

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001375-MR

DILLS BERRYMAN III and
ROB'S AUTO SALES, INC.

APPELLANTS

v. APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JUDGE
ACTION NO. 99-CI-00287

ORVILLE W. HARDY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, McANULTY, and SCHRODER, Judges.

COMBS, JUDGE: Dills Berryman, III and Rob's Auto Sales, Inc.

(Rob's), appeal a judgment of the Estill Circuit Court.

Following a bench trial, the court awarded Orville Hardy

\$157,331.31 for injuries he suffered in an automobile accident.

Although the appellants have raised several issues for our

review, they primarily argue that the weight of the evidence did

not support the award. After reviewing the record and the

findings of the trial court, we have discovered no error. Thus,

we affirm.

On January 19, 1999, Berryman, who was test-driving a used car offered for sale by Rob's, collided with a vehicle occupied by Hardy. There is no dispute that Berryman alone was at fault. Hardy was taken to a hospital complaining of back and neck pain. The appellants conceded liability for the accident. At trial, they disputed Hardy's claim for damages by arguing that he was exaggerating his symptoms. They introduced a videotape in which Hardy was shown engaging in physical activities, such as lifting heavy objects and rowing a boat -- activities which Hardy had claimed he was incapable of performing in his pre-trial deposition testimony.

Alternatively, the appellants attempted to establish that Hardy's symptoms were attributable to a pre-existing degenerative condition rather than to the automobile accident. They relied on the testimony of Dr. Benjamin McQuaide, a radiologist. After reading the X-rays taken following the accident, Dr. McQuaide stated that they failed to reveal any "findings of acute injury to the lumbar spine."

At the conclusion of the trial, the parties were directed to submit proposed findings of fact, conclusions of law, and a judgment. On February 27, 2001, the trial court entered the trial order and judgment tendered by the appellants. That order concluded that Hardy failed to prove that he had sustained any injury warranting an award of damages as a result of the collision caused by Berryman. Hardy filed a timely motion to alter, amend, or vacate the judgment. The court granted that motion and stated that its earlier judgment had been

"inadvertently" entered. On April 16, 2001, the Estill Circuit Court entered a new judgment which (with minor exceptions) was identical to the proposed judgment tendered by Hardy. The new judgment awarded Hardy the following sums in damages: \$456.31 for medical expenses; \$42,500 for future medical expenses; \$50,000 for his impaired earning capacity; and \$66,375 for pain and suffering (\$1,000 for the day of the wreck and \$5.00 per day for the remainder of Hardy's life expectancy). The appellants' motion to vacate the judgment was denied on May 25, 2001; this appeal followed.

The appellants contend that the trial court's findings are not supported by the evidence. They particularly object to the finding that Hardy's back condition is attributable to the accident and to the trial court's failure to give any weight to the surveillance tape, which depicted Hardy performing tasks inconsistent with his claim of disability after the accident.

Pursuant to CR¹ 52, our scope of review on appeal is strictly circumscribed and is limited to a consideration of whether the trial court's findings are clearly erroneous; *i.e.*, whether they lack a foundation of substantial evidence.

The findings of the trial judge may not be set aside unless clearly erroneous with due regard being given to the opportunity of the trial judge to consider the credibility of the witnesses.

Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995). Furthermore, when a bench trial is held, the trial court enjoys the exclusive province of determining the credibility and weight of the

¹Kentucky Rules of Civil Procedure.

evidence. We may not intrude upon its exercise of that prerogative. See Ironton Fire Brick Company v. Burchett, Ky., 288 S.W.2d 47 (1956).

Although the appellants contend that the trial court "misunderstood" the medical evidence, there was no finding that Hardy's bulging discs (as revealed by an MRI conducted after the accident) were caused by the accident. Rather, the court found that Hardy's lumbar facet syndrome was caused by the accident. Lumbar facet syndrome is an extremely painful chronic condition for which Hardy has been prescribed oxycontin, valium, and motrin. Specifically, the court recited the following analysis:

8. Dr. Ballard Wright, the senior physician in the Pain Treatment Center, and a Board certified practitioner in anesthesiology and pain medicine, testified that [Hardy's] back condition is causally related to the January 19, 1999 wreck; that his injuries are acute injuries; that his condition is permanent; that he should not, and indeed cannot, do the manual labor type work he did before the wreck; and that in his opinion [Hardy's] future medical expenses will be approximately \$50,000.00.

On causation, Dr. Wright specifically testified that "there is a causal effect between the accident and his present state that we find him in, for which we are treating him."

. . .

11. The Court finds that [Hardy] was injured in the wreck of January 19, 1999, due to the stipulated negligence of [Berryman]; that as a result he suffers chronic back pain for which he must take pain medication daily; that the condition is permanent; . . .

The appellants correctly note that the evidence established that Hardy had significant pre-existing degenerative

changes in his back. However, the evidence ably supports the court's finding that the accident exacerbated that condition into an acutely painful syndrome for which Hardy is required to take powerful pain medication. The trial court's finding that Hardy's back pain was caused by the accident is supported by the following testimony of Dr. Wright:

Q The injuries that [Hardy] complains of, are these consistent with the trauma that comes from an automobile accident?

