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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002212-MR

THOMAS E. KOENIGSTEIN — APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 02-CI-00111

MICHAEL AND DANIELLE MCKEE
INDIVIDUALLY AND AS NEXT FRIENDS
OF M.M., A MINOR — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, JUDGE; AND MILLER AND PAISLEY, SENIOR JUDGES.[1]

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Henry Circuit Court following the court's entry of summary

[1] Senior Judges John D. Miller and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

judgment as to the civil liability claims against appellant which held him liable for the assault and battery of appellee, M.M., and which resulted in a jury award of $200,606.70 in damages. Appellant claims that the judgment should be reversed and remanded for the reasons that (1) summary judgment as to the liability claims against him for assault and battery was improper, (2) the punitive damages award was excessive, (3) the trial court should have declared a mistrial and granted a new trial due to appellees' alleged misconduct, and (4) the trial court should have granted a new trial due to alleged juror misconduct. For the following reasons, we affirm.

In April 2001, appellant was arrested and charged with first degree sexual abuse, intimidating a witness, and distributing obscene matter to a minor. The charges resulted from an incident during which appellant engaged in improper touching of appellees' minor daughter, M.M., displayed pornographic material to M.M., and threatened to hurt M.M. if she reported the incident to anyone. Approximately one year later, appellant pled guilty to all three charges and was sentenced to five years' imprisonment.

Following appellant's guilty plea, M.M.'s parents filed an action on behalf of themselves and M.M., asserting claims against appellant for assault, battery, and outrage, as well as for various other claims that were eventually dismissed.

As to the issue of liability, the court granted summary judgment to appellees after concluding that appellant's guilty pleas to the criminal charges precluded him from relitigating that issue. The sole issue of damages was submitted to a jury, which returned a verdict of $50,000 for battery, $50,000 for assault, $606.70 for out-of-pocket expenses, and $100,000 in punitive damages. Appellant's motion to alter, amend, or vacate, or alternatively to award a new trial, was denied. This appeal followed.

Appellant's first argument is that the trial court erred by granting appellees' motion for summary judgment on the assault and battery claims. We disagree.

It is well settled in Kentucky that the standard for summary judgment requires a movant to "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Commonwealth v. Whitworth, Ky., 74 S.W.3d 695, 698 (2002). See CR 56.03. Moreover, "[b]ecause summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." Lewis v. B & R Corporation, Ky. App., 56 S.W.3d 432, 436 (2001).

Here, the trial court granted appellees' summary judgment motion after finding that under the principles of res

judicata, appellant was estopped from denying liability for the assault and battery of M.M. due to his guilty pleas to the related charges of first degree sexual abuse, distributing obscene matter to a minor, and intimidating a witness. Appellant asserts, however, that summary judgment was improper because although his guilty pleas were admissible, they were not conclusive as to civil liability, and he should have been allowed to explain his plea.

Several cases appear to establish conflicting legal rules relating to the issue of res judicata. At least one commentator has opined that "[i]t is arguable that no other doctrine within the field of civil procedure causes as much confusion among lawyers and the Courts as does res judicata." Gregory M. Bartlett & Margaret M. Maggio, Civil Procedure Survey, 28 N.Ky.L.Rev. 316, 348 (2001). Res judicata is defined as the "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). Further, "the rule of *res judicata* does not bar an action unless there is an identity of parties, identity of causes of action, and the prior action was decided on its merits." Moore v. Commonwealth, Ky., 954 S.W.2d 317, 318 (1997)

(citation omitted). See also Montgomery v. Taylor-Green Gas Co., 306 Ky. 256, 206 S.W.2d 919 (1947).

Until recently, courts generally found res judicata to be inapplicable to cases similar to the one now before us and instead followed the reasoning set forth in Race v. Chappell, 304 Ky. 788; 202 S.W.2d 626, 628 (1947), which held that

> [o]rdinarily a judgment in a criminal transaction cannot be received in a civil action to establish the truth of the facts on which it was rendered, but where the defendant in the criminal case pleaded guilty, and the record showing such plea is offered in evidence in a civil action against him, growing out of the same offense, the judgment is admitted, not as a judgment establishing a fact, but as a declaration or admission against interest that the fact is so. However, the defendant may testify as to the circumstances under which the plea was made and explain the reasons for such plea.

(Citation omitted.) See also Johnson v. Tucker, Ky., 383 S.W.2d 325 (1964). Likewise, convictions which did not involve guilty pleas, were admitted by the courts as "prima facie (permitting explanation or rebuttal) but not conclusive evidence." Harlow v. Dick, Ky., 245 S.W.2d 616, 618 (1952).

