

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001072-MR  
AND  
NO. 1998-CA-001156-MR

BEATRICE WILLIAMS

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE LEWIS HOPPER, JUDGE  
ACTION NO. 96-CI-00448

BOBBY J. BUTTREY

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING IN PART;  
REVERSING IN PART; AND REMANDING  
\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, EMBERTON, AND McANULTY, JUDGES.

McANULTY, JUDGE. This is an appeal from a judgment entered by the Laurel Circuit Court pursuant to a jury verdict and from an order overruling Kentucky Rule of Civil Procedure (CR) 59 post-trial motions. The appellant/cross-appellee, Beatrice Williams (Williams), argues that the trial court improperly denied her a new trial on the issue of damages. This is also a cross-appeal by the appellee/cross-appellant, Bobby J. Buttrey (Buttrey), alleging that the trial court erred when it failed to give a comparative negligence instruction and a mitigation of damages instruction. Buttrey also contends that the trial court erred when it directed a verdict to Williams on the issue of past

medical expenses. We affirm in part and reverse and remand in part.

On September 1, 1995, Williams was riding as a passenger in a van. While the van was stopped at a red-light, Buttrey rear-ended the van with his pick-up truck. The accident caused minimal damage to the vehicles. Williams suffered what was initially thought to be a minor bruise to her right knee as a result of her knee striking the dashboard. However, over the following days, the pain and swelling to the knee worsened and the knee eventually had to be operated on. Williams filed suit against Buttrey on June 25, 1996.

Following a jury trial, the trial court directed a verdict on the issue of Buttrey's liability in causing the accident and awarded Williams \$8,931.72 for her past medical expenses. The remaining damage issues were submitted to the jury, which returned a verdict awarding Williams \$0.00 for future medical expenses, \$0.00 for loss of future earnings, and \$0.00 for past and future pain and suffering. Williams moved for a new trial on the issue of damages. Buttrey moved for a new trial on the issues of liability and mitigation of damages in the event the trial court granted Williams's motion, and further moved that the trial court set aside its directed verdict regarding past medical expenses. The trial court denied both motions. This appeal and cross-appeal followed.

Williams argues that the trial court abused its discretion when it denied her motion for a new trial on the issue of damages. A new trial may be granted for inadequate damages if

the inadequate damages appear to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court. A trial court's order denying a motion for a new trial on inadequate damages will not be disturbed unless it is clearly erroneous. Cooper v. Fultz, Ky., 812 S.W.2d 497, 501 (1991). On appeal, the trial judge's determination as to whether to grant a new trial is considered presumptively correct and will be reversed only if it is clearly erroneous. Owens-Corning Fiberglass Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998).

First, Buttrey argues that Williams waived the damages issue because she failed to request that the trial court instruct the jury to return to the jury room and deliberate. We disagree. A jury's decision to award \$0.00 for pain and suffering represents a completed verdict and is subject to challenge as inadequate by a motion for a new trial. Cooper v. Fultz at 499. The issue of inadequate damages is preserved.

A line of cases holds that an award of \$0.00 pain and suffering damages is improper and is grounds for a new trial when accompanied by an award of medical expenses. Wall v. Van Meter, 311 Ky. 198, 201, 223 S.W.2d 734 (1949); Vittitow v. Carpenter, Ky., 291 S.W.2d 34, 35 (1956); Friar v. Webb, Ky., 394 S.W.2d 583, 584 (1965); Prater v. Coleman, Ky. App., 955 S.W.2d 193, 194 (1997). These cases reason that, "when a jury has found that a plaintiff has suffered physical injury in the past, there is always a certain amount of pain and suffering involved," Prater at 195, and that "[i]t will not do to say the jury believed it

proper for appellee to incur the medical expenses for non-existent injuries." Friar at 584. However, during the pendency of this case, on January 25, 2001, the Kentucky Supreme Court rendered an opinion in Miller v. Swift, Ky., \_\_\_ S.W.3d \_\_\_ (2001),<sup>1</sup> which overruled this line of cases, stating 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." Slip op. at 4 - 5.

Miller permits a jury verdict of past medical expenses and zero past pain and suffering. Here, however, Williams was injured to the extent that she was required to undergo invasive knee surgery. We cannot reconcile the medical testimony with an award of \$0.00 for past pain and suffering. In general, surgery necessarily involves pain and suffering. It is incongruent that a defendant could be held responsible for causing the injuries that required surgical procedures, and yet escape liability for the pain and suffering caused by the surgery.

It was clearly erroneous for the trial court to deny Williams's motion for a new trial on the issue of damages for past pain and suffering. We therefore reverse the trial court's denial of that motion, and remand the case for a new trial on the issue of damages for past pain and suffering.

The trial court's decision not to grant a new trial on the issues of future medical expenses, future loss of earnings, and future pain and suffering, on the other hand, was not

---

<sup>1</sup> While this case was never officially placed in abeyance, this panel has, in fact, been awaiting the Supreme Court's ruling in Miller prior to deciding the case.

erroneous. In negligence cases, the jury's verdict resolves any conflicts in the testimony and also any conflicts in the reasonable inferences to be drawn from the testimony in favor of the prevailing party. Horton v. Union Light, Heat and Power Co., Ky., 690 S.W.2d 382, 385 (1985). The role of an appellate court is limited to viewing the evidence from a standpoint most favorable to the prevailing party. Id.

