



In the Missouri Court of Appeals
Eastern District
DIVISION ONE

JAMES P. KAHN,	)	No. ED108947
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of St. Francois County
vs.	)	16SF-CC00234
	)	
TRISTON BLACKWELL,	)	Honorable Wendy Wexler-Horn
	)	
Respondent.	)	FILED: November 17, 2020

OPINION

James P. Kahn (“Kahn”) appeals from the trial court’s “Order and Judgment” (“Judgment”) finding in his favor, and against Triston Blackwell (“Blackwell”), on Kahn’s negligence claim against Blackwell, claiming that the trial court erred in denying his Motion for New Trial. We affirm in part, reverse in part, and remand.

Factual and Procedural Background

On October 4, 2015, Kahn was injured in an automobile collision when Blackwell’s vehicle, while traveling at a high rate of speed, crossed the center line of the road and struck the front of Kahn’s vehicle, which was traveling in the opposite direction. As a result of the collision, Kahn suffered serious injury to his legs, back, neck, shoulder, head, and left hand. On December 22, 2016, Kahn filed a petition for damages alleging personal injury stemming from Blackwell’s negligence. On June 9, 2017, Blackwell filed his answer, which denied several allegations in Kahn’s petition; Blackwell filed no counterclaims.

A trial commenced on January 22, 2020, and on January 24, 2020, the case was submitted to the jury. Later that day, the jury returned a verdict for Kahn and assessed his damages at \$10,000.00.

On January 30, 2020, Kahn filed a Motion for New Trial alleging that on the afternoon of January 24, 2020, during a break in the trial proceedings “just after the close of [Blackwell]’s case and just prior to closing arguments, there was improper contact between [Blackwell] and multiple jurors.” Kahn attached his affidavit and those of his counsel, Steve Wolf (“Wolf”) and Mark Rudder (“Rudder”).

In Kahn’s affidavit, he noted that during the January 24, 2020 lunch break, he and his wife were exiting the courthouse when they observed Blackwell standing in the smoking area with two jurors in the case. Kahn provided that his wife stated, “Hey wait a minute, you can’t be down here talking with them,” and that he stated “it was against the rules for the defendant or the plaintiff to be conversing with the jurors.” Kahn noted that Blackwell “just smiled” at them, and one of the jurors, a “dark-haired female,” asked, “What do you want us to do, this is where we have to come smoke.” Kahn explained that he then called over Wolf, who was exiting the courthouse at that time. Kahn provided that Wolf stated to Blackwell and the jurors that they could not be together, but the “male juror just kept smoking,[] never said anything[, and] made no attempt to leave,” and the female juror responded, “Where else can we go, what do you want from us, where else can we smoke?” Kahn reported that he and his wife then left for a coffeehouse across the street, and from there, they observed Blackwell walking toward the other side of the courthouse with a bailiff “a short distance behind.”

In Wolf’s affidavit, he provided that on January 24, 2020, he “witnessed an incident of possible improper contact between [Blackwell] and certain members of the jury just prior to

closing arguments.” Wolf explained that “just after the defense rested their case, and just prior to jury instructions and closing arguments,” he was exiting the courthouse and saw Kahn and his wife at the bottom of the steps when they called him over and asked, “Are we supposed to be hanging around with the jury?” Wolf indicated that he noticed Blackwell and the other two individuals, and that from the “context and circumstances,” he understood Kahn’s question to be “an expression of concern regarding [Blackwell] being with the jury.” Wolf provided that he “shook [his] head ‘no’ and said ‘no’” before walking to his car. Wolf explained that he “tried to call [Rudder] on his cell but the call did not go through,” so he “went ahead and left...for a pre-planned trip to Kansas” because he “had every confidence that [Kahn] would tell [Rudder] about the events.”

In Rudder’s affidavit, he noted that he “became aware of improper contact between [Blackwell] and multiple jurors” on January 24, 2020. Rudder provided that after closing arguments, Kahn “mentioned something to [him] about the bailiff having to run [Blackwell] away from some of the jurors outside,” but that he believed the incident “merely involved a bailiff doing his job.” Rudder explained that after the jury delivered the verdict and he exited with his clients, he “was fully informed for the first time of the situation that had taken place,” and the following morning, he contacted Blackwell’s counsel about the incident. Rudder reported that Blackwell’s counsel told him that she also observed Blackwell and the jurors, “but that [Blackwell] assured [her] that they weren’t talking about the case, and because he was in the designated smoking area that he was not doing anything wrong.”

