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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001282-MR

DAVID N. SNYDER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 01-CI-002727

BRIAN McCARLEY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * *

BEFORE: BARBER, COMBS, and KNOPF, Judges.

COMBS, JUDGE. This is an appeal from a judgment entered by the Jefferson Circuit Court in a tort action. For the reasons stated below, we affirm in part and vacate and remand in part.

Shortly after midnight on April 11, 2001, David Snyder forced his way into the apartment of his former fiancée, Gretchen Clayton. When Brian McCarley, Ms. Clayton's guest, emerged from the bathroom, Snyder began beating him with a retractable baton of the type commonly used by police officers

to subdue suspects. Snyder struck McCarley many times, causing severe lacerations and bruising about his head. Blood-soaked and unable to defend himself against the attack, McCarley fled the apartment and sought emergency medical care. McCarley testified that he believed that Snyder would kill him during the attack. Grisly photographs depicting the extent of McCarley's injuries were shown to the jury.

The jury rejected Snyder's version of the attack as a matter of self-defense or the defense of Ms. Clayton; it returned a unanimous verdict in favor of McCarley. McCarley received an award of \$25,000.00 for pain and suffering and \$2,465.00 for hospital and other medical expenses. In addition to the compensatory damages, McCarley was awarded \$100,000.00 in punitive damages. The court denied Snyder's post-judgment motions, and this appeal followed.

Snyder contends that questions about his personal wealth and finances asked during cross-examination were improper. Without conceding the point, McCarley observes that the trial court immediately sustained defense counsel's objection to the line of questioning. Plaintiff's counsel ceased that line of inquiry, and Snyder's counsel sought no additional relief. Since counsel received the relief he requested and did not ask the trial court to admonish the jury

or to order a mistrial, Snyder cannot now challenge the trial court's failure to provide such further relief *sua sponte*.

Snyder also objects to evidence pertaining to the physical injuries sustained by Ms. Clayton during the confrontation as well as to evidence of damage to her home and personal property. He contends that such evidence was improperly admitted and was unduly prejudicial since she had dismissed her action against Snyder prior to trial. We disagree.

We have carefully reviewed the contested portion of the trial court proceedings. As the result of a bench conference at the time of the opening statement, the trial court was on notice that this testimony would occur. We note that the trial court was particularly attentive to plaintiff's questioning of Ms. Clayton. Each time that Snyder's counsel objected to one of the plaintiff's questions, the trial court thoughtfully pondered the relevancy of the question posed and weighed its potential for undue prejudice to Snyder.

There was evidence indicating that Snyder gained access to Ms. Clayton's residence by breaking a window, that he attempted to destroy her personal property after McCarley had fled, and that Ms. Clayton was physically injured during the episode. All of this evidence was clearly relevant to the credibility of Snyder's allegation that the assault resulted

either from Snyder's defense of Ms. Clayton or from his own self-defense. In some instances, the probative value of the anticipated testimony substantially outweighed the danger of unfair prejudice to Snyder. In those instances, Snyder's objections to the testimony were accordingly overruled. In other instances, the anticipated testimony -- though perhaps relevant -- was properly excluded by the trial court because of its potential misuse by the jury. Snyder's objections were consistently addressed individually and were sustained more often than not. The trial court scrupulously monitored the questioning, and the admission of evidence on these points was tightly controlled. While it might have been prudent for the court to advise the jury with respect to the limited use that was to be made of this testimony, Snyder's counsel did not request such an admonition or a limiting instruction. Moreover, Snyder gave further testimony with respect to these details on his direct examination. Reviewing the entirety of the case, we perceive no error in the admission of the challenged evidence.

Next, Snyder contends that the evidence offered in support of McCarley's claims for compensatory damages was insufficient to support the jury's verdict. We disagree. McCarley's testimony relative to the amount of his medical expenses and as to the nature and severity of his pain and suffering -- both physical and emotional, coupled with the

photographs showing his obviously serious injuries, adequately supported the jury's relatively modest verdict in his favor.

Next, Snyder contends that the trial court failed to instruct the jury in accordance with the provisions of Kentucky Revised Statutes (KRS) 411.186. As a result, he contends, the jury was permitted to award an amount of punitive damages without proper guidance. We are compelled to agree.

