

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0451



PHILL STIRLING JUNKINS AND ELISSA MAGEE JUNKINS,
INDIVIDUALLY AND ON BEHALF OF THE MINORS
JACOB STIRLING JUNKINS AND KATELIN ALEXANDRA JUNKINS

VERSUS


MODERN MUZZLELOADING, INC., ET AL.

Judgment Rendered: DEC 14 2011

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF WASHINGTON
STATE OF LOUISIANA
DOCKET NUMBER 92,131-B

THE HONORABLE AUGUST J. HAND, JUDGE

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S. Bradley Rhorer
Julie J. Baxter
Baton Rouge, Louisiana
and
Addison K. Goff, IV
Ruston, Louisiana

Attorneys for Plaintiffs/Appellees
Phill Stirling Junkins and Elissa
Magee Junkins

Louis C. LaCour, Jr.
New Orleans, Louisiana

Attorney for Defendants/Appellants
Modern Muzzleloading, Inc. and
EBSCO Industries, Inc.

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

This is an appeal of a judgment that awarded damages following an accidental shooting with a muzzle-loading shotgun.

Phill Junkins, the plaintiff, was a 35-year-old assistant principal and head baseball coach at Bowling Green High School, in Franklinton, Louisiana, at the time of his injury. On the evening of March 31, 2004, Mr. Junkins was loading his shotgun, a Knight Rifles TK2000 12-gauge muzzleloader, in preparation for a hunt the next day. The basic facts of the accident are not disputed. Before the gun was loaded, Mr. Junkins fired a primer charge (with no gunpowder loaded) into a cotton patch inserted into the barrel on a "jag" attached to the end of the gun's ramrod. The intended purpose of firing a primer is to be sure that the channel between the primer and the breech or bottom of the barrel (where the gunpowder is placed) is clear. After firing the primer, Mr. Junkins removed the ramrod and the attached patch from the barrel. He then removed the spent primer, measured the gunpowder, poured the gunpowder into the barrel, and used the ramrod to ascertain that the gunpowder was properly seated at the base of the barrel. While he was doing this, the gunpowder ignited, propelling the ramrod from the gun barrel into his hand, causing him serious injury.

Mr. Junkins and his wife, Elissa Magee Junkins, individually and on behalf of their two minor children, Jacob and Katelin Junkins, filed suit against Modern Muzzleloading, Inc., d/b/a Knight Rifles, Inc., and EBSCO Industries, Inc. (collectively referred to hereafter as Knight Rifles), and other parties, asserting that the shotgun was defective. At the time of trial, the plaintiffs had reached a settlement with all of the defendants except for Knight Rifles.

The matter was tried before a jury. The jury returned a verdict against Knight Rifles and in favor of Mr. Junkins for \$1,500,000 in general damages, and

\$275,000 for past and future medical expenses, \$275,000 to Mrs. Junkins for loss of consortium, and also \$35,000 to Jacob Junkins and \$35,000 to Katelin Junkins for loss of consortium. The district court entered judgment in accordance with the jury's verdict. Knight Rifles filed a motion for new trial, judgment notwithstanding the verdict (JNOV), and remittitur, which was denied. Knight Rifles then filed this appeal.

Knight Rifles makes the following assignments of error:

1. The jury's conclusion that the TK2000 shotgun was defective was manifestly erroneous.
2. The district court's refusal to exclude evidence of [Knight Rifles'] warning language in a revised owner's manual constitutes reversible error.
3. The jury's award of \$1,500,000 in general damages was grossly excessive and the award of \$140,000 for future medical expenses had no evidentiary basis; hence, both awards were manifestly erroneous.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, Knight Rifles asserts that forensic evidence proved that the shotgun could not have discharged in the manner the plaintiffs claimed. Knight Rifles asserts that the essence of Mr. Junkins' case was that after Mr. Junkins discharged a primer to clear the breech of the shotgun, a small portion of the cleaning patch still burned; thus, when he later poured gunpowder into the barrel, and sought to seat it in place with the jag, the "latent ember" caused the gunpowder to ignite. However, Knight Rifles argues, the credible forensic evidence at trial demonstrated that this simply could not have happened because: 1) the gunpowder cannot ignite absent a heat source of nearly 800 degrees; 2) too much time elapsed between firing the primer and adding the gunpowder for any residual latent spark to remain; and 3) the gun could not have fired had Mr. Junkins not put a new primer on the gun.

