

SUPREME COURT OF ARKANSAS

No. 09-1356

LEAH POGUE, ADMINISTRATRIX OF
THE ESTATE OF MARY FRANCES
POGUE and CAROLYN SUE
RICHARDSON, ADMINISTRATRIX OF
THE ESTATE OF HANNAH FAYE
HAYES
APPELLANTS

V.

TRANSCONTINENTAL INSURANCE
COMPANY d/b/a CNA and STANDARD
LINES INSURANCE
APPELLEES

Opinion Delivered May 13, 2010

APPEAL FROM THE CLEBURNE
COUNTY CIRCUIT COURT,
[NO. CV2008-174-4]
HON. TIMOTHY M. WEAVER,
JUDGE

AFFIRMED.

JIM HANNAH, Chief Justice

Leah Pogue, Administratrix of the Estate of Mary Frances Pogue, and Carolyn Sue Richardson, Administratrix of the Estate of Hannah Faye Hayes, appeal a judgment of the Cleburne County Circuit Court. A judgment was entered on a jury verdict finding that payment of the automobile insurance policy limits of tortfeasor Matthew Milner fully compensated appellants for damages arising from fatal injuries inflicted on Mary Frances Pogue and Hannah Faye Hayes. Appellants assert that the circuit court erred in refusing to instruct the jury and clarify alleged misleading statements of appellee Transcontinental Insurance Company d/b/a CNA, Standard Lines Insurance's counsel. We find no error and affirm. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(5).

A brief review of the facts is helpful in understanding the issues in this case. On January 15, 2007, Mary and her mother Hannah were passengers in a van owned by Cooper Management Corporation, which owned the nursing home where Hannah resided. The van was struck by a motor vehicle driven by Milner; Hannah and Mary were killed, and van driver Betty Bennett was injured. Appellants brought a wrongful-death action against Milner. Bennett also sued Milner, and the cases were consolidated. Appellants and Bennett agreed to accept Milner's policy limits of \$1.5 million in exchange for a dismissal with prejudice. The money was deposited to the registry of the court, and a bench trial was held to determine total damages suffered by appellants and Bennett and to determine how the money in the registry should be divided.

The circuit court found the combined damages suffered by appellants and Bennett to be \$4,495,525.50. After determining the pro rata share, the circuit court disbursed the \$1.5 million that had been deposited into the registry of the court. Bennett received \$200,586.37, and the remaining amount, approximately \$1.3 million, was divided between the appellants.

Appellants, arguing that the damages awarded in the first trial failed to fully compensate them for their damages, filed a new action seeking to recover additional damages from the underinsured coverage of Cooper's motorist insurance policy. The parties executed a stipulation that set out the amount each appellant received in the first action, and that stipulation was entered into evidence in this case. Thus, the jury was aware of the recovery each appellant received in the prior trial.

Cooper had \$1 million in underinsured coverage on the van with CNA. Appellants assert that, based on the statements made by appellee's counsel, the jury was led to believe that the circuit court in the previous trial determined that the amount of money the appellants received in that trial fully compensated them for their injuries and damages. In support of this assertion, appellants point to statements of counsel occurring in the video depositions of Rebecca Pogue Brigole and Jennifer Pogue Veazey, that were shown in their entirety at trial. Appellants state,

[A]ppellee's counsel repeatedly made misleading statements about the bench trial which led the jury to believe it was the court, and not the policy limits, that determined the amount appellants actually received. This led the jury to wrongly conclude the amount of money received by the appellants must have been fair and sufficient because after all, it was the court and not the policy limits, that determined the \$1,300,000.

Appellants tried to resolve this issue of the alleged confusion about the prior damage awards early on in the trial of the present case by moving in limine. They sought to obtain a ruling that evidence of the award of \$4.4 million to appellants in the prior action was admissible to avoid the impression that the \$1.3 million distributed fully compensated appellants. The circuit court ruled against appellants on the motion in limine, finding that such evidence would confuse the jury in that they might conclude that the court had already determined that the appellants were due the \$4.4 million. Appellants addressed the issue again as the trial came to a close by offering a special jury instruction they believed would clarify the issue. The circuit court rejected the jury instruction. On appeal, appellants assert that, by failing to read the proposed special jury instruction, the circuit court left the jury with the impression that

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the court in the prior action determined that the \$1.3 million disbursed was the total amount that should be paid to appellants.

