

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001291-MR

RICKY CRAIG OWENS AND
TISHA L. OWENS

APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN M. HORNE, JUDGE
ACTION NO. 03-CI-01390

G. HENRY MAYLEBEN

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

BUCKINGHAM, SENIOR JUDGE: Ricky Craig Owens appeals from a civil judgment of the Boone Circuit Court entered against him in favor of G. Henry Mayleben for damages resulting from injuries Mayleben suffered in an automobile accident caused by Owens's negligence in driving his automobile while under the influence of alcohol and drugs. We affirm.

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

After leaving his welding job in Cleves, Ohio, on October 4, 2001, Owens went to a bar and consumed several mixed drinks of triple shot Wild Turkey which is in excess of 100 proof alcohol. He had also taken Xanax by prescription.²

Owens then drove on Interstate 275 through Ohio and Indiana and into Kentucky. He testified that he was traveling 70-75 miles per hour and that the speed limit on the interstate was 65 miles per hour. Owens had been driving about 45 minutes when he fell asleep or passed out, crossed over several lanes of traffic, went through a wide grass median and then several lanes of traffic, and crashed into an automobile being driven by G. Henry Mayleben, the appellee herein. Owens's blood alcohol content was .23%.

Mayleben was injured, and he thereafter filed a civil complaint against the Owens in the Boone Circuit Court.³ A bench trial was held, and the court found that Owens had operated his automobile negligently and under the influence of prescription drugs and alcohol. The court also found that Owens's actions were the direct and proximate cause of the accident and Mayleben's injuries.

The court awarded Mayleben damages exceeding \$60,000. Specifically, Mayleben was awarded \$3,077.22 for medical bills, \$10,000 for pain and suffering, \$500

² Owens testified that he had been prescribed to take Xanax four times daily, although he did not remember how many he had taken that day.

³ Tisha L. Owens, wife of Ricky Craig Owens, was named as a defendant in the action because Owens had transferred real property that had been in his name to her following the accident and prior to trial. The trial court's judgment concluded that this was a fraudulent transfer and ordered it set aside. That portion of the judgment has not been appealed.

for property damages (Mayleben's deductible), and \$50,000 for punitive damages. This appeal by Owens followed.

Owens's first argument is that the trial court erred by reviewing his criminal record despite the fact it was not a part of the court record. Any error in this regard was not preserved for appellate review, and Owens thus raises the argument under the palpable error rule. *See* Kentucky Rule of Civil Procedure (CR) 61.02.

It appears that the trial court had reviewed Owens's driving record prior to trial and noted to the parties after Owens's testimony that Owens had received a speeding ticket in Kenton County some time after the accident.⁴ Owens argues that the court's review of the record substantially prejudiced him from receiving a fair trial by causing the trial judge to have a predisposed opinion that had a direct effect on the award of punitive damages.

Because Owens's driving record and speeding ticket subsequent to the accident were not a part of the record in this case and were irrelevant at any rate, we agree with Owens that the court erred. Since the error was not preserved for our review, we must determine whether the error was a palpable one. CR 61.02 states that “[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice resulted from the error.”

⁴ Owens's conviction for DUI in connection with the accident was a part of the record in the form of a certified copy of the conviction record.

We conclude that the error did not affect Owens's substantial rights and did not result in a manifest injustice.⁵ Rather, we conclude that the error was a harmless one. *See* CR 61.01.

The second argument raised by Owens on appeal is that the trial court erred by not allowing his attorney to make a closing argument prior to announcing its judgment. After a brief recess following the close of evidence, the court announced its judgment. After doing so, the Owens' attorney stated that he would have given a closing statement but that the court had already announced its decision. The court then stated it had made a mistake, apologized for not allowing closing arguments, and gave the Owens' attorney an opportunity to give a closing statement at that time.

As noted by Mayleben's attorney in his brief, Owens did not cite any authority for his argument that it was error for the court not to allow closing arguments before announcing its judgment. In *Pozitzer v. W.R. Martin Co.*, 374 S.W.2d 194, 195 (Ky. 1964), the court held that “permitting oral argument in court actions should be a matter within the discretion of the trial judge.” Thus, the failure of the trial judge in this case to allow closing arguments by the attorneys was not error.

