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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2004-CA-002039-MR

WENDY M. DIXON — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 02-CI-00190

JUDY S. BROWN,
STATE FARM MUTUAL INSURANCE COMPANY,
AND
KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE: In an automobile accident on November 2, 1998, on U.S. Highway 41A in Henderson County, Kentucky, a vehicle driven by Judy S. Brown struck a vehicle driven by Wendy M. Dixon in the rear. Although she did not claim to be injured at the time, Dixon subsequently incurred medical expenses and filed a civil complaint against Brown in the Henderson Circuit

Court. A jury declined to award Dixon any damages following a trial, and Dixon's appeal herein followed. Finding no error, we affirm.

Dixon was an elementary school teacher in Henderson County on the day of the accident. She was driving home from school and was waiting in traffic to turn left when the vehicle she was driving was rear-ended by a vehicle driven by Brown. Dixon testified that she began to feel stiff later that evening and that she had neck and back pain the following morning. She also testified that she began having weekly migraine headaches that continued to the date of the trial.

Within a short time after the accident, Dixon sought medical treatment. She began with her family physician, Dr. James Buckmaster, and then went to a chiropractor, Dr. Juan Nunez. She saw Dr. Nunez 96 times in 13 months. Dixon testified that although Dr. Nunez was able to help her substantially with her back pain, he was unsuccessful in helping her get over her headaches. Therefore, Dr. Nunez referred Dixon to a neurologist, Dr. Michael Mayron.

Dr. Mayron gave her injections (mini occipital nerve blocks) in her neck and prescribed Depakote for the headaches. Dixon testified that she experienced side effects from the drug, including nausea and giant hives all over her body. She testified that she stopped seeing Dr. Mayron because he would

not keep his appointments and that she subsequently went back to Dr. Buckmaster. Dr. Buckmaster referred her to a pain specialist, Dr. White. After treatment with Dr. White was unsuccessful, Dixon testified that she went back to Dr. Buckmaster who prescribed Prozac for her. She eventually went to another neurologist, Dr. Carla Brandt.

Dixon testified that she experienced many physical problems at school following the accident, including headaches two or three times per week and vomiting in her classroom. She stated that there were times when she would turn the lights off and lie down or sit in a rocking chair. Dixon also stated that she missed 45½ school days after the accident before she finally resigned as a teacher in 2001. Her base salary at the time was $31,900.

The case was tried before a jury in the Henderson Circuit Court in February 2004. Prior to trial, Brown admitted liability and the court granted Dixon a summary judgment on that issue. In addition to testifying herself, Dixon presented medical evidence through the testimony of Dr. Brandt and Dr. Nunez. Dixon's husband as well as several persons who had associated with her at the school also testified on her behalf. Brown testified, but no other witnesses were called on her behalf.

At the conclusion of the trial, Dixon moved for a directed verdict on the issue of lost wages amounting to over $100,000.[1] The court denied the motion, and it submitted instructions to the jury allowing it to award damages for lost wages, pain and suffering (past and future), medical expenses (past and future), and impairment of the power to earn money. The jury declined to award Dixon any money as damages, and this appeal by Dixon followed the trial court's denial of her motion for a new trial and motion for a judgment notwithstanding the verdict.

Dixon's first argument is that the trial court abused its discretion in failing to grant a new trial and/or a judgment notwithstanding the verdict on the issue of past lost wages. Citing Inn-Group Management Services, Inc. v. Greer, 71 S.W.3d 125, 127 (Ky.App. 2002), Dixon notes that the role of an appellate court reviewing the evidence supporting a judgment entered upon a jury verdict is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict. Dixon argues that the trial court erred in not granting her a directed verdict for lost wages in the amount of $108,150. To support her argument, Dixon cites the testimony of the neurologist, the chiropractor, and her co-workers.

[1] We reject Brown's argument that Dixon failed to make such a motion. Although the words "directed verdict" were not used by Dixon's attorney, a review of the record indicates that such a motion was made.

Dixon maintains that Hazelwood v. Beauchamp, 766 S.W.2d 439 (Ky.App. 1989), is directly on point. In that case Hazelwood's hand was severely injured when it was caught in a John Deere hay baler. Despite the severity of the accident and the fact that Hazelwood underwent three surgeries, the jury awarded him only his medical expenses but nothing for pain and suffering or past and future lost earnings. Referring to "the uncontroverted evidence of the nature of the accident itself and the medical procedures performed," this court reversed and remanded the judgment for a new trial on the issues of pain and suffering and lost wages. Id. at 441.

In Taylor v. Kennedy, 700 S.W.2d 415 (Ky.App. 1985), this court held that a trial court "is precluded from entering either a directed verdict or judgment n.o.v. 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." Id. at 416. The facts in the Hazelwood case are distinguishable from those herein. In that case, the medical expenses and lost wages were clearly the result of the severe injury sustained in the accident. Here, there was a disputed fact upon which reasonable men could differ concerning the reason Dixon had incurred medical expenses and lost wages. There was evidence that the damage done to the vehicles was not extensive, and there was evidence in the medical records of

inconsistencies in Dixon's physical complaints to her medical providers and her testimony at trial.[2] In short, the issue of lost wages was properly presented to the jury, and the trial court did not err in failing to grant Dixon's directed verdict motion or her motions for a new trial and/or a judgment notwithstanding the verdict.

Dixon's second argument is that the trial court erred in failing to grant a new trial on the issues of lost wages, past pain and suffering, and past medical expenses. "[O]ur only function in reviewing the denial of a motion for new trial is to decide whether the trial judge abused his discretion." McVey v. Berman, 836 S.W.2d 445, 448 (Ky.App. 1992). Further, the trial judge's decision is "presumptively correct," and we will not reverse that decision unless it is clearly erroneous. Id.

