Cite as 2016 Ark. App. 595

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-16-466

EMIN BAJREKTAREVIC APPELLANT V. TRI-STATE TRUCK CENTER, INC., D/B/A MACK VOLVO TRUCK PARTS D/B/A J & O DIESEL APPELLEE	Opinion Delivered: DECEMBER 7, 2016 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION [NO. 60CV-14-2206] HONORABLE TIMOTHY DAVIS FOX, JUDGE AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Emin Bajrektarevic appeals from the Pulaski County Circuit Court's judgment dismissing his case with prejudice after granting appellee's motion for a directed verdict. On appeal, appellant contends that (1) the circuit court abused its discretion by failing to weigh prejudice when granting appellee's motion in limine to exclude witnesses; (2) the circuit court erred in granting a motion for directed verdict in favor of appellee after he established a prima facie case for negligence and breach of contract; and (3) the circuit court erred in failing to grant a new trial because the circuit court's rulings prevented appellant from having a fair trial. We disagree and affirm.

Appellant owned and operated a 2007 Volvo truck. The truck broke down in Arkansas, and Tri-State Truck Center, Inc. (Tri-State), made repairs. The Tri-State repair

invoice was in the amount of $14,713.38. Seven months later,[1] appellant was near Little Rock, and the truck broke down again. Appellant returned his truck to Tri-State. Tri-State repaired an air compressor and charged appellant only for the parts. The Tri-State invoice for the second repair was in the amount of $1,873.51.

Appellant drove the truck for another eight to ten thousand miles. While near El Paso, Texas, the truck broke down again, and the truck was towed to the Southwest Volvo Mack (Southwest) facility. Appellant contacted Tri-State, and Tri-State advised appellant to have the truck towed back to the Tri-State facility in Little Rock for possible warranty repair. Instead of having the truck towed back to Little Rock for warranty repairs, appellant rented another truck from Southwest and left his truck on the Southwest lot.[2]

In 2014, appellant filed a lawsuit against Tri-State alleging negligence and breach of contract, contending generally that the repairs were not made with the level or skill of a professional automotive technician. Appellant did not include a claim for breach of warranty. Appellant requested damages from Tri-State for rental fees at a rate of $2,200 per month, commencing in December 2012; inspection and repair costs already undertaken in the amount of $4,902.38; costs for further repairs; and lost wages. Tri-State answered the complaint and denied liability.

[1]The dates on the various invoices and the time frames testified to by the appellant are inconsistent; however, the inconsistent dates are not material to this opinion.

[2]The truck was apparently repaired by Southwest at a cost of $14,307.36. The repair invoice was not paid, and Southwest subsequently encumbered the truck with a mechanic's lien.

During the course of litigation, Tri-State propounded interrogatories to appellant. Appellant responded to the interrogatories; however, Tri-State complained that appellant's responses were inadequate and deficient, including, but not limited to the fact that appellant had not identified individuals with knowledge of the allegations contained in appellant's complaint. On February 6, 2015, appellee filed a motion to compel appellant to fully respond to its first set of interrogatories. The circuit court granted appellee's motion to compel on March 9, 2015. In its order, the circuit court ordered appellant to supplement its responses and produce the documents as directed within fourteen days of the order. In particular, the circuit court ordered appellant to specifically "identify" individuals who had knowledge concerning the events and circumstances that gave rise to the lawsuit. On March 23, 2015, appellant timely provided his supplemental responses.

The trial was scheduled for December 3, 2015. Appellant filed in November 2015 a motion to require the deposition of Lupe Sanchez, who was an employee of Southwest and resided in Texas. The court granted appellant's motion, and the deposition was taken on November 12, 2015, by remote video. On November 24, 2015, nine days before trial, appellant delivered another supplement to his answers to interrogatories and for the first time, identified Lupe Sanchez, Luis Almanza, and Juan Martinez, all of El Paso, Texas, as expert witnesses. On November 25, 2015, Tri-State filed a motion in limine to exclude recently disclosed witnesses. Tri-State claimed that all of these witnesses were known by appellant since the date of the mechanical failure that gave rise to the litigation and that it was prejudiced by the late disclosure of the expert witnesses because it would not have time to "probe the opinions of these newly disclosed experts, and secure rebuttal witnesses, if

necessary[,]" prior to trial. Additionally, Tri-State alleged that some of the opinions offered were based on hearsay and were inadmissible.

