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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001952-MR
AND
NO. 1999-CA-002012-MR

KATHLEEN NIEKAMP — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 96-CI-004176

JULIAN G. SHARP — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN 1999-CA-001952-MR
AND
DISMISSING IN 1999-CA-002012-MR
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Kathleen Niekamp has appealed from a judgment of the Jefferson Circuit Court entered on May 4, 1999, that followed a jury trial of her personal injury action for damages caused by a motor vehicle accident. Having concluded that the trial court did not err in denying Niekamp's motion for a new trial based on her claim of an inadequate award of damages for past and future

pain and suffering and no award of damages for loss of earnings, we affirm.[1]

Niekamp was injured in an automobile accident at the intersection of Bardstown Road and Tyler Lane in Jefferson County, Kentucky on July 7, 1995, when the appellee/cross-appellant, Julian G. Sharp, made a left turn in front of her. At the jury trial held in April 1999, the trial court granted a directed verdict in favor of Niekamp on the issue of liability. The trial court also granted Niekamp a directed verdict on her claim for damages for "medical expenses incurred" of $21,999.51, and "replacement services" of $1,247.00. All other claims for damages were submitted to the jury, which returned the following verdict: past and future mental and physical suffering, $6,753.49; future medical expenses, $20,000.00; and "[l]oss of her power to labor and earn money in the past and in the future", $0.[2]

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[1]While Sharp has filed a protective cross-appeal on the issue of liability, since we have affirmed on Niekamp's appeal, the cross-appeal is dismissed as moot.

[2]The verdict form read as follows:

> Mental and physical suffering which she has endured from the date of the accident until today and is likely to endure in the future not to exceed $200,000.00.
>
> $6,753.49
>
> Medical expenses incurred for her treatment up through today[.]
>
> $21,999.51
>
> Medical expenses she is likely to incur[ ] in

(continued...)

On May 14, 1999, Niekamp filed a motion for a new trial on the issue of damages.[3] The motion was denied by order entered on July 20, 1999. This appeal followed.

Since Niekamp claims the trial court erred when it denied her motion for a new trial, our review is limited to determining whether the trial court's ruling was clearly erroneous:

> [The] recent decision in Cooper v. Fultz, Ky., 812 S.W.2d 497 (1991), laid to

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[2](...continued)
the future not to exceed $20,000.00.

$20,000.00

Loss of her power to labor and earn money in the past and in the future not to exceed $200,000.00.

$0.00

Replacement services.

$1,247.00

[The jury verdict totaled $50,000.00, but the judgment entered by the trial court was for $30,293.39, since the difference of $19,706.61, in accordance with pre-trial stipulations, constituted subrogated claims.]

[3]Kentucky Rules of Civil Procedure (CR) 59.01(d):

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes: . .
>
> (d) Excessive or 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.

> rest any confusion which previously existed with respect to such appellate review. [The Supreme Court] began by declining any review until the trial court had first considered the substance of the claim and quoted with approval from Davis v. Graviss, Ky., 672 S.W.2d 928 (1984), which described a CR 59.01 ruling as "a discretionary function assigned to the trial judge who has heard the witnesses firsthand and observed and viewed their demeanor and who has observed the jury throughout the trial." Id. at 932. [The Supreme Court] followed Prater v. Arnett, Ky.App., 648 S.W.2d 82 (1983), in which the appellate court was held to be precluded from stepping "into the shoes" of the trial court, and precluded from disturbing its ruling unless it was found to be clearly erroneous.
>
> [The Supreme Court's] decision in Cooper amounts to a recognition that a proper ruling on a motion for new trial depends to a great extent upon factors which may not readily appear in an appellate record. Only if the appellate court concludes that the trial court's order was clearly erroneous may it reverse.[4]

Accordingly, if the jury's verdict awarding $6,753.49 for mental and physical suffering and $0 for loss of earnings is supported by the evidence, the trial court was not clearly erroneous in denying Niekamp's motion for a new trial and we must affirm.

In reviewing the evidence at trial, we note that Niekamp's primary injuries were a bruised sternum and a fracture-dislocation within the bones making up the subtalar joint of her right foot. She was taken to Baptist East Hospital where she was treated and released from the emergency room. X-rays were taken of her right ankle and read "negative for fracture." She was

[4] Turfway Park Racing Ass'n v. Griffin, Ky., 834 S.W.2d 667, 669 (1992).

placed in a splint, told to apply ice and pain medication was prescribed. She was told to follow up with her doctor.

Niekamp did this follow-up with Dr. Joseph G. Werner, Jr., an orthopedic surgeon, from July 13, 1995, to August 16, 1995. Dr. Werner treated Niekamp for a sprained ankle, prescribing a soft cast and pain medication. On August 16, 1995, Dr. Werner conducted an additional x-ray examination and he became concerned that Niekamp had actually sustained a fracture to her right foot. Dr. Werner referred her to Dr. Mark E. Petrik, another orthopedic surgeon who specialized in treatment of the hands and feet.

Dr. Petrik saw Niekamp on August 18, 1995, and observed that her ankle motion was good, but that she had limited side-to-side motion of her foot. He found that her foot was pushed to the outside, and he could not bring it to tilt inward, as a normal heel would. He advised Niekamp that he would need to open her foot surgically to reposition the bones.

