

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 2052

BARBARA S. FINCH AND TED A. FINCH

VERSUS

K-MART CORPORATION

Judgment Rendered: September 15, 2006

Appealed from the 22nd Judicial District Court
Parish of St. Tammany
State of Louisiana
Suit Number 2003-14044

The Honorable Patricia T. Hedges, Judge

John M. Robin
Covington, LA

Counsel for Plaintiffs/Appellants
Barbara S. Finch and Ted A.
Finch

Nora B. Bilbro
Defendant/Appellee
Neil C. Abramson
New Orleans, LA

Counsel for
Kmart Corporation

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Handwritten signatures of John M. Robin, Nora B. Bilbro, and Neil C. Abramson.

GAIDRY, J.

This appeal challenges a jury's damage award. We find no manifest error in the jury's verdict, and affirm.

BACKGROUND

Plaintiffs, Barbara and Ted Finch, filed this lawsuit against Kmart Corporation arising from an incident that occurred on June 27, 2003, while Mrs. Finch was having her picture taken at an Olan Mills portrait studio located inside the Kmart store. Mrs. Finch and her friend, Betty Crain, were posed for a photograph when five boxes of Visqueen, weighing between fifteen and fifty pounds, fell through the ceiling above the portrait studio. Claiming that one of the boxes hit her on the head, neck, and back, causing injuries requiring her to undergo a cervical fusion surgery, Mrs. Finch sought damages for past and future medical expenses, pain and suffering, mental anguish, lost wages and disability, while her husband sought damages for loss of consortium. Kmart disputed Mrs. Finch's claim that she was hit in the head, neck, or back by a falling box, and also insisted that Mrs. Finch's complaints of neck and back pain were not caused by the Kmart incident.

The case was tried before a jury, which found that Kmart was negligent and that Mrs. Finch suffered damages as a result of that negligence. The jury awarded Mrs. Finch \$787.00 for past medical expenses and \$4,213.00 for her past physical and mental pain and suffering. The jury declined to award any amount for future medical expenses, future physical and mental pain and suffering, lost wages, loss of enjoyment of life, permanent physical impairment, or loss of consortium.

The trial judge entered judgment in accordance with the jury's verdict. Thereafter, plaintiffs filed a motion for a new trial, or in the alternative, a

motion for judgment notwithstanding the verdict and additur, which was denied. This appeal, taken by plaintiffs, followed.

MOTION FOR MISTRIAL

Plaintiffs contend that the trial judge erred in failing to grant its motion for a mistrial based on the display of a document from Mrs. Finch's prison medical record that the defense projected onto a screen during Mrs. Finch's cross-examination. They do not seek a remand for a new trial, but ask that this court review the record *de novo* and enter a judgment thereon.

The record reflects that prior to trial, plaintiffs filed a motion in limine to exclude evidence of Mrs. Finch's criminal record and incarceration in federal prison on a drug possession conviction on the ground that more than ten years had passed since the date of her conviction. Before the jury was chosen, the parties argued the motion to the trial court. The defense insisted it only wanted to introduce medical evidence from the prison records in support of its claim that Mrs. Finch complained of neck and back pain prior to the Kmart incident. The defense selected four prison records containing evidence it claimed was relevant to the damage issues, and redacted references to the prison from the forms. Plaintiffs' attorney asked for and received permission to go over the redacted forms. The trial judge reserved ruling on the motion in limine with respect to the four redacted records until plaintiffs raised the issue again during trial, but granted the motion with respect to the remainder of the prison records.

While cross-examining Mrs. Finch, the defense displayed the redacted medical records on an overhead screen. The record complained of by the plaintiffs in the motion for a mistrial is the second page of a medical record dated September 10, 1995, in which Mrs. Finch complained of severe headaches and back pain. The document categorized Mrs. Finch's medical

status as “idle” and defined the term “idle status” in small print as “[t]emporary disability not to exceed three days duration. Restricted to quarters except for meals, religious services, or sick call. No recreation.” Mrs. Finch was asked whether she recalled that she was put on idle status, temporary disability, and she answered in the affirmative. Plaintiffs did not object to the use of this medical record during Mrs. Finch’s cross-examination.

