

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001147-MR

ALLSTATE INDEMNITY COMPANY

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 99-CI-00349

JAMES RILEY

APPELLEE

OPINION

AFFIRMING

** ** * * * **

BEFORE: DYCHE, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. Allstate Indemnity Company ("Allstate") appeals from two orders entered by the Marshall Circuit Court. Allstate appeals from a trial order and judgment, entered March 6, 2003, recognizing a January 15, 2003, jury verdict awarding James Riley ("Riley") a total of \$130,135.58 in underinsured motorists benefits, including \$63,000.00 in future medical expenses. Allstate also appeals from an order entered

May 6, 2003, denying its motion for judgment notwithstanding the verdict. We affirm.

Riley was driving his tractor trailer from Houston, Texas to Murray, Kentucky, when on September 21, 1996, while on eastbound Interstate 440 in Little Rock, Arkansas, he was struck by a pickup truck operated by Terry Robertson. Robertson drove onto Interstate 440 from an entrance ramp and attempted to make an illegal left turn into the westbound lanes of the interstate. Riley was unable to evade Robertson's pickup truck and hit the driver's side of Robertson's vehicle. As a result of this accident, Robertson and his passenger escaped injury, but Riley sustained injuries to his neck, back, left shoulder, and left knee. The Arkansas State Police noted that Robertson had consumed alcohol prior to this automobile accident. Despite his injuries, Riley reported this accident to his employer, repaired his vehicle, and returned to Murray.

The record reveals that Robertson's liability carrier, Oklahoma Farm Bureau, settled Riley's claim by paying Riley its liability limits of \$25,000.00 and was released from further liability. On September 13, 1999, Riley filed a personal injury action against Allstate to recover underinsured motorists benefits ("UIM") under his own policy.

A jury trial commenced in Marshall Circuit Court on January 14, 2003. At trial, Riley's treating physicians, Dr.

Ronald T. Zelle and Dr. Gary Gallo, testified concerning Riley's physical condition as a result of the automobile accident. Dr. Zelle testified that he treated Riley for lower back pain that radiated through his right leg. Dr. Zelle's examination revealed that Riley was undergoing degenerative changes in his back, but that Riley's complaints began as a result of the September 1996 accident. Dr. Zelle diagnosed Riley with congenital lumbar stenosis, recommended physical therapy, and imposed work restrictions. Dr. Zelle noted the physical therapy did provide Riley some relief, but Riley still complained of numbness in his legs. Eventually, Dr. Zelle referred Riley to Dr. Leon Ensalada, a pain management specialist who treated Riley's pain with an epidural steroid. Dr. Ensalada recommended that Riley return to full-time work. Dr. Zelle concurred with Dr. Ensalada's recommendation and released Riley to return to his normal work duties. Dr. Zelle testified that he believed Riley possessed no permanent physical impairment.

As for future medical expenses, Dr. Zelle testified that Riley was not a good candidate for surgery on his back. However, Dr. Zelle admitted that, if Riley's back problems persisted and became unbearable, a T6-T7 transpedicular microdiskectomy would become an option. Dr. Zelle, however, noted that Riley should pursue and exhaust all other treatments

before submitting to this surgical procedure because his symptoms were not clear enough to pursue surgery.

Dr. Gallo testified that he performed an independent medical examination on Riley on August 14, 2000. During his examination, Dr. Gallo diagnosed Riley with a herniated disc of the thoracic spine, associated sprains and strains, a lumbosacral sprain and strain, tendonitis, bursitis of the left shoulder, and spondylosis of the lumbar spine. Dr. Gallo stated that he believed that the degenerative condition of Riley's spine was caused by the September 1996 automobile accident. Dr. Gallo further testified that, under the 5th Edition of the AMA Guides, he assigned Riley an 8% impairment for the dorsal spine and lumbar spine, as well as a 2% impairment for his shoulder. Dr. Gallo noted that future surgery on Riley's back is an option if his back pain worsened. Dr. Gallo stated that there was a strong possibility that Riley would need to undergo back surgery, but estimated Riley's chances of undergoing future back surgery at 40%. Dr. Gallo estimated the cost of this type of surgery at \$50,000.00.