A Yes. These are frequent problems that we see. They are not unusual. So this is not an unusual situation. It is common.

Q Were the injuries to his vertebrae an acute injury?

A Well, I believe so. And I will say why. I did examine this patient thoroughly on February 2nd and I think that we will probably get to that. He still has evidence of what one would say a lumbosacral and cervical sprain. In other words, he has evidence of tenderness, muscle spasm, limitation of motion. These are the kinds of things you will see following trauma where there is a torque to the spine. They are painful, not incapacitating but painful. And they are often chronic and can be lifetime. They are treatable. The treatment is to minimize the discomfort and to maximize mobility.

His treatment at this point has been inadequate because of the things that we would like to do that would give him more comfort and more improved activity levels, we have not done. But I would simply say that this is --this patient is not unlike many patients we see here at the center. Therefore, I believe that--I guess what we are really here for today as much as to say does he have a medical problem, which we believe he does because we undertook to treat him long before we were brought into this from a medical/legal aspect. What we are here for probably inasmuch as anything is to

establish whether there was--whether this accident caused the present problem.

I think it did at least in part. I can't say that his total pain problem is related to this accident. I think but what the patient says and unless this is disputed and shown to be contrary to what his history is, he said that he was not getting medical attention and had no significant pain problem prior to this accident. So if that is in fact the case, if that is true, then one, I think, must conclude that there is a causal effect between the accident and his present state that we find him in, for which we are treating him.

So that's where I come from and what I can say about this. And if there are facts to dispute that, then let it be. But from our point of view, if you are asking me is this acute, it would appear to be acute. Now, were there, within this man's physical make-up, problems that could have ultimately resulted in a similar pain to what he has now, yes, he has changes on x-ray that show degenerative changes and these are what we call wear and tear disease.

This man was a laborer. He is uneducated. He worked at block laying and moving wheel barrows and picking up blocks. And this is the kind of individual who will ultimately develop in most cases, not every case, but in most cases, will develop sometime in their lifetime, neck and back pain. But we had an acute situation occur here which I believe brought into disabling reality what was dormant and so I feel, yes, this was an acute situation which has caused this man to be where he is today. . . .

This testimony, coupled with Hardy's testimony regarding his pre-accident condition and abilities, amply supports the trial court's findings with respect to the issues of the extent of Hardy's injuries as well as causation.

The appellants challenge the finding that there was no evidence to contradict Dr. Wright's medical opinion by citing to

the testimony of Dr. McQuaide, who found no evidence of an acute injury following the accident. While Dr. McQuaide testified that he saw no evidence of injury on the X-rays, he nevertheless acknowledged that there could be certain back disorders resulting from trauma that are not observable on X-rays. Dr. McQuaide did not examine Hardy nor did he take his medical history. Dr. McQuaide did not address (much less contradict) Dr. Wright's diagnosis of lumbar facet syndrome. Therefore, we find no error in the court's treatment of Dr. Wright's testimony.

The appellants also maintain that Dr. Wright's testimony was "too speculative" to support the findings with respect to causation. They rely on Nashville Railroad Company v. Mattingly, Ky., 318 S.W.2d 844, 849 (1958), in which an award was characterized as "so excessive as to indicate passion and prejudice on the part of the jury." The Mattingly case is distinguishable. Significantly, there was no evidence presented by the appellants that Hardy had an active disabling back condition prior to the accident as did the plaintiff in Mattingly. Furthermore, there was no medical evidence in the case before us to contradict Dr. Wright's opinion that Hardy's back pain was caused or at least aroused into disabling reality by the jolt that it suffered in the automobile accident. Assuming that Hardy's degenerative changes would have ultimately resulted in pain and disability, we find nothing excessive in the trial court's award of \$66,375 for the pain and suffering that Hardy will suffer far sooner than he otherwise would have experienced.

With respect to the medical evidence, the appellants argue that the trial court erred in allowing the deposition of Dr. Wright to be admitted into evidence because Hardy failed to disclose CR 26 information prior to his deposition. CR 26.05(a)(ii) requires a party to supplement his response to any question regarding:

the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

Hardy did not supplement his answers to interrogatories to disclose the nature of Dr. Wright's opinions with respect to causation. However, when a party fails to supplement discovery responses, a reversal for a new trial is proper only where the complaining party is able to show significant prejudice. Welsh v. Galen of Va., Inc., Ky.App., 71 S.W.3d 105, (2001). The appellants did not ask for a continuance to allow them to obtain evidence to rebut the allegedly surprising testimony of Dr. Wright. Accordingly, we find no abuse of the court's discretion in allowing the testimony to be admitted into evidence.

Next, the appellants argue that the court erred in making an award for past medical expenses and future medical expenses. With respect to past medical expenses, they allege that the figure to which Hardy testified at trial exceeded the amount contained in his pre-trial discovery responses. They also allege that the expenses were not reasonable and necessary. As to future medicals, they contend that Dr. Wright's testimony was

speculative and that it is not fair to require them to pay for a condition Hardy would have ultimately suffered.