On August 19, 1995, Dr. Petrik admitted Niekamp for surgery. Fortunately, he was able to manually force the bones into their normal alignment by closed reduction instead of opening her foot. Niekamp wore a long-leg cast to stabilize the joint until September 5, when a short-leg cast was applied. The cast was removed on October 10, and Niekamp underwent physical therapy for several weeks. X-rays performed on January 3, 1996, showed some progression of post-traumatic arthritis, and on April 23, 1996, repeat x-rays showed subtalar joint arthritis along

with increased arthritic effect on her calcanecuboid joint. While Niekamp still walked with a limp, Dr. Petrik informed her that it was too soon to proceed to surgery, and that there was little else he could do for her at that time.

Niekamp testified at trial that she continued to be in daily pain because of the arthritis in her foot, that she continued to walk with a limp, that she had problems with walking distances, with being on her feet for extended periods of time, and with keeping up with her children.

As our Supreme Court stated in Williams v. Shepherd:[5]

> The jury had the right to determine the monetary value of the loss of wages, pain suffered, and medical treatment sustained by [Plaintiff] as a result of the accident.
>
> . . .
>
> The composite opinion of twelve persons determined the extent and value of this type of injury. The jury measured the claim for pain and suffering. The verdict of the jury was within the scope of the pleadings, evidence, and instructions, and the amount of the verdict was not so inadequate as to show passion and prejudice.

Having reviewed the evidence at trial, we must conclude that the jury's award of $6,753.49 for past and future mental and physical suffering was supported by the evidence and it is affirmed.

Niekamp's second argument is that the jury verdict of $0 in damages for the "loss of her power to labor and earn money in the past and in the future" was inadequate. While this issue

[5]Ky., 452 S.W.2d 406, 407-08 (1970).

must also be analyzed under the substantial evidence test, our analysis is complicated by the jury instructions given by the trial court. The verdict form listed this damage claim as "[l]oss of her power to labor and earn money in the past and in the future not to exceed $200,000.00." However, we believe this claim for damages should have been separated into past lost earnings and future loss or impairment of her power to earn as set forth in Palmore & Eades, Kentucky Instructions To Juries § 39.04 and § 39.05 (5th ed., 1989):

> **Sec. 39.04 Same; loss of time**
>
> If you find for P you will determine from the evidence and award him a sum of money that will fairly and reasonably compensate him for such loss of wages and income as you believe from the evidence he sustained directly by reason of his injuries, not to exceed $_____.
>
> **Sec. 39.05 Same; future lost earnings**
>
> If you find for P you will determine from the evidence and award him a sum of money that will fairly and reasonably compensate him for such loss or impairment of his power to earn money in the future as you believe from the evidence he has suffered directly by reason of [his injuries] [the accident], not to exceed $_____.

Niekamp argues that since she was required to wear a cast on her leg and since she had to go to physical therapy, that "[c]learly, from the undisputed evidence presented to the jury, [she] had some loss to her power to earn money between the date of the injury and the date of the trial." As to her future loss of earning capacity, Niekamp argues that since the jury awarded

her $20,000.00 for future medical expenses, which was the exact amount Dr. Petrik estimated for the cost of a future surgery, "the jury had to conclude that it was 'likely' she would undergo the surgery" and "[t]he uncontradicted evidence clearly showed that [she] would be totally disabled for some period of time following the surgery" [emphasis original].

Sharp argues in his brief that Niekamp is not entitled to any relief on appeal because she was not entitled to the instructions that were given:

> Actually, the measure of damages allowed by the court's instructions for lost earning capacity is not correct. In reality, the jury should have been instructed in accordance with our tendered jury instructions because the measure of damages for lost earnings is actually "permanent impairment of earning capacity" (Hargett v. Dodson, [Ky.App., 597 S.W.2d 151, 153 (1979)]; W.A. Wickliffe Coal Co. v. Ryan, [241] Ky. 537, [540], 44 S.W.2d 525 [(1931)]). We tendered on behalf of Appellee proper instructions in this regard at our tendered Instruction Four [citation to record omitted]. Plaintiff-Appellant was not working at the time of the accident (and for a few years beforehand) so there should properly have been no lost wage instruction given. Nevertheless, the instruction actually given by the court was cast in terms of permitting the jury to make an award, if they chose to do so, for "loss of her power to labor and earn money in the past and in the future". This was copied from an instruction tendered by the Plaintiff and, of course, is not correct as a proper measure of damages based on the foregoing authorities. Since the jury refused to make an award on this account, there was no appealable error in the instruction from our perspective, but since the Plaintiff-Appellant did not tender a proper instruction in this regard, it seems to us that Appellant cannot complain of the

> failure of the jury to award under an improper instruction setting forth an improper measure of damages.

While we generally agree with the cases cited by Sharp, the problem with his argument is that he did not cross-appeal on the issue of an improper jury instruction. Thus, we are confronted with the question of whether an award of damages that was inadequate under the jury instruction that was given is grounds for reversal of the verdict when the jury instruction that was given gave the plaintiff more than she was entitled to in the first place. We know of no other way to address this error other than under the palpable error rule. Under CR 61.02,[6] a court may consider a palpable error which affects the substantial rights of a party even though the error was not sufficiently raised or preserved for review if a determination is made that manifest injustice has resulted from the error. Since the evidence at trial supports a verdict of zero damages for Niekamp's past loss of earnings and the impairment of her power to earn money in the future, we hold that the trial court was not

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[6]CR 61.02 provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

clearly erroneous in denying a new trial and we must affirm.

For the foregoing reasons, the appeal from the judgment of the Jefferson Circuit Court is affirmed and the cross-appeal is hereby dismissed as moot.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

William J. Nold
Louisville, KY

BRIEF FOR APPELLEE/CROSS-APPELLANT:

William A. Miller, Jr.
Louisville, KY