RENDERED: SEPTEMBER 15, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-000700-MR

LINDA WARD — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER GILL, JUDGE
ACTION NO. 96-CI-00188

WAL-MART STORES, INC. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Linda Ward appeals from a March 12, 1999, judgment of Logan Circuit Court awarding her damages of $6,650.00 in her negligence action against the appellee, Wal-Mart Stores, Inc.[1] She maintains that the award of damages, which was entered upon a jury verdict, is inadequate and that, for the following reasons, she is entitled to a new trial. The trial court erred, she asserts, first, in not directing a finding that Wal-Mart bore the entire fault for Ward's accident; second, in directing a verdict against Ward's claim for future medical expenses; and finally, in

[1]The March 12 judgment amends slightly and otherwise incorporates a judgment entered February 4, 1999.

affirming the jury's decision not to award damages for Ward's future pain and suffering and for her loss of earning capacity. Being unpersuaded that the trial court erred in any of these ways, we affirm its judgment.

The parties do not dispute that on May 10, 1995, while approaching a check-out lane in the appellee's store in Russellville, Kentucky, Ward, a woman approximately 50 years old, slipped in a puddle of the liquid soap children use to blow bubbles, lost her footing, and fell. According to Ward, the fall knocked her unconscious momentarily, but a few minutes later she was able to complete her purchase and drive herself home. Within the next day or so, however, one of Ward's ankles began to hurt, a large bruise appeared on her hip, and she suffered from a sore shoulder, a stiff neck, and severe headaches. She consulted a doctor about her ankle and was told that she had strained tendons there and in her foot, but that with rest they would mend. She also, about five days after the accident, sought treatment from a chiropractor. He provided some temporary relief for her back and shoulder pains, but the underlying symptoms, including now muscle spasms in her shoulder and neck, persisted.

In April 1996, almost a year after the accident, Ward was examined by an orthopaedic surgeon who found evidence that Ward suffered from the early stages of degenerative disk disease and that a cervical strain, likely the result of Ward's fall at Wal-Mart, had aggravated that condition. He recommended physical therapy for her muscle spasms and also recommended that Ward be examined by a neurologist. Ward has since been examined by no

fewer than three neurosurgeons, each of whom has basically confirmed the orthopaedist's diagnosis, although there is disagreement among them concerning how lasting the effects of the fall are apt to be.[2]

For approximately twenty years prior to the accident at Wal-Mart, Ward had worked on the production line at Carpenter Company, a manufacturer of foam linings for automobiles. As the operator of a hot wire machine, a device for etching or cutting grooves into pieces of foam, Ward was occasionally required to lift as much as fifty pounds and had regularly needed to reach above her head. Before seeing the orthopaedist, she had missed no time at work as a result of the accident. She had taken some vacation time immediately thereafter, and since then had simply endured her pain as well as she could. The orthopaedic surgeon restricted her work activities to raising her arms no higher than shoulder level and to lifting no more than 15 pounds. Carpenter Company moved Ward to a position within these restrictions. As of the time of trial, Ward had still not missed any work as a result of the accident.

On May 8, 1996, Ward filed suit against Wal-Mart. She sought compensation for, among other things, lost income and the loss of the capacity to earn income, past and future medical expenses, and past and future pain and suffering. The matter was

[2]The orthopaedic surgeon also found evidence that Ward suffered from carpal tunnel syndrome in both arms and eventually performed surgeries to mitigate that condition. Ward's initial complaint alleged that the carpal tunnel syndrome resulted from or was aggravated by the fall at Wal-Mart, but Ward has since abandoned this claim.

tried on January 28, 1999, with the result noted above. It is from that proceeding that Ward appeals.

At the appropriate times during trial, Ward moved for a directed finding that Wal-Mart alone, through its failure to maintain safe premises, bore responsibility for Ward's alleged injuries. The trial court denied those motions and instructed the jury to apportion fault between Ward and Wal-Mart as it saw fit. The jury apportioned fault equally, 50% to Ward and 50% to Wal-Mart. Ward maintains that there was no evidence of her negligence, and thus that the trial court erred in not directing a finding that Wal-Mart alone was at fault. We disagree.

A directed verdict, or in this instance a directed finding, is appropriate only in limited circumstances. As our Supreme Court has noted,

> [o]n a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. . . . Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses.

Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18-19 (1998) (citing Taylor v. Kennedy, Ky.App., 700 S.W.2d 415 (1985)). Where, as here, the trial court has denied the motion for directed verdict,

> the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion . . . [A] reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing

> party. Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814 (1992). . . . The reviewing court, upon completion of a consideration of the evidence, must determine whether the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. If it was not, the jury verdict should be upheld.

*Id.* at 18-19 (citations omitted).

