RENDERED: August 27, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002198-MR

RON PERRY CHEVROLET-PONTIAC-
OLDSMOBILE-GMC TRUCK, INC. and
CENTURY AUTO SALES, INC., D/B/A
RON PERRY'S CENTURY AUTO MALL — APPELLANTS

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 00-CI-00241

DEANNA SETSER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: Ron Perry Chevrolet-Pontiac-Oldsmobile-GMC Truck, Inc., and Century Auto Sales d/b/a Ron Perry's Century Auto Mall, appeal from a judgment entered following a jury verdict finding that the appellants negligently repaired the brake system on an automobile owned by Deanna Setser.

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Appellants allege that the trial court erroneously admitted expert testimony; that the damage award was excessive and not supported by the evidence; and that insurance was improperly brought to the jury's attention. We affirm.

In February 1999, Setser purchased a 1999 Dodge Stratus from Perry. In April 1999, Perry did a routine service on the automobile, and in May 1999, she again brought the automobile in for an oil change and tire rotation. After the May service, she noticed a vibration when applying the brake. On May 19, 1999, she returned the automobile to Perry's and was told the service department was full. She returned on May 21, 1999, and at that time a mechanic drove the automobile and determined there was a problem with the brakes. The brakes were worked on, and on the following day, Saturday, she again noticed the vibration in the brakes. On Monday, after phoning Perry's and informing them of the continued problem, she drove her children to the bus stop and was proceeding to Perry's when her brakes failed resulting in a violent collision.

Dr. Ottfried Hahn testified that the brake problem occurred after the tire rotation, and that it was caused by Perry's mechanics over-torquing the lug nuts, causing the rotors to warp. He further testified that after brake work on an automobile, it should be test driven. Appellants' expert, Dr. Thomas Eaton, testified that he found no defect in the brake

system on the automobile and no defect in the brake rotors. Three mechanics also testified, two of whom previously worked for Perry's. Kenneth Moore testified that when he worked at Perry's it was routine to test drive a repaired vehicle. Elwood Jobe, also a former Perry employee, serviced Setser's automobile but could not recall otherwise working on the automobile or test driving it after the brake repair. Donald Morrison, also a mechanic, testified that it is his practice to test drive a vehicle after brake repair. All agreed with Dr. Hahn that improper torquing can cause brake damage.

At the time of the accident, Setser, who was thirty-two years old, was wearing her seatbelt. She testified that as a result of the accident she was knocked unconscious and suffered a cracked sternum, broken clavicle, broken ribs and brain damage. She continues to have pain, dizziness, nausea and blackouts. She also suffers from depression. Although Setser had a prior electrocution injury that caused headaches, there was medical testimony that since her automobile accident, her symptoms have increased in frequency, duration, and severity. In addition to these medical problems resulting from the accident, Setser's right collarbone is permanently deformed as a result of the injuries.

The jury found the appellants were negligent and awarded Setser $1,507,139.31; $30,951.85 for past medicals,

$476,187.46 for future medicals, $500,000 for past pain and suffering, and $500,000 for future pain and suffering.

Appellants contend that Dr. Hahn failed to establish that the lug nuts were improperly torqued and that warped rotors caused the brakes to fail. In Briner v. General Motors Corporation,[2] a claim was made that a dealership had negligently repaired a steering mechanism. The court held that the dealership was entitled to a directed verdict:

> To justify a finding of liability on Universal's part would require a jury to first infer a breakdown in the steering mechanism attributable to a defect. Secondly it would be required to further infer that, had Universal made different inspections and tests it would have discovered and corrected the condition which ultimately caused plaintiff's car to veer to the left. This is piling inference upon inference, which leads to speculation. As said in Sutton's Adm'r v. Louisville & N.R. Co., 168 Ky. 81, 181 S.W. 938, 940 (1916):
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> > . . . it is held that conjecture affords no sound basis for a verdict. It is not sufficient, therefore, to present a number of circumstances about which one might theorize as to the cause of the accident. Where it is sought to base an inference on a certain alleged fact, the fact itself must be clearly established. If the existence of such a fact depend on a prior inference, no subsequent inference can legitimately be based upon it.[3]

[2] Ky., 461 S.W.2d 99 (1970).

[3] Id. at 101-102.

The cause of an accident cannot be based on an inference of a certain alleged fact. The fact itself must be clearly established.[4]

Here, although Dr. Hahn did not actually measure the torque, his opinion was based on his observation of Chrysler's own inspection of the damaged vehicle. At that time he observed that the lug nuts on the front wheels were significantly difficult to remove. Dr. Hahn testified that there were four leading causes of difficulty in removing lug nuts: dirt, rust, a collision, and torquing. He eliminated the first three and concluded that over-torquing was the cause. There was, therefore, not a complete absence of proof as to the reasonable probability that the lug nuts were over torqued.[5]

Additionally, the jury instructions were submitted without objection and placed the duty on the appellants to use ordinary care both in repairing and inspection of the brake system. Thus, it is possible that the jury did not find that the lug nuts were over-torqued, but that the appellants breached their duty of care when they failed to test drive the vehicle.

We disagree with appellants that the trial court should have excluded Dr. Hahn's testimony because he was not

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[4] Sutton's Adm'r v. Louisville & N.R. Co., 168 Ky. 81, 181 S.W. 938 (1916).

[5] Prater Creek Processing Co. v. McClanahan, Ky. App., 741 S.W.2d 278 (1987).

permitted to testify in Goodyear Tire & Rubber Co. v. Thompson,[6] concerning "bolting systems" because his theory was not demonstrated to be reliable. When examining the admissibility of an expert's testimony the court may consider:

> (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.[7]

Whether to admit or exclude expert testimony is within the sound discretion of the trial court.[8]

Dr. Hahn's opinion in this case, that over-torquing can cause brake failure, was confirmed by the testimony of mechanics and he produced extensive literature on the subject. We find no error.

We do not believe that the damages for past pain and suffering and future pain and suffering are excessive. As stated in Stanley v. Caldwell:[9]

> We have many times written that no rule can be laid down by which damages for pain

[6] Ky., 11 S.W.3d 575 (2000).

[7] Goodyear, supra, at 578-579.

[8] Id. at 577.

[9] Ky., 274 S.W.2d 383, 385 (1955).

> and suffering in a personal injury case may be accurately measured. At best, what is fair and right can only be left up to the judgment and discretion of the jury and this Court will not interfere with the verdict they render unless the assessment of damages was influenced by passion and prejudice, or it is so unreasonable as to appear at first blush disproportionate to the injuries sustained.

The injuries to Setser, a woman in her early thirties, are severe requiring daily injections and medications. There is medical testimony that within a reasonable degree of medical probability, her injuries are permanent. The award of past and future medical expenses was based on a proper instruction and the evidence supports the verdict.[10]

Finally, Dr. Hahn, when talking about the salvage of Setser's automobile, mentioned that he took a photograph because "insurance companies grab cars." Appellant's counsel objected and the court agreed. No further mention of insurance was made. There was no motion for a mistrial or other corrective action by the court. Any error was not preserved.

The judgment of the circuit court is affirmed.

[10] See Southard v. Hancock, Ky. App., 689 S.W.2d 616 (1985).

ALL CONCUR.

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