

Commonwealth Of Kentucky
Court Of Appeals

NO. 2004-CA-000468-MR
AND
NO. 2004-CA-000534-MR

JOAN CAVANA

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 01-CI-01370

TIMOTHY A. LOVE, M.D.

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF, TAYLOR, AND VANMETER JUDGES.

KNOPF, JUDGE: This is an appeal and cross-appeal from a judgment of the Campbell Circuit Court confirming a jury verdict and award in a medical malpractice case. The appellant, Joan Cavana argues that the trial court erred by giving the jury a comparative fault instruction and by denying her motion for a new trial after the jury awarded her only nominal damages for pain and suffering.

The cross-appellant, Dr. Timothy A. Love, argues that the trial

court erred by denying his motion for a directed verdict on the issue of liability. Finding no error, we affirm.

On August 16, 2000, Cavana went to the emergency room at St. Luke Hospital East in Fort Thomas, Kentucky, complaining of abdominal pain. Dr. Love, her treating physician, ordered an ultrasound of Cavana's gallbladder and diagnosed her abdominal pain as gallbladder disease. Dr. Love then discharged Cavana with instructions to consult with a general surgeon and with her family physician. Cavana returned to the emergency room ten weeks later, on October 30, 2000, complaining of abdominal pain and shortness of breath. Cavana's treating physician on that date ordered an electrocardiogram (EKG), which indicated that she had previously suffered a heart attack.

Thereafter, Cavana brought this action against Dr. Love and St. Luke Hospitals. She alleged that Dr. Love was negligent because he failed to order an EKG and diagnose her heart attack on her first visit. As a result, Cavana asserts that she has suffered permanent and irreversible heart damage. She sought damages for lost income, lost earning capacity, and pain and suffering.

St. Luke Hospitals settled with Cavana prior to trial. The matter then proceeded to a jury trial on December 1-5, 2003. The jury found that Dr. Love was negligent in his treatment of Cavana, but it also found that Cavana failed to exercise ordinary

care for her own health and safety. The jury apportioned 90% of the fault to Cavana and 10% to Dr. Love. The jury awarded Cavana \$1,500.00 for past lost wages, \$75,000.00 for lost earning capacity, and nothing for pain and suffering. After conferring with counsel, the trial court advised the jury that nothing for pain and suffering was inadequate as a matter of law.

Thereafter, the jury returned with a verdict of \$1.00 for pain and suffering. Based upon the jury's verdict and apportionment of fault, the trial court entered a judgment for Cavana in the amount of \$7,650.10. Subsequently, the trial court overruled Dr. Love's and Cavana's motions for judgment notwithstanding the verdict and for a new trial. This appeal and cross-appeal followed.

Cavana first argues that the jury should not have been instructed on the issue of comparative negligence. She concedes, as a matter of law, that comparative fault is applicable to all negligence claims, including her medical negligence claim. But Cavana argues that there was no evidence that the damage to her heart was caused by her delay in seeking treatment.

Similarly, Dr. Love asserts that he was entitled to a directed verdict. He concedes that there was evidence to support Cavana's claim that he was negligent in failing to diagnose her heart attack on August 16, 2000. Rather, he argues that there

was no evidence to support her contention that his negligence caused any additional damage to her heart.

Both Cavana's appeal and Dr. Love's cross-appeal address the sufficiency of the evidence justifying the trial court's submission of the issues of liability and comparative fault to the jury. The purpose of a motion for judgment notwithstanding the verdict is the same as that of a motion for directed verdict - to address the sufficiency of the evidence.¹ In ruling on either motion, the trial court is required to consider the evidence in a light most favorable to the party opposing the motion and to give that party every reasonable inference that can be drawn from the record.² All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions of the trier of fact.³ The motion is not to be granted "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ."⁴ On appeal, we are to consider the

¹ Lovins v. Napier, 814 S.W.2d 921, 922 (Ky. 1991).

² Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. 1985).

³ Kentucky & Indiana Terminal Railroad Co. v. Cantrell, 298 Ky. 743, 184 S.W.2d 111 (1944).

⁴ Taylor v Kennedy, *supra* at 416.

evidence in the same light.⁵ This Court's role is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict.⁶ The pertinent question is whether the verdict rendered is "palpably or flagrantly" against the evidence so as to "indicate that it was reached as a result of passion or prejudice."⁷ After reviewing the evidence presented, we conclude that the trial court properly submitted the issues related to causation to the jury.

Cavana's cardiologist, Dr. Vijaya Velury, reviewed the medical records as well as Cavana's testimony and journal. Based on this evidence, Dr. Velury testified that Cavana was exhibiting symptoms of heart failure on August 16, 2000. Dr. Love points out that neither Dr. Velury nor Cavana's other medical expert could precisely date when Cavana suffered the heart attack or when Cavana suffered additional damage to her heart. Nevertheless, Dr. Velury testified that the heart attack probably took place on August 16, and that the delay in diagnosing the condition increased the likelihood of permanent damage to the heart. The medical evidence, while not absolutely certain, was

⁵ Lovins v. Napier, *supra* at 922.

⁶ Inn-Group Management Services, Inc. v. Greer, 71 S.W.3d 125, 127 (Ky.App. 2002).

⁷ NCAA v. Hornung, 754 S.W.2d 855, 860 (Ky. 1988).

sufficient to support the jury's inference that Dr. Love's failure to diagnose Cavana's heart attack was a contributing factor to her injury.

Likewise, Cavana had a duty to exercise ordinary care for her own health and safety. There was evidence that Dr. Love told Cavana to follow-up her emergency room visit by consulting with a general surgeon and her own physician. He also recommended that she return to the emergency room if the symptoms persisted. Cavana did not seek additional treatment and she did not return to the emergency room until ten weeks later. Comparative negligence calls for liability for any particular injury in direct proportion to fault.⁸ Although it was not possible to precisely determine the extent that Cavana's delay in seeking treatment contributed to her ultimate injury, we conclude that there was sufficient evidence for the jury to apportion fault in this case.

Lastly, Cavana argues that the trial court erred in denying her motion for a new trial. She contends that the jury's award of \$1.00 for pain and suffering was inadequate as a matter of law. We disagree. In Cooper v. Fultz,⁹ the Kentucky Supreme Court rejected the contention that a jury's pain and suffering

⁸ Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984).

⁹ 812 S.W.2d 497 (Ky. 1991).

award was automatically inadequate as a matter of law when a jury intentionally indicated no pain and suffering award but awarded damages for medical expenses or lost wages. Rather, whether the award represents "[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court," CR 59.01(d), is a question dependent on the nature of the underlying evidence.¹⁰ Having heard the witnesses firsthand and observed and viewed their demeanor and having observed the jury throughout the trial, the trial court is in the best position to consider the sufficiency of the evidence. On appeal, therefore, this Court may not step into the shoes of the trial court, but is limited to considering whether the trial court's denial of her motion was clearly erroneous.¹¹

We find no clear error in this case. Cavana presented evidence that the damage to her heart has drastically limited her ability to continue her formerly active lifestyle. On the other hand, however, the medical evidence showed that Cavana's heart is still pumping at close to its normal capacity. Furthermore, Dr. Velury admitted that Cavana's heart function improved while he was treating her and it may continue to improve in the future.

¹⁰ Id. at 502.

¹¹ Miller v. Swift, 42 S.W.3d 599, 601 (Ky. 2001).

He also stated that Cavana may live out a normal life expectancy. Given this evidence, the jury's award of only nominal damages was supported by the evidence, and the trial court did not clearly err in denying Cavana's motion for a new trial.

Accordingly, the judgment of the Campbell Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS WITH RESULT.

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