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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002226-MR

KATHERINE GIBSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 03-CI-007479

DELPHIN B. MORELY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY AND SCHRODER, JUDGES.

HENRY, JUDGE: Katherine Gibson appeals from a jury verdict and judgment awarding her $0 in damages for pain and suffering. On review, we affirm.

On October 28, 2002, Gibson was involved in a motor vehicle accident in which she was hit head-on by a vehicle driven by the Appellee, Delphin Morely. Gibson subsequently filed suit against Morely on August 26, 2003, claiming injuries to her knee and seeking damages for medical expenses, pain and suffering, lost wages, and impaired earning capacity. The case

was tried before a jury on August 10 and 11, 2004. After all evidence was presented, the trial judge entered a directed verdict in favor of Gibson as to her $12,795.11 in medical expenses. The jury subsequently returned a verdict finding Morely 100% at fault for the accident and awarding Gibson $12,795.11 for past medical expenses (per the trial court's directed verdict), $750.00 in lost wages, $0 for pain and suffering, and $0 for impaired earning capacity. On September 17, 2004, the trial court entered a judgment consistent with the jury's verdict.

On September 24, 2004, Gibson filed a motion for a new trial, pursuant to CR[1] 59.01(d), arguing that the jury's award of $0 in damages for pain and suffering constituted "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." On October 11, 2004, the trial court entered an order denying the motion. This appeal followed.

On appeal, Gibson again argues that the jury's $0 verdict for pain and suffering was inadequate, and that the trial court erred in failing to grant her motion for a new

[1] Kentucky Rules of Civil Procedure.

trial. In Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984),[2] our Supreme Court set forth the test for a trial court to follow when reviewing an award of actual damages for excessiveness or inadequacy:

> When presented with a motion for a new trial on grounds of excessive damages, the trial court is charged with the responsibility of deciding whether the jury's award appears "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). This is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.

Id. at 932. See also Miller v. Swift, 42 S.W.3d 599, 601 (Ky. 2001). The Court went on to state the appropriate standard for appellate review on the issue of excessive or inadequate damages:

> "Upon reviewing the action of a trial judge in (granting or denying a new trial for excessiveness), the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge . . . to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous."

[2] Davis was overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483 (Ky. 2002). Sand Hill was subsequently vacated by Ford Motor Co. v. Estate of Smith, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003).

Davis, 672 S.W.2d at 932, quoting Prater v. Arnett, 648 S.W.2d 82, 86 (Ky.App. 1983); see also Burgess v. Taylor, 44 S.W.3d 806, 813 (Ky.App. 2001). In sum, we may only reverse the trial's court order if we find that it was clearly erroneous. Bayless v. Boyer, 180 S.W.3d 439, 444 (Ky. 2005). We also note that "the action of the trial judge is presumptively correct and the appellate court will not hastily substitute its judgment for that of the trial judge, who monitored the trial and was able to grasp those inevitable intangibles which are inherent in the decision making process of our system." Prater, 648 S.W.2d at 86.

Of particular emphasis in our evaluation here is the progeny of cases discussed in and resulting from Miller v. Swift, 42 S.W.3d 599 (Ky. 2001). In Miller, our Supreme Court dealt with another situation in which a jury had awarded medical expenses and lost wages but nothing for pain and suffering. The Court overruled Prater v. Coleman, 955 S.W.2d 193 (Ky.App. 1997) "to the extent it holds that a '0' award of pain and suffering damages, regardless of the evidence, is inadequate as a matter of law when accompanied by awards for medical expenses and lost wages." Miller, 42 S.W.3d at 602. It instead concluded that "[t]he law in Kentucky . . . does not require a jury to award damages for pain and suffering in every case in which it awards medical expenses." Id. at 601. We must instead examine the

nature of the underlying evidence to determine if the jury's decision is supported by probative evidence in the record. Thomas v. Greenview Hospital, Inc., 127 S.W.3d 663, 672 (Ky.App. 2004), overruled on other grounds by Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005). "If the verdict bears any reasonable relationship to the evidence of loss suffered, it is the duty of the trial court and this Court not to disturb the jury's assessment of damages." Hazelwood v. Beauchamp, 766 S.W.2d 439, 440 (Ky.App. 1989). Accordingly, if a jury's award of zero damages for pain and suffering is supported by evidence, a trial court is not clearly erroneous in denying a subsequent motion for new trial. See Bayless, 180 S.W.3d at 444.

Gibson points to a number of facts in support of her position that the jury's award was inadequate. For example, the accident resulted in Gibson suffering a "Grade I open lateral tibial plateau fracture," which is a crack through the shin bone that enters the knee joint. She required surgery immediately after the accident and spent three days in the hospital receiving physical therapy and treatment for pain and discomfort. Dr. Robert Goodin also testified that Gibson suffered a "relatively painful injury," and that he routinely prescribed patients who suffered this injury Percocet and morphine. He also stated that Gibson could not bear weight on her injured leg for two months following the accident. There

was also testimony from multiple persons indicating that Gibson experienced pain when she had to squat for prolonged periods of time or climb stairs.