The testimony of defense witness Dr. Friesen included testimony to the effect that while Williams will likely experience problems in the future with her knee, those problems will not necessarily be related to the accident, but, rather, may be associated with Williams's history of obesity. Upon drawing all inferences in favor of Buttrey, we cannot say that the evidence was palpably and flagrantly against the evidence so as to indicate that its decision not to award damages for future medical expenses, future lost earnings, and future pain and suffering was reached as a result of passion or prejudice, and, accordingly, we cannot say that the trial court was clearly erroneous in denying Williams a new trial on these issues.

In his cross-appeal,<sup>2</sup> Buttrey first argues that he was entitled to a comparative negligence instruction because Williams took unnecessary chances with regard to her own safety because she had the van seat moved forward to a position where her knees almost touched the dashboard. According to Williams, she had her

---

<sup>2</sup> The original jury verdict assessed zero damages against Buttrey and the cross-appeal as to the original jury verdict is effectively moot. The discussion herein relating to comparative negligence issues and mitigation of damages issues are included in the event the issues arise again on remand.

seat in this position because her infant child's car-seat was directly behind her seat, and having the passenger seat in a forward position made it easier to access the child-seat and care for her child.

Buttrey's argument that Williams was contributorily negligent for riding with her car seat in a forward position is based entirely on speculation. There was no competent expert testimony expressing that riding with the seat forward caused or contributed to the severity of the knee injury. Absent expert testimony to the contrary, it could as easily be speculated that had the seat been positioned farther back, the injury may have been more severe.<sup>3</sup>

In summary, the record does not establish what would have happened had Williams had her seat set farther back, and it would have been improper to submit a comparative negligence instruction to the jury and allow them to speculate on what would have happened. We discern no contributory negligence associated with Williams having her seat set forward for the purpose of facilitating the care of her child. It was not error for the trial court to deny a comparative negligence instruction, and on remand the trial court should not submit a comparative negligence instruction.

Buttrey argues that he was entitled to a mitigation of damages instruction because Williams failed to follow her

---

<sup>3</sup> For example, if the seat were set back, the knee may have traveled a greater distance prior to striking the dash, greater momentum may have been generated, and the knee may have struck the dash with greater force, thereby causing greater damage to the knee.

doctor's advice. In support of this argument, Buttrey cites the medical testimony produced at trial to the effect that Williams's condition would probably have been much better had she lost weight and exercised. Williams weighed 320 pounds at the time of the accident.

A mitigation of damages instruction recognizes that it is the duty of an injured person to exercise ordinary care not to aggravate his injuries and damages, Carney v. Scott, Ky., 325 S.W.2d 343, 345 (1959), and that an injured person is required to use ordinary care and reasonable diligence to secure appropriate treatment of an injury. Deutsch v. Shein, Ky., 597 S.W.2d 141, 145 (1980). The tortfeasor, in this case Buttrey, has the burden of proving that some of the consequences of the injuries inflicted by him might have been avoided through proper efforts and the exercise of ordinary care by the injured person. Carney at 345. Damages may be mitigated only in proportion to the aggravation of injuries by the injured person's improper conduct. Billroy's Comedians v. Sweeny, 238 Ky. 277, 37 S.W.2d 43 (1931); Carney at 347. Hence the burden was on Buttrey to establish that Williams failed to mitigate damages and, if so, the proportion of damages that may have been avoided by the mitigation.

The trial court's denial of a mitigation of damages instruction was appropriate in this case. The only deficient conduct cited in support of a failure to mitigate instruction was related to Williams's failure to lose weight and exercise. The failure to mitigate instruction is aimed at ensuring that a defendant is not penalized because a plaintiff fails to seek

proper medical care and treatment following an injury. The general medical testimony that Williams's condition "would probably have been much better had she lost weight and exercised" does not justify a mitigation instruction. Williams has a history of obesity and the medical testimony that her condition would be improved if she lost weight and exercised would be true whether she had this particular accident or not. Buttrey has failed to identify any specific conduct relating directly to Williams's failure to seek medical treatment following the accident so as to justify a mitigation instruction.

Buttrey's final argument is that the trial court erred in directing a verdict in Williams's favor regarding medical expenses. A directed verdict is appropriate when, drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. Buchholtz v. Dugan, Ky. App., 977 S.W.2d 24, 26 (1998). The trial court is required to "consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991). In our review, we must "consider[] the evidence in the same light." Id.

Our review of the record leads us to conclude that reasonable minds could come to but one conclusion under the facts of this case: Buttrey was negligent in the operation of the vehicle he was driving and his negligence caused the collision in question. Buttrey admitted the accident was his fault. He

admitted that he was distracted and ran into the back of the Williamses' van. Past medical expenses associated with the knee injury were established as \$8,931.72. As a result we affirm the trial court in directing the verdict in favor of Williams.

Thompson v. Piasta, Ky. App., 662 S.W.2d 223, 226 (1983).

For the foregoing reasons the judgment of the Laurel Circuit Court is affirmed in part and reversed and remanded in part for a new trial on the issue of damages for past pain and suffering.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE:

J. Robert Stansbury  
Stansbury, Zoellers & Hudson  
London, Kentucky

BRIEF FOR APPELLEE/CROSS-  
APPELLANT:

Wayne F. Collier  
Kinkead & Stilz  
Lexington, Kentucky