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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001469-MR

EVERETT C. CANADA
AND EVA BROOKS — APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY WINCHESTER, JUDGE
ACTION NO. 96-CI-00185

RHONDA R. SMITH — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BARBER, HUDDLESTON, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: The appellants, Everett C. Canada and Eva Brooks, have appealed from the judgment of the Whitley Circuit Court awarding them nothing for injuries they sustained as a result of an automobile collision with the appellee, Rhonda R. Smith. We reverse and remand for a new trial.

On August 21, 1994, Canada was operating his vehicle on U.S. Highway 25W near Corbin in Whitley County. Brooks, Canada's sister, was riding in the vehicle's back seat, immediately behind her young son, Ronnie Brooks, who was in the front passenger seat. All three occupants of Canada's vehicle were wearing seat restraints. Canada testified that, in anticipation of making a

left-hand turn into a gasoline/food mart, he activated his left turn signal, slowed down and then stopped, waiting for the on-coming traffic to clear. Before he could turn, he was hit in the rear by Smith, who was pulling a boat and trailer with her sport utility vehicle. Smith testified that immediately prior to the collision, she had been following Canada for more than a mile, at a speed of between 20 and 25 miles per hour, and at a distance of one car length. Smith explained that she was unable to stop her vehicle in time to avoid the collision because Canada had come to an abrupt stop and failed to indicate his intent to turn until he was actually stopped.

By all accounts, the damage to both vehicles was minor and no injuries from the accident required immediate treatment. Later that day, both Canada and Brooks began experiencing discomfort and went to the local emergency room for treatment. Following an x-ray examination, they were advised to see their doctor the next day. Dr. Bernard Moses, the appellants' family physician, diagnosed each with a strain/sprain type injury: Canada was diagnosed with a low back strain secondary to the automobile accident; Brooks had a cervical and left shoulder strain. Dr. Moses treated Canada with anti-inflammatory drugs and Brooks with muscle relaxants and injections of pain medication. He referred both appellants to physical therapy. Canada and Brooks received physical therapy at a clinic in Williamsburg, Kentucky for about eight months at which time their conditions improved and they were released.

On April 6, 1996, Canada and Brooks filed a complaint against Smith alleging that they had sustained injuries as a result of her negligence and that they had incurred "reasonable and necessary expenses" in excess of $1,000. In her answer, Smith alleged that Canada was "guilty of negligence" in causing the accident. State Farm Mutual Automobile Insurance Company, Canada's insurer, was allowed to intervene to recover basic reparations benefits paid on behalf of Canada and Brooks.

Prior to trial, the parties stipulated that State Farm had paid a total of $5,613 in medical expenses on behalf of Canada and $5,672 on behalf of Brooks. It was further stipulated that State Farm would "recover" from Smith and her insurer, GEICO, "in accordance with the proportion of liability as determined by a jury at the trial in this matter, and in an amount in accordance with the jury's determination of the reasonableness and necessity of said medical expenses."

The matter was tried in February 1998. The jury, after being instructed on the various duties of the two drivers, determined that both Canada and Smith failed to comply with those duties and that such failure "was a substantial factor in causing the accident." The jury apportioned fault 60% to Smith, and 40% to Canada. Canada and Brooks, who were not employed at the time of the accident, did not seek damages for lost wages, the impairment of their power to labor and earn money, or future medical expenses. Instead, they sought an award from the jury to compensate them for their past medicals (up to the stipulated amounts) and for their pain and suffering. The jury awarded

Canada $0 in both categories. Although the jury awarded Brooks nothing for her past medical expenses; nevertheless, it awarded her $2,000 for pain and suffering.

In its judgment entered on March 23, 1998, the trial court set aside the $2,000 awarded by the jury to Brooks. The trial court determined as a matter of law that she had "failed to sustain a threshold injury" and was "therefore barred for recovery for pain and suffering." The appellants and State Farm filed motions for a new trial based on the inadequacy of the damages and on the trial court's instructions which they alleged were "improper and outdated," and which, allegedly, "placed an erroneous burden on the Plaintiffs." The trial court denied the motion on May 29, 1998, without explanation.

In this appeal, Canada and Brooks argue (1) that the trial court erred in its instructions to the jury with respect to certain specific duties it imposed on Canada, (2) that the trial court erred in allowing the trooper who investigated the accident to testify that Canada and Brooks did not appear to require medical treatment at the scene of the accident, and (3) that the trial court erred in denying their motion for a new trial based on the inadequacy of the jury's award of damages. We agree that the appellants are entitled to a new trial on the issues of Canada's liability and on the issue of damages.

Our standard of review of a trial court's ruling on a motion requesting a new trial pursuant to CR[1] 59.01(d)[2], is well settled.

