RENDERED: July 24, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 96-CA-003030-MR

GARY BUDKE — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 95-CI-0624

JASON MORGAN and
NANCY MORGAN — APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, GUIDUGLI and JOHNSON, Judges.

JOHNSON, JUDGE: Gary D. Budke (Budke) appeals from the Campbell Circuit Court's trial order and judgment entered on September 18, 1996, following the trial court's October 17, 1996 order denying Budke's motion for a new trial. We affirm.

Budke, a twenty-four year old race car driver, sustained injuries in a December 22, 1994 automobile accident

with Jason Morgan (Morgan), a minor.[1] Two days after the accident, Budke bent down to pick up a paper towel, heard a loud pop in his back and began experiencing pain in his shoulders and upper back. He went to the emergency room where he was x-rayed and referred to Dr. Michael Grefer (Dr. Grefer). Dr. Grefer evaluated Budke on January 11, 1995, and then started Budke in a physical therapy program which lasted until March 24, 1995. On June 16, 1995, Budke brought suit against Morgan and his mother which alleged that Morgan's negligence caused Budke to suffer injuries to his neck, back and shoulder.

A jury trial was held on August 28, 1996. The damage to Budke's automobile and the rental replacement cost for his automobile were stipulated to be $2,797 and the medical expenses were stipulated to be $5,890. Budke's itemization of these medical expenses includes $212 for an emergency room visit, $687 for physician's visits, $36 for an x-ray, $33 for prescription medications and $4,922 for physical therapy services. Budke, Dr. Grefer and Joy Curry (Curry), executive director of the physical therapy services company, testified. Curry presented Budke's physical therapy records.

The jury apportioned fault entirely to Morgan and awarded Budke the $2,797 that he had claimed for property damage and loss of use of his vehicle and the $5,890 that he had claimed for his medical expenses. However, the jury denied Budke an

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[1] Morgan's mother, Nancy Morgan, owned the car which Morgan was driving.

award for pain and suffering by writing "0" on the dollar amount blank.[2] Nine jurors signed this verdict form. Budke's counsel immediately argued that the verdict was inconsistent since the jury awarded medical expenses but did not award damages for pain and suffering. He requested that the jury re-deliberate the zero verdict.

During a bench conference, Morgan's counsel stated that he believed that Budke was making a mistake in requesting re-deliberation on the pain and suffering award. However, Budke's counsel stated that he thought "that to do otherwise would be reversible." Morgan's counsel reiterated his belief that "the proper motion is not to have them re-deliberate but to have a new trial on that issue." Budke's counsel acknowledged that he was "not certain" about Morgan's counsel's argument but he was requesting re-deliberation to "comply[] with the client's request." Budke's counsel then stated that "at this time I'm willing to stand." The trial court instructed the jury as follows:

> Based upon the finding that you have made in this case that an award of negligence was called for by a nine or more verdict and that medical bills were called for as a result of that accident by nine or more individuals, pursuant to law there must be some award for pain and suffering. I'm going to ask you to recognize that there needs to be some award in that area and ask you to re-deliberate that issue along, everything else is a legally sufficient verdict that I can accept

[2] Budke's pain and suffering claim included past and future pain and suffering.

> here in open court but I am going to ask you to adjourn once again to the jury room on the issue of mental and physical suffering including such suffering as reasonably certain to endure in the future. That includes past, present and future and ask you to consider an award in that area based upon the other findings that you have made. I will do one new form for you that will have nothing more than that since this is already written on and I want to preserve this for the integrity of the trial itself.

The jury returned a unanimous verdict awarding Budke $3,000 for pain and suffering. Budke's counsel objected to the verdict "just from the standpoint" that he was "concerned and [] not certain as to the law on the requirement of having the jury come back with a zero on pain and suffering where they find fault 100% against the negligent party." Morgan's counsel reminded the trial court that it was Budke's counsel who had requested re-deliberation. The trial court then stated as follows:

> I guess the problem with that, if you're asking me to take any type of corrective action at this time, Mr. Blau, is that I did send them back at your request, obviously without objection and that jury did not come in with, under the parties - we had some discussion in chambers, they did come up with different than a very minor amount. The decision will stand basically because we requested them to go back and assess a figure and this one was unanimous, that's the only question they had total unanimity on and that was on the pain and suffering. So, I'll accept the verdict as rendered.

