

RENDERED: December 30, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2003-CA-002674-MR

KAREN WILSON AND VERNA RICHARDS

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN D. MINTON, JR., JUDGE  
ACTION NO. 01-CI-00100

BRANDON CUMMINGS

APPELLEE

AND

NO. 2003-CA-002696-MR

DIANA B. SAWYERS

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN D. MINTON, JR., JUDGE  
ACTION NO. 01-CI-00100

BRANDON CUMMINGS

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; JOHNSON, JUDGE; AND MILLER, SENIOR  
JUDGE.<sup>1</sup>

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

JOHNSON, JUDGE: Karen Wilson and Verna Richards in Case No. 2003-CA-002674-MR have appealed from a judgment of the Warren Circuit Court entered on September 18, 2003, which confirmed a jury's verdict that apportioned to Wilson 25% of the liability for the cause of any damages to Wilson and Richards as the result of a three-vehicle accident and awarded Wilson and Richards zero in damages. Diana B. Sawyers in Case No. 2003-CA-002696-MR has appealed from the same judgment claiming that the jury's failure to award her any damages was a result of passion or prejudice. Having concluded that Wilson was not entitled to a directed verdict on liability, that the jury was properly instructed, and that there was sufficient evidence to support the jury's apportionment of liability, we affirm in part in Case No. 2003-CA-002674-MR. Having concluded that the evidence was undisputed that the accident caused certain injuries to Wilson and Richards which resulted in some medical expenses and some pain and suffering, we reverse in part on the issue of damages for medical expenses and pain and suffering for Wilson and Richards and remand for entry of a judgment notwithstanding the verdict on the medical expenses related to the undisputed injuries of Wilson and Richards and a new trial on their claims for the pain and suffering for those undisputed injuries. Having concluded that the jury's award of zero damages to Wilson for her alleged lost wages and property damage was appropriate

under the evidence, we affirm on those issues. Having further concluded that the jury's award of zero damages to Sawyers was appropriate under the evidence, we affirm in Case No. 2003-CA-002696-MR.

This case arose out of a three-vehicle accident occurring on July 3, 2000, on Fairview-Boiling Springs Road in rural Warren County, Kentucky. The undisputed evidence showed that 17-year-old Brandon W. Cummings was driving a Honda Civic owned by his aunt in a southerly direction on Fairview-Boiling Springs Road at the time of the accident. When Cummings topped a "blind" hill, at a speed of approximately 60 miles per hour in a 55 miles per hour speed zone, which had posted a 35 miles per hour speed advisory, Sawyers was northbound on Fairview-Boiling Springs Road in her Chevrolet Blazer. At the time of impact, Sawyers had either completely stopped, had slowed and almost stopped, or had stopped and had slowly started moving again as she was making a left turn onto Norris Road. Fairview-Boiling Springs Road is a two-lane road which generally runs in a north-south direction and Norris Road is also a two-lane road which generally runs westward from its intersection with Fairview-Boiling Springs Road.

The evidence showed that when Cummings's vehicle collided with Sawyers's vehicle, Sawyers's vehicle was approximately 18 inches over the "imaginary" center line of

Fairview-Boiling Springs Road, as she was in the process of making a left turn onto Norris Road. At this same time, Wilson was also driving north on Fairview-Boiling Springs Road in her Honda Accord and had been following Sawyers for about one mile before the accident. Richards, who is Wilson's mother, was riding in the passenger seat of Wilson's vehicle. There was disputed testimony whether, as Sawyers was attempting to turn left, Wilson stopped her vehicle a few feet behind Sawyers's vehicle, or whether Wilson attempted to pass Sawyers on the right side of the road. Since Norris Road ends at Fairview-Boiling Springs Road, for Wilson to have passed Sawyers on the right side, she would have had to have driven onto the shoulder of Fairview-Boiling Springs Road and into the entrance to a gravel driveway leading to a farm field.

A jury trial was held on September 9 and 10, 2003, in the Warren Circuit Court.<sup>2</sup> At trial the disputed issues regarding liability included the speed of Cummings's vehicle and the locations of Cummings's, Sawyers's, and Wilson's vehicles at the time of the collision. As to their damage claims, all of Sawyers's alleged damages were challenged and most, but not all, of Wilson's and Richards's alleged damages were disputed.

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<sup>2</sup> Wilson and Richards had also sued Sawyers, but they had settled before trial. Richards did not sue Wilson. Cummings counterclaimed against Sawyers, but voluntarily dismissed his claim before trial. Thus, the remaining claims were by Sawyers, Wilson, and Richards against Cummings.

