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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1998-CA-000454-MR

DWIGHT P. HAMMOND — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 96-CI-00811

BERT SUMMERS, JR. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GARDNER, KNOPF, AND KNOX, JUDGES.

KNOX, JUDGE: In this personal injury action, appellant, Dwight P. Hammond, appeals from a jury verdict and judgment awarding him damages totaling $28,076.00, subsequently reduced by $10,000.00, pursuant to Kentucky's Motor Vehicle Reparations Act. We affirm.

On January 29, 1996, while waiting in traffic to make a left turn, appellant was rear-ended by a cattle truck driven by appellee, Bert Summers, Jr. The collision knocked appellant's vehicle approximately five hundred (500) feet down the road, and into a wooden fence. Appellant was driven to the Marymount Medical Center in London, Kentucky, where, as a precautionary measure, x-rays were taken of appellant's cervical spine. The x-

rays indicated no swelling or fractures. Appellant was treated for an abrasion on the back of his head, and released.

Two (2) days later, on January 31, 1996, appellant reported to the emergency room of Central Baptist Hospital in Lexington, Kentucky, complaining of a severe headache and a sensation of pressure behind his eyes. Appellant was diagnosed with post-concussion syndrome, advised to take Tylenol for his headache, and referred to Dr. Alexander Tikhtman, a neurologist, in the event there was no improvement within one (1) to two (2) weeks. A CT scan taken of appellant's head showed no hemorraging or fractures.

Appellant was forty-seven (47) years old at the time of the accident, and apparently had been working in the construction business for several years, mostly on a seasonal basis. Additionally, he owned Hammond Mountain Stakes, a business specializing in the production of survey stakes. His most recent employment had been as a party chief of a survey crew.

According to appellant, he continued to experience pain in his neck as well as his right shoulder, arm, and hand. On February 8, 1996, he was seen by Dr. Tikhtman, who surmised, on first impression, that appellant had suffered a cerebral concussion and a whiplash injury to his neck, and placed appellant on pain medication. An MRI test ordered by Dr. Tikhtman indicated that appellant was suffering from three (3) ruptured disks in his neck. During follow-up visits in late February and April of 1996, appellant indicated he was still

suffering from neck pain and had been unable to return to his construction job. Dr. Tikhtman restricted appellant to lifting a maximum weight of twenty (20) pounds.

In November 1996, appellant filed suit against appellee, alleging he had suffered grievous bodily injuries as a result of the accident on January 29, 1996. He ultimately requested an award of between $300,000.00 and $900,000.00 for past and future medical expenses, lost wages, impairment of his power to earn an income in the future, and pain and suffering. The matter was tried before a jury in December 1997. The court's having previously entered summary judgment in favor of appellant on the issue of liability, the sole issue at trial was that of damages. The jury heard testimony from several witnesses, including appellant, Dr. Tikhtman, Dr. David Pursley (a neurologist who testified on behalf of appellee), and one of appellant's former employers.

The jury awarded appellant a total of $28,076.00, which included $8,076.00 for medical expenses incurred thus far, $15,000.00 for lost wages, and $5,000.00 for pain and suffering. Appellant was awarded no damages whatsoever for either future medical expenses or impairment of his power to earn an income. By order entered January 23, 1998, the trial court reduced the jury verdict by $10,000.00, representing the recovery limit for basic reparations benefits under Kentucky's Motor Vehicle Reparations Act. Appellant has taken up several issues on appeal, each of which is addressed below.

1. Admission of appellant's medical records

During the course of the trial, appellee requested the introduction into evidence of certified copies of appellant's past medical records which, appellee argued, established that, by way of previous accidents, appellant had suffered neck injuries similar to those he now attributed to the accident of January 29, 1996. The court allowed the introduction of these records.

On appeal, appellant argues that appellee failed to timely identify and provide these records and that, as such, their introduction into evidence constituted clear error. Appellant maintains that in violation of the court's pretrial order setting the deadline for identification of witnesses and exhibits "on or before 30 days before trial," appellee failed, within the court's timeframe, to identify either the records themselves or any witnesses who would place them into evidence. Appellant notes that not until November 11, 1997, when appellee noticed depositions for the custodians of these records, did appellee clearly state his intent to introduce the records as evidence. Thereafter, two (2) days prior to trial, appellee provided appellant with copies of the records he had obtained during the discovery process.