Instead, while the jury was in recess and after arguing the admissibility of another piece of evidence, plaintiffs’ attorney moved for a mistrial, claiming it had been brought to his attention that the document in question had been displayed in front of the jury. Plaintiffs’ attorney insisted that the display was a violation of the court’s order regarding references to Mrs. Finch’s having been incarcerated. The defense noted that it had redacted all information about the federal prison, given the document to the plaintiffs’ attorney who had it for several days, and removed everything from the redacted documents that plaintiffs’ attorney had asked.

The judge instructed the defense to put the document back on the projector, and walked over to where the jurors sat. The judge stated that she could only read some of the writing in ink and the big print, such as the terms “idle status,” “restricted duty” and “totally disabled,” but was unable to read the rest of the language defining those terms. The judge also noted that even if the jury could read that Mrs. Finch had been restricted to quarters, it could have thought she was in the military. Under all of the circumstances, the trial judge concluded that no harm resulted from the display of the document, and accordingly denied the motion for a mistrial. The judge also ruled that Kmart could not use any of the redacted documents as demonstrative exhibits during its closing argument.

A court, on its own motion or the motion of any party, after hearing, may grant a mistrial. La. Code Civ. P. art. 1631(C). Generally, mistrials are granted because of some fundamental failure in the proceeding. Thus, a motion for a mistrial should be granted when the trial judge determines that it is impossible to reach a proper judgment because of some error or irregularity and where no other remedy would provide relief to the moving party. *Hunter v. State ex. rel. LSU Medical School*, 2005-0311, p. 4 (La. App. 1st Cir. 3/29/06), _____ So.2d _____. A motion for a mistrial may also be granted upon proof of prejudicial misconduct occurring during a jury trial, which cannot be cured by admonition or instruction. A trial judge is vested with broad discretion in ruling on the motion. *Id.* This court will not overturn a trial court's ruling on a motion for a mistrial absent an abuse of that discretion. *Id.*

Plaintiffs contend that the revelation to the jury that Mrs. Finch had a prison record was highly prejudicial and accounts for the low award entered by the jury in a case involving a surgical fusion. Kmart insists there was no prejudicial misconduct that would warrant the grant of a mistrial. It stresses that the trial judge conducted a hearing on the motion outside the presence of the jury, and submits that even if the jury could have read the document in its entirety, it was subject to different meanings, and thus was not so prejudicial to make it impossible for the jury to reach a proper verdict.

Upon reviewing the record, we find the trial judge did not abuse her discretion in refusing to grant a mistrial. At no time did defense counsel refer to Mrs. Finch's prison record or conviction for drug possession, and the document displayed to the jury, coupled with the questions posed to Mrs. Finch during cross-examination on her prior medical history, indicated it was nothing more than a medical record. The trial judge was satisfied that

the jury could not read the statement “restricted to quarters,” from their vantage point, and prohibited the defense from admitting the document into evidence for the jury to read. Accordingly, we conclude plaintiffs failed to demonstrate prejudice so as to warrant *de novo* review of the award by this court.

DAMAGES

Plaintiffs contest the amount of damages awarded for past medical expenses and pain and suffering as too low, and further challenge the jury’s failure to award damages to Mrs. Finch for future medical expenses, future pain and suffering, and past and future lost wages, along with the jury’s failure to award Mr. Finch damages on his loss of consortium claim. Plaintiffs urge that based on the evidence, Mrs. Finch should have been awarded \$77,458.00 for past medical bills and \$150,000.00 for past pain and suffering, and submit that she was entitled to a judgment of nearly half of a million dollars. Additionally, plaintiffs posit, Mr. Finch should have been awarded at least \$25,000.00 on his claim.

It is evident that by entering an award of \$5,000.00, the jury found as a fact that Mrs. Finch failed to demonstrate a causal connection between the Kmart incident and her subsequent neck surgery. This factual finding is governed by the manifest error standard of review. *Stobart v. State, Department of Transportation and Development*, 617 So.2d 880, 882 (La. 1993). The issue before this court is not whether the factfinder was right or wrong in its causation determination, but whether its conclusion was a reasonable one. *Jefferson v. Soileau*, 2003-0541, p. 5 (La. App. 1st Cir. 12/31/03), 864 So.2d 250, 253, writ denied 2004-0594 (La. 4/23/04), 870 So.2d 306. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be manifestly erroneous or clearly

wrong. *Peters v. Harmsen*, 2003-1296, p. 4 (La. App. 1st Cir. 4/2/04), 879 So.2d 157, 160.

