ARTHUR DOREY, JR., ET AL, *v.* HARRY MCCOY AND MONTE NE SHORES, INCORPORATED

5-4952 442 S.W. 2d 202

Supplemental Opinion on Rehearing July 14, 1969

1. **Damages—Pleading, Evidence & Assessment—Remission of Amount**—Reduction of jury verdict by trial court is within inherent powers of court independent of statute. [Ark. Stat. Ann. § 27-1903.]

2. **New Trial—Proceedings to Procure New Trial—Remission or Reduction of Excess of Recovery.**—Where party against whom judgment was rendered, trial court, and reviewing court did

not treat motion for reduction of damages as having been brought under section precluding court from granting new trial after having ordered reduction of damages, trial court was not precluded from granting new trial even though motion was in nature of motion under such statute. [Ark. Stat. Ann. § 27-1903.]

3. **Judgment—On Trial of Issues—Notwitrstanding Verdict.**—Judgment notwithstanding verdict may be granted only when judgment sought by movant is only result that could be reached on basis of pleadings or undisputed evidence.

4. **Judgment—Notwithstanding Verdict—Time For Motion.**—Motion for judgment notwithstanding verdict may only be entered before entry of judgment.

5. **Judgment—On Trial of Issues—Notwithstanding Verdict.**—Litigant should not be required to waive right to seek new trial in order to ask for judgment notwithstanding verdict, when latter relief cannot be sought after judgment is entered.

6. **Damages—Remission of Excess—Waiver.**—Failure to make timely motion to reduce verdict would constitute waiver of that relief.

7. **New Trial—Proceedings to Procure New Trial—Remission of Excess of Recovery.**—Even if motion which sought reduction in damages was one for judgment notwithstanding verdict, grant of reduction in damages did not preclude trial court from granting new trial.

8. **New Trial—Proceedings to Procure New Trial—Remission of Excess of Recovery.**—Even though giving party moving for reduction of verdict an election of reduction or new trial would not have been error, failure to do so was not an abuse of discretion.

Appeal from Benton Circuit Court, *Maupin Cummings,* Judge; supplemental opinion on rehearing.

Appeal from Benton Circuit Court; *Maupin Cummings,* Judge; affirmed.

Davis Duty for appellants.

Hardy Croxton for appellees.

JOHN A. FOGLEMAN, Justice. In their petition for rehearing, appellants call our attention to a statement

in our original opinion that they appealed from the trial court's action reducing the damages awarded by the jury from $1,800 to $1,650. This statement was erroneous, even though one of the points relied upon by appellants here was the sufficiency of the evidence to support the jury award of $1,800. The opinion should have stated that appellants appealed from the granting of the new trial and argued, on appeal, that the evidence was sufficient to support the jury's award of $1,800 in damages.

Appellants also allege that we have totally disregarded evidence adduced by appellants tending to show adverse possession of the lands on which the road in question was located in holding that there was such uncertainty as to the location of the lots upon which they claimed the road in question had been placed that we could not say that the trial judge abused his discretion by granting a new trial for error in the assessment of the amount of recovery. There was testimony by one of the appellants that the land occupied by his father, under whom appellants claim, included the road. On cross-examination this witness admitted that he never knew the exact boundary lines other than his father's house and its immediate environment. On redirect examination, these questions were asked and answers given:

"Q. You have stated you didn't know exactly where your boundaries were until the survey was run?

A. That's right.

Q. Did you have a general idea of the land that you claimed?

A. I know what my father claimed, yes.

Q. Did the land that your father, and you subsequently, claimed the land that now has a road on it?

A. Yes. I couldn't verify that till afterwards, though.

Q. Pardon?

A. I say I couldn't verify it till after, but it was the part that we thought was ours.

Q. The land you claimed is the part the road is on?

A. Yes."

The same witness then admitted that approximately one-quarter of the road was on a lot not claimed by appellants. We agree with appellants' statement in their original brief that evidence as to the portion of the road located on lands other than those claimed by appellants was not direct or definitive and that it might have left the jury wandering in the realm of conjecture. We do not agree with appellant that the burden of producing direct and definitive evidence on this essential element of appellants' measure of damages was upon appellees. Even though this evidence was not specifically mentioned in our original opinion, it was considered. We are still unable to say that the evidence so clearly preponderated in appellants' favor on the question of damages that the trial judge abused his discretion by granting a new trial. Under such circumstances, we sustain the action of a trial court granting a motion for new trial. *Bobbitt* v. *Bradford*, 241 Ark. 697, 409 S.W.2d 339.

