

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000552-MR

MID AMERICA AIRGAS, INC.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 97-CI-00391

RON MORRIS AND  
SOUTHEASTERN UNITED MIDGROUP, INC.,  
d/b/a ANTHEM BLUE CROSS AND BLUE SHIELD

APPELLEES

OPINION  
AFFIRMING IN PART AND  
REVERSING AND REMANDING IN PART WITH DIRECTIONS

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BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE: Mid America Airgas, Inc. (Airgas) appeals from a November 24, 1999, trial order and judgment of the McCracken Circuit Court. We affirm in part and reverse and remand in part with directions.

Airgas is in the business of selling various types of gases for use in the medical field and manufacturing processes. Appellee, Ron Morris, is a self-employed septic tank cleaner. Sometime prior to April 1997, Airgas discontinued its manufacture of acetylene gas. In the manufacture of acetylene gas, carbide

lime accumulates in the storage tanks. On April 1, 1997, Morris, d/b/a Ron's Septic System, was hired to remove these accumulations. Unaware of the caustic properties of the carbide lime, Morris worked in the lime for several hours. As a result, he received severe burns to the lower portions of his legs. These burns resulted in permanent tissue and nerve damage.

Morris brought an action against Airgas on April 23, 1997. Southeastern United Midgroup, Inc., d/b/a Anthem Blue Cross and Blue Shield (Southeastern), Morris' health insurer, intervened in order to assert its right to subrogation. On February 19, 1999, with leave of the circuit court, Morris' complaint was amended in order to seek punitive damages. The matter was tried on November 22 and 23, 1999. On November 24, 1999, a jury verdict and judgment awarded Morris \$30,000.00 for medical expenses and \$500,000.00 for pain and suffering, past and future. The jury declined to award punitive damages. The jury further apportioned liability thirty percent against Morris and seventy percent against Airgas. Airgas made a motion for a new trial and/or motion to alter, amend, or vacate the judgment. Ky. R. Civ. Proc. (CR) 59.02. This motion was denied by the circuit court. This appeal follows.

Airgas first contends the circuit court committed reversible error by allowing introduction of evidence showing Airgas' financial worth. In support of its argument, Airgas cites Hardaway Management Company v. Southerland, Ky., 977 S.W.2d 910 (1998). In Hardaway, the Kentucky Supreme Court held that parties may not present evidence of the financial condition of

either side of the litigation whether or not punitive damages were being sought.<sup>1</sup> Id. at 916. In the case *sub judice*, we believe the evidence should not have been introduced under Hardaway; however, for the reasons hereinafter stated, we view such admission as harmless error. Ky R. of Evid. 103; CR 61.01.

Morris introduced evidence of Airgas' net worth, then around four hundred million dollars, and of its annual gross sales of nearly one billion dollars. The record indicates that Airgas itself introduced evidence that it was a large national company traded on the New York Stock Exchange with thousands of employees. Airgas offered this information in an apparent attempt to show that it was a successful company and had never experienced any similar problems with the carbide lime at any of its facilities. Under the circumstances, we think Morris' evidence was partly cumulative in nature and thus harmless. See White v. Commonwealth, Ky., 5 S.W.3d 140 (1999); Texas Eastern Transmission Corp. v. Allen, Ky., 282 S.W.2d 338 (1955).

The award to Morris in this case was \$30,000.00 for medical expenses and \$500,000.00 in pain and suffering. That award was reduced by thirty percent based on the respective assignment of liability to the parties.<sup>2</sup> As hereinbefore noted,

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<sup>1</sup>We do note, however, that such evidence is permitted by statute to show the extent to which the defendant profited from the wrongful act itself. Kentucky Revised Statutes 411.186(2)(c); see United Parcel Service Company v. Rickert, Ky., 996 S.W.2d 464 (1999).

<sup>2</sup>The medical compensatory award will be further reduced by approximately \$2,200.00 that is to be paid to Southeastern United Midgroup, Inc., d/b/a Anthem Blue Cross and Blue Shield, as Morris' subrogee.

no award was made for punitive damages. In viewing the award upon the record as a whole, we believe the jury was unaffected by Airgas' financial strength. We, therefore, cannot say that the introduction of the financial evidence resulted in error prejudicial to Airgas. See Williams v. Payne, Ky., 515 S.W.2d 618 (1974).