Morely submits in response that Gibson made a number of statements at trial minimizing the amount of pain that she suffered as a result of the accident. For example, she admitted that she did not receive any pain medication until her leg was operated on by Dr. Goodin, and that she did not have any pain unless she moved her leg. Gibson also testified that she returned to work within a week of the accident. Moreover, testimony from Angelique Clark-Miller, who performed a functional capacity evaluation of Gibson, indicated that Gibson reported to her that she had no pain both before and after her testing, and that the worst pain she experienced due to the accident ranked as a "2" on a scale of 1 to 10. Dr. Goodin also could not recall whether or not he specifically prescribed Gibson any pain medication after her surgery.

After considering these facts and the record as a whole - and even though we believe the question at hand to be a relatively close one - we are not inclined to find that the trial court was clearly erroneous in failing to grant Gibson a new trial as to pain and suffering. It is not for us to second-guess the trial court in the absence of an error of law. See Davis, 672 S.W.2d at 932. All that is required under our law is

for there to be any sort of reasonable relationship between the verdict and the evidence of loss presented. Hazelwood, 766 S.W.2d at 440. The trial court concluded that such a relationship existed – based in large part upon the testimony of Gibson herself - and we cannot say that such a conclusion is clearly erroneous.

Gibson further argues that the holding in Miller is not applicable here because that case involved a situation in which the plaintiff had a pre-existing injury. However, we note that the Supreme Court has set forth that "the general principle advanced in Miller - that a zero verdict for pain and suffering may sometimes be appropriate - is not constrained to the facts of that case," and that it "is broadly applicable to cases which claim this type of error." Bayless, 180 S.W.3d at 444-45. Accordingly, we must reject Gibson's contentions in this respect.

We next address Gibson's argument that statements made by Morely's counsel in opening and closing arguments should be considered judicial admissions as to pain and suffering. Gibson cites specifically to Co-De Coal Co. v. Combs, 325 S.W.2d 78 (Ky. 1959) and Riley v. Hornbuckle, 366 S.W.2d 304 (Ky. 1963) in support of her position.

In Combs, our predecessor Court set forth that "[a]n opening statement of counsel is prefatory to introducing

evidence. Its purpose or function is merely to inform the judge and the jury in a general way of the nature of the case and the issues involved, particularly to outline what the attorney's client expects to prove." Combs, 325 S.W.2d at 79. However, as the Court further noted:

> It is true that the court may take a case from a jury or enter judgment where it is clear from an opening statement either that the plaintiff cannot recover or that the defendant has no defense, as the case may be. This regards the statement as a judicial admission of the nonexistence of or inability to prove a cause of action or a defense, but even in such a case the action of the court should be exercised cautiously and only where the admission is clear.

Id. As Riley further elaborates, the court should only take action when the admission in question is fatal to the case. Riley, 366 S.W.2d at 305; see also Lambert v. Franklin Real Estate Co., 37 S.W.3d 770, 774 (Ky.App. 2000); Samuels v. Spangler, 441 S.W.2d 129, 131 (Ky. 1969). Moreover, a court should not take action unless the statements or concessions are "plainly and understandingly made." Hill v. Kesselring, 310 Ky. 483, 490, 220 S.W.2d 858, 862 (Ky. 1949). Such a requirement is of utmost importance, as:

> a judicial admission is conclusive, in that it removes the proposition in question from the field of disputed issue, and may be defined to be a formal act done in the course of judicial proceedings which waives or dispenses with the necessity of producing evidence by the opponent and bars the party

> himself from disputing it; and, as a natural consequence, allows the judge to direct the jury to accept the admission as conclusive of the disputed fact.

Sutherland v. Davis, 286 Ky. 743, 749, 151 S.W.2d 1021, 1024 (1941); see also Sroka-Calvert v. Watkins, 971 S.W.2d 823, 828 (Ky.App. 1998); Nolin Production Credit Ass'n v. Canmer Deposit Bank, 726 S.W.2d 693, 701 (Ky.App. 1986).

Gibson points to a number of statements made by Morely's counsel in his opening and closing argument in support of his position that counsel made admissions that mandate a pain and suffering award. Specifically, during his opening statement, counsel told the jury that Gibson "had a very brief period of time in which she took pain medication," and quoted from a functional capacity evaluation that she self-reported a pain rating of 2 on a scale from 1 to 10. Gibson also points to the fact that, in his closing argument, counsel acknowledged to the jury that Gibson stopped taking pain medication in December 2002 and had trouble kneeling. She also notes that counsel asked the jury to consider a number between $100.00 and $1000.00 for the five months she was off of work as a pain and suffering award and mentioning a $5000.00 to $13,000.00 range as a "starting point."

However, after reviewing the record, we cannot say that the trial court was clearly erroneous in failing to grant

Gibson a new trial on the basis of the statements set forth above. Specifically, we do not believe that these statements rise to such a level that they should be considered to be "fatal" to Morely's defense, nor do we believe that they were sufficiently "formal" to constitute judicial admissions. Moreover, and perhaps more importantly, we fail to see in the record where Gibson presented the issue of these possible judicial admissions to the trial court before the case was submitted to the jury – whether in a motion for directed verdict or otherwise - and we therefore have reservations as to whether the issue is even properly presented for our review. In any event, we believe that Gibson's argument in this respect must be rejected.

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

COMBS, CHIEF JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
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