A hearing on the motion in limine was held on the day of trial. At the hearing, appellee explained that appellant had disclosed that he intended to call Lupe Sanchez, Luis Almonza, and Juan Martinez as expert witnesses only nine days prior to trial, which was the Tuesday before Thanksgiving. In addition, appellee argued that it had received additional documents regarding the expert witnesses via email at 1:42 a.m. on the morning of trial. Appellant responded that there was no undue prejudice because the answers to the interrogatories sent in March 2015 stated that he would be calling employees from Southwest. Upon further inquiry, appellant admitted that he failed to specifically identify the witnesses at the time the circuit court granted the motion to compel and that he had sent additional documents on the eve of trial. The circuit court, therefore, granted the motion in limine, stating,

> Well, I'm granting . . . the motion in limine in its totality with respect to those three witnesses, okay? I've been on the bench almost 13 years now, and it's the same every time in every civil case. If someone has to invoke the authority of the court to get a party to fully and completely respond to discovery, then they need to do it timely; and timely is not a week or two weeks or three weeks before trial.
>
> I allowed you all to take that deposition down there so that you would have a record that you could make, but it did not mean that you got to use them without some explanation.
>
> So, you can try the case without them, you can nonsuit, you can settle; it doesn't make me any difference. But, today, for the trial today, they're not going to be utilized okay?
>
> . . . .
>
> I'm here and I've got the day set, but we're all going to play by the rules that I hope that I consistently enforce every time I step out on the bench.

> Whether you're on this side of the rules this time or the other side of the rules the next time, they're hopefully always going to be the same in similar situations.
>
> And I cannot believe – or I cannot remember a single time where I have allowed utilization of witnesses or exhibits in this factual situation, so I'm not going to do it today. So, it's y'all's call, whatever you want to do. . . . [The witnesses are excluded] because they were not named until November, less than a month before [trial].

Appellant proceeded to trial without the testimony of the three excluded witnesses. Appellant testified that Tri-State repaired his 2007 Volvo in November 2012 at a cost of $14,713.38. A short time later, the truck broke down again, and appellant returned the truck to Tri-State. Tri-State repaired an air compressor, charging appellant for the parts without charging for additional labor costs. Appellant testified that he drove the truck another eight to ten thousand miles and that the truck broke down near El Paso, Texas. He had the vehicle towed to Southwest. Appellant testified that Southwest subsequently made the repairs to his truck at a cost of $14,307.36. Appellant stated that he had not paid the Southwest invoice, that his truck was still located at Southwest, and that Southwest had filed a mechanic's lien on the truck.

Appellant testified that he had contacted Tri-State and that Tri-State had instructed him to have the vehicle towed to Little Rock for repairs so that he could pursue a warranty claim. However, appellant stated that he could not afford to have the truck towed to Little Rock and instead rented a truck from Southwest. Appellant attempted to testify as to what the employees at Southwest had told him about the condition of his truck and the needed repairs. Appellee objected to the testimony as hearsay, and the objection was sustained.

The invoices from Tri-State to appellant were introduced into evidence. The Tri-State invoices included a provision that stated,

> This invoice is rendered pending acceptance by warranty activities, Tri-State Truck Center. Any portion not accepted, in whole or prorated, shall be debited to your account. Worn parts taken from your vehicle will be held 48 hours subject to your call. *Workmanship warranty: 90 days or 4,000 miles, whichever comes first. Tri-State Truck Center parts and Tri-State Truck Center Vendor parts will be warranted only at proper Tri-State Truck Centers and Vendor Facilities.* Exchange clutches, starters, generators, and regulators are warranted only at Tri-State Truck Center.

