Affirmed and Opinion filed July 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00172-CV

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KENNIE MATTHEWS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LIZABETH PARHAM MATTHEWS, DECEASED, Appellant

V.

S&A RESTAURANT CORP., STEAK AND ALE OF TEXAS, INC., AND STEAK AND ALE OF TEXAS, INC. D/B/A BENNIGAN'S , Appellees

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On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 95-019893

O P I N I O N

Kennie Matthews, individually and as representative of the estate of Lizabeth Parham Matthews, deceased, appeals from a take-nothing judgment granted S&A Restaurant Corp., Steak and Ale of Texas, Inc., and Steak and Ale of Texas, Inc., doing business as Bennigan's, here collectively called "S&A," in his lawsuit alleging negligent failure to provide security.

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I. Background

On December 30, 1995, at about 12:30 p.m., Kennie Matthews and his wife, Lizabeth Parham Matthews, entered a Bennigan's restaurant on the Southwest Freeway in Houston. In the restaurant foyer, they were robbed and shot by a Charles Harold "Dinkie" Hughes, a person not otherwise connected with the restaurant. Lizabeth Parham Matthews died of her wounds. Kennie Matthews sued S&A, alleging negligence and gross negligence in failing to provide security. After a jury trial and in accordance with the verdict, S&A received a take-nothing judgment. We affirm.

II. Discussion

A. Excluded Memorandum

In his first issue, Kennie Matthews complains that the trial court erred in excluding from evidence an S&A "policies and procedures" memo.

All relevant evidence is admissible, except as otherwise provided by law or the rules of evidence. Evidence that is not relevant is inadmissible. *See* TEX. R. EVID. 402; *see also Jones v. Red Arrow Heavy Hauling, Inc.*, 816 S.W.2d 134, 136 (Tex. App.—Beaumont 1991, writ denied). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence. *See* TEX. R. EVID. 401. In determining relevancy, a reviewing court looks at the purpose for which the evidence was offered. The relevancy test is satisfied if there is some logical connection either directly or by inference between the fact offered and the fact to be proved. *See Service Lloyds Ins. Co. v. Martin*, 855 S.W.2d 816, 822 (Tex. App.—Dallas 1993, no writ). The decision whether to admit evidence rests within the discretion of the trial court. *See E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

Matthews sought to introduce an S&A interoffice memorandum on the subject of "OPENING & CLOSING PROCEDURES." The memorandum dealt with preventing robbery

of the restaurant and theft by employees. The headings on the memo sections include "PRE-CLOSE PROCEDURES," "DAILY OPENING/PRE-OPENING PROCEDURES," "CLOSING PROCEDURES," "DELIVERIES," "TRASH REMOVAL," "DEPOSIT PROCEDURES." Also included was a section about what to do during and after a robbery and what could be done to prevent a robbery. Matthews argues that the memo is relevant to the question of S&A's negligence. He contends that the memo outlines policies that call for S&A employees to set up a crime-watch program, establish a liaison program with local police, and to call the police if suspicious people were seen in and around the restaurant. Matthews also notes that the memo provides, "These procedures focus on the times we are more at risk of such incidents [that is, robberies], i.e., during close, during opening *and while serving our guests*." [Italics added.]

Primarily, the memo deals with preventing robberies of the restaurant itself, especially during opening and closing. Even though the document touches on subjects that arguably could relate to the overall restaurant safety, it does not deal directly with protecting customers during service hours. The robbery at issue was not a robbery of the restaurant. Nor did it occur during opening or closing, but, rather, during the lunch hour.

Further, even though the memo was excluded, the jury heard evidence regarding the security measures S&A took and failed to take. For example, witnesses testified that S&A failed to institute a local crime watch and failed to employ a security guard. Other evidence showed that the manager stopped the policy of providing discount meals to police officers. One employee testified that he saw Hughes in the restaurant the day before the shooting and that he thought Hughes was casing the restaurant for a robbery but that he failed to report his observations to the manager. The employee, who had recently been through S&A's training program, testified that he had not been instructed to report such information to the manager. Also, much of the information in the memo was included in a Security Awareness Kit, which the court did allow into evidence.

