[Cite as *Shupe v. Media Distribs., L.L.C.*, 2012-Ohio-325.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lesley Shupe,	:	
Plaintiff-Appellant,	:	
		No. 11AP-336
v.	:	(C.P.C. No. 09CVD-07-11248)
Media Distributors LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on January 31, 2012

Malek & Malek, and *Douglas C. Malek*, for appellant.

Garvin & Hickey, LLC, *Preston J. Garvin*, *Michael J. Hickey* and *Daniel M. Hall*, for appellee Media Distributors LLC.

Michael DeWine, Attorney General, *LaTawnda N. Moore*, and *Sandra E. Pinkerton*, for appellee Marsha P. Ryan, Administrator, Bureau of Workers' Compensation.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Lesley Shupe, appeals a judgment of the Franklin County Court of Common Pleas in favor of defendants-appellees, Media Distributors LLC and Marsha P. Ryan, Administrator of the Bureau of Workers' Compensation ("Administrator"). For the following reasons, we affirm.

{¶2} On March 16, 2009, Shupe filed a claim with the Bureau of Workers' Compensation ("BWC") seeking benefits for an alleged work-place injury that occurred on February 17, 2009. Shupe claimed that she was leaning over a box when a ladder hit her on the back of her head. Shupe's physician diagnosed her with a cervical sprain.

{¶3} The Administrator initially allowed Shupe's claim. Shupe's employer, Media Distributors LLC, appealed the allowance. After a hearing, a district hearing officer vacated the Administrator's order and denied the claim. Shupe appealed the district hearing officer's decision. After a second hearing, a staff hearing officer affirmed the order of the district hearing officer. Shupe appealed the staff hearing officer's decision, but the Industrial Commission refused to hear the appeal. Pursuant to R.C. 4123.512(A), Shupe then appealed the order of the staff hearing officer to the trial court. In her petition, Shupe requested a judgment allowing her the right to participate in the workers' compensation fund. Shupe also demanded a jury trial.

{¶4} At trial, Shupe testified that she began working part time for Media Distributors, an on-line seller of VHS tapes, DVDs, and CDs, in July 2008. At that time, Shupe also worked part time as an independent contractor for Premier Office Movers, LLC ("Premier"). At Premier, Shupe disconnected computers and computer equipment, placed the computers and equipment on a rolling cart, and installed the computers and equipment at the client's new office. Shupe's job responsibilities at Media Distributors LLC included pulling inventory to fulfill orders, packing items for shipment to customers, cleaning, and cutting down cardboard boxes.

{¶5} Shupe claimed that on February 17, 2009, Greg Hall, the owner of Media Distributors LLC, asked her to help him box up some movies. Hall removed the movies

from a shelving unit and handed them to Shupe, who put them in a cardboard box sitting on the floor. While Shupe was leaning over the box, a six-foot aluminum ladder fell and hit her on the back of the head.

{¶6} In his trial testimony, Hall remembered the incident differently. According to Hall, he was kneeling and sorting through inventory to find specific items to fulfill an order. Shupe was standing to Hall's right. As he sorted, Hall handed to Shupe unwanted inventory to get those items out of his way. Hall heard the metallic rattle of an aluminum ladder and Shupe say "ow." When he looked up, Shupe had her right hand on the top of her head. Hall could not recall when this incident occurred.

{¶7} Although Shupe and Hall described the incident differently, they agreed on what happened next. Both Shupe and Hall testified that Hall told another employee, Geoffrey Knauerhase, to put the ladder in Hall's Chevrolet Suburban. Hall primarily used the Suburban to transfer inventory and store cardboard boxes before hauling the boxes to a recycling center. According to Hall, the ladder was always in the way, so he decided to relocate it to the Suburban.

{¶8} While Hall did not remember when Knauerhase moved the ladder, Knauerhase did. Knauerhase testified that he put the ladder in the Suburban sometime between Christmas 2008 and February 1, 2009, the date of the Super Bowl. To the best of his recollection, Knauerhase believed that he moved the ladder the second week of January. The ladder remained in the Suburban until Hall sold the Suburban in 2010.

