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IN THE COURT OF APPEALS OF INDIANA

DOMBROWSKI & HOLMES, INC., GREG COX and WAYNE BECKER,

Appellants,

vs.

JEFFREY L. BOWMAN,

Appellee.

No. 45A03-0511-CV-549

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable William E. Davis, Judge
Cause No. 45D02-0011-CT-187

October 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Dombrowski & Holmes, Inc. ("Dombrowski"), Greg Cox, and Wayne Becker (collectively, "Appellants") bring this appeal from the jury's verdict of $950,000 in damages awarded to Jeffery Bowman in this personal injury action. Appellants present a single issue for our review, namely, whether the evidence supports the jury's assessment of damages.

We affirm.

FACTS AND PROCEDURAL HISTORY

Before July 1, 1998, Bowman had perfect hearing. That day, however, Cox and Becker, employees of Dombrowski, threw an ignited explosive[1] into a pit near the opening of a cylindrical metal tanker truck. At the same time, Bowman was shoveling the contents of that tanker into a nearby storage container. Immediately after the explosion, Bowman felt pressure and heat in his ears, followed by a strong ringing and loss of hearing.

After his hearing had not returned to normal, on July 6, 1998, Bowman consulted a physician, Dr. Edward Applebaum, an ear, nose, and throat specialist. Dr. Applebaum diagnosed Bowman with "moderate sensory neural hearing loss," causing permanent hearing loss for high frequency sounds in both ears, but worse in the left ear, tinnitus, which is a constant ringing sensation in the ears, and recruitment, a phenomenon in which a damaged ear has less tolerance for loud noises, thereby amplifying them in a painful manner. Transcript at 223-26.

[1] The transcript reveals conflicting testimony as to what the object actually was. Bowman testified that the object was "a quarter stick of dynamite," while Becker and Cox testified that it was "a regular, run-of-the-mill firecracker," smaller than an M-80. Transcript at 53, 62-63, 144.

Bowman filed a complaint alleging injury due to negligence. At trial, Dr. Applebaum testified that Bowman's diagnosis was "very typical of trauma to the ear." Id. at 224. Dr. Applebaum stated that, due to Bowman's inner ear damage, Bowman has difficulty hearing women's and children's voices, telephones, warning signals such as bells and whistles, and other high-pitched sounds. Dr. Applebaum fitted Bowman with earplugs to protect him from loud noises that could cause pain and recommended that he constantly wear these ear plugs. Dr. Applebaum also recommended that Bowman use a white noise machine to help with sleep. Bowman's cumulative medical expenses from visiting Dr. Appelbaum totaled $963.

Bowman also called Dr. Nancy Dickey to testify on his behalf. Dr. Dickey has been a practicing audiological expert in Valparaiso for over twenty years. Dr. Dickey testified that Bowman's injury does not allow him to hear consonants properly. Specifically, sounds involving "S," "F," "and your blends, like t-h, s-h, and c-h . . . will not be clear." Id. at 181. For example, "mouse may be confused for mouth, or tear may sound like care or hair or fair." Id. at 182. Dr. Dickey stated that Bowman's ability to discriminate speech in typical environments was only 24% of a normal ability, and that as the usual male aging process occurs Bowman will lose even more hearing. In those circumstances, Dr. Dickey testified, such people have increased difficulty with simply understanding speech, they become isolated in group situations in which they are no longer able to participate, and they often become depressed. Dr. Dickey then told the jury that specialized hearing aids may mitigate some of these effects, and that those hearing aids cost approximately $6,000 per pair.

Bowman also called two economic experts to testify. The first, Michael Blankenship, a vocational specialist, testified that "the statistical probability is that [Bowman] will lose eight-and-a-half years of participation in the workforce." Appellant's App. at 78-79. The second expert, Dr. James Barnard, an economics professor at Valparaiso University, projected a work-life earnings loss of $167,000 based on the lost eight and one-half work years.

At trial, Appellants contested only the issue of Bowman's damages. In her closing argument, Bowman's lead counsel told the jurors "to consider the callousness and utter coldness" of the Appellants during deliberations. Transcript at 411. After the presentation of evidence, the jury returned its verdict. The jury found Appellants collectively at fault in the amount of $950,000, with Dombrowski 20% at fault and Cox and Becker each 40% at fault. Appellants filed a Motion to Correct Error pursuant to Indiana Trial Rule 59(A)(2), which the trial court denied. This appeal ensued.