Whatever relevant evidence the memo contained was cumulative of other admitted evidence. While the trial court would not have abused its discretion by including the memo, neither did the trial court abuse its discretion by excluding the memo as irrelevant.

Even if the evidence were relevant, a trial court could have excluded the evidence if its probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. TEX. R. EVID. 403; *see TCA Bldg. Co. v. Northwestern Resources Co.*, 922 S.W.2d 629, 637 (Tex. App.—Waco 1996, writ denied). We review a trial court's Rule 403 decision under an abuse of discretion standard. *See Central Tex. Hardware v. First City*, 810 S.W.2d 234, 238 (Tex. App.—Houston [14th Dist.] 1991, writ denied). The court would have been within its discretion to exclude the memo on grounds that it would have led to a confusion of issues, inviting the jurors to find S&A negligent for not following its own procedures for opening and closing and for asset protection rather than for not providing security for customers. Accordingly, we overrule Matthews's first issue.

B. Excluded Testimony

In the second and third issues, Matthews complains that the trial court erred in excluding testimony of Tony Fattahi, S&A's district manager, and in preventing the cross-examination of Paul Burklow, Bennigan's general manager, regarding their compliance or noncompliance with the policies outlined in the aforementioned memo. We have held the trial court did not abuse its discretion in excluding the memo as irrelevant or, if relevant, likely to be misleading. Thus, the trial court also did not abuse its discretion in excluding the testimony of the company officials regarding the memorandum. *See* TEX. R. EVID. 402. Accordingly, we overrule Matthews's second and third issues.

C. William Flock Testimony

In his fourth issue, Matthews complains that the trial court erred in excluding the testimony of William Flock, a former company employee and co-author of the aforementioned memo. The trial court excluded Flock's testimony after Matthews failed to designate him as a fact witness in his original answers to discovery requests or by later supplementation.

Matthews argues that he failed to designate Flock as a fact witness after S&A, during the discovery process, wrongfully withheld his name as a person with knowledge of relevant facts. This failure to disclose, Matthews argues, constitutes sufficient good cause to require the court to allow Flock's testimony even though Matthews failed to timely designate him as a fact witness.

Where a party fails to make, amend, or supplement a discovery response in a timely manner, sanctions are appropriate unless the court finds that such failure was for good cause or such failure will not unfairly surprise or prejudice the other party. *See* TEX. R. CIV. P. 193.6(a). The exclusion of the evidence is the sole remedy for not timely supplementing discovery. *See Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992). The remedy is mandatory and automatic. *See id.* The exception exists when good cause is shown why the testimony should be allowed in spite of the discovery sanction. *See Morrow v. H.E.B., Inc.*, 714 S.W.2d 297-98 (Tex. 1986). The determination of good cause is within the sound discretion of the trial court. *See id.* at 298. We may set aside that determination only if the trial court abused that discretion. *See id.*

Matthews argues that Flock was a fact witness, that is, a person with knowledge of relevant facts, and that S&A failed to disclose his name during discovery as required. *See* TEX. R. CIV. P. 194 (Requests for Disclosure). Matthews alleges that he first learned of the existence of Flock during the deposition of Richard Moe, S&A's director of asset protection and Flock's subordinate, approximately two weeks before the thirty-day deadline for witness designation. Matthews argues that he did not discover Flock's name and that Flock had knowledge of relevant facts until after that thirty-day deadline had passed. He contends that S&A's failure to disclose Flock's name constitutes good cause sufficient to allow the testimony.

Flock was director of human resources for S&A Restaurant Corp. The offer of proof showed that he had no specific knowledge of the incident at issue. The offer, in the form of a deposition, demonstrated, the following:

(1) Flock was coauthor of the "OPENING & CLOSING PROCEDURES" memo; (2) he would have testified that policies and procedures detailed in the memo should have been adopted by the management of the Bennigan's restaurant at issue; (3) he was concerned that security guards were being discharged in the Houston market to cut costs and increase cash flow; (4) he thought that corporate policies tying a manager's bonus to a restaurant's profitability discouraged a manager from hiring a security guard; and (5) he thought S&A did not provide a large enough budget to allow asset protection manager Moe to perform his duties.

