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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001804-MR

LORRI ROGERS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 04-CI-00614

GIANNA BELLUSCIO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

KELLER, JUDGE: Following a jury trial, Lorri Rogers was awarded only a portion of the past medical expenses she claimed to have incurred as a result of a motor vehicle accident, $4000 for her past pain and suffering, and nothing for pain and suffering in the future. Rogers has appealed from the Fayette Circuit Court's Judgment memorializing

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

the jury's decision as well as from the order denying her motions for a judgment notwithstanding the verdict or for a new trial. We affirm.

On the morning of August 18, 2000, Rogers, a mother of two young children, was involved in a motor vehicle accident when the Saturn she was driving was rear ended by the vehicle driven by Gianna Belluscio, a high school student. Immediately before the accident, Rogers was stopped on Clays Mill Road waiting to turn left. Belluscio misjudged the situation, thought Rogers had started her left-hand turn, and was unable to stop in time to avoid a collision. Both drivers, who had been wearing seatbelts, exited their vehicles, determined that no one was hurt, and then pulled their cars onto a side street to wait for the police. Only minor damage was visible on the vehicles.

While Rogers did not believe she had been injured, over the course of the day, her back and neck because increasingly more painful. She went to the emergency room at Central Baptist Hospital that evening. She followed up with her primary care physician, Dr. Lee Ricketts, who prescribed muscle relaxers, narcotic pain medication, and physical therapy. A neurological consultation in 2001 revealed that there were no neurological deficits causing her continuing pain. Rogers reported that her pain never went away completely. She continued to try to manage her pain day-to-day, but began experiencing an increase in her pain level in 2004. At that time, Dr. Ricketts referred Rogers to the Samaritan Pain Treatment Center, where she began pain management treatment with Dr. Luis Vascello. From July 2004 through April 2005, Rogers underwent several procedures, including blocks to determine the origin of her pain and then

radiofrequency treatment (RF), which is a longer lasting, not but permanent, treatment designed to deaden the nerve endings. While the RF treatments were successful on the left, Rogers had a bad reaction when Dr. Vascello attempted to perform the procedure on her right side. Dr. Vascello ended the procedure at that point, and has not attempted it again.

Rogers' medical records reveal that she made several complaints of neck pain, back pain, and headaches prior to the 2000 motor vehicle accident. Furthermore, after the accident, Rogers and her family took several vacations, including driving to Disney World twice and to Washington, D.C. once. Rogers also rode a roller coaster at Kings Island. In May 2001, Rogers started a Pampered Chef business, which included extensive travel by car. In December 2004, she returned to work as a respiratory therapist, as she had planned to do prior to the accident.

On February 13, 2004, Rogers filed a complaint in Fayette Circuit Court seeking damages for permanent injuries she received in the motor vehicle accident. She sought damages for past and future pain and suffering, for past and future medical expenses, and for the permanent impairment of her power to earn money in the future. In total, she demanded close to $600,000 in damages, including $47,767.86 for past medical expenses. At trial, the circuit court granted Rogers a directed verdict on liability, as Belluscio conceded that she had breached her duty during her opening statement. However, the circuit court denied Rogers' motion for a directed verdict related to past medical expenses. Two medical witnesses, Dr. Ricketts and Dr. Vascello, testified that

such medical treatment was reasonable and medically necessary. However, the circuit court determined that the jury had a right to examine the medical bills and determine whether the entire amount claimed was reasonable and necessary. At the conclusion of the trial, the jury returned a verdict awarding Rogers $4,000 in past pain and suffering, $0 for future pain and suffering, $0 for permanent impairment of her power to earn money in the future, $6,275.84 for past medical expenses, and $0 for future medical expenses. The circuit court entered a Judgment on June 5, 2006, memorializing the jury's verdict and awarded Rogers $4,000 after crediting Belluscio for the $10,000 in no-fault PIP benefits paid on behalf of Rogers.