An expert witness for Knight Rifles, James W. Carlson, had 60 years experience with muzzleloaders. He had been on the national board of the National Rifle Association, and he co-authored the *Muzzleloading Shotgun Handbook*. Mr. Carlson testified that when a primer is fired, the only thing that enters the barrel is hot gas, and nothing remains of the primer afterward. He had fired muzzleloaders thousands of times, and had never experienced or heard of latent sparks. Mr. Carlson testified that even if some remnant of the patch remained, it would only smolder at a temperature of 375 to 450 degrees because it is made of cotton; and thus, it could not ignite the gunpowder used by Mr. Junkins, which had an ignition temperature of 800 degrees. Mr. Carlson determined that there must have been a fresh primer in place (something even Mr. Junkins conceded was contrary to safe practice), and not a lingering ember, in order to ignite the gunpowder.

Branch Meanley also testified as an expert witness for Knight Rifles. Mr. Meanley is an expert in muzzleloading firearms, a representative for Knight Rifles, and a competitive shooter. Mr. Meanley worked to test the "latent spark" theory, and testified that it was not physically possible for the accident to happen the way Mr. Junkins claimed it happened.

Steve Howard testified as an expert for the plaintiffs in muzzleloading use, function, analysis, and capabilities with regard to accidental discharges. He testified that muzzleloaders possess a dangerous characteristic, namely, that embers, irrespective of their source of fuel, can remain in the barrels of the guns long enough for the user to place his or her hand over the barrel and can ignite the powder in the gun.

Another witness for the plaintiffs, Dr. Steve Wilcox, testified as an expert in human factors, warnings, and instructional analysis. Dr. Wilcox testified that Knight Rifles was unreasonable in failing to provide an adequate warning of the gun's dangerous characteristic of hidden embers, and that the manufacturer's

manual must contain a warning to call the user's attention to that danger, and to describe that danger, which it did not do in its manual.

It is well settled that a court of appeal may not set aside a finding of fact by a trial court or a jury in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989); **Arceneaux v. Domingue**, 365 So.2d 1330, 1333 (La.1978); **Canter v. Koehring Co.**, 283 So.2d 716, 724 (La. 1973).

When findings are based on determinations regarding the credibility of witnesses, the manifest error-clearly wrong standard demands great deference to the trier of fact's findings; for only the fact finder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. **Rosell**, 549 So.2d at 844.

The rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. **Lirette v. State Farm Ins. Co.**, 563 So.2d 850, 853 (La. 1990).

The jury reviewed all of the evidence presented at trial, and found the plaintiffs' witnesses credible, ruling for the plaintiffs on the issue of liability. After a thorough review of the record, we cannot say that these findings are manifestly erroneous or clearly wrong.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, Knight Rifles asserts that the evidence that its owner's manual was revised after Mr. Junkins purchased his shotgun should have been excluded as a remedial measure.

Knight Rifles filed a motion in limine to obtain an advance ruling on the admission of the manual. The trial court ruled that the manual was admissible for two reasons: one, since it was a manual related to other Knight muzzleloaders, it was not a subsequent remedial measure, and two, it related to Knight Rifles' defense that any hidden ember warning was unnecessary because hidden embers ignitions could not happen.

Generally, all relevant evidence is admissible. La. C.E. art. 402. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to a determination of the action more or less probable than it would be without the evidence. La. C.E. art. 401. Whether evidence is relevant is within the discretion of the trial judge, and his ruling will not be disturbed on appeal in the absence of a clear abuse of his discretion. **Hunter v. State ex rel. LSU Medical School**, 05-0311 (La. App. 1st Cir. 3/29/06), 934 So.2d 760, 763, writ denied, 06-0937 (La. 11/3/06), 940 So.2d 653; **Boudreaux v. Mid-Continent Cas. Co.**, 05-2453, p. 8 (La. App. 1st Cir. 11/3/06), 950 So.2d 839, 845, writ denied, 06-2775 (La. 1/26/07), 948 So.2d 171.

After a thorough review of the record, we find no clear abuse of discretion in the denial of the motion in limine in this case.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, Knight Rifles asserts that the jury award of \$1,500,000 to Mr. Junkins for general damages was grossly excessive and that the award for future medical expenses had no evidentiary basis. Thus, it asserts that both awards are manifestly erroneous.

THE GENERAL DAMAGES AWARD TO MR. JUNKINS

The discretion vested in the trier of fact is great and even vast, such that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular

case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff that the appellate court should increase or reduce the award. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 508 U.S. 910, 113 S.Ct. 2342, 124 L.Ed.2d 252 (1993).

