RENDERED: January 8, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003261-MR

LENDELL OAKES — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CI-00369

WAL-MART STORES, INC. — APPELLEE

and

NO. 1996-CA-003485-MR

WAL-MART STORES, INC. — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CI-00369

LENDELL OAKES — APPELLEE

and

NO. 1997-CA-000064-MR

LENDELL OAKES — CROSS-APPELLANT

CROSS-APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CI-00369

WAL-MART STORES, INC. CROSS-APPELLEE

OPINION AND ORDER
AFFIRMING IN PART AND REVERSING
IN PART WITH DIRECTIONS
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: This Court has before it two separate appeals that have been consolidated for our review. Lendell Oakes (Oakes) and Wal-Mart Stores, Inc. (Wal-Mart) have each appealed from the judgment of the Warren Circuit Court that was entered on November 1, 1996. The judgment was consistent with the jury's verdict following a trial on Oakes' claims predicated on premises liability.[1] We affirm in part and reverse in part with directions.

Oakes filed his complaint in the Warren Circuit Court on April 9, 1996, alleging that he had sustained an injury the previous April after slipping on spilled Easter candy near a check-out lane at a Wal-Mart store in Bowling Green. Oakes allegedly suffered a severe hematoma to his right hip and a groin hernia on his right side. The case was tried before a jury in

[1]Oakes has also filed a cross-appeal, but it does not raise any additional issues that were not already included in his original direct appeal.

October 1996. Medical evidence presented by Oakes indicated he had suffered a hernia in the right inguinal area above the scrotum, which was surgically repaired two months after the fall. Oakes testified that in addition to the pain and recurring infections in his right testicle, he had been impotent since the April 1995 incident at Wal-Mart. Dr. Oscar Carter (Dr. Carter) testified that, in his opinion, Oakes' loss of sexual function was due to the fall at Wal-Mart and the resulting groin injury.

Wal-Mart was allowed to offer evidence that Oakes had sustained a similar injury after falling in a grocery store in 1991. It also elicited testimony from Dr. Carter that Oakes had suffered bouts of prostatitis (inflammation of the prostate gland) and epididymitis (infection in the testicle) prior to the 1995 fall at its store in Bowling Green.

Both parties in their appeals raise issues concerning the procedure utilized by the trial court after the jury returned to the courtroom with an incomplete verdict. The jury had been instructed that Wal-Mart had a duty to exercise ordinary care for the safety of Oakes and that Oakes had a duty to exercise ordinary care for his own safety. Pursuant to these instructions, the jury found that both Wal-Mart and Oakes had failed to comply with those duties and that such failures were a substantial factor in causing Oakes' injuries. However, the jury neglected to complete Instruction No. IV which required it to determine the percentage of fault attributable to each party.

The trial court then informed the jurors that it was their duty to apportion fault and instructed them to deliberate further.

After the jury left the courtroom, the trial court advised the attorneys that there was an even more serious problem with the verdict than the jury's failure to complete the apportionment instruction. The following discussion transpired between the trial court and Wal-Mart's attorney, Hon. Matthew Baker (Attorney Baker):[2]

> Judge Lewis: I've got worse news than that. When they come back in and return the verdict, regardless of how it is, I'll have to send them back again, because they returned the medicals, but only gave sort-of a token pain and suffering.
>
> Attorney Baker: That's all right.
>
> Judge Lewis: I don't think it is.
>
> Attorney Baker: You've said $0 isn't appropriate and it is.
>
> Judge Lewis: It certainly isn't. Neither is $1.00.
>
> Attorney Baker: Over my objection.
>
> Judge Lewis: Of course, but I'm trying to save your verdict.
>
> Attorney Baker: Okay. I understand.
>
> Judge Lewis: If I don't do it, it's Bill's objection to make, which would ah . . .
>
> Attorney Baker: Okay.

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[2]Oakes' attorney, Hon. William P. Hagenbuch, Jr., was present, but did not comment on this issue.

> Judge Lewis: He's got all his medicals, it's just a matter of how to instruct them that you can't have that many medical bills . . . It's the same thing that happened the other day.
>
> Attorney Baker: Except it is an award, instead of no award.
>
> Judge Lewis: One dollar.
>
> Attorney Baker: Okay.