On February 5, 2020, the trial court entered its Judgment for Kahn in the amount of \$10,000.00 and further noted that “each party [was] to bear their own costs.”

On February 7, 2020 Kahn filed a Motion to Tax Costs, detailing his expenses to be taxed against Blackwell.

On April 3, 2020, Kahn filed an Amended Motion to Tax Costs and Motion to Amend Judgment. Therein, he asserted that his initial Motion to Tax Costs should be viewed, in substance, as a Motion to Amend Judgment, and that the Judgment should be amended to allow Kahn, as the prevailing party, to recover his costs against Blackwell. A hearing on Kahn's motions was scheduled for March 27, 2020, but repeatedly rescheduled until the motions were denied by operation of law¹, and Kahn timely filed his Notice of Appeal on May 6, 2020. Kahn's appeal follows.

Jury Misconduct

In Kahn's first point on appeal, he argues that the trial court abused its discretion in failing to grant his Motion for New Trial because he presented sufficient evidence "to demonstrate jury misconduct and improper contact with [Blackwell]." Kahn argues that despite his and Wolf's instructions, Blackwell and the jurors "failed to end the contact," and that this "adamant refusal" gave "rise to the appearance of evil" that highlighted the jurors' bias against him. Thus, he claims that the trial court should have granted his Motion for New Trial or "at a minimum, an evidentiary hearing on the issue of jury misconduct." Blackwell, however, has filed a Motion to Dismiss Kahn's first point, contending that Kahn waived any objection to juror misconduct where the issue was not raised with the trial court prior to the jury's verdict.

"A party cannot witness misconduct on the part of the court or the jury and sit by and wait the result of the verdict, and then, if it proves to be against him, object to the alleged

¹ "Any motion for new trial, motion to amend the judgment or opinion, or motion for judgment notwithstanding the verdict is overruled for all purposes if the trial court does not rule on it within ninety days after the date the last such timely motion is filed." Rule 78.06.

misconduct.” Nash v. Ozark Barbeque, Inc., 901 S.W.2d 353, 359 (Mo. App. S.D. 1995) (quoting Disbrow v. Boehmer, 711 S.W.2d 917, 927 (Mo. App. E.D. 1986)); see also Contestible v. Brookshire, 355 S.W.2d 36, 43 (Mo. 1962) (overruled on other grounds by Bennett v. Owens-Corning Fiberglas Corp., 896 S.W.2d 464 (Mo. banc 1995)) (disallowing defendant’s juror misconduct point on appeal because “defendant waived the objection by not objecting at the time of the occurrence to the alleged misconduct of the juror.”).

Here, both Kahn and Wolf explained in their affidavits that prior to closing arguments, they observed Blackwell and two jurors standing in a smoking area together. Kahn indicated that he explained to them that it was “against the rules for the defendant or the plaintiff to be conversing with the jurors,” but that no one left, Blackwell only smiled at Kahn, and one of the jurors asked what Kahn, “want[ed] us to do.” Both Kahn and Wolf noted that Kahn called over Wolf to ask whether Blackwell was permitted to “be hanging around with the jury,” and that Wolf stated that they could not. Wolf, who acknowledged in his affidavit that he “witnessed an incident of possible improper contact,” explained that he “tried to call [Rudder] on his cell but the call did not go through,” so he “went ahead and left...for a pre-planned trip to Kansas.” Rudder, in turn, acknowledged in his affidavit that he “became aware of improper contact between [Blackwell] and multiple jurors...[a]fter closing arguments,” as Kahn “mentioned something to [him] about the bailiff having to run [Blackwell] away from some of the jurors outside.” Although Rudder claims he was not “fully informed” of the alleged situation until after the jury rendered its verdict, Kahn, Wolf, and Rudder each established by their own admissions in their affidavits that they either observed or had some knowledge of potential improper contact between Blackwell and two jurors prior to the jury’s verdict. Despite these admissions, they made no effort to raise the issue with the trial court prior to the jury’s verdict on January 24,

2020. Instead, the issue was raised on January 30, 2020, six days after the jury rendered its verdict. “A party who witnesses misconduct and decides to play a game of chance cannot object to the alleged misconduct if it proves to be against him.” Welsh v. Burlington Northern Railroad Company, 719 S.W.2d 793, 800 (Mo. App. E.D. 1986).