Airgas complains that the circuit court erroneously admitted evidence that Morris was not covered by workers' compensation insurance. The court admonished the jury not to consider such evidence. We believe the circuit court's admonition was sufficient to cure any error. See Gould v. Charlton Company, Inc., Ky., 929 S.W.2d 734 (1996).

Airgas' next assignment of error is that the jury's award of \$30,000.00 in medical expenses was not supported by the evidence. Specifically, Airgas directs us to jury instruction number four, which reads:

INSTRUCTION NO. 4

You will determine from the evidence and award plaintiff a sum or sums of money that will fairly and reasonably compensate him for such of the following damages as you believe from the evidence plaintiff has sustained directly by reason of the incident:

- (a) Mental and physical suffering, including any such suffering he is likely to endure in the future: \$ \_\_\_\_\_
  
- (b) Reasonable medical expenses incurred: \$ \_\_\_\_\_

Under Instruction 4(b), the jury awarded Morris \$30,000.00. At trial, the evidence offered with respect to past medical expenses

was for an amount of approximately \$6,800.00. Airgas contends that the jury should not have awarded an amount exceeding the proof of reasonable past medical expenses. Morris, however, argues that the award of medical expenses reflects past as well as future medical expenses. We are constrained to agree with Airgas. We believe jury instruction 4(b) was clearly unambiguous. We interpret the instruction as allowing an award only for past medical expenses. We believe this interpretation is consistent with the plain language of that instruction: "[r]easonable medical expenses incurred." We also note that the circuit court repeatedly offered Morris' counsel the opportunity to include future medical expenses in the jury instructions, however, counsel declined. As such, we are constrained to conclude that the jury verdict, which obviously included future medical expenses, was inappropriate. Upon remand, the circuit court shall enter an amended judgment reducing the award for medical expenses to reflect past expenses only.<sup>3</sup>

Airgas next contends that the circuit court erred by permitting the jury to consider punitive damages, notwithstanding the jury made no punitive award. Airgas thinks the submission of the punitive damage issue encouraged the jury to make a compensatory award, which it would not otherwise have done.

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<sup>3</sup>There is a principle of law which permits an appellate court to affirm an award rendered under an erroneous instruction where the amount of the award is not disproportionate or excessive considering the evidence. See Herald v. Gross, Ky., 343 S.W.2d 831 (1961). We decline, however, to follow that rule in the case at hand as we think the award is disproportionate to the evidence especially in light of the fact the case was neither tried nor submitted on the issue of permanent injury.

Punitive damages are appropriate where there is evidence of a reckless disregard for the safety or property of others. See William v. Wilson, Ky., 972 S.W.2d 260 (1998), and Horton v. Union Light, Heat & Power Company, Ky., 690 S.W.2d 382 (1985). In violation of its own safety policy, it is undisputed that Airgas failed to give Morris a Material Safety Data Sheet (MSDS). An MSDS is written information concerning certain materials given to people expected to come into contact with those materials. Included in the information are warnings about the use and safety of such materials. There was testimony indicating that Airgas employees were aware of the hazards involved with carbide lime and failed to warn Morris of the dangers. In fact, there was evidence the employees played down the dangerous properties of the carbide lime. In light of such evidence, the circuit court found the jury could have believed Airgas deliberately misrepresented and concealed the danger of this lime. Thus, we cannot say the circuit court erred by submitting an instruction for punitive damages to the jury. Moreover, we are persuaded by the general rule of law that the giving of an instruction on punitive damages is harmless where the award is compensatory only. See Combs v. Stewart, 301 Ky. 50, 190 S.W.2d 861 (1945).

In conclusion, we affirm all issues on this appeal with the exception of the award of medical expenses. The medical award is remanded for proper adjustment.

For the foregoing reasons, we affirm in part, and reverse and remand in part with directions to enter an amended judgment consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

E. Frederick Straub, Jr.  
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BRIEF FOR APPELLEE, RON  
MORRIS:

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