IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00163 COA

LINDA SAUCIER, AS MOTHER AND GUARDIAN OF SHEILA SAUCIER, A MINOR

APPELLANT

v.

ANTHONY BELL D/B/A BAY VIEW PLAZA FURNITURE, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JERRY OWEN TERRY, SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

ROBERT H. TYLER

RUSSELL GILL

ATTORNEY FOR APPELLEE:

W. RAYFORD JONES

NATURE OF THE CASE: TORT-ASSAULT, BATTERY, UNLAWFUL IMPRISONMENT AND NEGLIGENT AND/OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

TRIAL COURT DISPOSITION: JURY VERDICT IN FAVOR OF DEFENDANT, ANTHONY BELL

BEFORE BRIDGES, P.J., BARBER, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This case is on appeal from a jury verdict in favor of the Defendant, Anthony Bell. Bell was sued by Shelia Saucier for assault and battery, unlawful imprisonment, and negligent or intentional infliction of emotional distress. The issue presented for consideration on appeal is this: Did the lower court err in admitting evidence intended to demonstrate Bell's good character and proper conduct with other female employees? Saucier argues that the sole purpose for this evidence was to improperly raise the inference that Bell, in keeping with his good character would not, on the occasions complained of by Saucier, have committed the alleged acts. Saucier argues such evidence is inadmissible under considerations raised by Mississippi Rule of Evidence 404(b). Although this Court agrees with the proposition asserted by Saucier on this appeal as an abstract statement of the law, we conclude that, on the facts shown in this record, the issue simply was not properly preserved for appellate review. We affirm the jury verdict and judgment for the Defendant.

I.

Facts

Shelia Saucier, a minor of the age of sixteen years, worked for a brief time for Anthony Bell in his furniture store in Gulfport, Mississippi. Saucier claimed that, during the course of her employment, Bell began to make unwanted advances of a sexual nature toward her. These actions included suggestive bodily contact, remarks concerning her physical characteristics, remarks about the possibility of the two going out together to a local bar, and hints of the possibility of the two engaging in sexual activities. These episodes culminated, according to her testimony, in an event where Bell, sitting behind his desk, removed his trousers on the pretext of having a missing button replaced. A fellow employee then closed Bell and Saucier together in Bell's office, whereupon he stood up, revealing that he was wearing only bikini underwear. He then proceeded to make remarks to Saucier of a suggestive sexual nature which she found inappropriate and distressing. No physical contact was alleged during this incident, and Saucier claims to have left work immediately thereafter, never to return.

II.

Discussion

Saucier actually raises two issues on appeal; however, both involve what Saucier characterizes as improperly admitted evidence of Bell's good character for the sole purpose of raising an inference that he would not have acted in the manner she alleges. The first issue is whether the trial court committed an abuse of discretion in admitting the evidence, and the second issue is whether the trial court erred in refusing to grant Saucier's post-trial motion for JNOV or, in the alternative, a new trial "in light of the overwhelming amount of impermissible character evidence introduced by Defendant Bell."

Saucier points this Court to the testimony of witnesses called by Bell, all of whom were employees or former employees, who testified briefly as to Bell's demeanor around the store. These witnesses, most of whom were female, were led through a litany of questions to the effect that Bell had never behaved inappropriately with them nor had they observed him engaged in any such activity with Saucier or anyone else. Saucier now claims that these recitals were improper evidence of other acts designed to prove Bell's good character in order to show that he acted in conformity with that good character in his dealings with Saucier, a course of action prohibited to Bell under Mississippi Rule of Evidence 404(b). *See* M.R.E. 404(b).

As we stated earlier, as an abstract statement of the law, we would agree with Saucier. In a civil action, unless character is specifically in issue, evidence of the good or bad character of a party is generally not admissible. By way of example, our Mississippi Supreme Court has stated:

> It is a general rule of law, adhered to in all but a few jurisdictions, that a party to a civil action is not entitled to bolster his case by introducing evidence of his good character even if his adversary charges him in the pleadings with committing a legal wrong, or even an act for which he might be subjected to criminal prosecution, such as conspiracy, embezzlement, fraud, [or] incendiarism.

Millers Mut. Fire Ins. Co. v. King, 232 Miss. 260, 266, 98 So. 2d 662, 663 (1957).

