rosemary Carter, went to a Rite Aid pharmacy located in New Tazewell to fill a prescription for medications she was taking for various problems, including anxiety and pain which she was experiencing as a result of injuries she suffered in a recent automobile accident. The appellant, John Ralph Bell, was employed by Rite Aid Corporation (hereinafter “Rite Aid”) as a licensed pharmacist at that location. Ms. Carter testified that on the occasion of her visit, Mr. Bell engaged her in friendly conversation and offered her cigarettes. Later, when Ms. Carter called the store to inquire if her prescription was ready, Mr. Bell spoke with her and asked her if she would go out with him. Ms. Carter agreed to do so after Mr. Bell assured her that he was unmarried and that his former girlfriend had moved back to West Virginia three to four months previously. In fact, Mr. Bell was married to Loretta Fay Bell and resided with her until some time in the succeeding month.

After this initial meeting, Ms. Carter and Mr. Bell embarked on a social relationship, dining together, drinking in bars, going to movies, and occasionally spending the night together, although both assert that they did not have sexual relations. Ms. Carter testified that “we were getting to know each other and I was just seeing where it was going.”

The relationship continued over the next two and a half months, during which time, Mr. Bell discussed the woman he had identified to Ms. Carter as his former girlfriend and advised her that this woman had a “really bad temper.” On the evening of October 31, 2003, Ms. Carter and Mr. Bell were at Mr. Bell’s residence when the phone rang. Mr. Bell instructed Ms. Carter to answer the phone and when she did so, the female caller wanted to know who she was and demanded to speak with Mr. Bell. When Mr. Bell’s conversation with the caller ended, he advised Ms. Carter that the caller was his ex-girlfriend and that “she was mad that he had a ... female friend over.” Actually, the caller was Mrs. Bell. During the call, Mr. Bell also spoke with Mrs. Bell’s adult daughter who advised him that his wife was “thinking about coming down there.” Mr. Bell attested that, based upon this information, he determined that he and Ms. Carter should leave the house and stay in a motel that night. He testified that if Ms. Carter and Ms. Bell were at the house together, “[w]ho knows what could happen,” and the best thing to do was to leave the house. Accordingly, that night Ms. Carter and Mr. Bell spent the night in a motel in Oneida.

It appears that Mr. Bell saw Ms. Carter again a couple of days later on November 3, and the two spent that night at Mr. Bell’s residence at his request. Mr. Bell testified that the next morning he received a phone call from Mrs. Bell, who advised him that she was coming home and stated, “I don’t want any surprises or anything like that when I get there.” Mr. Bell attested that Mrs. Bell had told him that she would arrive on the following Friday; however, approximately two to three hours later, Mrs. Bell entered the residence with her daughter. Ms. Carter testified that Mrs. Bell came into the guest bedroom where she was sleeping at the time, grabbed her by the hair, and jerked her onto the floor. Ms. Carter further attested as follows:

And she jerked me down onto the floor and she started beating me from there. And she beat me and just kept beating me.

...

She beat me, I mean, beat me from room to room, clear through the house on tile, ceramic tile, wood. The whole time [Mr. Bell] and her daughter, they were just - - they were following her around - - or I should say us around. And I mean, I was begging for somebody to help me. And I mean, I was just - - I was begging.

...

And she had my head and she kept beating it on the ground. And she beat me all the way, like I said, through the house, down the garage steps into the garage itself, which was cement. And she just - - she wouldn't stop. And with me begging, crying, screaming, pleading for somebody to help me.

Eventually, Ms. Carter was able to escape, ran to a neighbor's house for help, and subsequently, was transported to the University of Tennessee Medical Center ("UTMC") where she was intubated and, a few days later, underwent brain surgery. She remained at UTMC for a few days and was then transferred to the Patricia Neal Rehabilitation Center¹ for approximately one month.