Appellant argues that because our highest court has not explicitly held otherwise, the state of the law regarding res judicata has remained unchanged. He claims, therefore, that summary judgment was improper because his guilty pleas in the criminal action were not conclusive as to his liability in the

civil action, and that he should have been allowed to explain his plea to the jury. However, appellant fails to acknowledge the fact that the doctrine of res judicata has changed considerably since the rendition of the above cited cases. Most notable was the expansion of res judicata to include collateral estoppel, or issue preclusion, which does not require mutuality of the parties. More specifically, in Sedley v. City of West Buechel, Ky., 461 S.W.2d 556, 559 (1970), the Kentucky Supreme Court stated:

> It is true that Kentucky has subscribed basically to the rule which permits only parties to the former action, and their privies, to plead res judicata, and which requires "mutuality" in the application of the rule. Many jurisdictions, however, have adopted the doctrine of "claim preclusion" or "issue preclusion" under which a person who was not a party to the former action nor in privity with such a party may assert res judicata *against* a party to that action, so as to preclude the relitigation of an issue determined in the prior action. . . . The "preclusion" doctrine seems reasonable to us and we shall adopt it.

(Citations omitted.)

As the doctrine of collateral estoppel continued to evolve, the Kentucky Supreme Court recognized that determinations of fact that are essential to the decision in a prior proceeding also are conclusive in subsequent proceedings. Gregory v. Commonwealth, Ky., 610 S.W.2d 598, 600 (1980). The court explained that "[c]ollateral estoppel, or issue

preclusion, is part of the concept of res judicata and serves to prevent parties from relitigating issues necessarily determined in a prior proceeding." Id. at 600 (citing Sedley, supra, Barnett v. Commonwealth, Ky., 348 S.W.2d 834 (1961). Further, the court specifically recognized that collateral estoppel could be applied from a criminal to a civil proceeding. Id. at 600. This court subsequently followed Gregory and Sedley in holding that "[t]here is no question but that a criminal conviction can be used for purposes of collateral estoppel in a later civil action." Roberts v. Wilcox, Ky. App., 805 S.W.2d 152, 153 (1991) (citing May v. Oldfield, 698 F.Supp. 124 (E.D.Ky. 1988)).

The rationale underlying this modern use of collateral estoppel was clearly explained in Gossage v. Roberts, Ky. App., 904 S.W.2d 246 (1995), which found that in a civil action, the appellant was collaterally estopped from relitigating an issue concerning his act of shooting two women while under the influence of prescription medications, as causation had already been established in his criminal case. The court found the reasoning of an Illinois case to be particularly persuasive:

> There is no question that plaintiff had a full and fair opportunity in the [prior criminal] proceeding to litigate the issue of whether his actions were the result of an involuntary induced state of intoxication. Plaintiff voluntarily, intelligently, and knowingly waived the issue and entered his plea of guilty. On the incentive to litigate question, a person faced with the

> potential of being sentenced to a substantial term in prison has every incentive to interpose a defense that would constitute a complete defense to the crimes he is charged with committing.
>
> . . . .
>
> > The clearest case for such an estoppel is where a defendant pleads guilty to a substantial criminal charge and then seeks in civil litigation concerning the same transaction to assert that he did not commit the criminal act.

Id. at 249 (quoting Bulfin v. Eli Lilly & Company, 244 Ill.App.3d 785, 185 Ill. Dec. 269, 614 N.E.2d 403, 407 (1 Dist.1993) (citation omitted)).

Next, the Kentucky Supreme Court noted in Moore, 954 S.W.2d at 320, that "[w]hile the subject of collateral estoppel, or issue preclusion, has not been addressed by this Court recently, it remains a viable doctrine in this Commonwealth." May, supra, lends further support to the proposition that a prior criminal conviction can be conclusive of civil liability under proper circumstances. The defendant in that case had previously been convicted of tampering with odometers. The plaintiff brought an action seeking damages due to alterations to an odometer of a car that he had purchased from the defendant. The court found that the defendant was collaterally estopped from relitigating the issue of liability.

Finally, according to 47 Am. Jur. 2d Judgments

§732-§733 (1995), the modern trend among other jurisdictions is to treat criminal convictions conclusively as to subsequent proceedings when the factors of collateral estoppel are met. "Under the modern approach, a judgment of conviction precludes the defendant from denying the allegations in a subsequent civil complaint as to issues that were actually litigated and adjudicated in the prior criminal proceeding." Id. §733, at 210-211. "Generally, the higher standard of proof and numerous safeguards in criminal proceedings are given as rationale for the rule allowing judgments in criminal proceedings to have a preclusive effect in subsequent civil actions." Id. §732, at 209. In addition, preclusive effect is more often applied when, as here, the prior criminal proceeding "involved a 'serious offense' so that the defendant was motivated to fully litigate the charges." Id. §733, at 212.