First, we must examine both Matthews's actions in attempting to discover the identities of people with knowledge of relevant facts and S&A's actions in disclosing persons with knowledge of relevant facts. In a deposition approximately two weeks before the deadline to designate witnesses, Moe testified that he reported to the senior vice president of human resources. Matthews's attorneys did not then request the name of that senior vice president, Flock. Matthews did not discover Flock's name until after the deadline had passed. As for S&A's failure to disclose Flock's name as a fact witness, Flock had little or no knowledge of relevant facts. He was author of the aforementioned policy and procedures memo, which was excludible. This testimony regarding the memo was, therefore, irrelevant. His testimony that security guards were being dismissed, repeated elsewhere, was cumulative. As for his concerns that corporate policies discouraged managers from hiring security guards, not only did other witnesses testify about such policies, but such concerns are in the nature of an opinion, as are his concerns that S&A did not provide an adequate budget for Moe. As a fact witness, Flock cannot testify to matters that will require him to give an expert opinion. *See Baylor Med. Plaza Serv. Corp. v. Kidd*, 834 S.W.2d 69, 74 (Tex. App.—Texarkana 1992, writ denied).

Matthews failed to designate Flock as a fact witness within the deadline. The offer of proof shows Flock had little to offer as a fact witness, primarily evidence that was cumulative or in the nature of opinions. We cannot say that S&A was required to disclose his name as a person with knowledge of relevant facts. Matthews cannot blame his failure to discover Flock

on S&A's nondisclosure. The trial court did not abuse its discretion by failing to find that Matthews had demonstrated good cause for failing to timely designate Flock or by excluding Flock's testimony. Moreover, because Flock's testimony was irrelevant or cumulative, any presumed error would have been harmless. *See* TEX. R. APP. P. 44.1(a). Accordingly, we overrule Matthews's fourth issue.

D. Gross Negligence

In his fifth issue, Matthews complains that the trial court erred in entering a directed verdict against him on the issue of gross negligence.

Initially, we note that Matthews does not attack the legal or factual sufficiency of the evidence regarding negligence. At trial, the jury found no negligence. Without negligence, there can be no gross negligence. *See Shell Oil Co. v. Humphrey*, 880 S.W.2d 170, 174 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (finding of ordinary negligence prerequisite to finding of gross negligence). Thus, the jury would never have gotten to the issue of gross negligence. Even if we assume the trial court erred in granting a directed verdict on the gross negligence issue, such error was harmless in light of the jury's ultimate answer on negligence. *See* TEX. R. APP. P. 44.1(a). This gross negligence issue cannot rise to the level of reversible error. Nevertheless, in the interest of justice, we will address Matthews's gross negligence issue.

A directed verdict is proper when a defect in the opponent's pleadings makes the pleadings insufficient to support a judgment, when the evidence conclusively proves a fact that establishes a party's right to a judgment as a matter of law, or when the evidence offered on the cause of action is insufficient to raise a fact issue. *See* TEX. R. CIV. P. 268; *Kline v. O'Quinn*, 874 S.W.2d 776, 785 (Tex. App.—Houston [14th Dist.] 1994, writ denied). In reviewing the granting of a directed verdict by the trial court on an evidentiary basis, we will decide whether there is any evidence of probative value to raise issues of fact on the material questions presented. *See Qantel Bus. Sys., Inc. v. Custom Controls*, 761 S.W.2d 302, 304 (Tex. 1988). While doing so, we must consider all of the evidence in a light most favorable to the party

against whom the verdict was instructed, disregard all contrary evidence and inferences, and give the losing party the benefit of all reasonable inferences created by the evidence. *See Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994). Gross negligence has both an objective and a subjective element. *See Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 325-26 (Tex. 1993). First, when viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; second, the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. *See Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994).

Matthews argues the "OPENING & CLOSING PROCEDURES" memo, which provided that "criminal acts of any type can easily evolve into violence," coupled with evidence of criminal activity on and near the premises satisfied the objective prong of *Moriel*. As mentioned above, the memo is not relevant to the issue of a noontime robbery of a customer in the restaurant foyer, or, if relevant, it is excludible under Rule 403. Moreover, the evidence of crimes in and around the premises shows that most of crimes were nonviolent and none involved armed robbery leading to murder. The memo and the crime evidence do not objectively demonstrate an extreme degree of risk associated with the crime at issue, considering the probability and magnitude of potential harm.