When the jury returned, it had completed Instruction No. IV and apportioned fault 60% to Oakes and 40% to Wal-Mart. It had awarded Oakes all the medical expenses he had incurred as a result of the injury which amounted to $5,690.29, and $1.00 for past pain and suffering. As he had previously indicated to the attorneys, the trial judge instructed the jury as follows:

> Now, ladies and gentlemen, I don't know if Mr. Jones was on another jury. I had trouble earlier this term with this issue. The law is in the state of Kentucky--that if--and I don't know how you all derived at your verdict and that's not for me to try to figure that out. But, the law says that if a person has suffered medical expenses due to the negligence of another party, then because of those medical expenses incurred, that that would mean that they had to have suffered pain and suffering and so you all have returned the amount of $1.00, but they have said that not only can you not return zero, but you cannot return a token sum. There has to be a reasonable amount of pain and suffering that goes along with $5,690.29 worth of medical expenses and this is--and you all are the finders of fact--so you have to determine what that reasonable amount is. I can tell you that zero is not reasonable. I can tell you the $1.00 is not reasonable because you can't suffer $5,000.00 worth of

> medical expenses without having more pain and suffering than that. So, I'm going to ask you to return to the jury room and work on Instruction No. 5 and determine to the best of your ability what the reasonable amount of pain and suffering should be in this case.

After further deliberation, the jury returned its verdict awarding Oakes the sum of $9,000 for past pain and suffering. A judgment in favor of Oakes in the amount of $5,876.17 (40% of the total award) was entered on November 1, 1996.

Wal-Mart moved to alter, amend or vacate the judgment based on two grounds: (1) the original $1.00 for past pain and suffering was justified by the evidence; and, (2) Oakes' failure to notify his health insurance carrier pursuant to Kentucky Revised Statutes (KRS) 411.188, prevented him from recovering his medical bills from Wal-Mart. Oakes did not file any post-judgment motions, nor did he file a response to Wal-Mart's motion to alter, amend or vacate the judgment. On December 19, 1996, the trial court denied Wal-Mart's motion except it ordered that "any check or draft which is ultimately tendered to [Oakes] in satisfaction of the judgment" bear the names of both Oakes and his insurer. These two appeals followed.

Case No. 1996-CA-003261-MR

In his appeal, Oakes argues that the trial court erred in instructing the jury to reconsider its initial award of $1.00 for past pain and suffering. It is settled in this jurisdiction that when the jury has awarded the plaintiff his past medical expenses an award for past pain and suffering of $0, or a token

amount as awarded in the instant case, is inconsistent and inadequate as a matter of law. Laughlin v. Lamkin, Ky.App., ___S.W.2d___ (9-18-1998); Prater v. Coleman, Ky.App., 955 S.W.2d 193, 194 (1997); Hazelwood v. Beauchamp, Ky.App., 766 S.W.2d 439, 440-441 (1989); Phipps v. Bisceglia, Ky., 383 S.W.2d 367, 368 (1964); Vittitow v. Carpenter, Ky., 291 S.W.2d 34, 35 (1956); Biggs v. Toone, Ky., 244 S.W.2d 443, 445 (1951). It is also settled that a plaintiff does not waive his right to seek a new trial based on inadequacy of damages by failing to ask the trial court to have the jury sent back to reconsider its failure to make an appropriate award of such damages. Cooper v. Fultz, Ky., 812 S.W.2d 497, 501 (1991). The correct procedure for the trial court to follow when the jury has inserted $0, or any token figure for past pain and suffering after having awarded past medical expenses, is to receive the verdict and to correct the inconsistency upon a motion for a new trial. Id. at 499-500.

There is no question that the trial court erred in instructing the jury, which obviously thought little of Oakes' claim of past pain and suffering to begin with, to reconsider its award. However, any error in the trial court's instructions was waived by Oakes' failure to object to the trial court's sua sponte decision to have the jury reconsider its verdict. Kentucky Rules of Civil Procedure (CR) 51(3). Also, by not filing a motion pursuant to CR 59.01(a),[3] Oakes failed to

[3]CR 59.01(a) reads: "A new trial may be granted to all or (continued...)

preserve any alleged error due to an irregularity in the proceedings. Hamlin Construction Company, Inc. v. Wilson, Ky.App., 688 S.W.2d 341, 342 (1985).[4]

Obviously, Oakes, who asked the jury to award him the sum of $250,000 for past pain and suffering, was unhappy with the increased award of $9,000. However, Oakes' remedy was to have filed a motion for a new trial on the ground of inadequate damages pursuant to CR 59.01(d), which he did not do. In Shortridge v. Rice, Ky.App., 929 S.W.2d 194, 196 (1996), the trial court, at plaintiff's "insistence," utilized the same erroneous procedure of having the jury reconsider a $0 verdict for past pain and suffering. The jury ultimately awarded the plaintiff $1,000 for past pain and suffering, a sum representing one-fifth of her past medical expenses. On appeal, the plaintiff argued that the trial court erred when it denied her motion for a new trial which was based on the inadequacy of the award. This Court stated that under the circumstances presented in Shortridge, our review of the trial court's refusal to grant a

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[3](...continued)
any of the parties and on all or part of the issues for any of the following causes: (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial."