On the damage issue, the record reflects that Kmart stock-boy Daniel Finckbeiner was given the task of moving boxes of Visqueen measuring four and a half feet by six inches, and weighing about fifteen to fifty pounds, into Kmart's attic. He accomplished this by loading the boxes onto a conveyor belt, and then moved the boxes onto the ceiling tiles directly over the Olan Mills studio. At that time, Mrs. Finch and her friend, Mrs. Crain, were posed for a portrait, with Mrs. Crain sitting on a stool and Mrs. Finch standing behind her. Five of the boxes fell through the ceiling and along the back wall of the portrait studio. It was estimated that the ceiling was ten to twelve feet high.

Daniel Finckbeiner testified that after the fall, he rushed downstairs and found all of the boxes behind the stool in the studio. He attested that Mrs. Finch told him she was fine, and that she never complained about a box hitting her in the head or neck. Olan Mills photographer Joyce McKenny testified that she had just posed Mrs. Finch and her friend for their first photograph when the boxes fell. She stated that at the time the boxes fell, she was looking in her monitor at the ladies she had just framed in a close-up. She did not see any of the boxes hit Mrs. Finch in the head, neck, or back. Further, Mrs. McKenny attested, after the boxes fell, Mrs. Finch never told her that she had been hit in any of those places, but told her that one of the boxes hit her on the back of her leg. She also stated that Mrs. Finch did not complain of any type of pain, and that they continued the photo session, taking five more photographs. The portraits taken that day, offered into evidence, show a smiling Mrs. Finch. Mrs. McKenny filled out an Olan Mills customer injury report in which she indicated that five loaded boxes

fell from the ceiling onto Mrs. Finch, and further, that Mrs. Finch leaned over to protect her “elderly mother”¹ and protected herself by doing this. In the section of the report for part of the body injured, Mrs. McKenny wrote “back of right leg.”

Mrs. Crain admitted that because of her position, she did not see whether any of the boxes hit her friend in the head, neck, or back. Mrs. Crain attested that Mrs. Finch hit her on the back when the boxes fell. She could not recall whether any photographs were taken after the incident, and also could not recall Mrs. Finch telling anyone at the studio or any of Kmart’s personnel that she had been hit on the head, neck, or back. However, she stated, Mrs. Finch began to complain about neck pain while they were having a coke in Kmart’s café at the request of its manager. She further testified that after they left the Kmart store, Mrs. Finch told her a box hit her on the back of her head, neck, and shoulders, and then hit her on the leg. Mrs. Crain added that she saw a red spot on Mrs. Finch’s neck after they arrived home.

Mrs. Finch testified that one of the falling boxes hit her in the head, neck, and back as she leaned over her friend during the photo session, causing her to hit Mrs. Crain. She described the impact as hard and claimed to have been in shock therefrom. She denied that any of the boxes hit her in the back of the leg, but stated that one of the boxes may have hit a chair and then hit her on the shin. She testified that she told Mrs. McKenny a box hit her in the shin and that her shin hurt, but admitted she never told the photographer she had been hit in the head, neck, or back by a box. Mrs. Finch also acknowledged telling the Kmart stock-boy that she was fine shortly after the incident. Mrs. Finch attested that she and her friend

¹ Mrs. McKenny mistakenly assumed that Mrs. Crain was Ms. Finch’s mother.

continued taking pictures after the incident. Mrs. Finch stated that she began to feel pain in her neck and back several days later, but did not seek medical treatment until two weeks later. Mrs. Finch explained she delayed seeking treatment because she thought she had pulled a muscle in her back or pinched a nerve as a result of falling onto Mrs. Crain.