The jury returned a verdict which apportioned liability against Cummings at 37%, Sawyers at 38%, and Wilson at 25%. The jury did not award Sawyers, Wilson, nor Richards any amount for their alleged damages. Sawyers filed a motion for a judgment notwithstanding the verdict, motion for new trial, and motion to alter, amend, or vacate judgment on September 25, 2003, and Wilson and Richards filed a joint motion for a judgment notwithstanding the verdict, motion for new trial, and motion to alter, amend, or vacate judgment on September 26, 2003. The trial court denied all the motions in an order entered on November 20, 2003. This appeal followed.

Wilson claims that the trial court erred by denying her motion for a directed verdict as to Cummings's liability and by instructing the jury as to her possible negligence because at the time of impact "she owed no duty to the other motorists" and that "[s]he certainly could not have violated any duties under these uncontroverted facts." In her brief, Wilson states as follows:

At its most basic level, Karen Wilson could not be liable for this accident because she owed no duty to the other motorists. A motorist stopped in traffic and not intending to change her lane of travel has no duties to motorists ahead of her on the roadway. Such a motorist has no duty to these motorists because when stopped at a standstill, there is nothing that she can do, or nothing that she could fail to do, that would in any manner affect those

motorists farther on down the roadway. Mr. Cummings never once attempted to suggest the existence of a specific duty incumbent upon Karen. He did not, because he cannot. Without a legal duty, there can accordingly arise no negligence. If there is no potential for negligence, then it is improper for jury instructions to permit apportionment of liability on such individual [emphases added].

The obvious flaw in Wilson's argument, as pointed out by Cummings, is that the location of Wilson's vehicle at the time of impact was disputed. Sawyers testified that as she was attempting to turn left, Wilson pulled to her right onto a "little driveway" to perhaps try to come around her on the right shoulder.<sup>3</sup> Furthermore, photographs taken at the accident scene show that after the collision with Sawyers's vehicle, the front quarter section of Wilson's vehicle was sitting off the edge of Fairview-Boiling Springs Road and on the farm driveway. The pictures also show the rear of Sawyers's vehicle crashed into

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<sup>3</sup> While Wilson contends there was no evidence to support a finding that she had pulled to the right side of Sawyers's vehicle, we quote from Sawyers's trial testimony as follows:

[Wilson] had pulled to the right some. There was like a little driveway there, like they were, I don't know, if she was going to come around me on the right, or what. But, they had pulled to the right and when it [Cummings's vehicle] shoved me backwards and sideways, it pushed me into their car.

. . .

I think when I was going to make my left hand turn she was coming around me. Of course, she was traveling on down the road.

Wilson's vehicle striking the vehicle from the left front wheel to the driver's side door, not in the front of the hood.

Thus, there was sufficient evidence for the jury to find that Wilson had not stopped on Fairview-Boiling Springs Road in her lane of traffic as Sawyers attempted to turn left, but instead that Wilson attempted to pass Sawyers on the right shoulder, and that Wilson's attempt to pass on the right shoulder violated her duty "to exercise ordinary care for her own safety[.]" Wilson's argument that she had no duty is contrary to established law that an operator of a motor vehicle has the general duty to exercise ordinary care for one's own safety and for the safety of others.<sup>4</sup>

While Wilson's objection to the specific duties in the instruction may be well-founded,<sup>5</sup> the instruction as to the

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<sup>4</sup> Wemyss v. Coleman, Ky., 729 S.W.2d 174, 180 (1987). See also Hainline v. Hukill, Ky., 383 S.W.2d 353, 355 (1964) (noting that KRS 189.290 places a duty on a driver to exercise ordinary care for her own safety and the safety of others).

<sup>5</sup> Jury Instruction No. 3 provided as follows:

It was the duty of Karen Wilson (Wilson) in driving her vehicle to exercise ordinary care for her own safety and for the safety of other persons using the highway, and this general duty included the following specific duties:

- A) To keep a lookout ahead for other persons and vehicles in front of her or so near her intended line of travel as to be in danger of collision, and not to follow another vehicle more closely than was reasonable and prudent, having regard for the speed of the respective vehicles and

general duty was clearly appropriate. As our Supreme Court noted in Wemyss, the "'general duty' . . . is the duty to exercise ordinary care, and properly drafted instructions utilize 'specific duties' as imposed by statutes only as amplification of the 'general duty,' and not as the source of such duty."<sup>6</sup> Accordingly, we conclude that the trial court

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for the traffic upon and condition of the roadway;

B) To have her vehicle under reasonable control;

AND

C) To drive at a speed no greater than was reasonable and prudent, having regard for the traffic and for the condition and use of the roadway.