[4]We note that Oakes' brief is not in compliance with CR 76.12(4)(c)(iv) since he failed to provide "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

new trial would be "based upon the alleged inadequacy as [ ] if the jury had originally awarded $1,000.00." Id.

While there are some minor differences, the facts in the case sub judice are very similar to those in Shortridge. While Shortridge openly insisted that the trial court instruct the jury to reconsider its award, Oakes, though clearly invited by the trial court to object, by his silence, merely acquiesced in that procedure. Additionally, when the jury returned a verdict that Oakes still believed to be inadequate, Oakes, unlike Shortridge, did not move for a new trial.

The standard of review of this Court in reviewing issues of adequacy of a jury verdict is set out in McVey v. Berman, Ky.App., 836 S.W.2d 445 (1992). "[O]ur only function in reviewing the denial of a motion for new trial is to decide whether the trial judge abused his discretion." Id. at 448. See also Davis v. Graviss, Ky., 672 S.W.2d 928 (1984). Since the issue of whether a verdict should be set aside as either inadequate or excessive must first be addressed to the trial judge who "heard the witnesses firsthand and viewed their demeanor and who [ ] observed the jury throughout the trial", Davis at 932, it clearly is not a matter which can be raised for the first time on appeal. In sum, Oakes' acquiescence to the procedure utilized by the trial court, and his failure to seek a new trial, prevents this Court from addressing the jury's award for past pain and suffering.

The second argument Oakes makes is that the trial court erred in denying his motion in limine to exclude any evidence of, or reference to, his fall at a grocery store in 1991, and that it erred in overruling several objections he made during Wal-Mart's questioning of the medical experts regarding the prior fall and the resulting injury. He contends that the evidence was greatly prejudicial and comprised evidence from which the jury might have inferred that he was "abusing the legal system." Oakes further insists that the prior incident had no relevance in his case against Wal-Mart as the medical evidence "was absolutely clear that his 1991 hernia was on the left side and his 1995 hernia [was] on the right side." Wal-Mart, of course, counters that the evidence is both material and relevant.

Our standard of review of this issue is summarized in Transit Authority of River City v. Vinson, Ky.App., 703 S.W.2d 482, 484 (1985), as follows:

> Relevancy "is a determination which rests largely in the discretion of the trial court . . . ." Glen Falls Insurance Company v. Ogden, Ky., 310 S.W.2d 547 (1958). However, the trial court possesses the power to exclude relevant evidence "if its probative worth is outweighed by the threat of undue prejudice to the opposing party." R. Lawson, The Kentucky Evidence Law Handbook, § 2.00 at 21 (2nd ed. 1984). This court will not disturb a lower court's discretionary ruling on appeal absent an abuse of discretion. Id. at 22. See also Tumey v. Richardson, Ky., 437 S.W.2d 201 (1969).

Oakes contends that while he had a very similar fall in 1991 and a similar injury, a different side of his body was affected. However, Wal-Mart produced evidence that Oakes had also incurred some degree of sexual dysfunction as a result of the 1991 injury. Since Oakes was seeking an award to compensate him for impotency, a condition he attributed entirely to the 1995 injury, the evidence of the 1991 injury was relevant to the issue of the cause of that impotency. Accordingly, we find no abuse of discretion in the trial court's ruling on the evidentiary issue. We affirm in case no. 1996-CA-003261-MR.

Case No. 1996-CA-003485-MR

In its appeal, Wal-Mart also argues that it was improper for the trial court to instruct the jury to reconsider its verdict and contends that this Court should reinstate the $1.00 award for past pain and suffering. Wal-Mart's counsel did voice an objection when the trial court announced its intention to have the jury reconsider its verdict; however, we are unable to discern how Wal-Mart was harmed by the error. Once the jury determined Wal-Mart was liable for Oakes' injuries and awarded him all the medical expenses he incurred as a result of the fall, Wal-Mart was not entitled to the $1.00 verdict for past pain and suffering. Wal-Mart has cited Justice Wintersheimer's dissent in Smith v. McMillan, Ky., 841 S.W.2d 172 (1992) (jury found defendant doctor liable but awarded $0 damages--new trial granted on other grounds), and Carlson v. McElroy, Ky.App., 584 S.W.2d 754 (1979), for the principle that a nominal award for pain and

suffering is appropriate despite a verdict in favor of the plaintiff on the issue of liability. However, the jury in this case did not merely render a verdict of liability. It additionally awarded Oakes all the medical expenses attributable to his injury. Thus, while Wal-Mart insists that the trial court "had a fundamental misunderstanding of the law in this regard", we believe Wal-Mart is mistaken about the state of the law concerning nominal damages for past pain and suffering.