Appellee counters that he did, in fact, identify the medical records as trial exhibits by way of a pleading entitled "Defendant's List of Witnesses and Exhibits," forwarded to appellant on October 22, 1997, wherein appellee specifically identified "[a]ll medical records, MRI films, and CAT scans of

the plaintiff." Further, appellee counters, he was obliged to identify only the names of "all persons who will testify at the trial," pursuant to the court's pretrial order, and because the records custodians were not expected to testify at trial, they need not have been identified thirty (30) days prior thereto.[1] Appellee explains that he deposed the records custodians, and served each one with a subpoena duces tecum, for the sole purpose of procuring certified copies of the records.

In light of the circumstances, we believe appellant was timely apprised of appellee's intention to introduce all of appellant's medical records into evidence. Further, as concerns appellee's actual provision of copies of these records two (2) days prior to trial, it appears that appellee procured the records from appellant himself. We note a particular response made by appellee to discovery requests on December 20, 1996, almost one (1) full year prior to trial:

> Discovery is not yet complete; however, Defendant's review of <u>medical records furnished by counsel for the plaintiff</u> indicates the plaintiff was involved in a motor vehicle accident prior to the subject accident and suffered an episode of unknown etiology, which required the plaintiff to undergo testing for Multiple Sclerosis, which resulted in radiculopathy and pain in the plaintiff's right upper extremity, and further the medical records reveal the plaintiff suffered a herniated disc at C6,7 prior to the date of the accident. [Emphasis added.]

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[1]We note that the depositions were scheduled in a timely manner pursuant to the court's pretrial order.

Finally, appellant's own expert witness, Dr. Tikhtman, apparently had access to, and had already reviewed, appellant's medical records at least nine (9) months prior to trial, as evidenced by his references to them during his deposition of March 27, 1997. In our opinion, appellant was well aware of their existence and the role they would play in this litigation.

Appellant further argues the introduction of his medical records was prejudicial to him, given that he had inadequate notice of appellee's intent to use them as evidence and given their content. We have already expressed our opinion, that appellee provided adequate notice of his intent to introduce the records at trial.

As for the content of the records, appellant argues that certain references to his drinking beer, being depressed, and testing positive for a particular drug in his urine, were prejudicial. Further, appellant argues, the records contained references to numerous other medical problems from which appellant suffers but which are unrelated to the accident of 1996, e.g. appellant's having had seizures as a child; having been tested for multiple sclerosis as an adult; and, MRI studies of appellant's neck denoting findings as "normal." Appellant maintains that the records allowed too much speculation on the jury's part as to the causes of appellant's neck problems, and that they should not have been admitted pursuant to Phipps v. Winkler, Ky. App., 715 S.W.2d 893 (1986), in which this Court held that four (4) separate references to alcoholism in the

plaintiff's medical records constituted prejudice to the plaintiff, and should not have been introduced.

Appellee counters that the references in appellant's records with respect to beer, etc., are not sufficiently prejudicial to warrant reversal. We agree. On one page of records dating back to 1983, the observation was made that appellant "drinks about 4 - 6 beers a week." Such a statement hardly implies that appellant is an alcoholic or, otherwise, has a drinking problem. Additionally, two or three of these early records reference appellant's having been hit on the head with a limb, and his subsequent weakness and possible depression. As concerns the reference to a drug screen, appellant has not identified which drug was supposedly present in his system, nor is the name of the drug discernible from the record itself.

As for the remainder of references which appellant claims were prejudicial to him, we have thoroughly reviewed the medical records in issue, and find no references which rise to the level of prejudice present in Phipps. As such, and considering that by the very nature of this litigation, appellant has placed his physical condition in issue, we see no other problems with the introduction into evidence of certified copies of appellant's past medical records.