<sup>6</sup> Wemyss, 729 S.W.2d at 180. (We note that KRS 189.342 (2) and (3) would have provided a statutory basis for a specific duty. KRS 189.342 (2) and (3) state as follows:

(2) The operator of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:

(a) When the vehicle overtaken is making or about to make a left turn;

(b) Upon a roadway with unobstructed pavement of sufficient width for two (2) or more lines of vehicles moving lawfully in the direction being traveled by the overtaking vehicle.

(3) The operator of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movements safely. Such movement shall not be made by driving off the roadway unless passing vehicle comes to a complete stop and such movement may be made safely.

Further, KRS 189.290 provides in part that "[t]he operator of any vehicle upon a highway shall operate the vehicle in a careful manner, with regard for the safety . . . of . . . other vehicles upon the highway.")



correctly denied Wilson's motion for a directed verdict as to liability and that the jury was properly instructed.

As to Wilson's and Richards's claims that the trial court erred by not granting them a judgment notwithstanding the verdict or a new trial on the issue of damages, we agree in part with their contentions. The evidence that Wilson received a blow to her head from the accident resulting in bruising, swelling, and a knot on the left side of her head was undisputed. Similarly, there was undisputed evidence that Richards received a cut to her forehead from the accident. There was also no dispute that Wilson and Richards received reasonable medical treatment for those obvious injuries, including being taken to the hospital by an ambulance and appropriate emergency room treatment.

In Davis v. Graviss,<sup>7</sup> our Supreme Court explained the test for a trial court to follow when reviewing an award of actual damages for excessiveness or inadequacy:

When presented with a motion for a new trial on grounds of excessive damages, the trial court is charged with the responsibility of deciding whether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This is a discretionary

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<sup>7</sup> Ky., 672 S.W.2d 928 (1984).

function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.<sup>8</sup>

The Court went on to state the appropriate standard for appellate review on the issue of excessive or inadequate damages:

"Upon reviewing the action of a trial judge in (granting or denying a new trial for in excessiveness), the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge . . . to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous."<sup>9</sup>

Accordingly, if the evidence was not so conclusive as to entitle the plaintiffs to an award of damages as a matter of law, the trial court did not err by denying a motion for a judgment notwithstanding the verdict or a motion for a new trial.<sup>10</sup>

In Sutton v. Combs,<sup>11</sup> the Court characterized a judgment notwithstanding the verdict as being a tool used by the trial court "to save the time and trouble involved in a lengthy jury determination when (1) there is a complete absence of

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<sup>8</sup> Id. at 932. See also Miller v. Swift, Ky., 42 S.W.3d 599, 601 (2001).

<sup>9</sup> Davis, 672 S.W.2d at 932 (quoting Prater v. Arnett, Ky.App., 648 S.W.2d 82, 86 (1983)). See also Burgess v. Taylor, Ky.App., 44 S.W.3d 806, 813 (2001).

<sup>10</sup> Withers v. Berea College, Ky., 349 S.W.2d 357, 359 (1961).

<sup>11</sup> Ky., 419 S.W.2d 775, 777 (1967).

pleading or proof on an issue or issues material to the cause of action or defense, or (2) there are no controverted issues of fact upon which reasonable men could differ." In Hazelwood v. Beauchamp,<sup>12</sup> this Court recognized that where the plaintiff's "hand was crushed and mangled" in a hay bailer, the proof of pain and suffering was so compelling that the award of "0" was clearly inadequate. In that case, the failure to grant a new trial on damages was clearly erroneous. Likewise, the Court in Ford Motor Co. v. Zipper,<sup>13</sup> stated that a claimant is entitled to compensation for damages directly related to the injuries received in the accident, but not for damages relating to a preexisting condition. Although a zero verdict is not always improper, it is improper for the jury to return a zero verdict where a compensable injury exists.<sup>14</sup> The Court in Davis v. Lucas,<sup>15</sup> stated that a jury's failure to award damages will not be set aside unless the amount of the award is "so disproportionate as to strike the mind . . . as . . . result[ing] from passion, prejudice, corruption or mistake on the part of the jury."

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<sup>12</sup> Ky.App., 766 S.W.2d 439 (1989).

<sup>13</sup> Ky., 502 S.W.2d 74, 79 (1973).

<sup>14</sup> Id.

<sup>15</sup> Ky., 432 S.W.2d 411, 413 (1968).