{¶9} From Shupe's reaction to the ladder striking her, Hall thought Shupe's injury was on par with a paper cut or a stubbed toe. Shupe continued to work without complaint or medical treatment. However, Shupe claimed that, as time passed, she began

experiencing increasing pain in her neck and left shoulder and arm. Seeking relief from the pain, Shupe visited the emergency room at Doctors Hospital on March 2, 2009. According to the medical report from that visit, Shupe told the treating physician that "[s]he ha[d] not had any injuries that she recall[ed] but she d[id] a lot of heavy lifting at work and d[id] office moving at work." (Plaintiff's exhibit No. 3.) The physician diagnosed Shupe with an acute cervical sprain and prescribed a steroid and pain medication.

{¶10} Shupe returned to the Doctors Hospital emergency room on March 11, 2009 because her pain had not abated. Between the two visits to the emergency room, Shupe had recalled that a ladder fell on her. The medical report from the March 11, 2009 visit reflects that Shupe recounted her version of the ladder incident to the treating physician. The medical report also states that Shupe told the physician that when "[s]he came to the ER on March 2 and told them that she had the pain in her shoulder[,] [she] did not think to tell them regarding the entire episode, at least she said that she thought it was probably pain secondary to boxes that she was moving." (Plaintiff's exhibit No. 4.) The treating physician diagnosed Shupe with cervical strain and left shoulder strain with left arm paresthesias.

{¶11} On March 30 and April 27, 2009, Dr. Stephen Altic examined Shupe. Testifying at trial through deposition, Altic opined that Shupe had suffered a cervical sprain/strain as a direct and proximate result of the ladder striking her on February 17, 2009. In reaching this opinion, Altic relied solely on Shupe's version of events.

{¶12} Dr. Karl W. Kumler, an orthopedic surgeon, testified as an expert witness for the defense via his videotaped deposition. Initially, Kumler acknowledged that a cervical sprain/strain could result from a blow to the head. However, sprains and strains

generally heal in six to eight weeks. Thus, Kumler concluded that, if the ladder hit Shupe in mid-January, any resulting sprain or strain would have been healed or almost healed when she went the emergency room on March 2. Consequently, Kumler opined that a blow sustained in mid-January could not have caused the injury that Shupe sought treatment for in March.

{¶13} Kumler also testified that a cervical sprain or strain will not always result from a blow to the head. The type and extent of a person's injury depends on how the striking mechanism hits his or her head. According to Kumler, a person struck in the head by a ladder might just suffer a bruise.

{¶14} After deliberating, the jury determined that Shupe had proven that she suffered a cervical sprain on or about February 17, 2009. However, the jury found that Shupe did not prove that the cervical sprain was a direct and proximate result of her employment with Media Distributors LLC. The jury thus concluded that Shupe was not entitled to participate in the workers' compensation fund. In accordance with the jury's verdict, the trial court entered judgment for defendants on March 8, 2011.

{¶15} Shupe now appeals from the March 8, 2011 judgment, and she assigns the following error:

> The trial court erred, on Feb[ruary] 15, 2011, to the prejudice of Plaintiff-Appellant in ruling that a stipulation did not exist between the parties regarding whether Plaintiff-Appellant had been struck by a ladder while working on Feb[ruary] 17, 2009 for Defendant-Appellee, employer, Media Distributors, LLC. This ruling constituted an abuse of discretion. The trial court erred, on Feb[ruary] 17, 2011, to the prejudice of Plaintiff-Appellant when the trial court judge refused Plaintiff-Appellant's request to review the notes of a juror, which had been written down at home, a clear violation of the judge's order, brought into the court house, copied and provided to every other juror. The verdict had already been read, but out

> of fear of violating the "province of the jury", the judge only made these notes of this juror available after he had discharged the jury, thereby precluding the opportunity to poll this juror and the other jurors effectively on the record. Appellant timely filed this appeal.

{¶16} By this assignment of error, Shupe first argues that the trial court erred in ruling that the parties had not stipulated that a ladder struck her. We find that if the trial court committed the alleged error, it amounted to only harmless error.