2. Witness never served subpoena

On November 25, 1997, counsel for appellant executed, and the Laurel Circuit Clerk issued, a subpoena for Elmo Greer, a former employer of appellant's, to appear at the trial on behalf

of appellant.[2] It appears from the notation at the bottom of the subpoena, Mr. Greer was temporarily out of the state and, thus, was never served. On the morning of the trial, the following exchange occurred:

> Counsel for appellant: Your Honor, I had subpoenaed Elmo Greer and I'm not sure the sheriff has found him. I'd like to find out if he's here today as a . . . as a witness. If he's not, we need to make a . . .
>
> Court: [Bailiff]? Would you step up? Would you check on the subpoena for him?
>
> . . . .
>
> Bailiff: Elmo Greer, Jr., is in Pennsylvania.
>
> Court: Was he served?
>
> Bailiff: No. They couldn't get up with him.

There is no evidence in the record indicating that at this point, counsel for appellant moved the trial court for a continuance once he discovered his witness had not been served. Later, during a conversation at the bench, counsel for appellant informed the court, "in the event that Elmo Greer cannot be here as a witness, we might need to call Rex Greer, if we can substitute him. He'll say the same thing, we presume."

Appellant maintains on appeal that the trial court "overruled" his motion for a continuance based upon Mr. Greer's absence, and that the court's having proceeded with the trial despite his absence constituted clear error. Appellee counters

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[2]Apparently, Mr. Greer was expected to testify concerning appellant's job duties and his wages at the time of employment.

that it was appellant's responsibility to procure the presence of his witness, and he simply failed to do so. Further, appellee notes, the trial court could not possibly have "overruled" appellant's motion since appellant never actually moved for a continuance. As such, appellee maintains, appellant failed to preserve the issue on appeal.

We agree with appellee that appellant failed to preserve the issue, having never moved the court for a continuance. In fact, as is established from the dialogue above, counsel for appellant appeared willing to "substitute" another witness for Mr. Greer, and so, contrary to his argument on appeal, appeared not to contest the issue of Mr. Greer's absence. As such, we find no merit in appellant's argument.

3. Voir dire

During voir dire, counsel for appellant questioned potential jury members as follows:

> Do each of you understand that if a man like Dwight has a preexisting condition that makes Dwight more likely to be injured or more susceptible to injury, or more susceptible to greater injury, has that condition before the accident, then the rule in Kentucky . . . do you understand that the rule in Kentucky is that Mr. Hammond is still entitled to receive damages because the wrongdoer takes the plaintiff in whatever condition he finds him on the date of the accident? Did that make it clearer . . . Do each of you understand, ladies and gentlemen, that in Kentucky a defendant like Bert Summers is not entitled to any kind of credit, not entitled to any kind of set-off against the amount of Dwight Hammond's damages because of some kind of preexisiting condition that Dwight might have at the time of the rear-end collision?

Counsel for appellee then objected to this line of questioning, arguing that counsel for appellant was merely stating the law concerning damages representing the aggravation of preexisting conditions. Appellee maintained such law should appear in the court's instructions which were to be provided the jury at the close of the trial, not during voir dire. The court agreed, stating, "the jury's responsibility is to follow the court's instructions. I'll sustain the objection."

Appellant maintains on appeal that under Wemyss v. Coleman, Ky., 729 S.W.2d 174 (1987), he should have been permitted to continue his line of questioning.[3] He argues that given the fact the court was allowing the introduction of all of appellant's medical records, he should have been allowed to discuss the issue of damages for the aggravation of preexisting conditions with potential jury members.

Appellant, however, has failed to inform this Court of the specific questions he believes he should have been allowed to ask. "[']The principal purpose of voir dire is to probe each prospective juror's state of mind and to enable the trial judge to determine actual bias and to allow counsel to assess suspected bias or prejudice.[']" Thomas v. Commonwealth, Ky., 864 S.W.2d 252, 259 (1993) (citation omitted). Given that we have not been

[3]Wemyss restates the law that the tortfeasor takes the claimant as he finds him, and is not entitled to any credit or setoff against the amount of the claimant's damages simply because the claimant had preexisting conditions which made him more susceptible to injury. Wemyss, 729 S.W.2d at 178.

apprised of what would have been appellant's follow-up questions had he been allowed to ask them, and how those questions would have been pertinent to assessing potential bias on a juror's part, we cannot adequately address appellant's argument. In the absence of such information, appellant has failed to establish that he was prejudiced by the trial court's ruling in the matter.