Had the trial court sustained Wal-Mart's objection and followed the appropriate procedure and accepted the verdict, Oakes would have been entitled to a new trial as a matter of law. See discussion supra at pp. 6-7. If Wal-Mart believed $9,000 was an excessive amount for Oakes' past pain and suffering, a claim it has never made, its remedy was to have asked for a new trial based on excessiveness. It did not do this.[5]

Next, Wal-Mart argues that since Oakes failed to comply with KRS 411.188(2), the trial court erred in failing to deduct from the verdict the medical expenses awarded to Oakes. KRS 411.188(2) reads as follows:

> At the commencement of an action seeking to recover damages, it shall be the duty of the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold subrogation rights to any award received by the plaintiff as a result of the

[5]In its post-trial motion, Wal-Mart asked the trial court to alter or amend the judgment to reflect the jury's original award of $1.00 for past pain and suffering. Wal-Mart neither asked for a new trial, nor argued that $9,000 was an excessive award.

> action. The notification shall state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action.

At trial, Wal-Mart objected to Oakes' claim for medical damages because these expenses had already been paid by his health insurance carrier and because Oakes had failed to notify his insurer as required by the statute. Oakes' attorney informed the trial court that he had notified the insurer, but he had not filed a copy of the notification in the record. The parties then agreed that disposition of the matter could be made in a post-judgment motion.

As stated earlier, Oakes did not file a response to the post-judgment motion filed by Wal-Mart, and the trial court ordered that any payment to Oakes in satisfaction of the judgment also include the name of his insurer. In his brief, Oakes claims that he did comply with KRS 411.188(2). He has appended to his brief (1) a copy of the letter he sent to Blue Cross/Blue Shield of Indiana dated April 1, 1996, advising it both of the lawsuit and of the insurer's need to intervene and (2) a copy of the certified mail return receipt. Wal-Mart has moved this Court to strike the brief as it contains matters outside of the record. Since it is inappropriate to provide in a brief evidentiary material that is not part of the record, we grant Wal-Mart's motion in part. CR 76.12(4)(c)(vi); Croley v. Alsip, Ky., 602 S.W.2d 418, 420 (1980). We order that the two-page appendix

listed as "EXHIBIT A" and "EXHIBIT B" to Oakes' brief filed on September 23, 1997, in case no. 1996-CA-003485-MR be stricken from the record.

In any event, the purpose of KRS 411.188(2)[6] was to give notice to those who "hold subrogation rights" and to require those who hold such rights to either intervene or lose any rights "with respect to a final award." See Ohio Casualty Insurance Company v. Ruschell, Ky., 834 S.W.2d 166 (1992). Failure to comply with this portion of the statute did not inure to the benefit of Wal-Mart.

Whether or not Oakes had a contractual duty to give notice to his health insurance carrier and whether or not Oakes complied with that duty are issues that do not affect Wal-Mart's liability for its share of the jury's award. Wal-Mart did not have standing to assert such rights belonging to Oakes' medical insurer by way of post-judgment motion and for this reason it was inappropriate for the trial court to order that the insurer be named as a payee of the funds Wal-Mart must pay to Oakes. This question was not properly before the trial court and we reverse the judgment to the extent that the trial court ordered that the name of Oakes' health insurance carrier be placed on the check.

[6]While KRS 411.188(3) was clearly declared unconstitutional in O'Bryan v. Hedgespeth, Ky., 892 S.W.2d 571 (1995), prior to Oakes' fall, prior to the filing of his complaint, and prior to the trial, it is unclear what effect, if any, O'Bryan had on the procedure under KRS 411.188(2).

Accordingly, the judgment of the Warren Circuit Court is affirmed in part and reversed in part with directions only to vacate that portion of the order directing Wal-Mart to include the name of the collateral source payor on the check or draft drawn by Wal-Mart when satisfying the judgment. Further it is ORDERED that Wal-Mart's motion to STRIKE Oakes' brief be, and it hereby is, GRANTED as to the two-page appendix.

HUDDLESTON, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT.

ENTERED: January 8, 1999

/s/ Rick A. Johnson
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT/CROSS-APPELLANT, LENDELL OAKES:

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BRIEFS FOR APPELLANT/CROSS-APPELLEE, WAL-MART STORES, INC.:

Hon. Matthew J. Baker
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