Ward insists that there was a complete absence of proof on the issue of her negligence. On cross-examination, however, Ward testified that the scene of the accident was well lit. She also testified that, after the fall, she found herself virtually covered with the liquid, from her hair all the way down her side to her shoes. The employee who first came to Ward's assistance testified that, even after Ward's fall, the puddle covered two or three full-sized floor tiles and was readily visible. This evidence, the trial court believed, permitted a reasonable juror to infer that the spill was large enough for a duly cautious shopper to see and to avoid. We are not persuaded that the trial court's assessment of the evidence was erroneous, nor is the jury's finding that Ward was negligent so flagrantly against the evidence as to suggest bias or prejudice. We are obliged, therefore, to uphold the finding.

Ward testified that she continued to experience pain in her neck, her shoulder, and her upper back. She continued periodically to suffer muscle spasms. She had been taking for some time a prescription muscle relaxant and anticipated that she would continue to need it. She also anticipated that her need for over-the-counter pain medication would continue indefinitely.

Her pain, she said, while it had not disabled her, had made her movements slow and prevented her from accomplishing as much around her home and at her job as she had accomplished before the accident. A vocational expert testified that Ward's restriction to light-duty work had and would continue to cost her bonus income at her current job and had lessened her future earning capacity by shrinking the pool of jobs to which she would have access were she to lose her present one. Her injury had also, he believed, shortened Ward's work life. Ward's neurologist at the time of trial testified that Ward had reached the state of maximum medical improvement following her accident. Her work restrictions were permanent, as was likely to be her daily experience of pain and her need for medication and occasional treatment.

On the basis of the evidence just sketched, Ward sought damages for future pain and suffering and for the reduction of her capacity to earn income. The jury awarded her no damages on these aspects of her claim, and the trial court, upon Ward's motions for judgment NOV or for a new trial, upheld the jury's verdict. Ward maintains that the evidence compels a verdict in her favor and that accordingly the trial court erred by upholding the verdict to the contrary.

CR 50.02 and CR 59.01 provide respectively for JNOV motions and for motions for a new trial. This Court's task in reviewing the application of either rule is to determine whether the trial court abused its discretion or clearly erred. Cooper v. Fultz, Ky., 812 S.W.2d 497 (1991); Davis v. Graviss, Ky., 672

S.W.2d 928 (1984). Where, as here, the issue raised by these motions is the adequacy of a jury's award of damages, the trial court's discretion, like ours, is limited:

> 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.

Hazelwood v. Beauchamp, Ky. App., 766 S.W.2d 439, 440 (1989) (citing Davis v. Graviss, *supra*). For the following reasons, we are not persuaded that this jury's assessment should be disturbed.

In addition to the evidence sketched above, a third neurosurgeon testified on behalf of Wal-Mart that, based on his review of all the other medical findings and his examination of Ward not long before trial, her persisting symptoms of pain and stiffness were the result not of her fall, the effects of which were all likely to have healed, but simply of aging. All the neurosurgeons testified that their tests revealed no nerve damage, but that they did reveal degenerative changes to Ward's spine. And Ward herself testified that she had lost no time from her job, that she was earning a higher wage at the time of trial than she had been earning at the time of the accident, and that her then present job within her light-duty restrictions was apparently secure. This evidence adequately supports, we believe, notwithstanding Ward's evidence to the contrary, the jury's denial of Ward's claim for damages for future pain and

suffering and for lost earning capacity. The trial court did not abuse its discretion, therefore, by upholding that verdict.

As noted above, Ward testified that she continued to rely on prescription muscle relaxants, non-prescription pain medication, and occasional physical therapy for pain. Ward's chiropractor and one of her neurosurgeons testified that Ward's condition was not likely to improve, but that she would be reliant on those anti-pain measures, "from time to time," for the rest of her life. Based on this evidence, Ward sought damages for future medical expenses. The trial court granted Wal-Mart's motion for a directed verdict on this aspect of Ward's claim because, it explained, Ward's proof, while it did tend to show that she would incur medical expenses in the future, did not tend to establish the particular amount of those expenses with any degree of certainty and thus would require the jury to speculate as to the amount even if it agreed with Ward that some compensation was due. Juries not being permitted to speculate, Ward's claim, the trial court concluded, must fail. Ward contends that the trial court applied to her claim the wrong legal standard.

We have already observed that

> [g]enerally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses.

Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18-19 (1998) (citing Taylor v. Kennedy, Ky.App., 700 S.W.2d 415 (1985). Plainly, reasonable minds could differ upon Ward's entitlement to damages for future medical expenses and upon the extent of that entitlement. The trial court should not have directed a verdict, therefore, unless Ward's failure to establish the amount of her claim is, in some sense, "a complete absence of proof on a material issue."[3] We agree with the trial court that it is.

The Restatement (Second) of Torts § 912 (1979) provides that

> [o]ne to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.