4. Motions in limine and CR 59 motion

Appellant argues that the trial court erred in denying several of his motions in limine as well as his CR 59 motion alleging a total of seventeen (17) errors committed by the court. However, appellant neither identifies which motions in limine he believes were improperly denied, nor does he state any grounds upon which he believes this Court should reverse the trial court's rulings. Further, appellant states no specific grounds upon which he believes this Court should reverse his CR 59 motion. Armed with so little information, we decline to address these issues on appeal.

5. Reduction of the verdict by $10,000

Following a jury trial, judgment in this matter was entered on December 17, 1997, awarding appellant total damages of $28,076.00 including $8,076.00 for medical expenses incurred, $15,000.00 for lost wages, and $5,000.00 for physical and mental suffering and pain. Thereafter, on December 29th, appellant filed a CR 59 motion. In his response thereto, filed on January 8, 1998, appellee moved the court, under CR 60.02, for relief, arguing that pursuant to Kentucky's Motor Vehicle Reparations Act

(KRS 304.39-010 et seq.) and corresponding case law, the verdict should be reduced by $10,000.00, the maximum amount payable in basic reparation benefits (BRBs) under the Act.

Counsel for appellee concluded the motion for relief, "[t]he undersigned understood the Court would reduce the plaintiff's recovery after the judgment had been entered. Therefore, out of an abundance of caution, the defendant moves the Court pursuant to CR 60.02" to reduce the verdict by $10,000.00. By order entered on January 23, 1998, the trial court granted appellee's motion, reducing appellant's award to $18,076.00.

On appeal, appellant argues that appellee's motion to reduce the verdict was not timely made, although appellant does not apprise this Court under which rule or statute the motion was belatedly filed.[4] Nonetheless, we find no merit in appellant's argument. Rather, we agree with appellee, who counters that pursuant to CR 60.02(a), his motion was timely. That rule states:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect[.] The motion shall be made . . . not more than one year after the judgment, order, or proceeding was entered or taken.

[4]Appellant does not argue that Kentucky's Motor Vehicle Reparations Act does not allow for such reduction. The only issue on appeal is the timeliness of appellee's motion.

Appellee filed his motion only three (3) weeks after judgment had been entered, while appellant's CR 59 motion was yet pending. As such, given that the Motor Vehicle Reparations Act allows for BRB reductions, we believe the trial court was justified in reducing the verdict by $10,000.00.

6. Damages

The testimony at trial established that appellant had performed several different types of jobs over his lifetime, but had evidently most recently been employed as a survey party chief. Appellant testified that his survey equipment can weigh as much as thirty (30) to thirty-five (35) pounds, and the survey stakes he must sometimes carry with him as much as fifty (50) pounds.

Appellant's neurologist and medical expert, Dr. Alexander Tikhtman, testified that he believed appellant's current neck problems were caused by his being rear-ended by appellee, although he admitted that one of the three ruptured disks in appellant's neck had shown up in an MRI report from 1991. He testified that he had permanently placed appellant on a maximum weight-lifting restriction of twenty (20) pounds, and that it was not advisable for appellant to continue the normal activities of his job. Finally, Dr. Tikhtman testified, appellant would likely develop arthritis in his neck and, thus, would likely need to continue medical treatment, supplemented with anti-inflammatory medication over his lifetime. Concerning any possible surgery, however, Dr. Tikhtman testified that there

was only a twenty-five percent (25%) chance appellant would need surgery in the future for problems which originated with the 1996 accident in issue.

Appellee's medical expert, Dr. David Pursley, testified that while appellant did suffer a neck strain injury in the 1996 accident, his neck pain was due to more than one cause, namely: (1) a 1983 accident in which appellant was hit in the head by a tree limb, and was diagnosed with cervical (neck) strain injury; (2) an auto accident in 1985; (3) spondylosis (wear and tear as part of the aging process); and, (4) symptom magnification, which "refers to someone who has complaints that sound very severe but has no medical illness or injury that would explain complaints that are that severe." He testified that the only complaint with any causal relationship to the 1996 accident was that of simple neck strain injury, and that appellant should be able to lift a load of fifty (50) pounds and work 8-hour days. Finally, Dr. Pursley testified that there was no evidence indicating appellant would need either medical treatment or surgery in the future.