DISCUSSION AND DECISION

Appellants contend that the trial court abused its discretion when it denied their motion to correct error. Specifically, they maintain that the jury award of $950,000 is contrary to the evidence and excessive because the comments of Bowman's counsel to the jury combined with the questionable, "self-serving and uncorroborated" testimony of Bowman and his expert witnesses demonstrates that an improper element is the only explanation for the jury's verdict. Appellant's Brief at 4. We cannot agree.

Bowman calls into question the appropriate standard of review on appeal when the trial court denies the mandatory motion to correct error for a claim of excessive jury

damages. Specifically, Bowman argues that we must follow the abuse of discretion standard, while Appellants contend that we must apply the "substantive" standard applied by the trial court. However, as a practical matter, Bowman and Appellants use the same standard of review in their briefs. That is, both parties ask this court to look to the evidence before the jury. That analysis is the most consistent with our case law, as is reflected in Ritter v. Stanton, 745 N.E.2d 828 (Ind. Ct. App. 2001). In Ritter, we stated:

> The vast majority of Indiana cases simply consider whether the verdict was reasonable in light of the evidence presented at trial. . . . [T]his court has stated that "each case will stand and fall on its own merit when an award is challenged as excessive, and an award will not be disturbed unless it is manifestly excessive."

Id. at 846 (quoting S. Ind. Gas & Elec. Co. v. Scoles, 435 N.E.2d 287, 294 (Ind. Ct. App. 1982)).

Our supreme court summarized the appropriate standard of review of a jury's determination of damages in Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 462 (Ind. 2001):

> A jury determination of damages is entitled to great deference when challenged on appeal. The applicable standard of review was discussed and summarized by the Court of Appeals in Prange v. Martin, 629 N.E.2d 915, 922 (Ind. Ct. App. 1994), trans. denied.
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> > Damages are particularly a jury determination. Appellate courts will not substitute their idea of a proper damage award for that of the jury. Instead, the court will look only to the evidence and inferences therefrom which support the jury's verdict. We will not deem a verdict to be the result of improper considerations unless it cannot be explained on any other reasonable ground. Thus, if there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed.
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> Id. (citations omitted). Similarly, this Court has noted:

> Our inability to actually look into the minds of the jurors is, to a large extent, the reason behind the rule that we will not reverse if the award falls within the bounds of the evidence. We cannot invade the province of the jury to decide the facts and cannot reverse unless the verdict is clearly erroneous.

Annee v. State, 256 Ind. 686, 690, 271 N.E.2d 711, 713 (1971).

In Ritter, we clarified that improper considerations include passion, prejudice, partiality, and corruption, and that such considerations may be revealed only by an outrageously sized verdict. Ritter, 745 N.E.2d at 844.

Here, Appellants argue that the comments by Bowman's counsel to the jury combined with the questionable, "self-serving and uncorroborated" testimony of Bowman and his expert witnesses demonstrate that an improper element is the only explanation for the jury's verdict. Appellant's Brief at 4. Specifically, Appellants assert that the following facts reveal that the jury's verdict was not based on the evidence: (1) Dr. Applebaum testified that Bowman had "pretty good hearing" for most hearing ranges, Transcript at 223-24; (2) Dr. Applebaum also testified that "there's no reason to expect the noise damage itself will cause a progressive hearing loss," id. at 228-29; (3) tinnitus is very common and has other causes; (4) current hearing-aid technology will mitigate the effects of Bowman's damaged ears; (5) Bowman is currently employed and makes a higher wage now than he did at the time of the accident; (6) neither of Bowman's economic experts reviewed Bowman's actual tax returns from 2002 through 2005; (7) "Blankenship's testimony revealed many [technical] flaws with his analysis," and Dr. Bernard relied on Blankenship's conclusions, Appellant's Brief at 11-12; (8) Bowman's own testimony was "self-serving and uncorroborated," id. at 12, namely in regard to

Bowman's testimony that his life has been affected, his decision to wear ear plugs, and that he has difficulty hearing particular things. Because this evidence is in their favor, Appellants argue, the only reasonable explanation for the jury's verdict is that of an improper motive instigated by Bowman's counsel in her closing argument. Bowman counters that Appellants did not object to the challenged statements during his closing argument, that they offered no opposing testimony to Bowman's evidence, and that it was the jury's province to decide what evidence was persuasive and whether damages were justified. We agree with Bowman.