Riley also testified at trial concerning his physical condition. Riley noted that, despite receiving medical treatment, his back pain had worsened since the date of the accident. Riley testified that his back pain prevents him from sleeping well at night because of his inability to sleep on his

stomach or his back. Riley also noted that, because of his employment as a truck driver, he is unable to use pain medicine to relieve his back pain. Riley further testified that, as a result of his back injuries, he has developed bowel and kidney problems. Riley further noted that he has attempted to avoid surgery despite Dr. Zellem's offer to schedule and perform the surgery. According to Riley, Dr. Zellem informed him that his treatment options were limited if Riley chose not to undergo surgery. Despite his aversion to surgery, Riley testified that he believes that he will require future back surgery to alleviate his worsening back pain.

On January 15, 2003, the jury returned a unanimous verdict awarding Riley a total of \$130,135.58 in UIM benefits. The jury designated \$63,000.00 of this award for Riley's future medical expenses. As a result of this verdict, the trial court, in its judgment entered March 6, 2003, ordered Allstate to pay Riley its UIM policy limits of \$75,000.00 with interest at 12% per annum. Allstate immediately filed a motion for judgment notwithstanding the verdict, arguing that Riley presented no evidence at trial that he was reasonably certain to incur future medical expenses. The trial court denied Allstate's post-judgment motion in an order entered on May 6, 2003. This appeal followed.

Before addressing the argument presented before us, we are compelled to point out that Allstate has largely ignored a fundamental rule of this Court. In its brief, Allstate relies heavily upon an unpublished opinion of this Court in support of its argument therein. Citing an unpublished opinion in a brief submitted to this Court is improper practice under Kentucky Rules of Civil Procedure (CR) 76.28(4)(c). Jones v. Commonwealth, Ky. App., 593 S.W.2d 869 (1979). While we consider this violation harmless in this appeal, we strongly caution Allstate's counsel to avoid such improprieties in the future.

On appeal, Allstate argues that the jury's award of future medical expenses was erroneous because Riley produced no evidence at trial that it was reasonably certain that his back condition would require future surgery. Moreover, Allstate contends that the trial court compounded this error by denying its motion for judgment notwithstanding the verdict on this issue. We disagree.

In Davis v. Graviss, Ky., 672 S.W.2d 928, 932 (1984), the Kentucky Supreme Court stated "where there is substantial evidence of probative value to support it, the jury may consider and compensate for the increased likelihood of future

complications.”¹ In this matter before us, we believe that the record contains an abundance of testimony supporting the jury’s award for future medical expenses. First, Riley testified that his back condition was worsening and further noted that his back problems promoted other medical abnormalities, such as his increased bowel and kidney malfunctions. As such, Riley testified that he will be forced to undergo future surgery on his back. Moreover, Dr. Gallo testified that future surgery on Riley’s back is an option if his back pain worsened. Dr. Gallo believed that there was a strong possibility that Riley would need to undergo back surgery. Dr. Gallo estimated Riley’s chances of undergoing future back surgery, with its costs being approximately \$50,000.00, at 40%. While Dr. Gallo’s percentage estimate may not correspond with his belief that a strong possibility existed for Riley to undergo back surgery, we believe that Dr. Zelle’s testimony supports Dr. Gallo’s opinion that future surgery is more probable than not. Dr. Zelle testified that, while Riley was not a candidate for back surgery, this type of surgery would become an option if Riley’s symptoms were to worsen. When all of this testimony of record is considered, it is clear to us that sufficient evidence exists supporting the jury’s award for future medical expenses therein.

¹ Davis was abrogated on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co., Ky., 83 S.W. 3d 483 (2002). Sand Hill was subsequently vacated by Ford Motor Co. v. Smith, _____ U.S. _____, 123 S. Ct. 2072, 155 L. Ed. 2d 1056 (2003).

For the aforementioned reasons, the judgment of the
Marshall Circuit Court is affirmed.

ALL CONCUR.

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