Rogers moved the circuit court for a JNOV or for a new trial on the issue of past medical expenses, asserting that Belluscio submitted no proof to avoid a directed verdict on that element of damages. She argued that the only medical experts who testified were her treating physicians, and that both testified that their treatment was reasonable, necessary and related to the motor vehicle accident. In order to make the award it did, Rogers argued that the jury had to have disregarded the unrefuted medical evidence based solely on the argument of Belluscio's attorney. In response, Belluscio argued that the jury's verdict was not based upon passion or prejudice, but was based upon evidence elicited at trial, including Rogers' denial of any injury at the time of the accident, her complex medical history, the limited damage to her car, and her post-accident activities. She asserts that the jury could have determined that Rogers had suffered from a temporary muscle strain that healed within months. The circuit court

denied Rogers' motions in an order entered August 2, 2006, stating that: "[H]aving the opportunity to observe the plaintiff and to hear firsthand all of the other evidence in arriving at their verdict, the jury was not bound to accept as the absolute truth the testimony of the plaintiff or her doctors relating to her injuries." This appeal followed.

On appeal, Rogers raises essentially two issues: 1) that she was entitled to a JNOV on the total amount of her past medical expenses, less the $10,000 no-fault offset, and that the jury should not have been permitted to speculate on past medical expenses when no medical evidence was offered to counteract the opinions of her treating physicians; and 2) that she should have been granted a new trial on damages for past and future pain and suffering, as the jury disregarded the evidence or the instructions of the circuit court. Belluscio disputes each of the issues Rogers raises. We shall address each issue in turn.

ANALYSIS

A. DENIAL OF JNOV ON PAST MEDICAL EXPENSES

Roger's first argument addresses whether the circuit court properly denied her motion for a JNOV. She asserts that she submitted unrebutted proof through her medical experts that the treatments were both reasonable and necessary, and that Belluscio failed to rebut the reasonableness of the bills.

Kentucky's Civil Rules of Procedure govern the filing of a motion for a JNOV or for a new trial. CR 50.02 provides:

> Not later than 10 days after entry of judgment, a party who has moved for a directed verdict at the close of all the

> evidence may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party within 10 days after the jury has been discharged may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

In CR 50.01, the Civil Rules address motions for a directed verdict:

> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

The Court of Appeals addressed these Rules in *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985):

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no

> disputed issue of fact exists upon which reasonable men could differ.

Rogers first directs our attention to KRS 304.39-020(5)(a), which defines a "medical expense" as "reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, physical rehabilitation, rehabilitative occupational training, licensed ambulance services, and other remedial treatment and care. . . . There shall be a presumption that any medical bill submitted is reasonable." She then cites to four cases for the proposition that the submission of a medical bill is enough to establish its reasonableness. We have reviewed those cases, and agree with Belluscio's interpretation. The cases of *Daugherty v. Daugherty*, 609 S.W.2d 127 (Ky. 1980), and *Townsend v. Stamper*, 398 S.W.2d 45 (Ky. 1965), both deal with evidentiary issues concerning the admissibility of medical bills. Likewise, the cases of *Bolin v. Grider*, 580 S.W.2d 490 (Ky. 1979), and this Court's unpublished opinion in *Green v. Jackson*, 2002-CA-001127-MR (November 7, 2003), address whether the plaintiffs' medical expenses exceeded the statutory threshold. None of the cases Rogers cited address the issue in this case related to causation.

In addition to the cases Rogers cited, we have reviewed *Carlson v. McElroy*, 584 S.W.2d 754 (Ky.App. 1979), an opinion cited by Belluscio. In *Carlson*, this Court stated:

> The fact [that] Carlson received a directed verdict on liability does not necessarily mean she was entitled to some damages, if, as here, the jury believed she was not injured, or, if so, she was injured as a result of some other cause. In any event, the jury was not bound to accept as the absolute truth

> the testimony of either Carlson or her doctors relating to her injuries, and having the opportunity to observe Carlson giving her testimony and to hear first hand all the other evidence in arriving at their verdict, the jury could have believed Carlson grossly exaggerated the extent of her injuries, if any, or that her injuries were not as a result of this accident.