{¶17} Immediately prior to the commencement of his opening statement, Shupe's counsel informed the trial court that the parties had orally stipulated that Shupe was struck with a ladder, and that he planned to refer to that stipulation during the opening statement. Defense counsel contested plaintiff's counsel's articulation of the stipulation. According to defense counsel, the parties had only stipulated that a particular photograph depicted the ladder in question. After listening to argument on the issue, the trial court ruled that the parties had not stipulated that a ladder hit Shupe, and that Shupe would have to present evidence to prove that fact to the jury.

{¶18} A stipulation is a voluntary agreement between opposing parties concerning disposition of some relevant point so as to obviate the need for proof or to narrow the range of litigable issues. *Wilson v. Harvey*, 164 Ohio App.3d 278, 2005-Ohio-5722, ¶12; *Crow v. Nationwide Mut. Ins. Co.*, 159 Ohio App.3d 417, 2004-Ohio-7117, ¶18; *DeStephen v. Allstate Ins. Co.*, 10th Dist. No. 01AP-1071, 2002-Ohio-2091, ¶17. Once entered into, filed with and accepted by the court, a stipulation is binding upon the parties and is a fact deemed adjudicated for purposes of determining the remaining issues in the case. *Sammor v. Ohio Liquor Control Comm.*, 10th Dist. No. 09AP-20, 2009-Ohio-3439, ¶16; *Sherman v. Sherman*, 10th Dist. No. 05AP-757, 2006-Ohio-2309, ¶11. Thus, a

stipulation of fact serves as a substitute for the evidence which a party would otherwise have to adduce in open court. *State v. Turner*, 105 Ohio St.3d 331, 2005-Ohio-1938, ¶40; *Vengrow v. Vengrow*, 9th Dist. No. 24907, 2010-Ohio-2568, ¶10.

{¶19} Assuming that the trial court erred in finding no stipulation that a ladder hit Shupe, we conclude that that error was harmless. In order to secure a reversal of a judgment, a party " 'must not only show some error but must also show that that error was prejudicial to him [or her].' " *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶26 (quoting *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110). Error is harmless if a court determines that "if [the] error[ ] had not occurred, the jury or other trier of the facts would probably have made the same decision." *Hallworth v. Republic Steel Corp.* (1950), 153 Ohio St. 349, paragraph three of the syllabus. See also *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶17 ("When avoidance of the error would not have changed the outcome of the proceedings, then the error neither materially prejudices the complaining party nor affects a substantial right of the complaining party.").

{¶20} In the case at bar, the undisputed evidence demonstrated that a ladder struck Shupe. Although Shupe and Hall disagreed regarding how and when the incident occurred, they concurred that Shupe had suffered a blow from a ladder. Thus, the evidence served the same purpose as the alleged stipulation: it supplied the jury with proof that a ladder hit Shupe. As the jury had before it no contradictory evidence, it could only find that a ladder hit Shupe. Consequently, although Shupe was denied the benefit of the stipulation, that denial did not prejudice Shupe. With or without the stipulation, the jury would have to come to the same conclusion. Accordingly, we conclude that the

alleged error was merely harmless, and we overrule the first part of Shupe's assignment of error.

{¶21} By the second part of her assignment of error, Shupe argues that the trial court erred in refusing to let her examine a juror's notes before the court discharged the jury. We disagree.

{¶22} The trial court submitted the case to the jury on the afternoon of February 16, 2011. The next morning, the Deputy Jury Commissioner informed the judge's bailiff that a juror had told her that he had "found something last night and needed a photocopy machine so he could reproduce it to get it to all of the jurors." (Tr. 329.) With the parties' agreement, the judge questioned Juror Servick, a juror who fit the commissioner's description of the juror who spoke to her. Juror Servick said that when he arrived at the jury room, "one of the jurors said that he woke up at 4:00 in the morning and just wrote down stuff and made copies so that he could share [his thoughts] with everybody when we got together." (Tr. 331-32.) Juror Servick looked over his copy of the notes and concluded that it "said what [that juror] had been saying [in deliberations]." (Tr. 332.) Juror Servick had not heard any comments regarding the notes from the other jurors.