> Our task is to determine whether the trial court abused its discretion in not granting a new trial in light of the award made. Davis v. Graviss, Ky., 672 S.W.2d 928 (1984) The amount of damages is a dispute left to the sound discretion of the jury, and its determination should not be set aside merely because we would have reached a different conclusion. If the verdict bears any reasonable relationship to the evidence of loss suffered, it is the duty of the trial court and this Court not to disturb the jury's assessment of damages. Id.[3]

Because the trial court "monitored the trial and was able to grasp those inevitable intangibles which are inherent in the decision making process of our system," it is only where a review of the record reveals that its ruling constitutes an abuse of discretion that we may reverse its denial of a motion for a new trial.[4]

Having made that review, we believe that the trial court abused its discretion in failing to order a new trial on the issue of damages. While the amount of medical expenses were

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[1]Kentucky Rules of Civil Procedure.

[2]This rule allows a trial court to grant a new trial based on "[e]xcessive or inadequate damages" which "appear to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court."

[3]Hazelwood v. Beauchamp, Ky.App., 766 S.W.2d 439, 440 (1989). See also Humana of Kentucky, Inc. v. McKee, Ky.App., 834 S.W.2d 711, 725 (1992) and McVey v. Berman, Ky.App., 836 S.W.2d 445 (1992).

[4]Prater v. Arnett, Ky.App., 648 S.W.2d 82, 86 (1983). See also Cooper v. Fultz, Ky., 812 S.W.2d 497, 501 (1991).

stipulated, there was, as Smith points out, no stipulation that the expenses were reasonable and necessary, or caused by the accident. However, Smith offered no evidence whatsoever at trial that the medical expenses Canada and Brooks incurred were unreasonable or unnecessary, or related to any pre-existing disease or condition, or to any cause other than the automobile collision. Simply, the uncontradicted medical testimony established a causal relationship between the injuries suffered by Canada and Brooks and the automobile accident.[5] In his cross-examination of Canada and Brooks, Smith's counsel did not elicit any testimony that would support the jury's verdict of zero damages for the medical expenses necessitated by the accident. Even if the need for some of the services and treatment were in dispute (and it was not), this would not justify the complete denial of all medical services received by Canada and Brooks in the treatment of their injuries.

Smith relies on Carlson v. McElroy, Ky.App., 584 S.W.2d 754, 756 (1979), but it is not controlling under the circumstances presented in this appeal. In that case there was

[5]In fact, Smith's own medical expert, Dr. Daniel D. Primm, an orthopedic surgeon, concurred, without reservation, with Dr. Moses' diagnosis of the appellants' conditions and with the manner in which Dr. Moses treated the appellants. Dr. Primm examined both appellants in March 1997, at which time both had been released from treatment. He testified that he found both appellants to be "cooperative and open," and that he found no indication that either was deceptive or malingering. He further testified that the injuries the appellants suffered were "common" in the type of automobile collision they experienced, and that it was "normal" for most persons to heal from the type of soft-tissue injuries they suffered in about six months. Finally, he confirmed that physical therapy was a "reasonable" treatment in such cases, and stated that he "regularly" used physical therapy for his own patients.

medical evidence that the plaintiff had suffered no injury as a result of the accident and thus there was evidence to support the award of no damages. Unlike the evidence in Carlson, there was no conflicting evidence in the case sub judice, medical or otherwise, for the jury to evaluate on the issue of causation or the extent of the injuries suffered. Clearly, although the jury is not required to believe appellants or their doctors, it is not allowed to ignore uncontroverted evidence of the medical treatment the appellants received.[6] As it is obvious that the jury's failure to award Canada or Brooks any sum for medical expenses was not adequate to compensate them for their injuries, a new trial on the issue of damages is warranted.

The appellants also argue they are entitled to a new trial on the issue of Canada's liability for the accident because of the trial court's following instruction to the jury:

> INSTRUCTION NO. 4
>
> It was the duty of the Plaintiff, Everett Canada, to exercise ordinary care for [his] own safety and for the safety of other persons using the highway, and this general duty included the following specific duties:
>
> (a) To keep a lookout ahead and to the rear for other persons and vehicles near enough to be affected by the intended movement or stopping of the automobile, having regard for the speed of the respective vehicles and for the traffic upon and condition of the highway;
>
> (b) To have the vehicle under reasonable control;

[6] Hazelwood, supra at 441.

(c) To drive at a speed no greater than was reasonable and prudent, having regard for the traffic and for the condition and use of the highway[;]

(d) To exercise ordinary care generally to avoid collision with other persons or vehicles using the highway;

(e) Not to stop or turn the vehicle from a direct course upon the highway unless and until such stopping or turning could be made with reasonable safety, and if the Defendant's automobile was approaching near enough to be affected by such stopping or turning, not to stop or begin the turn without first giving a signal of the intention to do so, for not less than 100 feet traveled before the turn, by a mechanical left-turn signal device or by the extension of the hand and arm horizontally from the left side of the automobile;

(f) Not to stop the automobile or leave it standing on the main-travelled portion of the highway;

(g) Not to stop or suddenly decrease the speed of the automobile without first giving to the operator of any vehicle immediately following to the rear, if he had a reasonable opportunity to do so, a signal of intention by extending his hand and arm downward from the left side of his automobile.