Dr. Harold M. Stokes, an orthopedic surgeon who specializes in hand surgery, performed five separate surgeries upon Mr. Junkins following the accident. Dr. Stokes described the injury as a gunshot wound to the right hand and wrist with disruption of the median nerve and flexor tendons, loss of carpal bones and dorsal tendons, and gunshot wound also of the upper right arm. The first surgery, performed at the hospital under general anesthesia, consisted of debriding the arm wound by removing fragmental nonviable tissue and closing the lacerations of the upper arm. Dr. Stokes then explored and debrided the wound to the hand and wrist, excised necrotic tissue, and inserted a drain. He loosely closed the wound and stabilized the wrist with an external fixation device, consisting of four pins placed into the bones above and below the area of injury, and a rod fixing the pins and acting as a stabilizer. Dr. Stokes testified that the first surgery was done to simply clean and control the wounds and stabilize the hand, before proceeding with the later procedures to fully repair the damage. While the wounds healed Mr. Junkins saw a physical therapist for wound care and passive movement of his fingers.

On June 10, 2004, Dr. Stokes performed a second surgery to remove the external fixation device and fuse the wrist, using a local bone graft and plate and screw. This surgery was also done in the hospital under general anesthesia.

On August 19, 2004, Dr. Stokes performed a third surgery at the hospital under general anesthesia, removing a tendon and a nerve from Mr. Junkins' right calf, which was then grafted to the median nerve of his wrist. The plantaris tendon

from the leg was used to restore flexion to his thumb, and also some muscles from his hand were removed from the base of the hand and inserted over to the thumb so that he could oppose his thumb. After the cast was removed, Mr. Junkins started physical therapy.

On June 11, 2009, Mr. Junkins underwent a fourth surgery, also done under general anesthesia at the hospital, to repair a ruptured flexor tendon and also to excise a cyst. The cyst was not related to the injury.

By November 4, 2009, Mr. Junkins had developed pain and motion at the thumb fusion site. The fusion of the thumb appeared to have failed.

Thereafter, a fifth surgery took place on November 12, 2009, wherein Dr. Stokes put two pins on either side of the fusion site of the thumb, with a wire to stabilize it. Following the fifth surgery, Mr. Junkins experienced pain in the index and long fingers due to nerve crossover.

Dr. Stokes testified that the hypersensitivity of Mr. Junkins' right hand, with tingling and pain that felt like the hand was going to sleep and then waking up was permanent, due to all of the nerve work that had been done. Dr. Stokes further testified that Mr. Junkins remained in some form of constant pain, and would for the rest of his life. He also testified that Mr. Junkins had a sixty-nine percent impairment for his upper right extremity and a forty-two percent total body impairment.

At the time of the accident, Mr. Junkins was 35 years old, with a wife and two young children, and was working as a baseball coach and assistant principal. Following the accident, he was unable to continue his profession as a baseball coach, underwent five surgeries, and was left with permanent, constant pain, a sixty-nine percent upper right extremity impairment and a forty-two percent total body impairment. Keeping in mind the great and even vast discretion vested in the trier of fact, such that an appellate court should rarely disturb an award of general

damages, after a thorough review of the record, we find that the award of \$1,500,000 in general damages, while high, is not higher than that which a reasonable trier of fact could assess for the effects of this particular injury to this particular plaintiff such that the appellate court should reduce the award.

THE MEDICAL EXPENSES AWARD

The proper standard for determining whether a plaintiff is entitled to future medical expenses is proof by a preponderance of the evidence the future medical expense will be medically necessary. **Menard v. Lafayette Ins. Co.**, 09-1869 (La. 3/16/10), 31 So.3d 996, 1006.

The medical expenses award was \$275,000. The evidence proved past medical expenses of \$130,000. Thus, \$145,000 was for awarded for future medical expenses. Future medical expenses proved at trial were only for hand cream for the plaintiff, which costs approximately \$30 per month. Mr. Junkins was 41 years old at trial, and at \$30 per month, the hand cream would cost \$360 a year. Calculated at \$360 per year for the next 50 years, this would equal \$18,000 in future medical expenses, without discounting the total to present value (there being inadequate evidence upon which to base such a discount). Thus, the medical expenses award of \$275,000 is reduced to the amount proven by a preponderance of evidence at the trial: \$145,000 for past medical expenses, plus \$18,000 for future medical expenses, for a total of \$163,000.

Thus, the judgment of the district court is amended, reducing the medical expenses award to \$163,000, and in all other respects the district court judgment is affirmed. Costs are assessed against the appellants.

AMENDED, AND AS AMENDED, AFFIRMED.