{¶23} From Juror Servick's description, the trial court identified Juror Glover as the author of the notes. Under questioning, Juror Glover admitted that he had written down his thoughts and made copies of his notes for each juror. Juror Glover denied that the notes contained any outside information. According to Juror Glover, he had drafted the notes and provided copies because "[the jury] [was] having trouble getting organized [ ]

and [he] was trying to find a way to get [them] organized." (Tr. at 336-37.) However, the jury had not discussed the notes or used them as Juror Glover intended.

{¶24} The judge asked Juror Glover to collect all the copies and give them and the original notes to him. Juror Glover complied. Although the judge took the notes and copies into his possession, he did not read the notes or allow the parties to read the notes.

{¶25} The judge then recessed court so the parties could decide how they wanted to proceed. When the parties returned, the judge informed them that the jury had indicated that they had reached a verdict. Turning to the matter of Juror Glover's notes, the judge asked plaintiff's counsel whether he had anything to add to the record. Plaintiff's counsel and the judge engaged in the following discussion:

> MR. MALEK: Obviously I don't know what the notes say, so I just want to preserve any possibility to review the notes after the verdict has been reached just because at this point in time I think that it would be premature to read the notes.
>
> THE COURT: My impression is if we review the notes before we accept the verdict in this courtroom there is some potential that we are invading the province of the jury.
>
> MR. MALEK: Correct, that's also my --
>
> THE COURT: So you're not requesting to see the notes ahead of time?
>
> MR. MALEK: No, just after the verdict is reached.

(Tr. 343.)

{¶26} When it was her turn to speak, defense counsel proposed that the trial court accept the jury's verdict and then poll each juror regarding whether the notes influenced him or her. Defense counsel posited that if the court adopted this plan, no one would be

left "guessing as to whether or not [the jurors] were influenced, we [would] have a record, and then [we would] have a basis to request or declare a mistrial or not[.] * * * [A]t least we [could] assess[ ] that and can read [the notes] after [that] point." (Tr. 344.) In response, the judge stated, "what we could do is once we see [the jurors'] responses I could send them back [to the jury room] and we can move forward depending upon what they tell us." (Tr. 345.) Plaintiff's counsel agreed to that course of action. The judge then called the jury into the courtroom and announced the verdict.

{¶27} At the conclusion of a second recess, the judge and counsel debated the wording of two questions to ask each juror. Ultimately, everyone agreed that the judge would ask: (1) "[w]ere you aware of the specific contents of the document Mr. Glover provided this morning?," and (2) "[t]o what extent did Mr. Glover's writing in the document influence you?" (Tr. 356-57.) After asking these questions, the judge allowed each side to ask additional questions of each juror.

{¶28} In response to the questions, five of the jurors said that they were aware of the contents of the document, while two said that they were not aware. All of the five jurors who had answered the first question affirmatively stated that the writing in the document had no influence on them.

{¶29} After the judge had questioned all the jurors but for Juror Glover, plaintiff's counsel stated that he "would like the opportunity to see what is written on the document at this point in time before [he] would speak with [Juror Glover]." (Tr. 369.) The judge denied this request, expressing concern that reading the notes prior to the discharge of the jury would invade the province of the jury.

{¶30} The judge then called Juror Glover into the courtroom and admonished him for distributing copies of his notes. With the judge's permission, plaintiff's counsel asked the following questions and elicited the following answers:

> MR. MALEK: * * * What exactly was the purpose of the document that you produced, Mr. Glover?
>
> JUROR GLOVER: Well, like I said before, we were having difficulty getting an order to our discussion and trying to put things, you know, how we were going to discuss the things. And we left with things not settled and everything and then, you know, I just woke up at 4:00 in the morning, started thinking about the case, and [decided that] I'm going to get this down before I forget about it.
>
> MR. MALEK: What was the response from the others when you presented them with the document?
>
> JUROR GLOVER: Some of them looked at it. It wasn't used as, you know, a primary thing of discussion or anything.
>
> MR. MALEK: Did anyone say anything specifically to you with regards to the document and you producing the document?
>
> JUROR GLOVER: Not really. * * * I think one woman said that she was impressed that I did that.
>
> MR. MALEK: You don't think it alienated the other jurors in any way?
>
> JUROR GLOVER: I don't think so.