The appellants have once again failed to demonstrate prejudice resulting from Hardy's failure to update his answers to interrogatories. They deposed Hardy after the interrogatories were filed. They were aware that he was receiving on-going treatment at the Pain Treatment Center (where Dr. Wright practices) and that several costly medicines were prescribed for him. The trial court was entitled to find from the evidence that the medical expenses were reasonable – especially since there was no evidence to the contrary. See Bolin v. Grider, Ky., 580 S.W.2d 490 (1979). Additionally, the award of \$42,000 for future medicals is well supported by the testimony of Dr. Wright, who stated that Hardy's medical treatment would "be somewhere around \$50,000."

The appellants allege error in the trial court's award of \$50,000 for Hardy's impaired earning capacity. As with the other issues, they contend that the proof was "at best speculative." Again, after our review, we have determined that the evidence was sufficient to support the award for this item of damages. Although the appellants correctly state that Hardy has not filed tax returns for many years, he nevertheless testified that he earned approximately \$5,000 annually picking up odd jobs involving heavy labor. The evidence from both Hardy and Dr. Wright established that Hardy has a limited education and that he could not pursue the kinds of jobs he had performed in the past.

As the fact finder, the trial court was entitled to believe Hardy; its findings are not clearly erroneous.

The appellants particularly object to the following finding with respect to their surveillance tape:

10. The defense adduced testimony and a videotape from a private investigator who made long range still and videotape images of [Hardy] around his home and barns. While the videotape shows [Hardy] performing some manual functions, there is no indication that he was able to do so either without pain or on a regular basis. This evidence does not overcome the uncontradicted medical evidence on [Hardy's] medical condition and his medical disability testified to by Dr. Wright. In fact, what is seen on the videotape is precisely what Dr. Wright feared [Hardy] would do: try things which he really should not be doing from a medical standpoint because he does not understand the significance of medical advice due to his limited education and capacity.

The appellants argue that the surveillance tape totally undermined Hardy's claim that he was injured in the accident. They urge that this evidence "was compelling, uncontradicted, and conclusive." While the tape does show Hardy performing the types of lifting and moving which he had testified in his pre-trial deposition he could no longer manage without considerable pain, the tape was but one piece of evidence for the trial court to consider. Contrary to the appellants' contention, the tape does not clearly compel a finding in their favor on any of the issues tried by the court - including the extent of Hardy's physical injuries caused by the wreck.

Finally, after considering the procedural issues raised by the appellants, we find no reversible error. The appellants allege error with respect to the court's use of the findings of

facts, conclusions of law, and judgment tendered by Hardy. However, the appellants did not object when the trial court directed the parties to submit proposed findings of fact and conclusions of law. Nor did they complain when the trial court originally entered the exact judgment that they had tendered. Under these circumstances, and considering the precedent in this area, we find no abuse of the court's discretion in utilizing the proposed findings of fact submitted by Hardy. See, Bingham v. Bingham, Ky., 628 S.W.2d 628 (1982) and Prater v. Commonwealth, Ky., 954 S.W.2d 954, 956 (1997).

The appellants assert that the trial court's order vacating its original judgment without conducting a hearing was "highly irregular, improper, and suspicious." After studying the record in light of these accusations, we have found nothing sinister or improper in the ruling on Hardy's motion to vacate or amend pursuant to CR 52.02 and CR 59.05. Since the court ruled that it had not intended to enter the original judgment and that it had done so inadvertently, the appellants have not explained how a hearing on the motion would have been of any meaningful assistance. We are at a loss to discern how a hearing would have made any difference under these circumstances.

They also contend that the trial court did not have jurisdiction to amend its initial judgment outside the ten-day period provided in CR 52.02, which provides:

Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The

motion may be made with a motion for a new
trial pursuant to Rule 59. (Emphasis added.)

By reference to CR 59, a motion under CR 52.02 is timely made when it is served on the other parties within ten days of the entry of the judgment. See CR 59.02. In this case, the original trial order/judgment was entered February 27, 2001. Although Hardy's motion to vacate or amend was not filed until March 13, 2001, it was served on March 7, 2001 -- within ten days of the judgment. The certificate of service has not been challenged; thus, the motion was sufficiently timely to give the court an adequate jurisdictional basis for amending its findings and judgment. See Huddleston v. Murley, Ky.App., 757 S.W.2d 216 (1988).

Finally, the appellants argue that the court erred in allowing Hardy's wife, Linda Hardy, to testify because she had not been identified as a witness prior to trial. Although they contend that they were prejudiced by Mrs. Hardy's testimony, they fail to recite any specific fact traceable to her testimony. Essentially, Mrs. Hardy's testimony mirrored that of her husband with respect to his condition and medical treatment; at the most, it was merely cumulative. Thus, the alleged abuse of discretion -- if any -- did not result rise to the level of reversible error.

The judgment of the Estill Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Thomas L. Travis
Chad Wells
Lexington, Kentucky

BRIEF FOR APPELLEE:

James T. Gilbert
William Baxter Jennings
Richmond, Kentucky