To satisfy the subjective prong, Matthews advances three arguments. First, he contends that although general manager Burklow testified that he was not aware of criminal activity at the restaurant, several employees testified that criminal activity – primarily drug use in the restrooms and walked checks – was common. Even though this activity was common, Burklow ceased the practice of routinely giving discount meals to police officers. Second, Matthews argues restaurant management, due to cost concerns, failed to pursue certain security arrangements. Third, restaurant management failed to take security precautions even after corporate management distributed a Security Awareness Kit in an effort to educate managers regarding the risks involved in not heeding security precautions.

None of this evidence provides proof that S&A had actual subjective awareness of the risk involved of crime such as that at issue. The crime history of the area involved primarily nonviolent crimes. The Security Awareness Kit dealt mainly with opening and closing procedures, asset protection, and preventing drug use and gang activity in the restaurant. The incident at issue did not mirror other criminal activity in the area, nor was it associated with on-premises drug use or gang activity. The evidence cited by Matthews does not demonstrate S&A's subjective awareness of the risk of such a crime. Therefore, even if the jury had found ordinary negligence, there was no legally sufficient evidence of either the objective or subjective *Moriel* factors, thus precluding the submission of jury issues on gross negligence. The trial court did not err in granting a directed verdict to S&A on the gross negligence issue. Accordingly, we overrule Matthews's fifth issue.

E. Officer Hutchinson

In his sixth issue, Matthews complains that trial court erred in allowing the testimony of Officer Hutchinson after S&A failed to supplement its discovery information with additional information regarding the witness's home address.

If a party learns that its discovery response was incomplete or incorrect when made or complete and correct when made but no longer complete and correct, the party must amend or supplement the discovery response. *See* TEX. R. CIV. P. 193.5 (formerly TEX. R. CIV. P. 166b). If the party fails to amend or supplement its discovery response properly, the trial court must exclude the evidence unless the party seeking to introduce the evidence shows good cause. *See* TEX. R. CIV. P. 193.6(a).

S&A identified Officer Hutchinson as a person with knowledge of relevant facts and listed his employment address and phone number, that is, the address and phone number of the Houston police storefront location where he was stationed. Matthews argues that S&A acquired the officer's home telephone number during discovery but failed to supplement the discovery response with such information. The evidence showed that Matthews's attorneys telephoned once to the storefront but were not able to contact the officer. Previously, we have

found that listing a police officer's department address and phone number is sufficient identification, absent a showing that the party could not easily locate, interview, and depose the proposed witness. *See $23,000 v. State*, 899 S.W.2d 314, 317 (Tex. App.—Houston [14th Dist.] 1995, no writ). Here, S&A listed the officer by business address and phone number. This was sufficient. A single phone call to the storefront location does not establish Matthews's inability to contact the officer. Thus, the trial court did not abuse its discretion in allowing the officer to testify. Accordingly, we overrule Matthews's sixth issue.

F. Juror Dismissal

In his seventh issue, Matthews complains the trial court committed reversible error by dismissing a juror over his objection.

A court may dismiss a juror who has a bias or prejudice in favor of or against a party in the case. *See* TEX. GOV'T CODE ANN. § 62.105 (Vernon 1998); *Berry Property Management, Inc. v. Bliskey*, 850 S.W.2d 644, 653 (Tex. App.—Corpus Christi 1993, writ granted, order withdrawn, dism'd by agr.). In order to disqualify a juror, it must appear that the juror's state of mind leads to the natural inference that the juror will not act with impartiality. *See Bliskey*, 850 S.W.2d at 653. The court can remove a juror for bias or prejudice after the jury as been impaneled and after testimony has begun. *See id.* If bias or prejudice is established, then the juror is disqualified by operation of law. *See id.* (citing *Swap Shop v. Fortune*, 365 S.W.2d 151, 154 (Tex. 1963)). If prejudice on the part of a juror is not established as a matter of law, the trial court makes a factual determination as to whether the juror is prejudiced enough to merit disqualification. *See Glenn v. Abrams/Williams Bros.*, 836 S.W.2d 779, 783 (Tex. App.—Houston [14th Dist.] 1992, writ denied). The trial court's factual determination is within its discretion and will not be overturned absent a showing of an abuse of that discretion. *See id.*