Since Wilson and Richards suffered at least some obvious and undisputed injuries and since they received at least some undisputed, reasonable medical care in the form of ambulance transportation and emergency room treatment, we must conclude that the jury's award of zero damages for Wilson and Richards was clearly inadequate. Thus, based on the evidence presented at trial, the trial court erred by denying Wilson's and Richards's motions for a judgment notwithstanding the verdict with regard to their undisputed medical expenses for the undisputed, obvious injuries sustained in this accident. Accordingly, we reverse the trial court's judgment with regard to Wilson's and Richards's claim for the medical expenses directly related to their obvious and undisputed injuries from the accident and remand this matter for entry of a judgment for the amount of those expenses.<sup>16</sup>

Similarly, the trial court erred by denying Wilson's and Richards's motions for a new trial on their undisputed claims of pain and suffering related to the undisputed injuries just discussed. On remand, the trial court shall order a new trial on Wilson's and Richards's claims for pain and suffering

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<sup>16</sup> We realize that counsel stated at oral arguments that as a practical matter the amount of medical expenses to be awarded will not exceed the amounts of no-fault insurance benefits paid by the insurance company. However, if this matter is not settled and is tried again on the issue of pain and suffering, it may be necessary for the trial court to assign a value to these undisputed medical expenses.

related to these undisputed injuries. All of Wilson's and Richards's other claims for medical expenses and pain and suffering were disputed and the evidence did not compel an award on those claims.<sup>17</sup> Hence, we affirm in part and reverse and remand in part.

As to Wilson's claim that the trial court erred by denying her motion for a judgment notwithstanding the verdict or a motion for a new trial on her damage claims for lost wages of approximately \$8,556.16 for missed work from July 5, 2000, to October 16, 2000, and for property damage to her automobile of approximately \$2,200.00, we disagree. Since the severity of Wilson's injuries was disputed, it was within the province of the jury to determine whether the injuries that Wilson suffered from the accident caused her to miss any work and to lose any income. The trial court did not err by refusing to set aside the jury's verdict of zero damages for lost wages.

As to Wilson's claim for property damage, the pictures of Wilson's vehicle that were introduced at the trial show that she received some property damage. However, her only proof of that damage was that the vehicle was valued at between \$2,000.00 and \$2,200.00 immediately before accident, that she had not driven the vehicle since the accident, that she thought the front axels of the car were broken, and that the car was

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<sup>17</sup> Withers, 349 S.W.2d at 359.

inoperable and parked in a field. Wilson did not present any evidence as to the fair market value of her vehicle immediately after the accident. The jury was instructed that it could award Wilson "[t]he difference between the fair market value of her vehicle immediately before the accident and its fair market value immediately thereafter, not to exceed \$2,200.00." Since Wilson failed to present any proof as to the fair market value immediately after the accident, it was not error for the jury to award Wilson zero for the damage to her vehicle.<sup>18</sup>

In Case No. 2003-CA-002696-MR, Sawyers claims that the jury awarded her inadequate damages for her medical expenses and pain and suffering because the jury was influenced by passion or prejudice. But, unlike Wilson and Richards, all of Sawyers's medical expenses were disputed. Sawyers was not transported to the hospital by an ambulance and she did not go the emergency room until later than evening. Also, Sawyers had experienced pre-existing injuries that Cummings contended were the cause of her medical problems.

Sawyers concedes that the evidence regarding her damage claims were disputed, but she contends "that passion and prejudice was obvious on the part of this jury [and] [t]he extent of that passion and prejudice was evidenced by the rulings on the clearly objective damages suffered by Richards

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<sup>18</sup> Niagara Fire Insurance Co. v. Huffman, Ky., 253 S.W.2d 617, 619 (1952).

and Wilson.” Sawyers has not cited any legal authority for her contention that our determination that the jury’s award to Wilson and Richards was in part inadequate requires a conclusion that the jury’s determination to not award her any damages must necessarily have been the result of passion and prejudice. We must reject this argument since a determination of whether a particular damage award is inadequate must be based on the evidence of record pertaining to each element of damage. Since there was disputed evidence as to all of Sawyers’s damage claims, the evidence of record did not compel an award in her favor.<sup>19</sup> Thus, the trial court did not err by denying Sawyers’s motion for a judgment notwithstanding the verdict and a motion for a new trial. Accordingly, we affirm the trial court’s judgment as to Sawyers.

Based on the foregoing reasons, in Case No. 2003-CA-002674-MR, we reverse and remand on the undisputed medical expenses related to Wilson’s and Richards’s obvious injuries and the pain and suffering related to those injuries, and affirm on all other issues. We affirm in Case No. 2003-CA-002696-MR.

ALL CONCUR.

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<sup>19</sup> Withers, 349 S.W.2d at 359.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANTS KAREN WILSON AND  
VERNA RICHARDS:

David T. Sparks  
Bowling Green, Kentucky

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT DIANA SAWYERS:

Kenneth R. Haggard  
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Michael K. Bishop  
Bowling Green, Kentucky