This provision attempts to balance fundamental interests of the plaintiff and the defendant. On the one hand, the defendant is liable for compensation only to the extent of the plaintiff's injury, which it is the plaintiff's burden to prove, and concerning which the jury is not permitted to speculate. Wiser Oil Company v. Conley, Ky., 380 S.W.2d 217 (1964); *and see* Veazey v. State Farm Mutual Auto Insurance Co., 587 So.2d 5 (LA App. 1991) (applying this rule in the context of a claim for future medical expenses). In the context of this case, therefore, the general rule may be expressed as follows:

[3]Although she contested the point in her motion for a new trial, Ward concedes on appeal the fact that her proof does not establish, or provide the means to establish, the amount of her claim. She disputes only the legal effect of that shortcoming.

claims for future expenses must include proof, as nearly as can be realistically estimated, of both the unit cost of the goods or services at issue and the number of units apt to be needed. Under this rule the trial court correctly concluded that Ward's future-expenses claim failed because it did not estimate, as it would realistically have been possible to do, how often Ward was apt to need therapy sessions or prescription medication. Ward's claim that she would need these treatments "from time to time" for the rest of her life is so indefinite as to provide, in effect, no estimate at all.

On the other hand, there are cases in which the fact of compensable harm is well established apart from proof of the harm's extent. In such cases, it may happen that the extent of the harm defies proof or for some other reason is not proved. Nevertheless, as the Restatement notes,[4] to deny all recovery in such a case would be unfair to the plaintiff. *See* James v. Webb, 643 So.2d 424 (LA App. 1994) (remanding in such a case for additional proof on the amount of future expenses); Jones v. Trailor, 636 So.2d 1112 (LA App. 1994) (remanding for an award of future expenses in whatever amount the trial court deemed to be beyond dispute). These cases constitute an exception to the general rule just stated, but the exception does not apply here because Ward's future loss was not otherwise clearly established. There was evidence, as noted above, that Ward's medical needs did not stem from her fall but rather from natural changes to her spine. Ward's claim for future medical expenses, therefore, can

[4]Restatement (Second) of Torts, § 912 comment a (1979).

not be assessed apart from consideration of the particular expenses alleged. Because Ward's lack of proof on the latter question would have required the jury to speculate, the trial court did not err by concluding that the claim itself was speculative.

Against this result Ward relies on City of Louisville v. Maresz, Ky. App., 835 S.W.2d 889 (1992). In that case an award of future medical expenses was challenged as being unsupported by the evidence. In upholding the award, this Court pointed to numerous items of testimony tending to show that the plaintiff would likely require medical services in the future and held that the award of future medical expenses was thus adequately supported. As Ward observes, there is no mention in Maresz of the plaintiff's having to itemize, as it were, his future expenses, to prove the cost and the amount of the medical treatment he was allegedly likely to need in the future. Similarly, Ward insists, she should not have been required to prove more than the likelihood of future treatment.

Ward, we believe, reads Maresz too broadly. True, the narrow issue addressed on appeal in that case was *whether* the evidence tended adequately to show that the plaintiff was likely to need medical treatment in the future, not *which* treatments he was likely to need and their costs. The Court's focus on the one issue, however, does not imply, as Ward asserts, that the other issue was irrelevant to the plaintiff's claim. Rather, it suggests that the parties simply did not raise the other issue on appeal. Maresz, does not, we therefore believe, address the

question now before us and does not alter our previous analysis.[5] As discussed above, unless the need for compensable future medical treatment is beyond dispute, a claim for damages for future medical expenses will not lie unless there is evidence tending to establish both elements--the likelihood of the need and its likely extent. Ward's need for compensable future treatment not being beyond dispute, her failure to introduce evidence tending to specify with reasonable certainty the extent of her need precludes recovery on her claim. The trial court did not err, therefore, by so ruling.

For these reasons, we affirm the March 12, 1999, judgment of the Logan Circuit Court.

TACKETT, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: Under the circumstances of this case, I would remand for additional proof of the amount of future medical expenses. The evidence was overwhelming in this

[5]In Maresz, the Court relied in part on Davis v. Graviss, Ky., 672 S.W.2d 928 (1984). It may be well to note that our decision here does not conflict with that case either. In Davis, at 932, our Supreme Court held that a jury, when it is determining an award of damages for bodily harm, "may consider and compensate for the increased likelihood of future complications," provided that there is substantial evidence of probative value justifying compensation on that ground. Like pain and suffering, but unlike medical expenses, bodily harm is a "non-pecuniary" harm that is not easily translated into a monetary amount. *See* Restatement (Second) of Torts §§ 905, 906 (1979). See also *Id.* § 924 which distinguishes the types of damages typically at issue in tort-based causes of action. In making that translation, juries are necessarily entrusted with a broad discretion. Davis v. Graviss, *supra*. That discretion is less, however, when the question is compensation for pecuniary harms such as medical expenses. Such harms being naturally measured in monetary terms, the general rule, as stated in the text, is that they are compensable only to the extent that the monetary loss is shown with reasonable certainty.

case that Ms. Ward would continue to require treatment for her serious injuries. In effect, the jury penalized her for mitigating her losses by her return to work. I believe that its disregard of the evidence of her injury and inevitable need for ongoing treatment called for corrective action by the trial court in the form of a judgment notwithstanding the clearly inadequate verdict.

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