After thorough consideration of this issue, we conclude that although Race and Harlow have not been explicitly overruled, more recent cases clearly hold that the reasoning of those cases has been replaced with a new rule of law which prevents a civil defendant from relitigating an issue that was necessarily decided against him in a prior criminal action. In keeping with the idea that the "doctrines of res judicata and issue preclusion are based on rules of justice and fairness," Revenue Cabinet, Commonwealth of Kentucky v. Samani, Ky. App.,

757 S.W.2d 199, 202 (1988) (citations omitted), several factors must be considered, including "(1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; (4) a prior losing litigant." Moore, 954 S.W.2d at 319 (citing Sedley, supra). See also Yeoman v. Commonwealth, Ky., 983 S.W.2d 459 (1998).

Here, both the criminal and the civil cases against appellant involved the issue of whether he engaged in the sexual abuse of M.M. Appellant's guilty plea is certainly a final decision on the merits of the criminal case as he admitted to the allegations against him. Moreover, it is clear from the record that appellant knowingly, intelligently, and voluntarily waived his right to a trial before entering his guilty plea. As such, we believe that the trial court correctly applied the doctrine of collateral estoppel in this case.

Next, appellant argues that even if collateral estoppel is applicable herein, the court erred by entering summary judgment as to the battery claim because none of the criminal charges to which he pled guilty satisfied the elements of a civil battery. Specifically, appellant argues that although the civil battery charge required a finding that the contact between appellant and M.M. was harmful or offensive, neither first degree sexual abuse nor any of the other criminal

charges against him required a finding of harmful or offensive contact. We disagree.

The trial court inferred that appellant's conduct was harmful and offensive to M.M. The court found support for this position in Thompson v. West American Insurance Company, Ky. App., 839 S.W.2d 579, 581 (1992), which recognized that it is well known that sexual molestation causes emotional and psychological harm to its victims. See also Goodman v. Horace Mann Insurance Company, Ky. App., 100 S.W.3d 769 (2003). While we certainly agree with appellant that not all sexual contact is harmful and offensive, it cannot reasonably be disputed that sexual abuse or molestation of a child is not only criminal, it is perforce harmful and offensive.

Next, appellant asserts that summary judgment as to liability for the assault claim was improper because (1) the elements of assault are not satisfied by the elements of intimidating a witness, (2) an issue of fact existed as to the assault claim, and (3) the court should have granted appellant's motion for a directed verdict at the close of appellees' proof. Again, we find no merit in these claims.

As each of these arguments is based on similar grounds, they shall be addressed collectively. First, appellant argues that he had no intent to intimidate or threaten M.M., and that his guilty plea did not establish that she feared or

apprehended imminent contact. However, it is clear that since appellant pled guilty to the criminal charge of intimidating a witness, he cannot now deny that conduct. In addition, appellant has offered no evidence to dispute M.M.'s testimony that she feared him as a result of his conduct, and appellant's argument that any harm to M.M. was not imminent because the threat would become manifest only if she took steps to tell someone is completely without merit and utterly repugnant. Further, we are not persuaded by appellant's assertion that there was no conclusive evidence to show that he had the apparent or actual ability to carry out the threat against M.M., since the record clearly shows that he had ample opportunity to carry out his threats as it is undisputed that M.M. spent the night at his home on the night the abuse occurred and that she frequented his home thereafter up until the time of his arrest. Although appellant claims that he made no offer or act to carry out his threat of harm to M.M. and that words alone are insufficient to support an assault claim, he overlooks the fact that immediately prior to his threat, he had engaged in improper and harmful sexual contact with M.M. In addition, on the night of the abuse, appellant slept in the same bed as M.M. and her aunt for the first time. Further, based on the record before us, the trial court correctly denied appellant's request for a directed verdict for the reason that "[i]n ruling on a motion

for a directed verdict, the trial court must accept the evidence of the party opposing the motion as true and draw all inferences from the evidence in that party's favor. A verdict should not be directed unless the evidence is insufficient to sustain the verdict." Burgess v. Taylor, Ky. App., 44 S.W.3d 806, 810-811 (2001).

Appellant next argues that even if summary judgment was appropriate, the trial court erred by failing to grant him a new trial on the ground that the jury's damages award of $200,606.70 was excessive. While this issue was previously reviewed by appellate courts under an abuse of discretion standard, we must now conduct a *de novo* review. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), Phelps v. Louisville Water Company, Ky., 103 S.W.3d 46 (2003). CR 59.01(d) allows the trial court to grant a new trial to a party if the damages are excessive and appear "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court."

