REL: February 8, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2171008

Rebecca M. Fazzingo

v.

Carl D. Orange and Keim TS, Inc.

Appeal from Madison Circuit Court
(CV-15-902019)

EDWARDS, Judge.

On November 21, 2013, Rebecca M. Fazzingo was involved in an automobile accident with a vehicle driven by Carl D. Orange; the vehicle was owned by Orange's employer, Keim TS, Inc. ("KTSI"). Fazzingo sued Orange, KTSI, and a number of

fictitiously named defendants in the Madison Circuit Court ("the trial court"), seeking damages for negligence, wantonness, and KTSI's negligent entrustment of the vehicle to Orange.[1] A jury trial commenced on May 14, 2018. After Fazzingo rested her case, which consisted of her testimony and the deposition testimony of her chiropractor, Dr. Adam Shafran, Orange and KTSI orally moved for a judgment as a matter of law on all the claims against them. The trial court granted a judgment as a matter of law in favor of both Orange and KTSI, stating on the record that,

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[1]Although Fazzingo included fictitiously named defendants in the complaint, the record does not reflect that the complaint was ever amended to substitute any actual defendants for the fictitiously named defendants; thus, no defendants other than KTSI and Orange were served with the complaint.

> "When there are multiple defendants and the summons (or other document to be served) and the complaint have been served on one or more, but not all, of the defendants, the plaintiff may proceed to judgment as to the defendant or defendants on whom process has been served and, if the judgment as to the defendant or defendants who have been served is final in all other respects, it shall be a final judgment."

Rule 4(f), Ala. R. Civ. P. Thus, the existence of the fictitiously named defendants in the complaint does not prevent the judgment entered by the trial court from being final. See Edosomwan ex rel. Edosomwan v. A.B.C. Daycare & Kindergarten, Inc., 32 So. 3d 591, 593 (Ala. Civ. App. 2009).

> "[a]fter listening to the testimony -- specifically listening to the cross-examination of [Fazzingo] -- I do not believe that [Fazzingo] has established credible evidence of causation between whatever contact these two vehicles had and the injuries she complained of. I don't find that there is credible evidence to establish specific injuries or damages which related specifically to this accident."

After her timely postjudgment motion was denied, Fazzingo appealed to the Alabama Supreme Court, which transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7(6).

On appeal, Fazzingo argues that the trial court erred in granting KTSI and Orange's motion for a judgment as a matter of law on the negligence claim against them.[2] Fazzingo contends that the trial court erroneously resolved issues regarding the credibility of the testimony presented at trial in making its decision to enter the judgment as a matter of law. She further argues that she presented substantial evidence, through both her testimony and that of Dr. Shafran, indicating that the accident caused her injuries.

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[2]Notably, Fazzingo does not contest the entry of a judgment as a matter of law on the wantonness or negligent-entrustment claims, and, therefore, she has waived any issues regarding those aspects of the judgment. See Tucker v. Cullman-Jefferson Counties Gas Dist., 864 So. 2d 317, 319 (Ala. 2003) (stating that issues not raised and argued in brief are waived).

> "When reviewing a ruling on a motion for a [judgment as a matter of law], this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion .... Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a [judgment as a matter of law]. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a [judgment as a matter of law], this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id."

Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003). Substantial evidence is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989); see also Ala. Code 1975, § 12-21-12(d).

Fazzingo testified that she was driving her son to school on the morning of November 21, 2013, when she slowed down as

she approached a yield sign so that she could be certain that she could merge into oncoming traffic. She said that she heard squealing tires and that the vehicle driven by Orange struck the rear of her vehicle. According to Fazzingo, she felt no pain initially, but, she testified, she began to feel pain radiating from her back to her chest and in her lower back approximately 10 to 15 minutes after the police officer who responded to the accident had left the scene. Fazzingo said that she drove herself to the hospital, where she was evaluated in the emergency room.

