

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002787-MR

EDDIE DEAN HURLEY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 96-CI-00406

DAVID FERRELL AND NATIONWIDE
MUTUAL INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Eddie Dean Hurley has appealed from a judgment of the Pike Circuit Court that awarded him damages resulting from an automobile accident. Hurley argues that the sum of \$13,013 that was awarded by the jury for his damages is inadequate and was the result of misconduct by the appellee, David Ferrell, who represented himself at trial. We conclude that the verdict is supported by the evidence and affirm.

On April 12, 1995, Hurley had stopped his vehicle at a stop sign at an intersection on Highway 632 near Phelps,

Kentucky, when his pickup truck was struck in the rear by a vehicle operated by Ferrell. Ferrell swerved in an attempt to avoid the accident, but the left front portion of his automobile collided with the rear of Hurley's pickup truck. Hurley, who was wearing his seat belt, did not need emergency treatment at the scene and was able to drive away in his truck. He called a doctor the next day and was seen by Dr. Vasu C. Arora two days after the accident. Hurley complained of pain in his lower back, middle back, and neck. He was treated by Dr. Arora for over a year and was subsequently treated by Dr. Steven Harrison, a chiropractor.

On March 25, 1996, Hurley filed a complaint against Ferrell in the Pike Circuit Court. In addition to property damage sustained to his vehicle in the amount of \$1900, Hurley alleged that he "received diverse cuts, bruises, permanent impairment and permanent injuries and suffers and will continue to suffer great mental anguish and excruciating physical pain so that his capacity to earn money has been permanently impaired, curtailed and reduced." He also alleged that he had "endured and continues to endure severe emotional pain and suffering, and loss of enjoyment of life."

Ferrell, who was uninsured at the time of the collision, filed a pro se answer in which he alleged that the "statements" in the complaint were not true. He asked that any "judgment" be abated until he could afford an attorney. On June 17, 1996, Hurley amended his complaint to assert a claim against his own insurer, the appellee, Nationwide Mutual Insurance

Company, to recover for his alleged injuries under the uninsured motorist provisions of his insurance policy. Nationwide filed a cross-claim against Ferrell.

The matter was tried in September 1998. Ferrell acted as his own attorney. The jury was made aware during voir dire of the nature of Hurley's claims against both Ferrell and Nationwide and of Nationwide's cross-claim against Ferrell. At the conclusion of Hurley's case, the trial court granted his unopposed motion for a directed verdict against Ferrell on the issue of liability. Ferrell and Nationwide proceeded to offer evidence bearing on the issue of damages. In its closing argument, Nationwide suggested that Hurley was not entitled to any damages other than his unpaid medical bills and property damage. Nationwide also reminded the jury that it would ultimately look to Ferrell to recoup any sums it was required to pay to its own insured. Ferrell told the jury that he was willing to pay for the damage to Hurley's vehicle, but that he did not think that Hurley had actually sustained any physical injury as a result of the accident. In addition to his medical bills and property damage, Hurley asked the jury to award him \$115,000 for lost wages and his impaired earning ability¹, and \$100,000 for pain and suffering. The jury awarded Hurley the maximum allowed by the instructions for his property damage

¹Hurley explained to the jury that he arrived at this figure by multiplying \$5,000, a conservative figure which he contended represented the difference between what he could earn prior to the accident and what he could possibly earn after the accident, by twenty-three years, the three years prior to trial and the twenty years that he expected to work after the trial.

[\$1800] and un-reimbursed medical expenses [\$3,213], and \$8,000 for mental and physical pain and suffering. It awarded nothing for either lost wages or the permanent impairment of his power to earn money.

A judgment was entered on September 30, 1998, awarding Hurley \$13,013 against both Ferrell and Nationwide, and awarding Nationwide a judgment against Ferrell for a like sum. Hurley filed a motion to alter, amend or vacate the judgment and/or for a new trial pursuant to CR² 59.01. He argued that the "jury blatantly ignored all the evidence" concerning his lost wages, or "misunderstood the instructions," or was "prejudiced or influenced by some irrational conclusion." As grounds for the motion, Hurley argued that the damages the jury awarded were clearly inadequate and the result of prejudice caused by the "meanderings" of Ferrell during the trial. He argued that Ferrell attempted to portray him, Hurley, as a drug dealer, while depicting himself as a working man with five children to support. The motion was denied on October 21, 1998, and this appeal followed.

Hurley argues that the trial court erred in denying his motion for a new trial based on the inadequacy of the damages awarded for pain and suffering and the lack of any award for lost wages or his alleged impaired earning capacity. Hurley insists that the jury disregarded the "plentiful" evidence concerning his lost wages and inability to continue in the type of work he did before the accident. He argues that it was irrational for the

²Kentucky Rules of Civil Procedure.

jury to have awarded him all of his medical expenses and to have refused to make any award for lost wages.

CR 59.01 provides that a new trial may be granted for "inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." It is, of course, the function of the trial court which "has heard the witnesses firsthand" and "observed the jury throughout the trial," to determine whether the jury's award has been given under the influence of passion or prejudice or in disregard of the evidence or instructions.³ A trial court's order denying a motion for a new trial on the basis of inadequate damages is presumed to be correct and may not be disturbed upon review by this Court unless it is clearly erroneous.⁴ In making that determination, this Court is charged with reviewing the record and deciding whether when "viewed from a standpoint 'most favorable' to the prevailing party, there is evidence to support the verdict and judgment."⁵

A review of the record discloses that there was conflicting evidence on the question concerning the nature of and the extent of any physical impairment that Hurley may have suffered from the accident. Hurley, who was in his mid 40's at the time of trial, has a ninth grade education and spent most, if not all, of his working life as a coal miner. Hurley earned

³Davis v. Graviss, Ky., 672 S.W.2d 928, 932 (1984).