After a jury determines that punitive damages are properly awarded, the provisions of KRS 411.186 require the jury to consider a number of factors before arriving at a sum. Pursuant to the statute, the jury is to consider the following factors:

- (a) the likelihood at the relevant time that serious harm would arise from the defendant's misconduct;
- (b) the degree of the defendant's awareness of that likelihood;
- (c) the profitability of the misconduct to the defendant;
- (d) the duration of the misconduct and any concealment of it by the defendant; and;
- (e) any actions by the defendant to remedy the misconduct once it became known to the defendant.

The jury instructions given by the trial court in this case did not incorporate any of the factors enumerated in KRS 411.186. The instructions given to the jury provided no standard whatsoever to assist or guide the jury in its determination. As a result, we vacate the jury's award and remand for a trial limited to a proper assessment of punitive

damages. In light of our decision to vacate and remand on the issue of the proper amount of punitive damages to be awarded, we need not consider Snyder's final contention that the amount of punitive damages originally awarded was excessive.

The judgment is affirmed in part and vacated and remanded in part for further proceedings.

BARBER, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS WITH SEPARATE OPINION.

KNOFF, JUDGE, CONCURRING: I fully agree with the reasoning and the result of the majority opinion, but I write separately to add to the discussion regarding the punitive damages instructions. The fundamental problem is that Kentucky case law has not clearly set out that assessment of punitive damages is still a two-step process. First, the jury must determine that punitive damages are justified. And second, once the jury decides to award punitive damages, it must determine the appropriate amount of damages. The jury must be properly instructed on both steps.

Under the first step, KRS 411.184 requires a jury to find by clear and convincing evidence that a defendant acted with "fraud, oppression, or malice" in determining whether to award punitive damages. In Williams v. Wilson, Ky., 972 S.W.2d 260 (1998), the Kentucky Supreme Court found the statute

restricted a right of recovery for wrongful death or personal injury in violation of Ky. Const. §§ 14, 54 and 241.

Accordingly, the Court re-instated the common-law rule allowing recovery for punitive damages based on gross negligence.

Recently, in Phelps v. Louisville Water Co., Ky., 103 S.W.3d 46 (2003), Sand Hill Energy, Inc. v. Ford Motor Co., Ky., 83 S.W.3d 483 (2002), *vacated and remanded by U.S. Supreme Court in Ford Motor Co. v. Smith*, 155 L. Ed. 2d 1056, 123 S. Ct. 2072 (2003), and in City of Middlesboro v. Brown, Ky., 63 S.W.3d 179 (2001), the Kentucky Supreme Court approved the use of a common-law instruction defining the gross negligence standard to be used in award for punitive damages. However, the instructions at issue in those cases only involved the first step in assessing punitive damages; whether the jury should impose punitive damages. Unfortunately, this focus on the first step has led some trial courts to disregard the second step; the jury instructions for determining the amount of punitive damages.

Consequently, the jury still must be separately instructed on the guidelines to determine the amount of punitive damages. As the majority correctly notes, these factors are set out in KRS 411.186(2). Furthermore, Williams v. Wilson did not address the constitutionality of this statute. A trial court's instructions need not mirror the precise language of the

statute. Indeed, some of the factors will not be applicable to every case.

Nevertheless, the jury must be given some framework within which to calculate the amount of punitive damages. Such an instruction goes to the fundamental fairness of the jury's deliberative process. The United States Supreme Court has recognized that a punitive damages award based upon inadequate instructions may violate a party's due process rights. State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. ---, 155 L. Ed. 2d 1056, 123 S. Ct. 2072 (2003); Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 149 L.Ed.2d 674, 121 S. Ct. 1678 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 129 L. Ed. 2d 336, 114 S. Ct. 2331 (1994); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991).

The jury in the present case was not instructed as to any factors to consider in calculating the amount of damages. In the absence of any directive from the trial court to consider the culpability of Snyder's conduct, the jury had no basis to calculate the amount of punitive damages. Therefore, I agree

with the majority that the jury's award of \$100,000.00 in punitive damages was arbitrary and must be set aside.

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