Cite as 2010 Ark. App. 662

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 09-1121

MARINA VELAZQUEZ, as Parent and Next Friend of the Minor Child CRUZ HERNANDEZ APPELLANT V. BRITTON RIDDLE APPELLEE	**Opinion Delivered** OCTOBER 6, 2010 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CIV-2007-444] HONORABLE STEPHEN TABOR, JUDGE AFFIRMED

JOHN B. ROBBINS, Judge

In this appeal, appellant Marina Velazquez, as parent and next friend of her son Cruz Hernandez, appeals the trial court's denial of a motion for new trial and the judgment in favor of the defense. This personal-injury lawsuit was filed in Sebastian County Circuit Court following a pedestrian-vehicle accident on a late afternoon in May 2006 in Fort Smith, Arkansas. Appellant alleged that appellee Britton Riddle was negligent in driving his vehicle and in striking nine-year-old Cruz as he ran across the street near his home.[1] The jury entered a unanimous defense verdict. Appellant contends a new trial is warranted because

[1]The transcript is not consistent in stating Cruz's age. Age eight and nine are used in different parts of the testimony and pleadings. Because his age is not critical to the issues at hand, we use age nine for simplicity.

(1) the trial court erred in rejecting a proffered nonmodel jury instruction, and (2) one juror committed misconduct. We disagree and affirm the jury verdict.

A trial court's refusal to give a proffered jury instruction will not be reversed absent an abuse of discretion. *Thomas v. Olson*, 364 Ark. 444, 220 S.W.3d 627 (2005). A party is entitled to a jury instruction if it is a correct statement of the law and there is some basis in the evidence to support giving the instruction. *Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003). Nonmodel jury instructions should only be given when the trial judge finds that the model instructions do not contain an essential instruction or do not accurately state the law applicable to the case. *Nelson v. Stubblefield*, 2009 Ark. 256, 308 S.W.3d 586.

Pending trial, appellant's attorney filed a motion in limine to prevent any mention of the boy's parents "who are not parties individually" as being responsible for, causing, or contributing to any damages sustained by Cruz. Another motion in limine followed, specifically requesting the trial judge to prevent appellee, his attorneys, and any witness, from attempting to assign fault to the parents "directly or by implication or innuendo." In arguing for the motion in limine, appellant's attorney specifically alleged that there was no evidence to suggest parental negligence. The trial judge granted the motion.

At the conclusion of the evidence, the trial judge read twenty-two jury instructions based upon Arkansas Model Jury Instructions. The instructions were typical of civil negligence trials: explaining the role of the judge and attorneys, the concept of ordinary care, negligence, proximate cause, elements of damage, comparative fault between Cruz and

Riddle, the duty to anticipate the behavior of children, common law rules of the road, the rule that minors are not held to the same standard as adults but rather are required to act as "a reasonably careful minor of his age and intelligence," the preponderance burden of proof, and the rule that civil trials require at least nine of twelve jurors to reach a verdict.

Appellant's attorney proffered a nonmodel jury instruction to tell the jury specifically that any purported negligence on the part of Cruz's parent or parents was not to be attributed to Cruz. Appellant's attorney argued that the lawsuit was required to be filed by a parent on behalf of the child, so the proffered jury instruction would clarify that parental negligence, if any, could not be attributed to Cruz in assigning fault. The judge rejected the instruction, stating that he would not instruct the jury on parental negligence because appellant's attorney had specifically been granted his motion in limine to prevent any evidence of parental fault from being presented to the jury.

As argued to the trial court, appellant asserts that because the caption of the lawsuit included Cruz's mother, there was "a distinct possibility that, unless instructed to the contrary, the jury could infer the Appellant's mother was involved in the lawsuit and logically impute the parents' negligence to the child unless instructed otherwise." We hold that the trial court did not abuse its discretion.

While the proffered jury instruction might be a correct statement of the law, there was no evidence to support giving it to the jury.[2] Instructions that reference matters on which no evidence was presented should not be given. *See Nelson*, *supra*; *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003) and cases cited *infra*. Instructions stating only abstract legal propositions should not be given. *Southern Farm Bureau*, *supra*. We affirm the trial court's discretionary decision to reject appellant's nonmodel jury instruction regarding parental negligence. *See Decay v. State*, 2009 Ark. 566 (holding that nonmodel jury instructions should not be given unless the model jury instructions do not accurately reflect the law).

Appellant's second point on appeal is that a new trial should have been granted due to juror misconduct demonstrating a reasonable probability of prejudice. Ark. R. Civ. P. 59(a)(2). The reasonable probability of prejudice is not presumed but must be demonstrated by the movant seeking a new trial. *St. Louis Sw. Ry. Co. v. White*, 302 Ark. 193, 788 S.W.2d 483 (1990); Ark. R. Civ. P. 59(a). We will not reverse the trial court's denial of a new trial unless there is a manifest abuse of discretion by the trial court. *B & J Byers Trucking, Inc. v. Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984).

[2]Because appellant ordered an abbreviated record on appeal, the testimony and exhibits at trial are not part of the record before us. We will not presume that appellee introduced evidence of parental fault in violation of appellant's motion in limine granted by the trial court.

Here, after the jury entered a unanimous defense verdict, appellant's attorney filed a motion for new trial alleging that juror Frank Withrow (1) improperly made up his mind prior to retiring to the jury room, and (2) improperly inspected damage to the defendant's vehicle in the courthouse parking lot during trial, thus improperly conducting his own investigation outside the record. The motion asserted that this information was learned through appellant's attorney calling Withrow on the telephone, asking questions, and recording the conversation.[3] A hearing was convened at which Withrow appeared as a witness.

Withrow stated to the judge that he had made up his mind after all the evidence had been presented and all the witnesses had testified. The defendant was the last to testify, and Withrow stated in his recorded comment to the attorney that he had made up his mind after the defendant testified, which was "all" the evidence. The judge found appellant not to have shown that Withrow prematurely decided his vote. Moreover, there was no allegation that Withrow infected the jury with any alleged premature judgment. In the absence of demonstrating a reasonable probability of prejudice, we will not reverse.

[3]There was much discussion at the hearing on the motion for new trial about the propriety of appellant's attorney calling a juror, recording the conversation, and being the affiant in support of a new trial. Appellant's attorney retracted his request for new trial as to any information about what was discussed in deliberations. The judge stated he did not consider any evidence that would violate Ark. R. Evid. 606(b). We make no comment on whether the attorney's actions constitute a violation of the Arkansas Rules of Professional Conduct or any other legal authority.

As to the alternative allegation that Withrow improperly conducted his own investigation against the judge's direction, Withrow testified that he merely walked by the defendant's vehicle because it was on the way back into the courthouse from a smoking break. Withrow said he never left the sidewalk to examine the vehicle, but he did look. A photograph of the dent on the vehicle was already admitted as evidence at trial, there was testimony about the dent at trial, and the photograph was taken back into the jury deliberation room. Withrow said he did not feel that he was violating any juror rules, nor did he see anything on the vehicle that was not already part of the evidence at trial. There was no allegation that Withrow made any comment to fellow jurors about what he had seen in the parking lot. The judge found that this outside observation of the defendant's vehicle, accidental or not, was simply cumulative to properly admitted evidence presented to all the jurors. *Diemer v. Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993) (one relevant factor in deciding whether juror misconduct warrants a new trial is whether the juror's observation impugned a fact presented by a party). Again, we cannot say that the trial court manifestly abused its discretion, particularly in the absence of demonstrating a reasonable possibility of prejudice.

We affirm the judgment and the denial of appellant's motion for a new trial.

KINARD and BROWN, JJ., agree.