On September 26, 1996, Budke filed a motion for a new trial pursuant to Kentucky Rules of Civil Procedure (CR) 59.01 arguing that the verdict was contrary to the evidence and to the law and that the amount of the award was grossly inadequate. The

trial court stated that pursuant to Cooper v. Fultz, Ky., 812 S.W.2d 497 (1991), the award of zero dollars for pain and suffering was not inconsistent--it was a complete verdict which was subject to a motion for a new trial based on the allegation of inadequacy. The trial court then stated as follows:

> However, it was the Plaintiff who moved the Court to return the jury to further deliberate which resulted in the award of 0 dollars for pain and suffering to be changed to $3,000 for Plaintiff's pain and suffering. . . . The trial court is charged with the responsibility of deciding whether the jury's award appears to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.
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> . . .
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> The jury had the opportunity to hear Plaintiff's testimony, the testimony of the witnesses and his treating physician to consider for its deliberations. An award of $3,000 for pain and suffering is not inadequate based upon the testimony presented to the jury in this case.

The trial court denied Budke's motion for a new trial. This appeal followed.

Budke argues that the trial court erred in ordering the jury to re-deliberate when the proper procedure was to grant a new trial. In affirming the trial court, we find Shortridge v. Rice, Ky. App., 929 S.W.2d 194 (1996), persuasive. Shortridge brought an action against Rice for personal injuries suffered in an automobile accident. The jury apportioned fault equally and awarded Shortridge $5,000 of her claimed $18,000 medical expenses; however, the jury wrote "0" in the dollar amount blank

for pain and suffering. Shortridge's attorney asked repeatedly for the trial court to order the jury to reconsider the zero verdict. After the trial court refused three times, it granted Shortridge's request and the jury awarded Shortridge $1,000 for pain and suffering. On appeal, Shortridge argued that the original jury verdict was defective and the trial court erred in ordering the jury to reconsider the zero award since she was entitled to a new trial pursuant to Cooper, supra. However, this Court distinguished Shortridge from Cooper as follows: "While we agree wholeheartedly with Cooper, we cannot overlook Shortridge's insistence that the trial court order reconsideration. We will not fault the court for complying with that insistent request." Shortridge, supra at 196.

In the case sub judice, Budke stood upon his request for reconsideration in spite of Morgan's argument that a motion for a new trial was the proper procedure. The trial court acknowledged that the appropriate remedy under Cooper was a motion for a new trial, but the trial court emphasized that it ordered reconsideration of the verdict only at counsel's insistence. The Shortridge Court did not fault the trial court for complying with Shortridge's insistence on jury reconsideration; likewise, in applying Shortridge to the case sub judice, we cannot fault the trial court in this case either.

Budke's second argument is that the jury verdict of $3,000 for pain and suffering was clearly inadequate and not supported by the weight of the evidence. The trial court noted

that the unanimous jury verdict was "different than a very minor amount." We again find Shortridge, supra, persuasive. In Shortridge, this Court stated as follows:

> As noted, after reconsidering the pain and suffering issue, the jury increased the award from zero to $1,000.00. Shortridge claims that the increased pain and suffering award was inadequate and that the court should have accordingly granted her motion for a new trial. This is not a case where the jury simply erased the zero and replaced it with "a few dollars" which, as the Supreme Court pointed out in Cooper, 812 S.W.2d at 500, would not correct the inadequacy. Rather than simply awarding "a few dollars" after reconsideration, the jury awarded Shortridge $1,000.00, one-fifth of the unchallenged $5,000.00 award of special damages. This case is, therefore, distinguishable from Cooper and cases such as Hazelwood [v. Beauchamp, Ky.App.,] 766 S.W.2d at 439 [1989], where the jury only awarded $250.00 after reconsideration.

929 S.W.2d at 196.

Budke points out that "[i]n the case at bar, there was no independent medical examination done by the Appellees, Jason and Nancy Morgan. In fact, there was no evidence at all offered contrary to the Appellant's treating physician, Dr. Grefer." While Dr. Grefer testified that Budke was injured and needed physical therapy, he also testified that Budke received $5,000 of physical therapy to treat a purely subjective condition. Dr. Grefer stated that he had made no objective finding that indicated that Budke had a medical problem. Dr. Grefer also stated that he had last seen Budke on March 22, 1995, and at that time Budke made an appointment to return in four weeks. Dr.

Grefer stated that Budke never returned and the fact that Budke had not sought therapy in over fifteen months would appear to indicate that Budke's condition was satisfactory. The jury observed Budke give his testimony first-hand and simply may not have believed that Budke's pain and suffering was as great as he claimed. See Davidson v. Vogler, Ky., 507 S.W.2d 160, 162 (1974). We conclude that the verdict bears some reasonable relationship to the evidence and we cannot say the trial court's evaluation of the jury's award was contrary to the evidence. The jury's award of $3,000 represents over half of the medical award, and as stated in Shortridge, "[t]his is not a case where the jury simply erased the zero and replaced it with 'a few dollars' . . . ." 929 S.W.2d at 196. The trial court did not err in refusing to grant a new trial based upon the claim of an inadequate award.

For the foregoing reasons, we affirm the judgment of the Campbell Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Robert E. Blau
Cold Spring, KY

BRIEF FOR APPELLEE:

Hon. A. Berry Howe
Wilder, KY