As an initial matter, Appellants clarify in their Reply Brief that they are not appealing Bowman's closing argument, to which they did not object at trial. Rather, they present that issue merely to demonstrate that, once the legitimacy of the evidence on record is stripped away, the only reasonable source to justify the jury's determination of damages is Bowman's closing argument. Hence, we need not address the propriety of that closing argument if we hold, which we do, that the jury's verdict was within the scope of the evidence.

The Appellants' citation to a litany of purportedly favorable facts ignores the rule that this court will neither reweigh the evidence nor judge the credibility of the witnesses when reviewing whether a damage award is excessive. See Kroger Co. Sav-On Store v. Presnell, 515 N.E.2d 538, 545 (Ind. Ct. App. 1987). A damage award will be reversed only when it is not within the scope of the evidence before the finder of fact. See Sears, 742 N.E.2d at 462 (quoting Prange, 629 N.E.2d at 922). Here, the jury heard evidence that Bowman suffered actual damages in the cumulative amount of $963, future medical

expenses approximating $6,000, and lost future wages approximating $167,000. Accordingly, the evidence directly supported damages totaling $173,963.

In addition, the jury was instructed to consider damages for Bowman's "physical pain and mental suffering."[2] Transcript at 454. "Awards for pain, suffering, fright, humiliation and mental anguish are particularly within the province of the jury because they involve the weighing of evidence and credibility of witnesses." Landis v. Landis, 664 N.E.2d 754, 757 (Ind. Ct. App. 1996) (citing Prange, 629 N.E.2d at 923). "Physical and mental pain are, by their very nature, not readily susceptible to quantification, and, therefore, the jury is given very wide latitude in determining these kinds of damages." Id. Damages for pain and suffering are of necessity a jury question that may not be reduced to fixed rules and mathematical precision. Ritter, 745 N.E.2d at 845. Where the damages cannot be calculated with mathematical certainty, the jury has liberal discretion in assessing damages. Id.

Bowman testified that, on a scale of one to ten, where "one is the least amount of pain and ten is the most amount of pain you could stand," his pain is a seven. Transcript at 170. Bowman also testified that his life has been affected, that he must now wear ear plugs, and that he has difficulty hearing particular things. Appellants challenge Bowman's testimony as "self-serving," Appellant's Brief at 12, however, "[i]n jury trials, jurors are the exclusive finders of fact and judges of witness credibility. . . . The jury was free to disbelieve . . . self-serving and incredible testimony." Davidson v. Bailey, 826 N.E.2d 80, 89 (Ind. Ct. App. 2005).

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[2] Appellants do not specifically argue against the damages awarded for pain and suffering. Regardless, we address it for thoroughness.

Dr. Applebaum testified that Bowman now has difficulty hearing women's and children's voices, telephones, warning signals such as bells and whistles, and other high-pitched sounds encountered in every day life. Also, the jury heard evidence that Bowman has a constant ringing sensation in the ears and that the damage to his ears produces more pain than normal from loud noises. Further, Dr. Dickey testified that Bowman is unable to distinguish common sounds, including "S" and "F," and that his disability will only progress as he ages, eventually resulting in his failure to understand any speech and the likelihood that he will become isolated, unable to participate in group situations, and depressed.

Thus, considering the evidence most favorable to the verdict, as a result of Appellants' negligence Bowman's life has been permanently altered such that his everyday life will be more physically uncomfortable, more difficult, and more isolated. We cannot say that an award of $776,037 for pain and suffering is either outside the bounds of the evidence or so outrageous as to indicate an improper motive. See, e.g., Ritter, 745 N.E.2d at 833 (affirming the jury's award of $37,000,000 for pain and suffering when there existed approximately $3,281,741 in past and future medical expenses); Landis, 664 N.E.2d at 757 (affirming the jury's award of $537,200 for pain and suffering though no physical injury occurred).

The jury was in the best position to assess whether the evidence presented as to the nature, extent, and source of the injury justified the damages. Faulk v. Chandler, 408 N.E.2d 584, 586 (Ind. Ct. App. 1980). Our review of the record shows that "[n]othing . . . indicates the verdict of the jury was prompted by prejudice, passion, partiality or

corruption. Evidence as to [Bowman's] injuries . . . and resulting damages was, at best, conflicting." Id. Thus, the trial court did not abuse its discretion in denying the motion to correct error.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.