(Emphasis added.)

Appellant called Tom Williamson, Tri-State's service manager, as a witness. Williamson testified that Southwest had sent him an email that stated, "Our technician has determined that failure was caused from improper adjustment of the cam gear. Which in turn caused failure of both air compressors."[3] Williamson testified that he disagreed with the email because in order to diagnose the problem referenced in the email, one would have to tear down and disassemble the engine. While the pictures showed catastrophic damage, Williamson explained that one could not point to one specific thing as the cause.

Appellant also called Tom Reynolds, a master technician for Tri-State, as a witness. Reynolds testified that he had supervised some of the repair work on appellant's truck in 2012; however, he was not responsible for replacing the air compressor in the second repair. Reynolds testified that one could not make an assessment on what happened to appellant's truck just based on the pictures provided by Southwest. He further testified that he had no idea what had caused the truck to break down without further looking at it.

[3]Tri-State objected to the introduction of the Southwest email as containing hearsay. The circuit court overruled the objection, and that ruling is not an issue on appeal.

At that point in the proceedings, appellant requested to introduce the deposition of Lupe Sanchez into evidence based on the unavailability of the witness. The circuit court denied the motion for the reasons previously stated in its ruling on the motion in limine, and the deposition was proffered.

After appellant rested, appellee moved for a directed verdict based on appellant's failure to provide any testimony to establish the cause of the truck's failure in El Paso, Texas.

> [TRI-STATE:] I move for a directed verdict, Your Honor. . . . There has been no testimony to establish the cause of what – – of the failure of the truck in El Paso, Texas.
>
> [APPELLANT:] And, Your Honor, I believe that there has been testimony that the – – the truck has broken down within a certain amount of miles after a – – a full overhaul has been done while – –
>
> THE COURT: Worn parts taken from your vehicle will be held 48 hours and subject to your call. Workmanship warranty: 90 days or 4,000 miles, whichever comes first.
>
> . . . .
>
> All right. Well, there's two causes of action that are pled, one for negligence, one for breach of contract. The Court finds that the plaintiff failed to meet its burden of proof with respect to either of those claims, and the complaint is dismissed with prejudice.

Appellant timely filed a motion for new trial pursuant to Arkansas Rule of Civil Procedure 59. In his motion for new trial, appellant alleged that the circuit court's order granting appellee's motion in limine was an abuse of discretion. He additionally alleged that he established a prima facie case of negligence under the doctrine of res ipsa loquitur. However, he did not specifically contest the circuit court's dismissal of his action for breach of contract.

The circuit court subsequently filed an order denying appellant's motion for new trial. This appeal followed.

I. *The Discovery Sanctions*

Pursuant to Arkansas Rule of Civil Procedure 26(e), a party is under a duty to seasonably amend a prior discovery response if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other party during the discovery process or in writing. S*ee Harp v. Sec. Credit Servs.*, *LLC*, 2012 Ark. App. 661. This duty includes supplying supplemental information about the identity and location of persons having knowledge of discoverable matters, the identity and location of each person expected to be called as a witness at trial, and the subject matter and substance of any expert witness's testimony. Ark. R. Civ. P. 26(e). If a party fails to seasonably supplement his or her discovery responses as required and another party suffers prejudice, then the circuit court may make any order which justice requires to protect the moving party, including but not limited to imposing any sanction allowed by subdivisions (b)(2)(A)–(C) of Arkansas Rule of Civil Procedure 37.

On appeal, appellant first argues that the circuit court abused its discretion by failing to weigh prejudice when granting appellee's motion in limine to exclude witnesses. He alleges that he provided notice in his March 2015 discovery responses that he may call Southwest employees even though he did not specifically identify them and that he timely updated his responses after the November deposition. Therefore, he argues that the circuit court abused its discretion in granting the motion to exclude witnesses because it "severely

prejudiced" his case. He further argues that the circuit court failed to consider the "comparative prejudicial effects of its decision[.]" We disagree.