In May of 2004, Ms. Carter filed a complaint against Mr. and Mrs. Bell and Rite Aid Corporation for damages allegedly arising out of the above described incident. Specifically, inter alia, the complaint charged Mr. Bell with breach of duty to a social guest, negligent infliction of emotional distress, and professional malpractice; Mrs. Bell with assault and battery, false imprisonment, and intentional infliction of emotional distress; and Rite Aid with vicarious liability and negligent supervision. Ms. Carter later nonsuited her case against Rite Aid. A jury trial commenced on October 26, 2006, as to the charges against Mr. and Mrs. Bell and resulted in a verdict against them and an award of compensatory damages to Ms. Carter in the amount of \$150,000. As to this award, Mr. Bell was found liable for thirty per cent (\$45,000); Mrs. Bell was found liable for forty per cent (\$60,000); and Ms. Carter herself was found liable for thirty per cent (\$45,000). The trial court denied a subsequent motion for a judgment notwithstanding the verdict or for new trial, and this appeal by Mr. Bell² followed.

II. Issues

Three issues are presented for our review:

¹ The Patricia Neal Rehabilitation Center is a rehabilitation hospital that specifically treats individuals with neurological injuries.

² Mrs. Bell did not appeal.

1) Whether Mr. Bell owed a duty of care to Ms. Carter under the circumstances of this case.

2) Whether there was material evidence that Mr. Bell breached a duty of care owed to Ms. Carter.

3) Whether there was material evidence that the damages alleged by Ms. Carter were caused by Mrs. Bell's assault.

III. Standard of Review

In addressing the issues presented in this case, we are called upon to review both conclusions of fact that were reached by the jury and conclusions of law reached by the trial court. With regard to the former, under Tenn. R. App. P. 13(d), it is provided that “[f]indings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict.” The Tennessee Supreme Court reiterated this rule in *Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896, 898 (Tenn. 1992), stating, “It is well established that when reviewing a judgment based on a jury verdict, appellate courts are limited to determining whether there is material evidence to support the verdict.” In an earlier case, the Tennessee Supreme Court had stated as follows:

It is the time honored rule in this State that in reviewing a judgment based upon a jury verdict the appellate courts are not at liberty to weigh the evidence or to decide where the preponderance lies, but are limited to determining whether there is material evidence to support the verdict; and in determining whether there is material evidence to support the verdict, the appellate court is required to take the strongest legitimate view of all the evidence in favor of the verdict, to assume the truth of all that tends to support it, allowing all reasonable inferences to sustain the verdict, and to discard all to the contrary. Having thus examined the record, if there be any material evidence to support the verdict, it must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury.

Crabtree Masonry Co. v. C. & R. Constr., Inc., 575 S.W.2d 4, 5 (Tenn. 1978). Unlike determinations of fact, a trial court's conclusions of law are reviewed de novo and are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

IV. Duty of Care

The first issue we address is whether Mr. Bell owed Ms. Carter a duty of care.

The existence of a duty is an essential element in a cause of action for negligence, and the question of whether there is a duty in a given case is a question of law to be determined by the court. *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). The Tennessee Supreme Court has further recognized that a “balancing approach” should be utilized in determining the existence of a duty, stating as follows:

Duty is the legal obligation a defendant owes to a plaintiff to conform to a reasonable person standard of care in order to protect against unreasonable risks of harm. *See McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d at 894; *McCall v. Wilder*, 913 S.W.2d [150, 153 (Tenn. 1995)]. In assessing whether a duty is owed in a particular case, courts must apply a balancing approach, based upon principles of fairness, to identify whether the risk to the plaintiff was unreasonable. *See Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn. 1997). This Court has stated that “a risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant’s conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.” *McCall v. Wilder*, 913 S.W.2d at 153; *Rice v. Sabir*, 979 S.W.2d [305, 308 (Tenn. 1998)].

Staples v. CBL & Associates, Inc., 15 S.W.3d 83, 89 (Tenn. 2000).

