

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2001-CA-001112-MR
and
2001-CA-001142-MR

TERESA WOLFORD

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JUDGE
CIVIL ACTION NO. 00-CI-00447

MARY RATLIFF AND
TRAVELERS INDEMNITY COMPANY

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: On January 7, 2000, Teresa Wolford and Mary Ratliff were involved in an automobile accident in Pike County, Kentucky. Each has appealed from the judgment entered by the circuit court following a jury trial. We find no error and thus affirm.

The circuit court action was filed by Wolford against Ratliff and against her own insurance company for underinsured benefits. The vehicle being operated by Wolford at the time of the accident was rear-ended by the vehicle being operated by Ratliff. At trial, Wolford received a directed verdict on the

liability issue, and the issue of her damages was submitted to the jury. The jury awarded Wolford \$16,350 for past medical expenses, but it awarded her nothing for past pain and suffering, future pain and suffering, future medical expenses, or impairment of her ability to earn money.

Prior to trial, Wolford settled with Ratliff's liability insurance carrier for the policy limits of \$25,000. Wolford's underinsurance carrier, Travelers Indemnity Company, substituted its payment of \$25,000 so as to preserve its subrogation rights against Ratliff. See Coots v. Allstate Ins. Co., Ky., 853 S.W.2d 895 (1993). See also KRS¹ 304.39-320. Because the amount of damages awarded by the jury was less than \$25,000, the court's final judgment reflected that Wolford would recover no further amounts. The judgment also awarded Wolford her costs. Both parties appealed from the final judgment

Wolford's first argument is that the trial court erred in failing to grant her motion for a new trial on the ground that the jury verdict was inconsistent and inadequate because it awarded damages for past medical expenses but nothing for pain and suffering or the other items of damages she requested. In support of her argument, she cites Prater v. Coleman, Ky. App., 955 S.W.2d 193 (1997), Cooper v. Fultz, Ky., 812 S.W.2d 497 (1991), and Laughlin v. Lamkin, Ky. App., 979 S.W.2d 121 (1998).

The Laughlin case relied on the Prater case, and Prater has since been overruled by the Kentucky Supreme Court in Miller

¹ Kentucky Revised Statutes.

v. Swift, Ky., 42 S.W.3d 599 (2001). The Cooper case was also discussed extensively in the Miller case.

In Prater, this court held that "an award for past medical expenses must be accompanied by an award for past pain and suffering, which has long been the law in Kentucky." Id. at 195. In Miller, the Kentucky Supreme Court overruled Prater "to the extent it holds that a '0' award of pain and suffering damages, regardless of the evidence, is inadequate as a matter of law when accompanied by awards for medical expenses and lost wages." Id. at 602. Therefore, in accordance with Miller, the jury's verdict in this case was not inadequate as a matter of law. However, it was subject to being set aside on a motion for a new trial if the trial court determined the damages were inadequate. CR² 59.01(d).

Wolford testified at trial concerning her injury, her pain, and how her activity had been limited since the accident. Her treating physician, Dr. Ronald Mann, testified that Wolford showed signs of degeneration in her neck and back, including evidence of preexisting bone spurs. He indicated that these could be quite painful. Dr. Matthew Wood performed an independent medical evaluation on Wolford, and he testified that when Wolford visited his office, she complained of unusual tenderness at almost every point he touched. However, Dr. Wood stated that he could not find any source or cause of the discomfort. Dr. Mann testified that he did not think Wolford's activity need be restricted, and he further testified that he did

² Kentucky Rules of Civil Procedure.

not believe she needed the pain medication prescribed to her by Dr. Mann.

The evidence before the jury concerning whether Wolford incurred pain and suffering was conflicting. As the finder of fact, the jury had the right to believe part of the evidence and disbelieve other parts. Sroka-Calvert v. Watkins, Ky. App., 971 S.W.2d 823, 828 (1998). The credibility of the witnesses, including Wolford, was for the jury's determination. Speck v. Bowling, Ky. App., 892 S.W.2d 309, 313 (1995).

Wolford also asserts that she should have been awarded damages because she suffered from depression as a result of her injuries. She cites the testimony of Dr. Wood in support of her argument. Dr. Wood testified that he did not believe it appropriate for him to diagnose her with clinical depression. He further stated, "but if she is depressed it's not surprising and deserves treatment." We find nothing in the cited testimony where Dr. Wood stated that any depression suffered by Wolford was as a result of the accident. In short, we conclude the trial court did not err in denying Wolford's motion for a new trial due to inconsistent or inadequate damages.

Wolford's second argument is that the trial court erred in failing to give the jury an instruction for damages concerning increased risk of future harm. In support of her argument, she cites Palmore, Kentucky Instructions to Juries, Sec. 39.02.1, 2002 Cumulative Supplement. A close reading of that proposed instruction indicates that such an award could be included in the jury's award for pain and suffering, permanent impairment of

power to earn money, and hospital and medical services. The instruction refers to the award as a "enhancement" of the other awards. In this case, there were no other awards for pain and suffering, permanent impairment of power to earn money, and hospital and medical services. Furthermore, a jury should not be instructed regarding the increased risk of future harm as a separate element of damages, and such risk should only be considered in assessing damages for future pain and suffering. Owens Corning Fiberglas Corp. v. Parrish, Ky., 58 S.W.3d 467, 451 (2001), citing Capital Holding Corp. v. Bailey, Ky., 873 S.W.2d 187, 195 (1994).

In Ratliff's appeal, she argues that the circuit court erred in awarding costs to Wolford. "Costs shall be allowed as of course to the prevailing party unless the court otherwise directs[.]" CR 54.04(1). See also KRS 453.040(1)(a). Ratliff argues that since Wolford recovered nothing in the judgment, then she was not the prevailing party and should not have been awarded her costs.

In support of her argument, Ratliff cites Lewis v. Grange Mut. Cas. Co., Ky. App., 11 S.W.3d 591 (2000). In that case, the trial court awarded the plaintiff her costs in a personal injury action arising from an automobile accident. The jury had found that the defendant was liable for the accident but the plaintiff had not suffered an injury. Id. at 592. Therefore, the plaintiff was not awarded any damages. This court concluded that a plaintiff who succeeds in obtaining a verdict on

the issue of liability but is not awarded damages is not a "prevailing party" so as to be awarded costs. Id. at 594.

We conclude that the Lewis case is distinguishable on its facts from this case and that Wolford was the prevailing party and was entitled to recover her costs. In both this case and the Lewis case, the plaintiff prevailed on the issue of liability. However, the jury awarded the plaintiff nothing in the Lewis case, while the jury awarded the plaintiff in excess of \$16,000 in this case. Even though Wolford was unable to recover any further amounts because she had settled with Ratliff's insurance carrier, we nonetheless conclude that she was the prevailing party in the case because the jury awarded damages to her. Thus, the trial court did not err in awarding Wolford her costs.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
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