(Tr. 374-75.)

{¶31} Once plaintiff's counsel completed his questioning of Juror Glover, the judge called all the jurors into the courtroom and discharged them. The judge then distributed copies of Juror Glover's notes to counsel.

{¶32} Now, on appeal, Shupe argues that the trial court erred in not disclosing Juror Glover's notes after the announcement of the verdict but before the discharge of the

jury. According to Shupe, her counsel had a right to read the notes and question the jurors on the basis of the notes. Shupe contends that, without the notes, her counsel was unable to effectively question the jurors regarding the effect of the notes.

{¶33} Shupe does not explain what kind of questions her counsel did not ask, but would have asked, had he been able to read the notes before querying the jurors. The trial court had already generally inquired into the degree to which the notes influenced each juror. The jurors who knew of the contents of the notes all denied being influenced. Apparently, plaintiff's counsel wanted to probe into the truthfulness those denials by asking each juror whether his or her opinion of the specific matters addressed in the notes changed because of what Juror Glover wrote. We find that the trial court correctly precluded such questions.

{¶34} Evid.R. 606(B) states that:

> Upon an inquiry into the validity of a verdict * * *, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict * * * or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented.

The first sentence of this rule preserves the integrity of jury deliberations by declaring jurors incompetent to testify about any matter directly pertinent to, and purely internal to, the emotional or mental processes of the jury's deliberations. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 75. The second sentence permits jurors to testify only about

"extraneous prejudicial information" and "any outside influence" under certain circumstances.

{¶35} Here, the trial court walked a fine line. On one hand, Juror Glover wrote the notes at home, and thus, they could potentially qualify as an outside influence. To the extent that the notes constituted an outside influence, the second sentence of Evid.R. 606(B) permitted the jurors to testify whether the notes influenced them. On the other hand, the notes constituted Juror Glover's impression of the evidence and the conclusions that he drew from the evidence. The first sentence of Evid.R. 606(B) barred Juror Glover from testifying about those thoughts, and it barred the other jurors from testifying regarding the effect of those thoughts on their deliberations.

{¶36} We find that the trial court appropriately negotiated the hazards presented by this situation. Although the trial court questioned the jurors generally about the influence of the notes, it did not allow questioning regarding the specific matters discussed in the notes. This tactic elicited the testimony necessary to adjudge whether possible juror misconduct prejudiced Shupe, which would have provided ground for reversal. See *State v. Kehn* (1977), 50 Ohio St.2d 11, 18-19 (holding that an appellate court will not reverse a judgment because of juror misconduct unless the complaining party demonstrates prejudice, and finding no such prejudice where each juror stated that his verdict was in no way influenced by the notes of one juror). At the same time, the trial court protected the sanctity of the jury's deliberative process by preventing substantive inquiry into the jurors' mental processes.

{¶37} Shupe also asserts that Juror Glover alienated the other jurors by taking notes.[1] Whether this is true or not, other jurors' reputed dislike of Juror Glover or his note taking did not present a reason for the trial court to divulge the notes before discharging the jury. Plaintiff's counsel could have asked jurors whether Juror Glover's note taking bothered them without knowing the contents of the notes themselves. We note that plaintiff's counsel did ask Juror Glover whether he thought his note taking alienated other jurors, and Juror Glover answered negatively.

{¶38} In sum, we find no error in the trial court's handling of this unusual situation. Thus, we overrule the second part of Shupe's assignment of error.

{¶39} For the foregoing reasons, we overrule the entirety of the assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.

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[1] Juror Glover was the only juror who did not sign the verdict form. From this, Shupe presumes that Juror Glover championed Shupe's case in the jury room. Shupe speculates that the other jurors found against Shupe because Juror Glover, who wanted to find in Shupe's favor, alienated them.