Mr. Bell contends that he owed Ms. Carter no duty to protect her from the assault she suffered at the hands of his wife. In support of this argument, Mr. Bell cites various Tennessee cases for the proposition that the duty to protect against unreasonable harm generally does not extend to the protection of others from a third person’s dangerous conduct absent some special relationship which, Mr. Bell contends, was not present in this case. Mr. Bell’s argument is inapposite. There is no indication that the trial court determined that Mr. Bell had a duty to protect Ms. Carter. To the contrary, the trial court specifically rejected imposing upon Mr. Bell such a duty to protect Ms. Carter from Mrs. Bell’s assault or to render Ms. Carter aid from such assault. In this regard, we note the following statements of the trial court included in its instructions to the jury:

NO DUTY TO RENDER AID

Generally, a person does not have a duty to render aid to another or protect another from the dangerous, criminal or intentional act of a third person. In the case at issue, defendant John Ralph Bell does not owe a legal duty to render aid or protect plaintiff Rosemary Carter from any dangerous, criminal or intentional act of defendant

Loretta Fay Bell. If you find Loretta Fay Bell committed some dangerous criminal or intentional act upon the person of plaintiff Rosemary Carter, you may not find defendant John Ralph Bell at fault in causing any damages to plaintiff solely for failing to render aid or protect plaintiff from defendant Loretta Fay Bell.

Rather than a duty to protect Ms. Carter or render her aid, the trial court determined that Mr. Bell owed Ms. Carter a duty of ordinary care as the owner, lessor or occupant of his house, as confirmed by the following jury instruction:

DUTY OF OWNERS, OCCUPANTS OR LESSORS OF PREMISES

One who owns, occupies or leases property is under a duty to use ordinary care, which is the care that ordinarily careful persons would use to avoid injury to themselves or others under the same or similar circumstances. There is no duty to guarantee the safety of those entering upon the property.

You should consider all the surrounding circumstances in deciding if the defendant used such care.

Mr. Bell presents no argument that the trial court erred in concluding that, as the “owner, occupier or lessor” of his premises he owed Ms. Carter a duty to use ordinary care, and we find no error in that conclusion, which is in accord with the law of this state. In *Ruth v. Ruth*, 372 S.W.2d 285, 287 (Tenn. 1963), the Tennessee Supreme Court noted that “[t]he law places the duty upon the person in control of premises to exercise reasonable and ordinary care under the circumstances not to cause injury to an invitee.” As further stated by the Court in *Hudson v. Gaitan*, 675 S.W.2d 699, 703-04 (Tenn. 1984):

[T]he duty owed is one of reasonable care under all of the attendant circumstances, foreseeability of the presence of the visitor and the likelihood of harm to him being one of the principal factors in assessing liability. Care that is reasonable in one context may be wholly unreasonable or more than reasonable in a different context. This duty of reasonable care shall extend to all persons who come upon the defendant’s property with his consent, express or implied.

(Citations omitted).

We conclude that the trial court did not err in its determination that Mr. Bell owed Ms. Carter the duty of reasonable care owed to an invitee by the owner or occupier of premises. Mr. Bell’s argument to the contrary is of no merit.

V. Breach of Duty

Our review of the record further confirms that there was material evidence in this case to support the finding that Mr. Bell negligently breached the reasonable duty of care he owed Ms. Carter under the circumstances presented in this case.

The record includes evidence that at the time Mr. Bell initiated his relationship with Ms. Carter he was aware that, as a result of injuries sustained in a recent automobile accident, she was in physical pain and was suffering from memory problems, anxiety and depression, and was receiving medication to alleviate these problems. Ms. Carter testified that at some point in their relationship Mr. Bell gave her Percocets,³ although she did not have a prescription for this medication. Ms. Carter further attested that Mr. Bell told her that “he knew I was in pain and he was trying to help me.” Ms. Carter further testified, “I trusted him. He was a - - I mean, he was a pharmacist, and so I knew, you know, that he knew what he was doing and I felt safe enough with him that he wouldn’t give me anything that would hurt me or put me, like, under or anything, trying to take advantage of me.”

The record further shows that Mr. Bell deceived Ms. Carter into entering into a relationship with him by telling her that did not have either a wife or girlfriend when in fact he was married to Mrs. Bell and she was at that time still living in their home. Ms. Carter attested that had she known that Mr. Bell was married, she would not have entered the relationship. Mr. Bell continued to deceive Ms. Carter as to the fact of his marriage for the duration of his relationship with her, and Ms. Carter remained unaware that he was married when she was attacked by Mrs. Bell.