Appellants also vigorously urge that the trial court acted under Ark. Stat. Ann. § 27-1903 (Repl. 1962) and was thereby barred from granting a new trial after having ordered a reduction of the damages. Although it was stated in the original opinion that appellants' motion for reduction of the verdict was in the nature of a motion under that section, neither the appellants, the trial court nor this court categorized the motion as

having been filed under that section.[1] That section is not the basic authority for reduction of a jury verdict by a trial court. Such action is within the inherent powers of the trial court aside from and independent of that statute. *Dierks Lumber & Coal Company* v. *Noles,* 201 Ark. 1088, 148 S.W. 2d 650. Section 27-1903 only purports to limit that basic power in certain cases. This court has reversed the judgment of a trial court and ordered a new trial in a case wherein the appellee's attorneys offered to file a remittitur in the amount by which the trial judge found the verdict to be excessive. See *Jamison* v. *Spivey,* 197 Ark. 698, 125 S.W. 2d 453. While it is true that this court found that that verdict was still excessive, there would be no reason why the trial court could not grant the same relief, if it felt that there was still error in the assessment of damages in actions upon contracts or for injury to or detention of property.

If it is applicable at all, § 27-1903 might have prevented the filing of a motion for new trial, if appellees had offered, or could be required, to file and enter of record a release of all errors that may have accrued at the trial upon appellants' remitting the amount by which the judgment was held to be excessive. There is no indication that appellees waived any errors in the trial nor is there any showing that appellants remitted the excess. The requirement that a litigant surrender his right of appeal as a condition upon which he may accept the reduction of an excessive verdict by the trial court has been held to be beyond the power of the legislature as a violation of Article 7, Section 4 of our Constitution. *St. Louis & N. A. Rd. Co.* v. *Mathis,* 76 Ark. 184, 91 S.W. 763, 113 Am. St. R. 85. If we accepted appellants' theory that the two motions were so inconsistent that the motion to reduce precluded a motion for new trial, we would be imposing the same

[1]This section may be applicable only to those cases wherein the damages are not susceptible of definite pecuniary measurement, as in cases involving pain and suffering, etc.

penalty upon a litigant. There is no logical reason why this court could so deny the right of appeal under the constitutional provision if the General Assembly could not.

Not only did appellants fail to enter a remittitur in the amount found excessive by the trial court, but they argue here that the court erroneously treated the jury's verdict of $1,800 as excessive. Their action is tantamount to a refusal to enter the remittitur, and would have justified the granting of a new trial, if § 27-1903 applies. *Kroger Baking Company* v. *Melton,* 193 Ark. 494, 102 S.W. 2d 859. Appellants cite no authority for their position that the filing or granting of a motion to reduce a verdict precludes the granting of a motion for a new trial.

Appellants also insist that the first motion was for judgment notwithstanding the verdict. Ordinarily that motion is for the purpose of obtaining a judgment reaching the opposite result from the jury's verdict, e.g., a judgment for defendant when the verdict was for the Plaintiff. It can only be granted when the judgment sought by the movant is the *only* result that could be reached on the basis of the pleadings or the undisputed evidence. *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S.W. 2d 176; *Spink* v. *Morton,* 235 Ark. 919, 362 S.W. 2d 665. A motion for judgment notwithstanding the verdict may only be entered before the entry of Judgment. *Oil Fields Corporation* v. *Cubage,* 180 Ark. 1018, 24 S.W. 2d 328. A litigant should not be required to waive the right to seek a new trial in order to ask for judgment notwithstanding the verdict, when the latter relief cannot be sought after judgment is entered. Failure to make a timely motion to reduce a verdict would constitute a waiver of that relief.

While there are some decisions to the contrary, it is held in a number of jurisdictions that a successful

or unsuccessful motion for judgment notwithstanding the verdict does not constitute a waiver of or bar to the granting of a new trial. See *Jolley* v. *Martin Bros. Box Co.,* 158 Ohio St. 416, 109 N.E. 2d 652 (1952), and cases cited therein. See also *Sallden* v. *City of Little Falls,* 102 Minn. 358, 113 N.W. 884, 13 L.R.A. (n.s.) 790, 120 Am. St. R. 635 (1907). The case cited in the original opinion, even though based upon the Federal Rules of Civil Procedure, supports this position. The Supreme Court of the United States there held that a trial court should pass on an alternative motion for new trial even though it granted judgment notwithstanding the verdict. Partial support for that holding was found in the common law rule quoted in the original opinion. Even if the motion here is properly one for judgment notwithstanding the verdict, it did not bar the granting of a new trial.

While it may well be that the trial court in instances such as this would not err in giving a moving party his election of a reduction of a verdict or a new trial, we still cannot say that his failure to do so is an abuse of discretion.