Citing the Hazelwood case, she maintains that the jury was "not free to ignore the undenied evidence of . . . lost wages attributable solely to the accident." See id. at 441. As we have stated above, whether Dixon incurred lost wages because of the accident was a fact issue subject to the jury's

[2] For example, Dixon testified that she began having headaches the day following the accident, but the medical records of Dr. Buckmaster three days after the accident contain no reference to any such complaint by Dixon. Further, the medical records indicated that Dixon had seen a chiropractor for back pain at some point prior to the accident. Additionally, the records from Dr. Nunez 21 days following the accident made no mention of any complaint by Dixon of headaches, and Dr. Mayron's records show that he suggested to Dixon that her headaches may be caused by job-related stress.

determination. Likewise, there was a fact issue concerning Dixon's claim for past pain and suffering.

Finally, Dixon argues that the court erred in not granting her a new trial and/or a judgment notwithstanding the verdict for past medical expenses. In addition to the testimony of the medical professionals and her co-workers, Dixon refers to a stipulation between the parties concerning such expenses. Prior to trial, counsel for the parties signed a written stipulation that stated that "Wendy Dixon's medical expenses as a result of the accident on November 2, 1998 are $20,362.25." She argues that these expenses are presumed to have been reasonable pursuant to KRS[3] 304.39-020(5)(a) and that a verdict failing to award medical expenses was in disregard of the evidence and was thereby inadequate. See CR[4] 59.01(d).

"The general rule of damages is that necessary and reasonable expenses for medical services may be recovered in a suit for personal injuries." Langnehs v. Parmelee, 427 S.W.2d 223, 224 (Ky. 1967). There is no question that Dixon had medical expenses exceeding $20,000 following the accident. However, despite the language of the written stipulation, the parties did not treat the stipulation as dispositive of the issue of whether those expenses were incurred because of the

[3] Kentucky Revised Statutes.

[4] Kentucky Rules of Civil Procedure.

accident.[5] We believe the trial court correctly ruled that there was a fact issue in this regard. The jury obviously determined that the medical expenses were not incurred due to the accident, and we conclude, as did the trial court, that there was substantial evidence to support the verdict. See Lewis v. Grange Mutual Casualty Co., 11 S.W.3d 591 (2000), where this court held that a jury is not bound to always accept the medical bills submitted into evidence by a plaintiff as reasonable and necessary. Id. at 593.

The judgment of the Henderson Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: While I fully agree with the reasoning and the result of the majority opinion, I find the jury's verdict in this case troubling. Dixon presented compelling evidence that she began to suffer debilitating back pain and headaches after the accident. As a result of these conditions, Dixon incurred substantial medical expenses, lost wages and pain and suffering. While there was some question concerning when the headaches began and there was some evidence that Dixon had been treated for back pain prior to the accident,

[5] Dixon's attorney acknowledged this in his argument to the trial court on his motion for a new trial and/or motion for judgment notwithstanding the verdict.

there was no evidence that these symptoms manifested themselves prior to the accident to the degree which Dixon experienced after the accident. Furthermore, the evidence showed that Dixon only occasionally missed work due to illness prior to the accident, but missed over forty-five days of work during the two-and-a-half years following the accident. In short, I find it very difficult to justify the jury's conclusion that Dixon suffered no injury or loss whatsoever as a result of the accident.

But as the majority correctly points out, this is not our standard of review. The reviewing court must accept the evidence as true, draw all reasonable inferences from it in favor of the claimant, refrain from questioning the credibility of the witnesses of the claimant and refrain from assessing the weight that should be given to any particular item of evidence. Lewis v. Bledsoe Surface Mining Company, 798 S.W.2d 459, 461 (Ky. 1990). As the plaintiff in this case, Dixon had the burden of proving not only that she suffered damages, but also that those damages were caused by Brown's negligent act. Simply because a result follows from an event does not require a finding that the event caused the result. This is referred to as the logical fallacy of coincidental correlation, or "*post hoc ergo proctor hoc*" (after this therefore because of this). While

the jury could have concluded that Dixon's injuries were caused by the accident, it was not required to do so.

Moreover, Dixon bore the risk of non-persuasion on these issues, and the jury was not bound to believe her or her doctors. Spalding v. Shinkle, 774 S.W.2d 465, 467 (Ky. App. 1989). The trial judge and the jury were in the best position to consider the credibility of witnesses and the weight to be given to the evidence. Dixon does not suggest that the jury's verdict was motivated by any unfairly prejudicial evidence or improper arguments. Rather, the jury did not believe the evidence which she presented. Therefore, although I find the jury's verdict to be harsh under the circumstances, I must agree with the majority that we have no basis for disturbing it.

COMBS, CHIEF JUDGE, DISSENTING: I am compelled to dissent. The facts of this case reveal overwhelming evidence that Dixon was so severely injured by the accident that a jury could not reasonably have found otherwise. Hazelwood v. Beauchamp, 766 S.W.2d 493 (Ky.App. 1989) cited by Dixon, is directly on point and should govern in this case. The trial court either should have entered a directed verdict in her favor (or a judgment notwithstanding the verdict) or should have granted her a new trial on the issue of past lost wages.

The concurring opinion correctly notes the unrefuted severity of her injuries yet stops short of granting relief.

The very ambivalence of the reasoning in the concurrence supports the wisdom of granting a new trial.

I also agree with Dixon that she should prevail in her argument as to her entitlement to past medical expenses according to the terms of the pre-trial stipulation between the parties.

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