We further note that Mr. Bell admitted that he was aware that Mrs. Bell had “a really bad temper” and that he knew she had once been arrested for assaulting a police officer. The following testimony of Mr. Bell with regard to Mrs. Bell’s phone call to his house on October 31, 2003, shows that Mr. Bell was clearly aware that his wife’s behavior was unpredictable:

Q. Did you discuss [with Ms. Carter] the significance of Ms. Bell’s telephone call being answered by Ms. Carter?

A. Yes.

Q. What did you talk about?

A. You know, what did she say. She was like, you know - - she was just talking rude and no one is going to talk to me like that. *I said, oh, man, I wish that wouldn’t have happened, she might get upset. She just - - I don’t know what will happen. She might come back home. She might not.*

(Emphasis added). Mr. Bell further testified that if his wife and Ms. Carter were at the house together “it wouldn’t be a good thing. ... Who knows what could happen[?]”

³ Percocet contains oxycodone and therefore constitutes a scheduled II controlled substance. PHYSICIANS DESK REFERENCE 1037 (54th ed. 2000) and Tenn. Code Ann. §39-17-408. Knowing delivery of a controlled substance is a criminal offense. Tenn. Code Ann. §39-17-417.

In *Eaton v. McClain*, 891 S.W.2d 587, 594-5 (Tenn. 1994), the Tennessee Supreme Court noted that the premises owner's general "duty to maintain the premises in reasonably safe and suitable condition ... included the responsibility of either removing or warning against any latent dangerous condition on the premises of which [the owner was] aware or should have been aware through the exercise of reasonable diligence." In the instant matter, Mr. Bell failed to warn Ms. Carter of a hidden dangerous condition by failing to inform her that she was entering a house that he had, until recently, shared with a woman to whom he was still married, who had a "bad temper," and was unpredictable.

In sum, we find that the record contains material evidence from which the jury could have reasonably concluded that Mr. Bell breached the duty of care he owed to Ms. Carter in that while she was in a physically and mentally vulnerable condition he deceived her into entering into a relationship that she would have otherwise rejected and thereby eventually lured her into his house and exposed her to a likelihood of harm at the hands of his wife, whom he knew to have a propensity for violence.

VI. Causation

The final issue we address is whether there is material evidence to support the jury's award of compensatory damages in the amount of \$150,000.

Mr. Bell contends that Ms. Carter failed to establish that the medical condition for which she received treatment and for which she seeks compensation was actually caused by Mrs. Bell's assault. In this regard, Mr. Bell notes that Dr. William Snyder, a neurosurgeon at UPMC who performed surgery upon Ms. Carter after the assault, was called as a witness to establish causation. Mr. Bell asserts that Dr. Snyder's testimony regarding causation was contradictory and that, as we have previously noted, "contradictory statements by the same witness regarding a single fact cancel each other out." See *Church v. Perales*, 39 S.W.3d 149, 169 (Tenn. Ct. App. 2000).

The record shows that in September of 2002, Ms. Carter suffered head injuries in an automobile accident and that in April of 2003, she was again involved in an automobile accident and sustained additional injuries that included two broken arms, a broken pelvis, broken ribs, and a punctured lung. Dr. Snyder testified that a CT scan of Ms. Carter's head shortly after she was attacked by Mrs. Bell revealed a left subdural hemorrhage which he described as "a bleed between the brain and the covering on the brain." Dr. Snyder attested that the blood revealed by the scan indicated areas of both chronic bleeding, which is associated with an old injury, and acute bleeding, which is "more of an active bleeding." He further attested that he thought it "likely" that some of the acute bleeding was the result of Mrs. Bell's assault, although he also testified that he "really couldn't say" if that was the case. Dr. Snyder testified that he treated the subdural hemorrhage by drilling small holes into Ms. Carter's skull which allowed the blood to irrigate, relieving pressure on her brain. Dr. Snyder testified that this surgical procedure would have been necessary based on the chronic bleeding alone, but also testified that Ms. Carter certainly was worse [after the attack by Mrs. Bell] and "the fact that she had at least some chronic fluid there tipped her over the edge." Specifically, Mr. Bell contends that the testimony

of Dr. Snyder leaves in question whether the surgery he performed upon Ms. Carter was necessary to treat a condition resulting from the assault by Mrs. Bell or a condition resulting from prior trauma and unrelated to the assault.

