[Cite as *Hutsell v. Allstate Ins. Co.*, 2007-Ohio-276.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87878

DELMAN HUTSELL

PLAINTIFF-APPELLEE

vs.

ALLSTATE INSURANCE CO., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-546507

BEFORE: Celebrezze, A.J., Sweeney, J., and McMonagle, J.

RELEASED: January 25, 2007

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Allstate Insurance Company ("Allstate" or "appellant") appeals the jury verdict that awarded judgment to appellee in this uninsured motorist action. Upon review of the record and the arguments of the parties, we affirm.

{¶2} This civil action arose from a dispute about the scope of insurance coverage following an automobile accident that occurred on August 29, 2002. Delman Hutsell ("Hutsell" or "appellee") was driving a friend's car[1] when he was struck from the rear while stopped at the intersection of South Moreland and Buckeye Roads in Cleveland. The driver of the car that struck him, later identified as Destiny Tayla Farrell ("Farrell"), immediately fled the scene of the accident. When Farrell was eventually tracked down, it was discovered that she did not have car insurance, and Hutsell was forced to recoup his damages, including those for personal injury, through an uninsured motor vehicle policy provided by Allstate that covered the automobile he was driving at the time of the accident.

{¶3} Allstate conceded coverage and stipulated that negligence caused the accident. The remaining issues at trial pertained to whether Hutsell's alleged pain was caused by the automobile accident and whether the medical treatment he received because of that alleged pain was reasonable. Allstate argued that Hutsell had not sufficiently proven a reasonable causal relationship between the car accident and the treatment he underwent for alleged pain in his back, neck and left knee. At the conclusion of trial, a judgment was entered against

[1]The automobile was owned and insured by Kimberly Wilson, who was also a passenger in the car at the time of the accident.

Allstate, and the jury awarded Hutsell $9,000 in damages for soft tissue injuries sustained during the accident.

{¶4} Allstate appeals the judgment and jury award, asserting a single assignment of error.

{¶5} "I. The trial court erred to the prejudice of the defendant by allowing plaintiff's counsel to improperly argue that Allstate had not produced a medical expert to rebut his doctor's testimony thus giving rise to an impermissible inference as to the burden of production in a civil trial and violating the 'uncalled witness rule' prohibiting this argument as well as inciting the passion and prejudice of the jury."

{¶6} Appellant argues that a portion of appellee's counsel's closing arguments were improper and prejudicial. It claims that during closing arguments, appellee's counsel inferred that appellant failed to call a rebuttal expert witness to refute the evidence presented by appellee's medical expert. Appellant contends that such remarks improperly prejudiced the jury and incorrectly framed the applicable burdens of production in this civil litigation. The specific exchange challenged by appellant in this appeal follows:

{¶7} "[Plaintiff's counsel:] There is one other very important thing here that [defense counsel] failed to mention, and I can understand why. The court rules in the Civil Rules of Procedure, in order to afford fairness to defendants like the Allstate Insurance Company, or any other defendant, allow a provision

for them to have the defendant examined by a doctor of their choice. That gives that doctor an opportunity to examine in this case Mr. Hutsell.

{¶8} "[Defense counsel]: Objection, Your Honor.

{¶9} "The Court: Overruled.

{¶10}"[Defense counsel]: Objection.

{¶11}"The Court: Go ahead.

{¶12}"[Plaintiff's counsel]: I was going to say, is that a misstatement of the rules? I don't think it is.

{¶13}"Examine Mr. Hutsell, talk with him, ask him questions about what happened, determine his credibility and see whether he's testifying truthfully or not, and then do a physical examination of him, and render his opinion. And his opinion also can be rendered so that he could say that Dr. Nickels' treatment was necessary, was too much, not enough, not appropriate, or that his bill was too much. They don't bring in any testimony to say that. They just bring in the insurance company who said that's not right. That' s not -- you know. His case is not a good case because he's got holes in it. I'm going to let you draw whatever conclusion you want as to why Allstate Insurance Company did not have Mr. Hutsell examined by their doctor." (Tr. 230-231.)

{¶14}Evid.R. 301 provides the underlying presumptions as they pertain to applicable burdens of proof and production in a civil action. The burden of production here rested on appellee to prove that the medical treatment he

received was necessary and related to the automobile accident. Appellant was under no burden to prove that such treatment was unnecessary or unrelated. Appellant contends the jury was unduly prejudiced by appellee's closing arguments that inferred flaws in appellant's defense for not offering a rebuttal witness to appellee's medical expert. Appellant asserts that a reversal and new trial is warranted. We do not agree.

