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# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2001-CA-001460-MR (APPEAL)
AND
NO. 2001-CA-001503-MR (CROSS-APPEAL)

GLADYS HORNBACK — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET COLEMAN, JUDGE
ACTION NO. 99-CI-00375

RITA S. KOONTZ — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
ON APPEAL AND CROSS-APPEAL
** ** ** ** **

BEFORE: KNOPF, MILLER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Gladys Hornback appeals from the judgment of the Hardin Circuit Court awarding damages in her favor, which she claims to be insufficient. Hornback seeks a retrial on all damages issues. Rita Koontz cross-appeals, arguing that the trial court erroneously awarded Hornback a partial retrial on damages when she was awarded nothing for pain and suffering by the first jury. Koontz seeks to have the second trial held for naught and the original verdict reinstated. We disagree with

both parties, and affirm the judgment of the Hardin Circuit Court.

On March 18, 1997, Hornback's brother was driving a vehicle in which she was a passenger when he prepared to turn left from KY 3005 into a subdivision in Hardin County and was struck from behind by a vehicle driven by Koontz. The roads were wet at the time of the accident, and Koontz claimed that there was black ice on the roadway, although no evidence was produced showing that this was the case. Hornback suffered broken bones and soft tissue damage. Hornback claimed $68,312.55 in past medical expenses and prescription drugs, but the evidence indicated that over half of those expenses were incurred in the six months immediately prior to trial and not the three years following the accident.

Hornback testified that she was continuing to visit a chiropractor three times a week. She introduced evidence of chiropractor bills of over $15,000, but did not call the chiropractor, Lynn Greenwell, to testify either by deposition or in person. She also testified that as a result of the accident, she was unable to work at the job she held prior to the accident at the Fort Knox commissary and that she hired another person, Darrell Hodge, to do the work for her. However, Hodge testified that he had personally witnessed Hornback performing the same duties after the accident as before. Hornback also called an expert witness, John Tierney, to do a vocational assessment. Tierney, who is not a medical doctor, opined that Hornback was 100% occupationally disabled and unable to return to work. Tierney claimed to have reached this conclusion by reviewing her

medical records. However, he did not review the deposition of Dr. James Harkess, discussed below, which contradicted Tierney's assessment.

Hornback's treating physicians testified that the injuries sustained in the accident had completely healed, that there was no evidence of neurological involvement, and that any remaining problems were "musculogenic in nature". Significantly, Dr. David Seligson, an orthopedic surgeon, found that there was evidence of "symptom magnification" on Hornback's part. Another doctor, Gregory Nazar, also found no neurological problems and concluded that her fractures were not the likely source of any continued problems. Further, the defendant's independent medical evaluation (IME) doctor, James Harkess, reviewed her medical records and saw Hornback in person three years after the accident, and concluded that she had no lingering effects from the accident at all, no objective sign of injury apart from the healed fractures, and that there was no reason she could not work in the same job at the Fort Knox commissary that she held prior to the accident. He recommended that she cease all treatment she was receiving, which included a long-standing regimen of narcotic painkillers, and return to work. Hornback strenuously objected to the introduction of Harkess's testimony at trial, arguing that Harkess was biased in such a way as to render his testimony at best useless and at worst highly prejudicial. We address this argument below.

At the first trial, the court submitted the issue of liability to the jury, which found Koontz to be entirely at fault

in the accident. However, the jury awarded only $32,366.92 in past medical expenses, $20,733.58 in lost income, and nothing for future medical expenses, pain and suffering, or permanent impairment of power to earn money. The trial court granted Hornback's motion for a new trial on damages, but limited the trial to the question of damages for pain and suffering. The second jury awarded $20,000 in damages for pain and suffering. Both parties appealed.

Turning first to the question of whether the issue of liability should have been submitted to the jury, we hold that any error was harmless. The jury found that Koontz was entirely at fault in the accident, and after a review of the record we perceive no prejudice to Hornback from the submission of the issue to the first jury. Even if Hornback was entitled to a directed verdict on the issue of liability, the error does not affect her substantial rights, and we therefore disregard it. Blair v. Day, Ky. App., 600 S.W.2d 477 (1979).

