Opinion issued June 23, 2020.

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00121-CV

KEVIN COOK, Appellant

V.

MONAGHAN MEDICAL CORPORATION, Appellee

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2016-68279

MEMORANDUM OPINION

Appellant, Kevin Cook, is appealing a judgment rendered after a jury trial in favor of appellee, Monaghan Medical Corporation. In a single issue, Cook argues that the trial court abused its discretion by denying his motion for new trial. We affirm the trial court's judgment.

Background

Cook was formerly employed in an outside-sales position for Monaghan. Monaghan terminated Cook's employment on September 30, 2015 and replaced him with a female employee. Cook subsequently sued Monaghan for gender discrimination pursuant to Chapter 21 of the Texas Labor Code.

In its response to Cook's First Request for Production, Monaghan produced a document entitled "Statement of Facts." The Statement of Facts notes that Cook's supervisor, Josi Wood, and Bill Seitz, VP of Sales and Marketing, "called [Human Resources] to discuss ending [Monaghan's] employment relationship with Kevin Cook" on September 3, 2015. Monaghan's Human Resources Manager, Kathie Cameron, testified during her deposition that she drafted the Statement of Facts after she spoke with Wood and Seitz on September 3, 2015. The document includes the "recommendation" of Wood and Seitz that Cook's employment be terminated and the grounds for termination. According to Cameron, "we sent it up to [Joaquim Balles, Monaghan's in-house counsel] and Gerald [Slemko, Monaghan's then-acting president] . . . just as this is what we're going forward with, do you see any issues." Cameron explained that she had emailed the document to Balles and Slemko, but she would need to see the email transmitting the Statement of Facts to know the exact date it was sent. She testified that she still had access to her email and she

knew the transmittal email message existed because she had not deleted emails relating to this matter.

Cameron testified that although she knew on September 3, 2015 that Cook's employment was going to be terminated, his employment was not terminated until September 30, 2015. When asked to explain the twenty-seven-day period, Cameron testified that she drafted the Statement of Facts sometime after September 3, 2015, and she was not sure when the document was sent to Balles and Slemko for their review, but there was likely a gap of time between those two events. She also testified that she had traveled for part of the month and that likely explained another gap in the timeline.

After Cameron's deposition, Cook served Monaghan with his Fifth Request for Production seeking, among other things, "All emails to/from [Cameron] in September 2015 relating to Kevin Cook. This request specifically includes, but is not limited to, emails to/from Gerald Slemko." Monaghan produced eight pages of emails in response, including several emails sent from September 11, 2015 to September 15, 2015 between Cameron and Dawn Janveaux, a senior Human Resources consultant, regarding the termination of Cook's employment. Specifically, on September 11, 2015, Cameron sent Janveaux an email to which she attached an employment agreement between Cook and Monaghan. She also attached termination letters for two other employees. Janveaux forwarded Cameron's email

to Balles, Monaghan's in-house counsel, thirty minutes later. On September 14, 2015, Balles responded to Janveaux's email and Janveaux forwarded Balles' response to Cameron. On September 15, 2015, Cameron sent another email to Janveaux with the subject line "Kevin Cook letter" and she attached a copy of Cook's separation agreement. Janveaux responded that afternoon, informing Cameron that she would be out of the office from September 21 to September 28 and asking Cameron to "keep [her] in the loop." Cook did not ask to depose Janveaux or submit any additional production requests about her apparent involvement with Cook's termination after he received these documents.

After the first day of trial, Cameron searched her emails again using new search terms and she located the transmittal email. Monaghan's counsel forwarded the transmittal email to Cook's counsel that evening. The email, which is dated September 9, 2015, was sent by Cameron to Janveaux with the subject line: "Statement of Facts KC." The body of the message is blank and the only document attached to the message is the Statement of Facts that Monaghan had previously produced to Cook. Cook did not object to the production of the email, seek a continuance, or request that he be allowed to conduct further discovery in light of the email during the next two days of trial.

After the jury returned a unanimous verdict in favor of Monaghan, Cook moved for new trial, claiming he was prejudiced by the timing of the production of

the transmittal email. The trial court entered judgment based on the jury verdict and denied Cook's motion for new trial based on his claim that the transmittal email was newly discovered evidence. This appeal followed.

Motion for New Trial

In his sole issue on appeal, Cook argues that the trial court abused its discretion by denying his motion for new trial.

A. Standard of Review and Applicable Law

"A party seeking a new trial on grounds of newly discovered evidence must demonstrate to the trial court that (1) the evidence has come to its knowledge since the trial, (2) its failure to discover the evidence sooner was not due to lack of diligence, (3) the evidence is not cumulative, and (4) the evidence is so material it would probably produce a different result if a new trial were granted." *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010). We review the denial of a motion for new trial for abuse of discretion. *Id.*

B. Analysis

Cook argues that he is entitled to a new trial based on the production of the transmittal email because he did not receive the email until after trial began, he had used due diligence to obtain the email during discovery, and the email was not cumulative of other evidence. *See id.* (requiring party seeking new trial to establish that "the evidence has come to its knowledge since the trial"). Cook further argues

that it is likely that the transmittal email, which he contends "essentially changes Monaghan's story regarding the circumstances and communications surrounding Cook's termination," would have produced a different result because the jury was instructed that it could infer unlawful discrimination based on "inconsistent or conflicting explanations for [Monaghan's] conduct."