{¶15}This court has made it clear, and it is well established, that wide latitude is afforded to counsel in both opening and closing statements. *Smith v. Sass, Friedmann, & Assoc.*, Cuyahoga App. No. 81953, 2004-Ohio-494. "'The assessment of whether the permissible bounds of closing arguments have been exceeded is *** a discretionary function to be performed by the trial court. Such determination will not be reversed on appeal absent an abuse of discretion.' *Pang v. Minch* (1990), 53 Ohio St.3d 186, 559 N.E.2d 1313, paragraphs two and three of the syllabus. Only if the circumstances are of such reprehensible and heinous nature as to constitute prejudice will this court reverse a judgment. *Hunt v. Crossroads Psychiatric & Psychological Ctr.* (Dec. 6, 2001), Cuyahoga App. No. 79120, citing *Kubiszak v. Rini's Supermarket* (1991), 77 Ohio App.3d 679, 688, 603 N.E.2d 308; other citation omitted." *Smith*, supra at ¶26.

{¶16}The closing argument comments cited by appellant do not rise to such a reprehensible and heinous nature to warrant a reversal of the jury's decision. Nor did the trial court abuse its discretion in its actions. To constitute

an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 50 OBR 481, 450 N.E.2d 1140. We do not find that the trial court's actions were unreasonable, arbitrary, or unconscionable.

{¶17}Appellant supports its argument in this appeal by requesting this court to adopt its interpretation of the "uncalled witness rule." In doing so, appellant first cites the seminal case on this rule, *Graves v. United State* (1893), 150 U.S. 118, which was ruled on over a century ago. Appellant proceeds to develop its argument through a federal case out of the Fifth Circuit Court of Appeals, *Herbert v. Wal-Mart Stores, Inc.* (1990), 911 F.2d 1044, which articulates how the "uncalled witness rule" applies to the Federal Rules of Evidence.

{¶18}The case before us is an Ohio case, which strictly applies the Ohio Rules of Evidence, and the "uncalled witness rule" has no bearing on the outcome of this case. The dispositive question here is whether the closing statement comments at issue were so prejudicial to the jury that we are forced to reverse the jury award and remand this matter for a new trial.

{¶19}A new trial may be granted where a jury awards damages under the influence of passion and prejudice. *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28; *Jones v. Meinking* (1987), 40 Ohio App.3d 45; *Hancock v. Norfolk & Western Rd. Co.* (1987), 39 Ohio App.3d 77; *Litchfield v. Morris* (1985), 25 Ohio

App.3d 42. A damage award should not be set aside unless the award is so excessive that it appears to be the result of passion and prejudice, or unless the award is so manifestly against the weight of the evidence that it appears that the jury misconceived its duty. *Toledo, Columbus & Ohio River Rd. Co. v. Miller* (1923), 108 Ohio St. 388; *Cox*, supra; *Litchfield*, supra.

{¶20}The jury award in this case was logically based on sound and credible evidence. Appellee presented evidence of his injuries and subsequent treatment through the testimony of his witness, Dr. Nickels. The jury's $9,000 award can hardly be viewed as excessive in light of the evidence in the record. Appellant's assignment of error is without merit, and this appeal fails.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., CONCURS;
CHRISTINE T. McMONAGLE, J., CONCURS AND
WRITES SEPARATELY.

CHRISTINE T. McMONAGLE, J., CONCURRING WITH SEPARATE OPINION:

{¶21}I write separately only to address appellant's request that this court "forge new territory" in order to apply the "uncalled witness rule" to civil cases in Ohio. *Herbert v. Wal-Mart Stores, Inc.* (C.A.5, 1990), 911 F.2d 1044, cited by appellant, *declined* to apply such rule in a federal matter, concluding that the rule was a procedural anachronism in light of Fed.R.Evid. 607 (which dispensed with the voucher rule) and rules governing discovery in the Federal Rules of Civil Procedure.

{¶22}I see no reason to deviate from the logic of *Herbert*; however, it is important to note that I do not find the statements made by appellee's counsel a violation of the "uncalled witness rule." The argument cited by appellant was permissible comment upon appellant's failure to rebut evidence presented by appellee. Even under the aegis of the "uncalled witness rule," this was fair comment, and in no way impermissibly shifted the burden of proof.