⁴Prater v. Arnett, Ky.App., 648 S.W.2d 82, 86 (1983); McVey v. Berman, Ky.App., 836 S.W.2d 445 (1992).

⁵Davis, supra at 933 (citing Rogers v. Kasdan, Ky., 612 S.W.2d 133 (1981)).

approximately \$28,000 in 1993, the last year he worked prior to the accident, but he had not been employed for more than a year before the accident. Hurley testified that he had suffered a work-related back injury in the 1970's, but that prior to being laid-off in 1993, he was not experiencing any back problems that would effect his ability to work. Hurley gave considerable testimony concerning the negative impact that the accident had had on his quality of life. In brief, he testified that he went from being an active person with several hobbies, including hunting and fishing, to spending most of his time sitting and watching television.

Hurley offered medical evidence from Dr. Arora and Dr. Harrison. Dr. Arora, an internist who has a sub-specialty in geriatrics, diagnosed Hurley as having sustained a cervical spine sprain as a result of the accident. When Hurley's pain persisted after several months of conservative treatment, Dr. Arora advised his patient to obtain an MRI. These tests were administered in November 1995, and indicated that Hurley had a bulging disc in his neck and also in the lower back. Thus, the doctor advised Hurley to seek treatment from an orthopedic specialist.

Instead of following that advice, Hurley obtained the services of a chiropractor. Dr. Harrison diagnosed Hurley as having a sprain/strain syndrome of the cervical spine with pain radiating into the shoulder and arm region. It was his opinion that Hurley could not work as a coal miner or at any job that required heavy lifting or the extension of his arms. In addition to manipulating his spine, Dr. Harrison treated Hurley with

different forms of physical therapy and electrical stimulation. Dr. Harrison saw Hurley until the fall of 1996, after which time Hurley testified that he could not afford to continue the treatment.

At the request of Nationwide, Hurley was examined by Dr. Timothy Wagner, a orthopedic surgeon. Dr. Wagner agreed with Hurley's treating physicians that Hurley's low back and cervical spine pain was the result of a strain injury from the automobile accident. However, Dr. Wagner also opined that Hurley had not incurred any permanent impairment as a result of the accident and that if he would lose the forty pounds he had gained and "work his self back into shape," he could eliminate much of his symptomology and return to his previous work in the coal mines.

In addition to the expert testimony, there was lay evidence concerning the type of activities in which Hurley engaged after the accident. One witness, Ferrell's wife, testified that she saw Hurley "four-wheeling" a few months after the accident. Hurley's former wife, Etta Hurley, testified that she had observed Hurley operating a weed-eater and gardening and moving items from his current girlfriend's flower shop. There was also evidence that just days after the accident Hurley had engaged in a fight with a disgruntled employee of his girlfriend. Thus, even though the jury obviously believed that Hurley was injured in the accident and suffered some pain as a result, this type of evidence, along with Dr. Wagner's testimony, is of sufficient quality to support the jury's refusal to award any sum for past wage loss or for the impairment of his ability to earn

wages. Further, the jury was obviously not persuaded by Hurley's testimony, or that of his doctors, that his lingering pain and suffering were either of the caliber to which he testified or entirely attributable to the automobile accident.⁶

As Hurley points out, CR 59.01 also provides that the trial court may grant a new trial when damages are rendered by reason of passion or prejudice. He argues that he was prejudiced by Ferrell who "consistently and repeatedly made statements he should not have made. . . despite the Court's several and poignant admonitions to Ferrell to refrain from doing so." Indeed, the record reveals that Ferrell insinuated that Hurley associated with a known drug dealer, and that his girlfriend lied on the stand. Ferrell also made it absolutely clear that in his opinion Hurley was a malingerer and was attempting to perpetrate a fraud upon the jury by testifying that he had a permanent injury as a result of the accident.

Many of the comments of which Hurley complains were inappropriate. However, Hurley's objections were all sustained by the trial court. Furthermore, the trial court issued various admonitions to Ferrell that he should not attempt to testify by making comments to the jury while asking questions of witnesses, and to confine his arguments to the sworn evidence. Hurley did not request that the jury be admonished, nor did he move for a mistrial.

⁶Shortridge v. Rice, Ky.App., 929 S.W.2d 194, 196 (1996) (citing Davidson v. Vogler, Ky., 507 S.W.2d 160 (1974)).

It is settled that if a party's objection is sustained and no further relief is requested, the issue has not been properly preserved for this Court's review.⁷ Hurley's failure to seek further curative relief in the trial court indicated that he was satisfied with the relief afforded. Further, when improper comments are made, the appropriate procedure is to move the trial court to admonish the jury to disregard the comments.⁸ Having failed to seek any further relief in the trial court, Hurley is precluded from obtaining a reversal of the judgment based on this misconduct.⁹ In any event, we are not convinced that the jury was prejudiced by anything Ferrell said or by the knowledge that Nationwide would be entitled to seek reimbursement from Ferrell.

Accordingly, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sheila P. Singleton
Pikeville, KY

BRIEF FOR APPELLEE:

Geoffrey D. Marsh
Prestonsburg, KY

⁷See Campbell v. Commonwealth, Ky., 788 S.W.2d 260 (1990); West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989); Commonwealth, Dept. Of Highways v. Hess, Ky., 420 S.W.2d 660, 662 (1967).

⁸Huber & Huber Motor Express v. Martin's Adm'r, 265 Ky. 228, 96 S.W.2d 595, 598 (1936).

⁹We also note that Hurley has failed to comply with CR 76.12(4)(c)(iv) that requires the appellant to provide "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."