With respect to the first criteria, it is undisputed that Cook received the transmittal email during trial, not after. Relying upon Rule of Civil Procedure 324(b)(1), Cook argues that it is immaterial whether he received the new document during or after trial because the rule does not draw a distinction between evidence discovered after trial began or after trial ended and the rule should not be interpreted so narrowly. *See* TEX. R. CIV. P. 324(b)(1). Cook's reliance upon Rule 324(b)(1) is misplaced. Rule 324 is a rule focused on preservation of error, not substance. The rule mandates that certain complaints must be raised in a motion for new trial in order to be preserved for appellate review, including a challenge based on newly discovered evidence. *See id.* ("A point in a motion for new trial is a prerequisite to the following complaints on appeal[, including a] complaint on which evidence must be heard such as one of . . . newly discovered evidence. . . ."). The criteria for acquiring a new trial based on newly discovered evidence, however, are set forth in case law that dictates that a party is not entitled to a new trial on this basis unless it establishes that "the evidence has come to its knowledge since the trial." *Waffle*

House, 313 S.W.3d at 813; *see also Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983), *overruled in part on other grounds by Moritz v. Preiss*, 121 S.W.3d 715, 720–21 (Tex. 2003). Because it is undisputed that Cook received the transmittal email during trial, Cook has not established that he is entitled to a new trial based on newly discovered evidence. *See Waffle House*, 313 S.W.3d at 813; *Jackson*, 660 S.W.2d at 809; *see also Ramirez v. Otis Elevator Co.*, 837 S.W.2d 405, 408, 413 (Tex. App.—Dallas 1992, writ denied) (declining to "extend the newly discovered evidence doctrine to evidence discovered during the progress of the trial" and holding plaintiff did not establish that she was entitled to new trial based on more than 43,000 pages of new evidence produced on fourth day of trial).

Even if Cook had met the first requirement, he was still required to demonstrate that the transmittal email was not cumulative of other evidence and that the email is so material it would probably produce a different result if a new trial were granted. *See Waffle House*, 313 S.W.3d at 813. Specifically, Cook argues that the transmittal email would likely have produced a different result at trial because it changed the timeline of events and contradicted other evidence suggesting that the decision to fire Cook was made on September 3, 2015.

Cameron testified that she drafted the Statement of Facts after her September 3, 2015 conversation with Wood and Seitz, which includes their "recommendation" that Cook's employment be terminated and the grounds for termination, and that the

document was subsequently transmitted by email to Balles and Slemko for their review. Cameron did not remember the date the email was sent, but she knew it was sometime after September 3, 2015. She also testified that "there probably was a gap of time" between when she spoke with Wood and Seitz and when the email was sent to Balles and Slemko. The transmittal email, which is dated September 9, 2015, is consistent with this aspect of Cameron's testimony.

Although the transmittal email was sent to Janveaux, as opposed to Balles or Slemko directly, other emails produced by Monaghan in discovery reflected that Janveaux was acting as an intermediary between Cameron and Balles with respect to the administrative portion of Cook's termination. Specifically, the emails show that, between September 11, 2015 and September 15, 2015, Janveaux forwarded email messages and documents about Cook's termination from Cameron to Balles, and she forwarded Balles's responses to these emails to Cameron.

Although the transmittal email provides additional detail about the internal flow of information regarding the termination of Cook's employment, it does not change the timeline of events, as Cook argues. It also does not introduce a new potential witness because other emails produced by Monaghan in discovery reflected Janveaux's involvement in the administrative portion of Cook's employment termination. Cook could have deposed Janveaux or sent additional discovery

requests about her involvement in the matter, or questioned Cameron during trial about any discrepancy.

Further, the transmittal email was a blank document that merely transmitted the Statement of Facts from one Monaghan employee to another. The fact of transmission and a rough estimate of its transfer date had been established previously and the document itself had been produced earlier in the discovery process. It is highly unlikely that the transmittal letter would have yielded a different result if it had been produced earlier.

Because Cook did not demonstrate to the trial court that he was entitled to a new trial based on newly discovered evidence, we hold that the trial court did not abuse its discretion by denying Cook's motion. *See id*. We overrule Cook's sole issue.

Attorney's Fees

In a cross-point, Monaghan contends that Cook's appeal is frivolous and requests that it be awarded its appellate attorney's fees. *See* TEX. R. APP. P. 45 (damages for frivolous appeals in civil cases).

We may award just damages to a prevailing party if we objectively determine, after considering "the record, briefs, or other papers filed in the court of appeals," that an appeal is frivolous. *Id.*; *see Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). An appeal is frivolous when the record,

viewed from the perspective of the advocate, does not provide reasonable grounds for the advocate to believe that the case could be reversed. *Smith*, 51 S.W.3d at 381. The decision to grant appellate sanctions is a matter of discretion that an appellate court exercises with prudence and caution and only after careful deliberation. *Id.*; *R. Hassell Builders, Inc. v. Texan Floor Serv., Ltd.*, 546 S.W.3d 816, 832–33 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). Rule 45 does not require an award of damages in every case in which an appeal is frivolous. *Id.* at 833. After a review of the record, briefing, and other papers filed in this Court, we deny Monaghan's request for damages. *See* TEX. R. CIV. P. 45; *R. Hassell Builders*, 546 S.W.3d at 833.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.