Kahn counters Blackwell’s Motion to Dismiss by arguing that the fact that no objection was raised prior to the jury’s verdict should not bar relief because this “case does not involve a significant delay.” He notes that the jury misconduct issue was raised in his Motion for New Trial “only 6 days after” the alleged occurrence. This argument is unavailing. We find Welsh v. Burlington Northern Railroad Company instructive. Id. In Welsh, an employee sued his employer for injuries sustained during the course of his employment. Id. at 795. Following trial, the case was submitted to the jury, and the jury returned an unsigned verdict in favor of the employer. Id. The judge informed the jury that he could not accept the unsigned verdict, and the jury returned to deliberate once more before returning a verdict in favor of the employee that complied with the judge’s instructions. Id. at 795-96. At that point, the employer moved for a mistrial stemming from an alleged emotional display by the employee in front of the jury when the first, unsigned verdict was read, claiming that the display “caused the jurors to have sympathy for [the employee]” and “change” the verdict to favor him. Id. at 796. The trial court overruled the motion. Id. On appeal, this Court concluded that the employer waived its allegation of error pertaining to the alleged emotional display because the employer “failed to object and to timely request the trial court to take any corrective action” “at the time when the alleged emotional display occurred.” Id. at 800. We noted that “[o]nly after the jury had rendered its verdict in favor of [the employee], *more than one hour* after the alleged emotional display, did [the employer] first move for a mistrial because of the alleged emotional display.” Id. (emphasis

added). Accordingly, we found that “waiver occurred as a result of [the employer’s] actions.” *Id.* at 801.

Here, like Welsh, Kahn, Wolf, and Rudder took no action to raise any issue regarding the alleged improper contact with the trial court before the jury rendered its verdict. Instead, the issue was not raised until six days after the alleged occurrence. Accordingly, like Welsh, Kahn’s inaction constituted a waiver of his allegation of error regarding Blackwell’s alleged improper contact with jurors. Thus, we grant Blackwell’s Motion to dismiss. Point I is denied.

Costs

In Kahn’s second point on appeal, he argues that the trial court abused its discretion in failing to assess costs against Blackwell because Kahn was the prevailing party at trial. We agree.

“The award of costs is a matter within the circuit court’s sound discretion, and we will not disturb the award absent a showing of an abuse of discretion.” Green v. Plaza in Clayton Condominium Ass’n, 410 S.W.3d 272, 284 (Mo. App. E.D. 2013) (quoting Sasnett v. Jones, 400 S.W.3d 429, 441 (Mo. App. W.D. 2013)). “An abuse of discretion occurs when the court’s decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice.” *Id.* (quoting Sasnett, 400 S.W.3d at 441) (internal quotation marks omitted).

Section 514.060 RSMo 2000² provides that “[i]n all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law.” Likewise, Rule 77.01 provides that “[i]n civil actions, the party prevailing shall recover his costs against the other party, unless otherwise

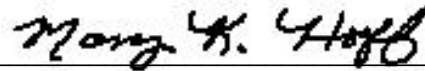
² Unless otherwise indicated, all further statutory references are to RSMo 2000 as amended.

provided in these rules or by law.” “Statutes allowing the taxation of costs are strictly construed.” Matthes v. Wynkoop, 435 S.W.3d 100, 111 (Mo. App. W.D. 2014) (quoting Gene Kauffman Scholarship Found., Inc. v. Payne, 183 S.W.3d 620, 627 (Mo. App. W.D. 2006)).

Here, Kahn filed a petition alleging one count of negligence against Blackwell. Blackwell raised no counterclaim. Following a trial, the jury found Blackwell to be liable and awarded Kahn \$10,000.00 in damages. Although Kahn was thus the prevailing party, the trial court did not allow him to recover his costs, instead ordering “each party to bear their own costs.” We find that the trial court abused its discretion in doing so “as [Kahn] was entitled to recover at least some of his costs as the prevailing party” under Rule 77.01 and Section 514.060. Hathaway v. Halley, 499 S.W. 3d 782, 784 (Mo. App. E.D. 2016). Accordingly, we reverse the Judgment with respect to the trial court’s award of costs and remand this case for the trial court to consider what costs Kahn is entitled to recover. Point II is granted.

Conclusion

The Judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

A handwritten signature in black ink, appearing to read "Mary K. Hoff", written over a horizontal line.

Mary K. Hoff, Judge

Colleen Dolan, Presiding Judge and Robert M. Clayton III, Judge: Concur