The record reflects that Mrs. Finch visited Dr. Kasey Chenevert on July 14, 2003, and August 4, 2003, complaining of neck and back pain. Dr. Chenevert ordered X-rays, which showed degenerative changes in Mrs. Finch's spine. Dr. Chenevert diagnosed neck pain and prescribed an anti-inflammatory and pain medication. The doctor noted that on an earlier visit, seven months before, Mrs. Finch did not complain of neck or back pain, and indicated that if a box had in fact fallen from the ceiling onto Mrs. Finch, her complaints of neck and back pain could be related to the Kmart incident.

Mrs. Finch consulted Dr. Stefan Pribil in September of 2003 for neck and back pain. He acknowledged that X-rays taken after the incident showed a collapsed disc space in Mrs. Finch's lower back and a profound bony spur in her cervical spine, conditions that predated the Kmart incident. He ordered an MRI, which showed a cervical disc herniation. Dr. Pribil recommended two months of physical therapy, with surgery as an alternative. On December 10, 2003, Dr. Pribil performed a cervical disc fusion surgery on Mrs. Finch. He testified that she did well after the surgery, and by the end of January 2004, was virtually pain-free. Dr. Pribil discharged Mrs. Finch from his care in October of 2004. Dr. Pribil opined that while Mrs. Finch's spinal difficulties predated the Kmart incident, if the history given was correct and she was hit in the head, neck, and back by a falling box, the Kmart incident materially contributed to the development of symptoms that eventually led to her surgery.

Dr. John Burvant, an orthopedic surgeon who examined plaintiff on March 2, 2004, at the defendant's request, reviewed the diagnostic tests performed on Mrs. Finch and stated that Mrs. Finch had degenerative changes in her spine that predated the Kmart incident. These changes, he stated, would be expected to cause symptoms such as headaches and neck pain. He attested that based on the history Mrs. Finch gave him, that she had no neck pain before the incident but had it afterwards, and if she was hit in the head, neck, and back by a falling box, he would relate her pain to the Kmart incident. However, he attested, it would be far less likely for her to have neck or back pain from the incident if the box hit her in the leg.

The defense offered evidence that Mrs. Finch complained of neck and back pain prior to the Kmart incident. It also offered the testimony of Bob Phenix, who supervised Mrs. Finch at Hobby Lobby at the time of the incident. He testified that Mrs. Finch told him about the incident, but never complained of neck or back pain while she was working. He added that Mrs. Finch called him in October of 2003 to report that she was quitting her job because she could not work for the new manager. She did not tell him that she could not work because of pain or could not perform her work tasks, and did not associate the Kmart incident with her decision to quit.

A claimant's lack of credibility on factual issues can serve to diminish the veracity of his complaints to a physician. The credibility of the plaintiff is especially significant when a physician must relate a medical condition to an accident when it is the plaintiff who provides a physician with a history of his symptoms. Thus, in many cases the credibility of the history given by the claimant to his physicians becomes as important as the medical opinions based in part on that history. The rule that questions of credibility are for the

trier of fact also applies to the evaluation of expert testimony. **Peters v. Harmsen**, 2003-1296, p. 8 (La. App. 1st Cir. 4/2/04), 879 So.2d 157, 162.

After reviewing the record in its entirety, it is obvious that the jury simply did not believe Mrs. Finch's account of the incident. In entering the \$5,000.00 damage award, the jury must have concluded that Mrs. Finch sustained, at most, a minor strain to her back or neck when she leaned over her friend as the boxes fell, which caused her some pain and accounted for the need for medical treatment. Thus, the jury could conclude from the evidence that not all of Mrs. Finch's medical expenses were causally related to the Kmart incident. Therefore, its decision to award \$787.00 in past medical expenses and over \$4,000.00 for pain and suffering, is entirely reasonable and may not be disturbed by this court.

Furthermore, we find no error in the jury's refusal to award damages for future pain and suffering, future medical expenses, disability, lost wages, loss of enjoyment of life, or loss of consortium. Our review of the record convinces us that plaintiffs failed to sustain their burden of proving entitlement to these elements of damages.

CONCLUSION

For the foregoing reasons, the judgment is affirmed. All costs of this appeal are assessed to plaintiffs, Barbara S. Finch and Ted A. Finch.

AFFIRMED.