The problem with the position taken by Saucier on this appeal is this: Saucier's counsel displayed a remarkable inconsistency in regard to the admission of such evidence during the course of the trial. On some occasions this sort of evidence was admitted without objection. On other occasions, Saucier's counsel sought to solicit such evidence from witnesses through his own cross-examination.

Yet, probably the most telling incident demonstrating the lack of merit in Saucier's present complaint revolves around defense witness Stacy Cruse. Prior to her testimony before the jury, Saucier's counsel raised a preliminary objection on the basis that this witness was not employed at the store during the time of the incidents and could not possibly have any probative evidence to offer other than to testify "that Mr. Bell is a nice man." This objection clearly framed the issue of the admissibility of "good" character evidence to bolster the defendant's case. More or less by mutual agreement reached among the attorneys and the trial court, it was decided that this witness's testimony would be proferred for consideration by the court outside the presence of the jury so that the court could determine its relevancy and thus its admissibility. The witness was asked on direct a number of questions concerning Bell's conduct at work involving other young female employees -- exactly the type of evidence Saucier now suggests compels this Court to reverse the verdict returned against her. Yet during the course of Saucier's counsel's cross-examination outside the jury's presence, it developed that Bell had asked this witness, who was also a young female employee, out for a drink at a local bar. At that point, Saucier's counsel specifically stated on the record, "We'll withdraw our objection and let this witness testify."

It is evident that Saucier's counsel made a strategic decision at that point that he was willing for the

jury to hear arguably inadmissible evidence of Bell's good conduct if he could, in exchange, get before the jury this one incident of what he considered improper conduct by Bell with his young employee. The law is clear that, without a timely objection to the admission of evidence, the trial court may not be put in error on appeal for allowing such evidence to come in. *Stewart v. Stewart,* 645 So. 2d 1319, 1322-23 (Miss. 1994) (citations omitted). If this is true for the simple failure to enter a timely objection, then it is doubly true when the proposed evidence is the subject of a specific affirmative waiver of any objection at the time the evidence is presented.

We conclude that a party may not let objectionable matters into evidence in when it suits her purpose and exclude similar evidence at other times during the course of the trial when it does not.

Our review of the case convinces this Court that the complained of evidence, whether or not it was abstractly admissible under our rules of evidence, was admitted on occasion without timely objection and in one major instance under a specific waiver of objection by counsel. Thus, there can be no error by the trial court for failing to rule properly on an objection that was never made. For essentially the same reason, the receipt of this evidence, now vigorously argued to be improper, did not provide a basis for post-verdict relief, whether in the form of a new trial or a JNOV.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS AFFIRMED. COSTS OF THE APPEAL ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION. THOMAS, P.J., NOT PARTICIPATING.

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PAYNE, J., SPECIALLY CONCURRING:

I write to express both my agreement with the result of this case based upon the law and my frustration with that result. If Saucier is to be believed, Bell's behavior was egregious. The very reason that Bell introduced character witnesses was to attempt to convince the jury not to believe Saucier. Obviously the sole purpose of the introduction was to attempt to prove that because these witnesses testified that Bell had not harassed them, then he could not possibly have harassed Saucier. This is the very essence of what Mississippi Rule of Evidence 404 seeks to eliminate:

> The difficulty surrounding character evidence is with regard to its inferential use. When a party attempts to prove that a person [he himself] has a certain character trait and that he acted in accordance with it, the court will exclude the testimony. To do otherwise is to [favorably] prejudice the person, to render him in the eyes of jurors [not] liable, not because of what he did or did not do in the instant case, but because of what he has done or failed to do in the past.

M.R.E. 404 cmt. (citations omitted). Within this quotation I have placed certain words in brackets to highlight the application of Rule 404 to the present situation in which the party, Bell himself, has tried to bolster his defense by inferential use of character evidence. I would dissent in this case were it not for the trial strategy where the objection to this testimony was withdrawn.

I write to distance myself from any appearance of giving assent to sexual harassment or encouragement to any person who may be engaged in it. Where admissible proof is available, remedy by the courts is attainable. I would hope that the result of this case is not to give aid and comfort to supervisors in the workplace who would tend to persist in inappropriate behavior regarding teenage female employees.