Fazzingo admitted that she had been involved in an automobile accident in 2011 and that one of her lumbar vertebra had been fractured in that accident. She said that she had recovered from the effects of the 2011 accident and that she was "not 100% but fine." She further admitted that she had suffered from neck problems before the 2013 accident. Fazzingo explained that her neck had "bothered [her] a lot, but it could [have been] arthritis," that her neck pain before the 2013 accident "was nothing ... like it is," and that her neck pain after the 2013 accident was different and worse than it had been before the 2013 accident. Overall, Fazzingo said,

the pain in her back was also worse than before the 2013 accident, and, she testified, it affected her ability to take care of her grandchildren. However, Fazzingo said that Dr. Shafran's treatment had improved her condition. She explained that he had given her exercises to do and that they had "helped a lot."

On cross-examination, Fazzingo admitted that she had not told the emergency-room personnel that she had suffered from back or neck pain before the accident. However, she explained that she had not done so "[p]robably because -- the reason I was talking about the past -- he was asking me about then." Fazzingo also admitted that she had gone to the hospital on May 9, 2013, complaining of back and neck pain, after which the hospital performed magnetic resonance imaging ("MRI") scans on her cervical, thoracic, and lumbar spine. Upon further questioning, Fazzingo admitted that she had been receiving Social Security disability benefits for over 12 years, which, she said, was based primarily on an injury to her knee; however, she admitted that she had indicated on her disability application that she also suffered from chronic neck pain.

Dr. Shafran's deposition was read into the record. He testified that he had reviewed the records from Fazzingo's examination at the emergency room after the 2013 accident and that he had also reviewed other medical records. Dr. Shafran first examined Fazzingo in February 2014, and he performed flexion and extension views of her neck. He said that those tests revealed ligament instability in her cervical spine, which, he explained, likely had resulted from the 2013 accident because her neck was turned in rotation at the time of the impact. Dr. Shafran admitted, however, that the instability could have been present before the 2013 accident.

In addition, Dr. Shafran testified regarding the differences in Fazzingo's May 9, 2013, MRI results and the results of her December 2013 MRI scan, taken after the November 2013 accident. Dr. Shafran noted that the reports from both MRI scans showed the existence of the fractured lumbar vertebra and that it had remained "stable." He also noted that both scans showed that Fazzingo suffered from degenerative changes in her spine. However, Dr. Shafran testified that the December 2013 MRI scan revealed a new bulging disk in Fazzingo's thoracic spine. He also testified

that Fazzingo had a "Schmorl's node" at T12/L1, which, he opined, was likely due to trauma caused by the 2013 rear-end collision. Dr. Shafran explained that Fazzingo's age, degenerative changes, the position of her body at the time of the impact, and her gender affected her susceptibility to an injury. According to Dr. Shafran, his treatment of Fazzingo was related to the 2013 accident and was reasonable. He also opined that the 2013 accident had exacerbated Fazzingo's underlying degenerative disk disease and had caused her further injury and continued pain. Specifically, he stated:

> "[M]y opinion is the fact that she was involved in a past accident, a past collision, and was not -- was not involved in any ongoing treatment prior to seeing me or prior to [the 2013] accident tells me that her condition was stable. And then the collision that occurred, I believe the date of injury on 11/21 was the exacerbation of the symptoms that she had to see me for."

Fazzingo argues that she presented evidence sufficient to withstand KTSI and Orange's motion for a judgment as a matter of law on her negligence claim. In light of the trial court's expressed reason for granting the requested judgment as a matter of law, we first note that

> "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a

> judge, whether he is ruling on a motion for summary judgment or for a [judgment as a matter or law]. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes [v. S.H. Kress & Co.], 398 U.S. [144,] at 158-159 [(1970)].'"

O'Rear v. B.H., 69 So. 3d 106, 115 (Ala. 2011) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)), abrogated on other grounds by Ex parte Vanderwall, 201 So. 3d 525, 537 (Ala. 2015).