Preservation

CNA argues that, because appellants failed to object and obtain a ruling on whether counsel's comments in the video depositions became a comment on the evidence by the circuit court, they waived the issue and deprived themselves of their sole issue on appeal. That is incorrect. While appellants did not make the specific objection that CNA notes, they did raise the issue of the jury being confused about the prior damages award and obtained a ruling on it in the hearing on their motion in limine and in the hearing on their proposed special jury instruction. Appellants did not appeal the decision on the motion in limine; however, they did appeal the decision rejecting their proposed special jury instruction. That issue is preserved for appeal.

Special Jury Instruction

Appellants offered the following special instruction:

The amount of money received by the plaintiffs and Betty Bennett has been presented to you only to prove that Matt Milner's insurer, State Farm, paid out the limits of his policy. This amount of money received by the plaintiffs from State Farm is not evidence of the amount of the plaintiff's actual damages. The amount of the plaintiff's actual damages is to be determined by you according to the other evidence you have heard in this case.

"A trial court should give the jury a nonmodel instruction only when the model instructions fail to correctly state the law or if there is no model instruction on the subject." *Cluck v. State*, 365 Ark. 166, 179, 226 S.W.3d 780, 789 (2006) (quoting *Mayo v. State*, 336 Ark. 275, 284,

984 S.W.2d 801, 806 (1999)). A decision on whether to instruct the jury is decided under an abuse of discretion standard. *Barnes v. Everett*, 351 Ark. 479, 492, 95 S.W.3d 740, 748 (2003). Appellants argued that statements of counsel in the depositions showed how the jury was confused by statements of counsel made in the depositions. The following are excerpts of statements of counsel from the Brignole and Veazey depositions where the prior trial was mentioned:

Attorney: Do you know if—and I understand you are not a lawyer. I’m going to try to explain this in lay terms. But is it your understanding that the claim against him settled and that his insurance company tendered its money into the court and then you all went to court for the judge to divide those proceeds, those settlement proceeds up, does that —

...

Attorney: There was a judgment that was entered that the jury saw. Have you seen that document?

...

Attorney: To the best of your knowledge, were those proceeds divided and paid in accordance with the order that Judge Weaver entered last year?

...

Attorney: Was there anything in particular about the judge’s apportionment of those proceeds that you take issue with or that you disagreed with?

...

Attorney: And it was at that proceeding when Judge Weaver made a determination about some insurance proceeds and divided them up among the family members, is that correct?

Appellants assert that the statements of appellees’ counsel caused the jury to wrongly conclude

“the court, and not the policy limits, determined the amount of money the appellants received at the bench trial.”

The circuit court instructed the jury with Arkansas Model Jury Instruction–Civil 2303. This instruction provided the burden of proof in underinsured motorist claims, which included an instruction on whether the appellants were fully compensated. The jury was read the appellants’ burden of proof, including as follows: “Fifth, that on January 15th, 2007, Matthew Milner carried liability insurance in an amount insufficient to fully pay for the damage resulting from a motor vehicle accident for which Matthew Milner is at fault.” The jury-verdict form, as to both plaintiffs, asked, “Do you find from a preponderance of the evidence that the amount of Matthew Milner’s automobile liability insurance was insufficient to fully compensate the claimants for the fatal injuries of Mary Frances Pogue/Hannah Hayes?” In closing, appellants argued as follows:

Milner had automobile liability insurance coverage with State Farm and the limits of one million, three hundred thousand. That, pursuant to the court order the available limits were paid and distributed . . . so you can see the amounts that were paid to each claimant. You have to decide, first, that the amount of compensation that’s already been paid under the primary insurance coverage was not adequate, and, therefore, the underinsured motorist policy applies. And then you decide how much should be awarded to the plaintiffs in the case.

The record does not reveal a direct statement by anyone that distribution of the proceeds of the policy limits on Milner’s State Farm policy fully compensated the appellants. Statements of appellees’ counsel in the videotaped depositions indicated that the proceeds acquired in the first action were distributed by the court, and they did not assert or imply that

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the court in the prior action determined that payment of the \$1.3 million fully compensated the appellants. The model jury instruction clearly set out the law. The jury was to decide if the appellants were fully compensated by the prior payments. The jury-verdict form asked the jury to determine whether the appellants were fully compensated by the proceeds from the first action. The model instruction did not fail to correctly state the law, and the special jury instruction was not needed to clarify the issues or the comments of counsel. We find no error and, therefore, no abuse of discretion.

Affirmed.

Davidson Law Firm, LTD, by: *Charles Darwin "Skip" Davidson*, for appellants.

Barber, McCaskill, Jones & Hale, P.A., by: *Michael J. Emerson*, for appellees.