The standard of appellate review of decisions by the circuit court to exclude or permit the testimony of any witness at trial is whether the circuit court has abused its discretion. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997). In light of the facts and circumstances of this case, we cannot conclude that the circuit court abused its discretion in excluding the testimony of the three witnesses. In March 2015, the circuit court granted a motion to compel and specifically ordered the appellant to identify individuals with knowledge pertaining to appellant's complaint. Appellant timely responded to the order but did not identify the three alleged expert witnesses. In fact, appellant did not identify these three alleged expert witnesses until November 24, 2015, which was only nine days before the date of trial. As such, the circuit court did not abuse its discretion in excluding these three witnesses. Thus, we affirm on this point.

II. *The Directed Verdict*

Next, appellant argues that the circuit court erred in granting a motion for directed verdict[4] in favor of appellee after he established a prima facie case for negligence and breach of contract. It is the circuit court's duty, in deciding a motion to dismiss made after the presentation of the plaintiff's case, to determine whether, if the case were a jury trial, there would be sufficient evidence to present to a jury. *Woodall v. Chuck Dory Auto Sales, Inc.*, 347 Ark. 260, 61 S.W.3d 835 (2001). The circuit court does not exercise its fact-finding

[4]While appellee styled its motion as one for directed verdict, because the underlying matter was resolved at a bench trial, we treat the motion as one for dismissal. Ark. R. Civ. P. 50(a); *Rutland v. McWhorter*, 2016 Ark. App. 163, 485 S.W.3d 722.

powers, such as judging the witnesses' credibility, in making this determination. *Id.* On appeal, we view the evidence in the light most favorable to the nonmoving party, giving the proof presented its highest probative value and taking into account all reasonable inferences deducible therefrom. *Id.* We affirm if there would be no substantial evidence to support a jury verdict. *Id.* In other words, when the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the dismissal should be reversed. *Id.*

Appellant contends that he established a prima facie case of negligence under the doctrine of res ipsa loquitur. However, the theory of res ipsa loquitur was not pleaded in appellant's complaint nor did appellant raise this theory at trial. *See Copeland v. Hollingsworth*, 259 Ark. 603, 535 S.W.2d 815. In fact, the first time appellant raised this argument was in his motion for new trial. This court has repeatedly held that an argument first made in a motion for new trial is not timely, because a Rule 59 motion cannot be used to raise arguments not made to the trial court before the entry of judgment. *Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 454 (2002); *Whisnant v. Whisnant*, 68 Ark. App. 298, 6 S.W.3d 808 (1999). Therefore, we affirm the dismissal of the cause of action for negligence.

Appellant additionally contends that the circuit court erred in dismissing his breach-of-contract claim because he established the elements even without the testimony of the excluded witnesses. He argues that his claim was for breach of contract and not for breach of warranty despite the arguments presented at trial. Appellant further suggests without any citation to specific authority that Tri-State breached its contract simply because his truck broke down after having it repaired weeks prior. We disagree. In appellant's first amended

complaint, he alleged that appellee breached the contract by failing to adhere to "[a]n expressed or implied term of [the] service contract . . . that [appellee] would complete the repairs on the vehicle with the level or skill of a professional automotive repairman, thereby making the vehicle roadworthy." However, appellant failed to introduce testimony at trial to show that Tri-State breached its contract as alleged, and we, therefore, affirm on this point on appeal.

III. *Motion for New Trial*

Appellant's final argument is that the circuit court erred in failing to grant a new trial because the circuit court's rulings prevented appellant from having a fair trial. Appellant primarily reargues his initial arguments as discussed above in support of his contention that the circuit court erred in denying his motion for a new trial. Because we do not find merit to these arguments for the reasons expressed above, we do not find that the circuit court erred in its denial and affirm.

Affirmed.

GLADWIN, C.J., and KINARD, J., agree.

McPherson Law Firm, PLLC, by: *James McPherson*, for appellant.

James, Carter & Priebe, by: *Daniel R. Carter*, for appellee.