Fazzingo's testimony at trial had certain inconsistencies and was not always clear. In addition, her testimony was to the effect that she may not have given the emergency-room personnel complete information about her previous or existing medical conditions. However, the fact that Fazzingo's own testimony might have been conflicting or contradictory is not a basis for entering a judgment as a matter of law. As Fazzingo points out in her brief on appeal, any conflicting or contradictory testimony, even her own, is to be resolved by the jury and not by the trial court. See Semmes Nurseries, Inc. v. McVay, 279 Ala. 42, 45, 181 So. 2d 331, 333 (1965).

> "The fact that a plaintiff makes contradictory statements, in his own case, does not justify the court in directing the verdict against the plaintiff. Which version of plaintiff's testimony should be believed is a question for the jury,

> although the fact that his testimony is conflicting could be considered by the jury in weighing the testimony and treated as a circumstance against him."

McVay, 279 Ala. at 45, 181 So. 2d at 333.

In support of the trial court's judgment as a matter of law, KTSI and Orange contend that Dr. Shafran's testimony was "predicated on two erroneous facts" and that those erroneous facts could not have been relied upon by Dr. Shafran to form an opinion regarding causation. Therefore, they argue, Fazzingo failed to present substantial evidence regarding causation.[3] To support their argument, KTSI and Orange rely on Alabama Power Co. v. Robinson, 447 So. 2d 148, 152 (Ala. 1983), in which our supreme court stated:

> "An expert witness may give his opinion based on his own knowledge of the facts, stating those facts and then his opinion, or he may give an opinion based upon a hypothetical question as to facts already in evidence or evidence to be subsequently admitted. Yates v. Christian Benevolent Funeral Homes, 356 So. 2d 135, 139 (Ala. 1978); C. Gamble,

[3]KTSI and Orange specifically argue that Fazzingo failed to create a "genuine issue of material fact" regarding causation of her alleged injuries. However, because we are reviewing the entry of a judgment as a matter of law and not a summary judgment, we construe their argument to be that Fazzingo failed to present substantial evidence of causation such that a judgment as a matter of law in favor of KTSI and Orange was warranted.

> McElroy's Alabama Evidence, § 130.01 (3d ed. 1977). Where personal observation is lacking, however, an expert witness cannot be permitted to give his expert opinion until facts upon which his opinion is to be based have been properly hypothesized before him."

We cannot agree that Robinson supports the entry of the judgment as a matter of law in the present case. First, we note that the issue in Robinson was whether an expert's opinion had been properly admitted. Dr. Shafran's testimony was admitted without objection in the present case. Second, once expert testimony is admitted, "any challenge to the facts upon which an expert bases his opinion goes to the weight, rather than the admissibility, of the evidence." Baker v. Edgar, 472 So. 2d 968, 970 (Ala. 1985); see also Dyer v. Traeger, 357 So. 2d 328, 330 (Ala. 1978). Any decision regarding the weight to assign to Dr. Shafran's testimony is for the jury, not the trial court. See Star Freight, Inc. v. Sheffield, 587 So. 2d 946, 951 (Ala. 1991) (discussing the admissibility of expert testimony and stating that "it was the jury's duty to determine the weight to be accorded to the testimony of the witnesses").

The evidence presented by Fazzingo at trial, although not without contradiction, was substantial evidence that, if

believed by the jury, could establish that her injuries and resulting treatment by Dr. Shafran were causally related to the 2013 accident. Thus, the trial court erred by entering a judgment as a matter of law in favor of KTSI and Orange on the negligence claim. We reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Moore and Hanson, JJ., concur.

Donaldson, J., concurs specially.

DONALDSON, Judge, concurring specially.

I concur with the main opinion. Regarding the language of Alabama Power Co. v. Robinson, 447 So. 2d 148, 152 (Ala. 1983), quoted in the main opinion, I note that that case was decided before the adoption of the Alabama Rules of Evidence in 1996 and, more particularly, before the October 2013 amendment to Rule 703, Ala. R. Evid.