Owens's next argument is that the trial court erred in awarding punitive damages to Mayleben in the amount of \$50,000. In this regard, he first argues that the trial court did not state the basis of its award and also that punitive damages were unwarranted and not proven by clear and convincing evidence. The trial court found that the “action of Defendant, Ricky Craig Owens in driving his motor vehicle, with the

⁵ We note that the trial court did not mention the speeding ticket in its judgment.

.23g/100ml blood alcohol content, on top of taking Xanax, on top of driving at a speed anywhere from 10 to 15 mph over the posted speed limit, and then falling asleep at the wheel while driving at an excessive rate of speed is such an egregious, wanton and grossly negligent course of conduct that punitive damages ought to be awarded.”

Owens argues that he was deprived of due process of law because the court failed to make specific findings relative to the three “guideposts” set forth by the U.S. Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 1520, 155 L.Ed.2d 585 (2003). First, Owens has not demonstrated that such findings were required to be specifically made by the court. Second, if such findings were essential, Owens is not entitled to relief on that ground at any rate since the court's failure to make such findings was not brought to its attention by a written request for more specific findings. *See* CR 52.04.

We conclude that the court's findings were adequate and that the court was within its discretion in awarding punitive damages under KRS 411.184, Kentucky's punitive damages statute. *See Shortridge v. Rice*, 929 S.W.2d 194, 198 (Ky.App. 1996); *Cooper v. Barth*, 464 S.W.2d 233, 235 (Ky. 1971).

Campbell requires that punitive damages be reviewed under three “guideposts.” They are: “(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the injury and the civil penalties authorized or imposed in

comparable cases.” *Campbell*, 538 U.S. at 418, 123 S.Ct. at 1520. Further, the first guidepost is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award[.]” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589,1599, 134 L.Ed.2d 809 (1996).

In reviewing the three factors, we will focus particularly on the first. Owens's conduct resulted in physical as well as economic harm. Further, his conduct very clearly exhibited indifference or at least reckless disregard for the health and safety of others. On the other hand, while much of Owens's conduct was deliberate, the result was accidental. At any rate, we conclude that the award was not unreasonable in light of Owens's actions and was within the limits of what due process allows. *See Campbell, supra*.

Finally, Owens argues that the punitive damages award was excessive because it exceeded the single-digit ratio between punitive and compensatory damages. *See Campbell*, 538 U.S. at 438, 123 S.Ct. at 1531 (“few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”).⁶ Owens states that since the compensatory award was \$3,577.22, punitive damages should not have exceeded \$35,000. In response, Mayleben states that because his actual damages were approximately \$33,000 (\$23,000 of which did not go to Mayleben due to subrogation claims), an award of punitive damages of over \$300,000 would have been permissible.

⁶ We note that the U.S. Supreme Court in *Campbell* also stated that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” 538 U.S. at 425, 123 S.Ct. at 1524.

In addition to medical bills and property damages totaling approximately \$3,500, Mayleben's compensatory damages also included an award of \$10,000 for pain and suffering. An award of damages for pain and suffering is for the purpose of compensation and thus constitutes compensatory damages. See *Wall v. Van Meter*, 223 S.W.2d 734,736 (Ky. 1949); *McVey v. Berman*, 836 S.W.2d 445, 449 (Ky.App. 1992); *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 494 n. 39 (Ky. 2002), *certiorari granted, judgment vacated on other grounds by Ford Motor Co. v. Smith*, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003). Therefore, an award of \$50,000 for punitive damages was within the single-digit ratio discussed by the U.S. Supreme Court in the *Campbell* case.⁷ In short, considering the actions of Owens and the amount of compensatory damages, we conclude that the court was within its discretion in awarding Mayleben \$50,000 in punitive damages.

The judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANTS:

Hon. Steven J. Megerle
Covington, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Hon. D. Anthony Brinker
Covington, KY

⁷ In fact, the award was within the 4-to-1 ratio suggested in *Campbell*.