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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002356-MR

VERNA LEE — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 00-CI-00492

KATRINA OSBORNE; and
GRANGE MUTUAL CASUALTY
COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Verna Lee appeals from a Laurel Circuit Court judgment awarding her damages for past medical expenses but no damages for future medical expenses or pain and suffering. For the following reasons, we affirm.

On June 12, 1998, as the vehicles driven by Katrina Osborne and Lee approached each other on a narrow road, Lee ran into a culvert, overcorrected her vehicle, and ran into a tree. Lee was removed from her vehicle on a board and taken to the emergency room, where x-rays were taken which a radiologist

opined revealed no fracture.[1] Lee was released from the hospital and underwent physical therapy. There was some testimony that Lee further injured herself on a physical therapy machine. After Lee failed to progress at the rate her doctor expected, a second set of x-rays and an MRI revealed a compression fracture at the L-2 area.[2] Throughout this time, Lee was prescribed pain medication and occasional pain injections.

Lee, her husband, and her daughters each testified regarding the pain and suffering Lee experienced subsequent to the automobile accident. There was testimony that Lee had to be carried into her home after leaving the emergency room. They also testified that Lee's pain prohibited her from participating in activities as she had before the accident, such as gardening, housework, and physical labor at her husband's church. Further, Lee testified that she lived with daily pain.

Lee filed suit against Osborne and Lee's own insurance company, Grange Mutual Casualty Company, due to the fact that Osborne was an uninsured driver. After a trial, the jury found each party to be 50% at fault for the accident. The trial court

[1] To later prepare for his deposition in this matter, the radiologist compared the initial x-rays to x-rays taken of Lee approximately fourteen months later and concluded that the original x-rays in fact showed a minimal cortical fracture.

[2] A defense expert opined that Lee suffered whiplash during the accident and subsequently fractured her back during physical therapy. This expert opinion was based, however, upon the radiologist's initial opinion that the emergency room x-rays revealed no fracture.

ultimately entered a judgment adopting the jury's verdict, which awarded Lee $14,082.52 for past medical expenses but $0 for both future medical expenses and pain and suffering.

Thereafter, Lee sought a new trial,[3] alleging that the jury's zero verdict for pain and suffering was inadequate, unsupported by substantial evidence, contrary to law, reflective of jury confusion in understanding the instructions, and the result of the influence of passion or prejudice. The court denied Lee's motion as follows:

> [T]he Defendant offered proof that any pain suffered by the Plaintiff was for a pre-existing condition and that the Plaintiff engaged in the same type of activity she had engaged in before the accident. It was then not unreasonable for the jury to believe that the Plaintiff did not suffer pain as a result of the accident. Under the standard set out in Miller v. Swift, [42] S.W.3d 599 (Ky., 2001), the verdict of the jury is not inconsistent.[4]

This appeal followed.

A CR 59.01 ruling is "a discretionary function assigned to the trial judge who has heard the witnesses firsthand and observed and viewed their demeanor and who has

[3] CR 59.01.

[4] When a jury awards zero for pain and suffering but awards other damages, the verdict is complete and not inconsistent, although it may be inadequate. *Cooper v. Fultz*, 812 S.W.2d 497, 499 (Ky. 1991), *abrogation on other grounds recognized by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493-96 (Ky. 2002). The trial court apparently meant inadequate, not inconsistent. *See Miller v. Swift*, 42 S.W.3d 599 (Ky. 2001).

observed the jury throughout the trial."[5] Contrary to Lee's assertion, there is no presumption that an award for compensable pain and suffering should normally accompany an award for medical expenses. Rather, when ruling on a motion for a new trial on the grounds of excessive or inadequate damages, the trial court must determine whether the jury's award was "given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court."[6] It is not inadequate as a matter of law in Kentucky for a jury to award damages for medical expenses and nothing for pain and suffering.[7]

Lee discusses our role in such an appeal at length in her appellate brief. The case law is clear, however, that when a trial judge denies a motion for a new trial based on inadequate damages, such as here, our role is to review whether the denial of the motion was clearly erroneous.[8] In fact, the Kentucky Supreme Court recently reiterated this standard in *Bayless v. Boyer*,[9] espousing that we give a trial court's decision with regard to a motion for a new trial "a great deal of deference." Ultimately, "if the jury's verdict of zero

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[5] *Miller*, 42 S.W.3d at 601 (quoting *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984)).

[6] CR 59.01(d); *See Cooper*, 812 S.W.2d at 501.

[7] *Bayless v. Boyer*, 180 S.W.3d 439, 444 (Ky. 2005); *Miller*, 42 S.W.3d at 601.

[8] *Miller*, 42 S.W.3d at 600-01 (Ky. 2001).

[9] *Bayless*, 180 S.W.3d at 444.

damages for pain and suffering is supported by evidence, the trial court was not clearly erroneous in denying [the] motion for a new trial."[10]

The plaintiff in *Miller v. Swift*[11] suffered from "rheumatoid arthritis, carpal tunnel syndrome, gastritis and problems with her knee and shoulder" prior to the subject accident. The Kentucky Supreme Court affirmed the trial court's denial of a new trial even though the jury awarded medical expenses and lost wages but nothing for pain and suffering, holding that the evidence "supported a finding by the jury that [the plaintiff] did not suffer additional pain as a result of the accident[.]"[12] Here, the defense offered testimony that Lee had preexisting osteoporosis and that in September 1997, approximately nine months before the accident, she saw a doctor complaining of low back pain she had been experiencing for a month. After x-rays revealed no fracture, the doctor prescribed a non-steroidal, anti-inflammatory medication. Lee reported at a follow-up visit that she still had some low back pain but that the pain had decreased.

Obviously Lee did not have as many preexisting conditions as the plaintiff in *Miller.* Still, we believe that

[10] *Miller*, 42 S.W.3d at 601.

[11] 42 S.W.3d at 600.

[12] *Id.* at 599.

here, as in *Miller*, the evidence supported the jury's zero verdict for pain and suffering, in that the jury could have found that the accident did not cause Lee to suffer any more pain than that which prompted her to see a doctor before the accident. Although Lee and her family testified extensively regarding Lee's pain and suffering, both Lee and her husband also testified that Lee had never had any back pain prior to the accident. The defense offered testimony to refute this contention, in the form of the doctor who treated Lee for back pain nine months before the accident. "A jury is not bound to believe a plaintiff or her doctors."[13]

Even if the trial court erroneously found that Lee engaged in the same types of activity both before and after the accident, the jury's verdict and trial court's holding are ultimately supported by the evidence, as set forth above.

The judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

[13] *Spalding v. Shinkle*, 774 S.W.2d 465, 467 (Ky.App. 1989) (referencing *Carlson v. McElroy*, 584 S.W.2d 754 (Ky.App. 1979); *Davidson v. Vogler*, 507 S.W.2d 160 (Ky. 1974); and *Thompson v. Spears*, 458 S.W.2d 1 (Ky. 1970)).

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