The appellants contend they were prejudiced by subsections (f) and (g) of this instruction which erroneously identified Canada's duty as one not to stop his car on the highway, and not to stop without first giving a hand signal. Although the appellants objected to the inclusion of these two subsections, Smith's counsel, who tendered the instruction,

argued that they were appropriate and assured the trial court, when asked, that the instruction contained in (g) was still the law. Clearly, the instruction in 4(g) is not a correct statement of the law and should not have been given, and 4(f), as the appellants argued at trial, as they argue now, had no application in light of the evidence presented to the jury.

Smith continues to insist that instruction 4(g) "was warranted," and that the duties therein "were consistent with the authority of [Palmore, Kentucky Instructions to Juries §16.29(2)(c) (4th ed., 1989).]" While Smith is correct that 4(g) is contained in the bound volume of Palmore's Instructions, the Cumulative Supplement to that volume clearly indicates that the instruction should be "deleted" as it has not been an accurate reflection of the law since 1988.[7]

[7]Palmore, supra, §16.29 (Supp. 1999), reads:

> Until 1988 KRS 189.380(3) provided as follows: "No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal to the operator of any vehicle immediately in the rear when there is opportunity to give such signal." Effective July 15, 1988 [not July 15, 1998 as alleged in Smith's brief], this provision was amended to read: "No bus driver shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal to traffic following the bus." Hence there is now no statutory provision to support the giving of a specific instruction for the driver of a vehicle other than a bus. Whether a driver should in some manner have given a signal of his intention of stopping or suddenly decreasing his speed would be a matter of ordinary care under the circumstances of the case.

Even if the instruction were a proper reflection of the law, it would have been inappropriate under the evidence presented in this case. Both Instruction 4(f) and 4(g) pertain to situations where a driver suddenly slows down or stops in the road for no apparent reason and is hit from the rear. It is undisputed that Canada was making a left-hand turn into a business and that at the time he was hit his turn signal had been activated. The only conflict in the evidence was at what point in time Canada began signaling his intent to turn. Thus, the only factual question for the jury to decide was properly and adequately framed in Instruction 4(e), that is, did Canada exercise ordinary care by signaling far enough in advance to alert Smith of his intent to turn and to stop, if necessary, to safely accomplish his turn. The specific duties contained in 4(f) and 4(g) are simply not germane in turning situations as certainly a person making a left-hand turn has a duty to stop to avoid colliding with on-coming vehicles.

Smith argues that even if the instructions were "somewhat redundant and possibly unnecessary" that we should determine them to constitute "harmless error." Smith has not cited a single legal authority in support of this argument. However, it is settled in this jurisdiction that an erroneous instruction is "presumed to be prejudicial" and that the "appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error."[8] We agree with the appellants' argument that we have no means of

[8]McKinney v. Heisel, Ky., 947 S.W.2d 32, 35 (1997).

determining whether the jury's verdict, which found Canada to have breached his duties and which apportioned 40% of the fault for the accident to him, was predicated upon the misstated duties outlined in Instruction 4(f) and (g). We thus conclude that there was indeed "a substantial likelihood the jury was confused or misled by the instructions," a situation which requires reversal on the issue of Canada's negligence.[9]

Finally, the appellants argue that the trial court erred in allowing Trooper Billy Madden to testify that neither of them required medical treatment at the scene of the accident. The appellants contend that "[i]t is well established that a lay witness cannot give an opinion as to a party's medical condition, or, as in this case, a party's need for medical treatment." We do not believe that the admission of Trooper Madden's testimony constituted error.

Trooper Madden did not testify that the appellants had not been injured in the accident. Trooper Madden was asked whether he recalled "seeing any injuries that required medical attention," to which he responded, "[n]o." On cross-examination, the trooper testified that he did not have any personal knowledge concerning the appellants' injuries, and further that he had no reason to disagree with the diagnosis of their doctors. Simply, Trooper Madden did not testify to any medical conditions, or the lack thereof, that he was not competent to address. There is

[9]We also agree with the appellant that on remand there will be no necessity to retry the issue of Smith's negligence. The trial court should direct a verdict of liability against Smith, leaving for the jury's consideration only the issue of Canada's negligence, and, if necessary, the issue of apportionment.

nothing in Trooper Madden's testimony that diminishes the appellants' claims for damages to compensate them for their injuries which, they admit, did not become manifest until some time after the accident.

Accordingly, for the foregoing reasons, the judgment of the Whitley Circuit Court is reversed and the matter is remanded for a new trial consistent with this Opinion.

ALL CONCUR.

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