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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000560-MR

KENNETH LEE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
CIVIL ACTION NO. 02-CI-00468

ALICE ETHERIDGE

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Kenneth Lee appeals from a Christian Circuit Court judgment and a subsequent order which denied his alternative motions for a new trial on damages, judgment notwithstanding the verdict, or an alteration, amendment or

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

vacation of the judgment. Lee's post-judgment motions followed entry of a judgment based on a jury verdict which awarded him some of the medical expenses he allegedly incurred as the result of an automobile accident, but failed to award the remaining medical expenses he had sought as well as damages for pain and suffering. Because the Kentucky Supreme Court has held that damages for pain and suffering need not necessarily accompany damages for medical expenses, and because we agree with the trial court that there was sufficient evidence to support the jury's verdict, we affirm the judgment.

On February 17, 2001,² Lee and Alice Etheridge were involved in an automobile accident in Hopkinsville, Kentucky. Lee had moved into the right lane at an intersection and was preparing to turn when Etheridge's car struck his pickup truck from behind, causing damage to its left side.

Lee claimed that immediately following the collision he felt severe pain in his head, neck and shoulders and could not move his neck. His passenger drove him to the Jennie Stuart Medical Center emergency room where he underwent a series of tests, including several X-rays and MRIs, to determine the cause of his pain. Subsequently, he consulted several specialists. Eventually, in March 2002, Lee underwent surgery, a cervical

² Appellant's brief gives November 17, 2001, as the date of the accident; however, the record indicates that the accident took place on February 17 of that year.

laminotomy, to relieve the pressure caused by a bulging disk in his neck.

Lee also filed suit against Etheridge during that month, alleging that she had been negligent in the operation of her vehicle, causing injuries to his neck.

At trial, the testimony of several medical experts was offered regarding the bulging disk in Lee's neck. The experts offered differing opinions as to the severity of his condition, whether it was a pre-existing condition, and whether it had been caused or exacerbated by the accident with Etheridge.

A jury unanimously found that Etheridge had been negligent in the operation of her automobile, and awarded Lee \$5,273.10 for past medical expenses, but nothing for pain and suffering. After the trial court denied Lee's post-judgment motions, he appealed to this Court.

Lee's primary argument is that the jury could only have been acting out of passion and prejudice in awarding him over \$5,000.00 in medical expenses without any accompanying damages for pain and suffering. In his view, the jury's decision was inconsistent, contrary to the evidence presented at trial, and could only have resulted from a mistaken belief that an individual should not be compensated for pain and suffering.

Lee acknowledges that the controlling case on the issue of whether damages for pain and suffering must necessarily

accompany an award of medical expenses is Miller v. Swift.³ In Miller, the Supreme Court held that a jury's decision not to award damages for pain and suffering when it awards medical expenses is not automatically inconsistent or inadequate as a matter of law.⁴ The Court instead directed that an assessment of the adequacy of the damages should be based on whether there was sufficient evidence to support the jury's conclusion.⁵

Our standard of review is therefore limited to determining whether, based on the evidence offered at trial, the circuit court's denial of Lee's post-judgment motions was clearly erroneous.⁶ "[I]f the jury's verdict of zero damages for pain and suffering is supported by evidence, the trial court [did not clearly err] in denying [the plaintiff's] motion for a new trial."⁷

In Lee's case, sufficient evidence was adduced to support the jury's decision not to award damages for pain and suffering. There was considerable evidence that the bulging disk in Lee's neck was a pre-existing condition. Evidence was also offered of accidents and injuries Lee suffered both before and after the collision with Etheridge that could either have caused or aggravated his condition. For instance, the jury was

³ 42 S.W.3d 599 (Ky. 2001). See also Thomas v. Greenview Hosp., Inc., 127 S.W.3d 663, 672-73 (Ky.App. 2004).

⁴ Id. at 602.

⁵ Id.

⁶ Id. at 601.

⁷ Id.

informed that Lee had a history of back pain and numbness in his arms, dating back to 1993. Dr. Russell Travis testified that Lee had a significant fall of about twenty feet in 1999, that he was involved a motor vehicle accident on August 3, 2000, and that he was struck in the neck with a two-by-four on August 30, 2000. Evidence was also offered that some six weeks after the collision with Etheridge, Lee was injured in a fight during which someone stamped on his wrists. Lee was also involved in a motorcycle accident in November 2001, approximately nine months after the accident with Etheridge and approximately four months before his neck surgery. Although the jury could have returned a verdict awarding Lee additional medical expenses and damages for pain and suffering, it was free to reach a contrary conclusion given the evidence Etheridge elicited. That evidence was sufficient to support the view that any pain suffered by Lee was the result of events other than the collision that precipitated this lawsuit.

Lee also argues that the jury failed to account for the testimony of his neurologist, Dr. John T. Ebert, who stated that Lee was in pain when he examined him on various occasions. However, Dr. Ebert acknowledged that the measurement of pain is necessarily subjective. When Lee's attorney asked him if he had seen Lee in any pain and discomfort during his examinations, Dr. Ebert replied:

Oh, sure. But, of course, you know, pain is a subjective symptom. There's no way to objectively measure or quantify it, and it's based entirely on patient behavior and what the patient says. So it can be feigned if so desired. Because it cannot be objectively measured or quantified, that is what leads to so many difficulties.

Lee also points to his own testimony and that of his brother and father regarding the pain he experienced following the accident. This testimony was not so compelling or irrefutable that the jury acted unreasonably in failing to believe it. And, even if the jury believed the testimony that Lee suffered pain, sufficient evidence was offered to support the view that his pain may not have been caused by the accident with Etheridge.

Lee also argues that he would not have undergone the cervical laminotomy if he had not been suffering severe pain. Again, however, the surgical procedure was performed more than a year after the accident with Etheridge, and evidence was offered that he had suffered other significant injuries in that interval.

Lee attempts to distinguish the facts of his case from those in Miller v. Swift.⁸ In his view, the justification for the holding that damages for pain and suffering need not be

⁸ Supra, note 3.

awarded was the fact that in Miller the medical expenses were awarded exclusively to cover the cost of diagnostic tests performed on the plaintiff, who had a pre-existing condition. Under these circumstances, he argues, it is possible to envision that the plaintiff did not endure any additional pain and suffering as a result of the automobile accident.

By contrast, Lee argues, the amount he was awarded for medical expenses indicates that the jury believed he should be compensated for more than the diagnostic bills incurred at the Jennie Stuart Medical Center emergency room. He claims that the jury must also have intended the damages partly to cover the charges for the treatments rendered by Dr. Ebert. This is not the only possible interpretation of the jury award, however. Lee sought medical expenses totaling \$24,328.00. According to an exhibit of itemized medical expenses that he submitted, the jury's award of medical expenses (\$5,273.10) is just \$19.00 more than the expenses he incurred at Jennie Stuart Medical Center for emergency room care and diagnostic tests (\$4,642.10), plus diagnostic radiology bills incurred at Pennyrile Radiology (\$612.00). Thus, the jury may indeed have awarded damages solely for his extensive diagnostic tests. Its decision not to award damages for pain and suffering was therefore entirely appropriate under Lee's interpretation of Miller.

Lee has not shown that the trial court erred in finding that there was sufficient evidence to support the jury's verdict. Hence, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth R. Haggard
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Thomas N. Kerrick
Scott D. Laufenberg
KERRICK, STIVERS & COYLE,
P.L.C.
Bowling Green, Kentucky