Next, we address the question of whether it was proper for the court to admit the testimony of Dr. Harkess into evidence. Hornback's argument turns on the question of bias, and whether Harkess improperly formed an opinion of her medical condition before he performed an examination in person. Harkess testified that he had concluded, from a review of her medical records, that Hornback was not permanently injured and should not be suffering any continued symptoms related to the accident. While Hornback argues that this proves Harkess's bias against her, we cannot agree. Critically, Harkess testified that he

reached that conclusion from a careful review of her medical records, and that his examination of Hornback confirmed what he already suspected. Reaching a conclusion from medical records does not equate to an improper bias, and it is common practice in personal injury cases for the defense to hire an expert witness to provide an IME, especially when a plaintiff claims, as Hornback did, to have a permanent injury. Indeed, whenever a plaintiff puts her physical condition in controversy, the defense has good cause for an examination by an independent medical practitioner. Taylor v. Morris, Ky., 62 S.W.3d 377, 379 (2001). Hornback urges us to reconsider our holding in Sexton v. Bates, Ky. App., 41 S.W.2d 452 (2001), and instead hold that she should not have been ordered to submit to an examination by Harkess, whom she claims had already formed an opinion that she was magnifying her symptoms. We disagree, and follow our holding in Sexton, taking notice that Harkess had only formed an opinion based on her medical records. Further, we note that Harkess's opinion is not radically out of line with that of Hornback's own doctors, as Drs. Seligson and Nazar both concluded that her injuries had healed and there was nothing neurologically wrong with her. It was not error for the court to admit Harkess's testimony, and the jury was entitled to consider it as evidence of her medical condition more than three years after the accident.

Next, Hornback argues that it was not proper for the court to allow a limited retrial on damages. Prior to the limited retrial, Koontz argued that the case of Shortridge v.

Rice, Ky. App., 929 S.W.2d 194 (1996), was instructive as the court in that case authorized a limited retrial on the issue of punitive damages. Hornback takes the position that "damages" is one monolithic issue, and cannot be subdivided. Anything less than a retrial on every element of damages, she argues, is insufficient. We disagree. The case of Deutsch v. Shein, Ky., 597 S.W.2d 141, 146 (1980), states that "a party who has already had his day in court as to a particular issue may not have another opportunity to relitigate the same point unless a partial new trial will result in a miscarriage of justice." Hornback contends that the first jury was unfairly prejudiced against her, and that its failure to award pain and suffering damages, impairment of earning capacity, and future medical expenses, and the award of less than the claimed amount of past medical expenses is evidence of the jury's bias against her. However, a more obvious conclusion can be drawn from the evidence. The jury simply refused to believe that she had any permanent injury, or that she would require future medical treatment, or that the claimed medical expenses were all related to the accident. There is ample evidence to support the jury's finding that Hornback is not permanently injured, and is magnifying (or, indeed, imagining or even fabricating) her symptoms. While the jury's finding may not satisfy Hornback, it is legally sound and will not be disturbed on appeal. It is by no means a miscarriage of justice to order a limited retrial on the issue of pain and suffering only.

Turning briefly to a related issue presented in the cross-appeal, Koontz urges us to hold, citing the recent case of Miller v. Swift, Ky., 42 S.W.3d 599 (2001), that the limited retrial should never have been held and the jury's original verdict should be reinstated, awarding nothing for pain and suffering. However, a careful reading of Miller indicates only that a jury is not bound to award pain and suffering damages when it is not warranted by the evidence. However, given that Hornback was indeed injured in the accident, we believe that it was not erroneous, even in light of Miller, to order a new, limited trial. In Miller, the jury's award of nothing for pain and suffering was supported by the evidence. Here, even though her injuries subsequently healed, broken bones and soft tissue injuries would seem to indicate that an award of nothing for pain and suffering was inappropriate. The court did not abuse its discretion in ordering a limited retrial with respect to that element of damages.

In another related argument, Hornback contends that it was inappropriate for the court to inform the jury in the second trial what the plaintiff was awarded in the first trial. We are not persuaded that the court erred by so informing the jury. In Turfway Park Racing Ass'n v. Griffin, Ky., 834 S.W.2d 667 (1992), the Kentucky Supreme Court held that "the jury should be given all relevant information as it decides the issues presented and know how its decision on a particular issue will affect the overall result." Id. at 673. We follow the reasoning of the

Supreme Court in this case, and hold that it was not error to inform the jury of the previous award of damages.

Hornback also contends that it was reversible error to allow Koontz to testify at the second trial, as she had no relevant information to give the jury regarding the plaintiff's pain and suffering. Hornback contends that Koontz was permitted to testify in such a way as to make the jury sympathetic to her position. However, it is not improper to allow the jury to hear the background of the case or the parties, and we conclude that no prejudicial error could have resulted from the introduction of such testimony. Bolin v. Commonwealth, Ky., 407 S.W.2d 431 (1966).

Lastly, Hornback argues that it was improper for the court to issue instruction number four at the first trial. Instruction number four reads: "[y]ou will not find for the Plaintiff, Gladys Hornback, for any medical condition that did not directly result from the automobile accident of March 18, 1997." Given that there were issues regarding several alleged pre-existing conditions, as well as issues involving unnecessary medical expenses, this instruction was completely proper. Hornback's assertion that the instruction, when coupled with instruction number five's language, "for such damages as you believe from the evidence were sustained directly as a result of the accident," led the jury to believe that Hornback was seeking damages for unrelated conditions, is mere speculation and not sufficient to warrant reversal.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

MILLER, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURRING IN RESULT.

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