After the jury was impaneled and sworn, but before testimony had begun, S&A brought to the attention of the trial judge that a juror had been seen in the hallway talking to one of Matthews's expert witnesses. The judge conducted a hearing out of the presence of the other

jurors in which he questioned the juror and the witness. The juror told that judge that he and the witness had once worked for the same company and that the witness had been the juror's manager. In their courthouse conversation, the juror and the expert had discussed their old company. The witness also told the juror, "I guess you'll be hearing me in this case." The juror told the judge that he was not biased by his relationship with the witness and that he would decide the case on the evidence.

The judge expressed concern that the expert had told the juror that he, the expert, would testify. The judge may have been concerned that the witness was playing upon the prior relationship between the witness and the juror to influence the juror. The judge also may have been concerned that the juror might in some way defer to his former manager. The judge dismissed the juror over Matthews's objection. The trial court made a factual determination about the juror's bias. Because the record does not show that the trial court's factual determination constituted an abuse of discretion, we will not reverse the court's ruling on the juror's bias.

Matthews also appears to argue that the trial court erred in proceeding to verdict with only eleven jurors. Matthews argues that the court could proceed to verdict with only eleven jurors, absent agreement of the parties, only if the juror was removed by death or disability. *See* TEX. CONST. art. V, § 13; TEX. GOV'T CODE ANN. § 62.201 (Vernon 1998); TEX. R. CIV. P. 292; *McDaniel v. Yarbrough*, 898 S.W.2d 251, 252 (Tex. 1995). Because the juror was neither dead nor disabled, he argues, the trial court erred in proceeding to verdict.

Under the Texas constitution, Matthews had the right to a jury of twelve. *See* TEX. CONST. art. V, § 13; § 62.210. This right can be waived, however. *See Dickson v. J. Weingarten, Inc.*, 498 S.W.2d 388, 390-91 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ). After the court removed the juror, Matthews could have requested and received a mistrial and a new jury. *See Rabson v. Rabson*, 906 S.W.2d 561, 563 (Tex. App.—Houston [14th Dist.] 1995, writ denied). Although he preserved his complaint about the judge's removal of the juror, he acquiesced in the decision to proceed to verdict with eleven jurors, and thus waived

any complaint. Although, Matthews now complains that he did not waive his complaint about proceeding to verdict, the record shows otherwise, as follows:

> [PLAINTIFF]: Your Honor, we would object to that motion and are opposed to that motion [to remove the juror] on the basis that there is no evidence in this regard whatsoever that this juror has committed any misconduct or has any bias or prejudice as a result of the incident that we have been talking about this morning. It was nothing more than a casual greeting. Therefore, Your Honor, the plaintiffs object to the removal of this juror.
>
> THE COURT: Okay. That objection is overruled. Then juror No. 15 from the panel and juror number, what is he on –
>
> THE BAILIFF: He is No. 4.
>
> THE COURT: Juror No. 4 on the panel will be disqualified.
>
> [DEFENSE] Your Honor, it's my understanding – Mr. Martin [plaintiff's attorney], please confirm this, that now that we have made our objection, you have sustained it, he has made – he has put his objection to your ruling on the record, that he now agrees to it.
>
> THE COURT: Okay.
>
> [PLAINTIFF]: It's my understanding, Judge, that you have discretion on this point.
>
> THE COURT: No, I don't have discretion, no, sir. The question is do the parties agree to go forward with 11 jurors?
>
> [DEFENSE]: Defendants agree, Your Honor.
>
> THE COURT: What say the plaintiff?
>
> [PLAINTIFF]: Okay, I guess we agree. Notwithstanding our objection.
>
> THE COURT: Well, objection has been overruled. All right. Thank you very much.

Although at the time the court removed the juror, Matthews was entitled to a mistrial and a new jury. He rejected such a remedy. He now asks us for that very remedy. After the trial court removed the juror, both Matthews and S&A agreed to proceed and did proceed with eleven jurors, as was their right. Therefore, Matthews has waived any complaint about the number of jurors. Accordingly, we overrule Matthews's seventh issue.

III. Conclusion

Having overruled Matthews's seven appellate issues, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed July 13, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).