While the record does appear to support Mr. Bell's argument with respect to some of Dr. Snyder's testimony, we find no contradiction in Dr. Snyder's testimony regarding the fact that Ms. Carter required rehabilitative therapy solely as a consequence of the assault by Mrs. Bell. In this regard, Dr. Snyder concluded his testimony as follows:

Q. So, Doctor, let me make sure I understand what you're saying. If [Ms. Carter] only had this chronic condition, the treatment she would have received may have been the irrigation and the burr holes, but she would not have had to go through the Patricia Neal rehabilitation and so on?

A. Yeah. I believe that's true. I probably could have operated on her and she would have been in here for a couple of days and she would have gone home, depending on her symptoms pre op. But usually when people present with a headache and a little weakness they would have gone back home and wouldn't need to be put in rehab.

Q. So it's fair to say that this trauma that she received that brought her to this hospital tended to exacerbate the chronic condition and cause more treatment, necessary treatment?

A. I think that's a fair statement.

This testimony constitutes material evidence that Mrs. Bell's assault caused Ms. Carter to need rehabilitative therapy, and further evidence was presented that the cost of this therapy totaled \$66,499.

We also note that Mr. Bell's argument that Ms. Carter failed to establish causation in this case is based upon the assumption that the jury's award consists solely of compensation for medical costs incurred. However, it is unclear from the record specifically what elements of damages to which the jury's award pertains. While Ms. Carter's complaint requested "compensatory damages for [her] past and continuing medical bills, past and continuing emotional distress, and past and continuing pain and suffering," the record merely reflects an award of \$150,000, and it is not disclosed what portion of this \$150,000 was awarded for medical bills, what portion for emotional distress, and what portion for pain and suffering. In addition to the material evidence supporting medical costs incurred by Ms. Carter, we find material evidence supporting an award for pain and suffering and emotional distress. In that regard, we note the previously cited testimony of Ms. Carter wherein she recounts that Mrs. Bell beat her from room to room, and we further note her additional testimony as follows:

Q. Ms. Carter, after this beating that you took, did you feel physically different than you did before the beating?

A. Well, yeah.

Q. Can you tell the jury what kind of physical conditions you felt afterwards that were different from before?

A. Yeah. My memory. My memory is completely changed. I don't - - I can remember a little long-term and short memory, I just have a hard time. ...

Q. What about other conditions besides your memory?

A. My arm, after that it never fused to the rod⁴. So they had to take - - so now instead of having the rod in this, like, in my arm, I'm waiting for it to heal. They had to take out the rod and they had to - - now I've got a scar from here to here (indicating).

...

Q. Anything else besides your arm and your memory?

A. My arm and my memory, my back. Yes, my back. It hurts.

Q. Was your back hurting before this? I mean, was your back hurting because of the car accident?

A. Yeah, it was. I mean, it was hurting, but it became much more severe.

Q. Okay. And anything else?

A. Yeah. My vision. When I was in the hospital, I had - - when I was in UT and Patricia Neal, I had some kind of condition. I can't remember the name of it, but it was caused from the injury to my head.

Q. What symptoms did you have that you didn't have before this beating?

A. I was seeing like three or - - I was seeing like three TVs.

Q. How long did that persist?

⁴ As noted, in April of 2003, both of Ms. Carter's arms were broken in an automobile accident. At the time she was attacked by Mrs. Bell, Ms. Carter had surgically implanted rods in both arms to facilitate her recovery.

A. They took me from Patricia Neal to Dr. Ryan and got me fitted for - - with glasses and bifocals. And it lasted about a year.

In sum, we find that there is material evidence that the attack suffered by Ms. Carter for which Mr. and Mrs. Bell were responsible caused her to incur medical bills, and experience emotional distress and pain and suffering which warranted the jury's award of \$150,000 in compensatory damages.

VII. Conclusion

For the reasons stated herein, the judgment of the trial court is affirmed. Costs of appeal are assigned to the appellant, John Ralph Bell.

SHARON G. LEE, JUDGE