The jury did not award appellant any damages for either future medical expenses or future lost wages, and awarded him only $5,000.00 for pain and suffering. On appeal, appellant argues that the verdict, with regard to the above-referenced damages, was inadequate.

"Courts generally are not disposed to set aside verdicts as inadequate unless the amount awarded is so small and in such variance with the facts as to indicate the verdict was

influenced by passion and prejudice." Farrow v. Cundiff, Ky., 383 S.W.2d 119, 121 (1964) (citations omitted). The testimony elicited from the two medical experts in this case was conflicting as concerned the degree to which appellant could perform his job, Dr. Tikhtman's testifying that appellant could no longer perform the duties of a party survey chief, and Dr. Pursley's testifying that appellant could, in fact, carry fifty (50) pound loads and work 8-hour days. In our opinion, the jury fulfilled its function, determining the weight to be given each doctor's testimony, and awarded damages accordingly. Given Dr. Pursley's testimony, we do not find the verdict to have been at variance with the evidence before the jury. We note the following language from Head v. Russell, Ky., 307 S.W.2d 557 (1957):

> We believe the awards of $350 to Mrs. Powers and $2,000 to Mrs. Head were not so grossly inadequate as to shock the conscience, or to appear to be the result of passion and prejudice, in light of the medical proof before the jury. The jury could have believed that the injuries suffered by the ladies were the minimum injuries described in the conflicting medical testimony. It was for the jury to determine what weight, if any, should be given to each doctor's description of the injuries. We still adhere to our reluctance to substitute our own views on a question of the adequacy or inadequacy of an award for those of a jury without what we consider legal cause.

Id. at 560. (Citations omitted).

7. Exclusion of certain testimony

During the testimony of Zane Alexander, a former employer of appellant's, in which Mr. Alexander identified the types of duties involved in appellant's work, counsel for appellee objected to the question whether Mr. Alexander would hire appellant and if so, under what conditions, if any. Counsel conceded that Mr. Alexander's testimony concerning job duties and prevailing wages was, in fact, relevant. However, he maintained, Mr. Alexander's testimony concerning the conditions under which appellant could be hired was more akin to that which would normally be elicited from a vocational evaluator, an expert witness, and was therefore an inappropriate line of questioning. The court agreed, and Mr. Alexander's testimony was placed in the record by avowal. Specifically, Mr. Alexander testified that if appellant were restricted to lifting a maximum of twenty (20) pounds and were actually limited to very little neck movement, he would not hire appellant.

On appeal, appellant argues that Mr. Alexander's testimony on avowal should have been allowed because it went directly to the issue of damages, i.e. future lost wages. Appellee counters that the information was not relevant, given that any award of future lost wages should be based, not on whether Mr. Alexander would hire appellant, but on whether, according to the medical testimony, appellant had the ability to perform his job duties as a survey party chief. We agree. The information provided by Mr. Alexander on avowal was not relevant to the issue of damages.

8. Instructions

The jury was instructed:

> If you determine Dwight P. Hammond is entitled to recover damages for his injuries, your reward shall include compensation for losses attributable or related to a pre-existing physical condition, but only if and to the extent that such pre-existing condition was aroused or aggravated by the accident which occurred on January 29, 1996.

On appeal, appellant argues that his jury instruction concerning preexisting conditions and the aggravation thereof should have been given the jury, rather than the above instruction. However, we note that appellant's proposed instruction, tendered to the court the day before trial, was identical to the above instruction actually given the jury.[5] Thus, it appears that the trial court did, in fact, use appellant's tendered instruction, and that as such, appellant has no cause to complain.

For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| James A. Ridings | Brian C. House |

[5]Appellant's proposed instruction is found on page 317 of the record and reads: "If you determine that Dwight Hammond is entitled to recover damages for his injuries, your award shall include compensation for losses attributable or related to his pre-existing physical condition, but only if and to the extent that such pre-existing condition was aroused or aggravated by the accident in question."

London, Kentucky

London, Kentucky