Here, having carefully reviewed the record, we simply do not find that the compensatory damages awards of $50,000 for the assault and $50,000 for the battery of M.M. are excessive. At the time of the abuse, appellant's status as M.M.'s uncle by marriage placed him in a position of trust. Instead of

protecting and caring for M.M., however, he used his position to take advantage of her. At trial, appellees presented competent evidence to show that M.M. developed various problems as a result of appellant's actions. Specifically, M.M. experienced physical symptoms, fear, withdrawal from family and friends, and required mental health treatment before she could resume the activities of her previous life. The total compensatory award of $100,000 does not appear to have been given by the jury under the influence of passion or prejudice, as the psychological results of appellant's conduct will undoubtedly follow M.M. into adulthood.

Next, the issue of whether the jury's award of $100,000 in punitive damages award was excessive must be reviewed in light of the following three factors: "(1) the degree or reprehensibility of the defendant's conduct; (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases." Phelps, 103 S.W.3d at 53 (citing BMW of North America, Inc. v Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)). We believe that these three criteria have been met. First, the reprehensibility of appellant's conduct is obvious. Second, there was no disparity between appellees' award for punitive

damages and their award for compensatory damages as both were approximately $100,000. Finally, the punitive damages award is not inconsistent with prior awards in Kentucky. For instance, in Roman Catholic Diocese of Covington v. Secter, Ky. App., 966 S.W.2d 286 (1998), this court upheld a jury's award of $50,000 in compensatory damages and $700,000 in punitive damages to a former student who was subjected to improper sexual touching by a teacher. These factors collectively and conclusively indicate that the jury's punitive damages award was not the result of passion or prejudice, as there was clearly sufficient evidence to support the award to appellees.

Appellant next argues that the trial court abused its discretion or erred by refusing to grant a new trial or a mistrial due to appellees' alleged misconduct. We disagree.

CR 59.01 allows a trial court to grant a new trial if a party was denied a fair trial due to irregularities in the proceedings, or if the prevailing party engaged in misconduct. Moreover,

> [i]t is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

Burgess, 44 S.W.3d at 814-815 (quoting Gould v. Charlton Company, Inc., Ky., 929 S.W.2d 734, 738 (1996)).

Here, appellant claims that he was prejudiced by appellees' allegedly deliberate failure to supplement discovery responses or to otherwise provide requested information concerning the healthcare providers and mental health professionals utilized for M.M.'s treatment or counseling. However, appellant has presented no evidence to establish that appellees intentionally withheld any requested information, and the trial court responded to appellant's objection by admonishing the jury not to consider any testimony by M.M.'s mother regarding the undisclosed information. Given these circumstances, we are not persuaded that by denying appellant's request for a new trial, the trial court was clearly erroneous. Miller v. Swift, Ky., 42 S.W.3d 599 (2001). Further, we do not believe that the trial court's admonition to the jury was inadequate or that the court erred by failing to grant a mistrial.

Finally, appellant claims that the court erred by failing to grant him a new trial due to juror misconduct. See CR 59.01(b). We disagree.

"To obtain a new trial because of juror mendacity, 'a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a

challenge for cause.'" Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 796 (2003) (quoting McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 850, 78 L. Ed. 2d 663 (1984)). Here, a juror's affidavit provides the only support for appellant's assertion that he was denied a fair trial due to juror misconduct. However, not only was the trial court unable to consider this affidavit because it was untimely, see Ligon Specialized Hauler, Inc. v. Smith, Ky. App., 691 S.W.2d 902, 904 (1985), but

> [i]t is fairly well settled in Kentucky that . . . a verdict cannot be impeached by the testimony of a juror. This rule at times may work a hardship when juror misconduct, a valid basis for a new trial as set forth in CR 59.01, can only be shown by the testimony of a fellow juror. However, the theory is that a juror will recognize and report any misconduct to the trial court immediately and that to allow him to do it after the verdict "would invite the very kind of mischief the rule was designed to obviate."

Doyle v. Marymount Hospital, Inc., Ky. App., 762 S.W.2d 813, 815 (1988) (quoting Rietze v. Williams, Ky., 458 S.W.2d 613, 620 (1970)). Without further evidence, appellant has failed to establish that the trial court erred by denying his request for a new trial.

The judgment of the Henry Circuit Court is affirmed.

JOHNSON, JUDGE, CONCURS.

MILLER, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MILLER, SENIOR JUDGE, DISSENTING. I am not of the opinion that a guilty plea in a criminal prosecution should be conclusive as to civil liability.

Guilty pleas are entered for diverse reasons, not the least of which is to avoid financial ruin. To all but the wealthy the cost of a criminal defense is staggering.

I think it a bad precedent to adopt a rule permitting a criminal adjudication, whether by guilty plea or otherwise, to conclusively establish civil liability, based upon some arcane ratiocination involving collateral estoppel or issue preclusion. I find no authority dictating to the contrary. In my view the rule enunciated in Race v. Chappel, 304 Ky. 788, 202 S.W.2d 626 (1947), is the applicable law.

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