Id. at 756.

In the present matter, the record supports the jury's decision to award less than the amount requested as past medical expenses. The circuit court properly held that the jury was entitled to determine whether the expenses were reasonable and necessary, which was reflected in the jury instructions. The instructions further required the jury to find that Rogers sustained the injuries as a direct result of the accident, but could also compensate her for losses due to the activation or aggravation of any preexisting condition. Based upon the facts of this case, the jury reasonably determined that Rogers should not be compensated for the entirety of the past medical expenses she claimed. The vast majority of the claimed expenses represented bills for pain management treatment, which totaled approximately $35,000. Rogers did not even seek this treatment until July 2004, close to four years after the accident and several months after she filed the subject lawsuit. Furthermore, as Belluscio pointed out, Rogers continued with her daily life, including raising her children, beginning a business that included travel by automobile, participating in family vacations requiring driving long distances, and going back to work in her chosen profession as a respiratory therapist. The jury was entitled to consider the entirety of the evidence and testimony in making its decision. Based upon that evidence, the jury reasonably determined that Rogers was not entitled to be awarded

the full amount of past medical expenses, despite the medical testimony that all of the treatment she underwent was reasonable and necessary, and related to the 2000 accident.

We hold that the circuit court did not commit any error or abuse its discretion in denying Rogers' motion for a JNOV on the award of past medical expenses.

B. NEW TRIAL ON PAIN AND SUFFERING

Next, Rogers argues that she is entitled to a new trial based upon the jury's disregard of the evidence, and that the circuit court erred in denying her this relief. The grounds for a new trial are listed in CR 59.01 as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:
>
> (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
>
> (b) Misconduct of the jury, of the prevailing party, or of his attorney.
>
> (c) Accident or surprise which ordinary prudence could not have guarded against.
>
> (d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.
>
> (e) Error in the assessment of the amount of recovery whether too large or too small.
>
> (f) That the verdict is not sustained by sufficient evidence, or is contrary to law.
>
> (g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have

> discovered and produced at the trial.
>
> (h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

Our standard of review from the denial of a motion for a new trial "is limited to whether the trial court's denial of [the] motion was clearly erroneous[.]" *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001).

In the present case, Rogers has focused on subsection (d) of CR 59.01, and asserts that the jury's award of damages for pain and suffering, both past and future, was inadequate. The jury awarded $4000 in past pain and suffering and $0 in future pain and suffering. In *Miller*, the Supreme Court addressed the adequacy of a jury's pain and suffering award, holding that "if the jury's verdict of zero damages for pain and suffering is supported by [the] evidence, the trial court was not clearly erroneous in denying Millers' motion for a new trial." *Id*. at 601. Relying upon its earlier opinion of *Cooper v. Fultz*, 812 S.W.2d 497, 502 (Ky. 1991), the *Miller* Court further stated, "*Whether the award represents* 'excessive or *inadequate damages* appearing 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), *is a question dependent on the nature of the underlying evidence*." *Miller*, 42 S.W.3d at 602 (emphasis in original).

We agree with Belluscio that the circuit court properly denied Rogers' motion for a JNOV on her award, or lack of award, for past and future pain and suffering. The jury agreed that Rogers was entitled to an award for past pain and suffering damages, but found that she was entitled to considerably less than she had requested. The medical

evidence of record certainly supports that Rogers experienced pain following the accident in that she sought and received treatment for her injuries. However, the record is clear that Rogers was able to continue with her life, including participating in several family vacations, trips to theme parks, as well as returning to work first as a Pampered Chef associate and later in her trained profession as a respiratory therapist. Based upon the evidence of record, the jury's decision with regard to damages for pain and suffering does not appear to be the result of passion or prejudice, and does not elicit shock and surprise. Rather, the decision represents the jury's determination that the injuries Rogers sustained in the accident, while causing her pain at first and necessitating treatment, resolved over the first few months following the accident. Accordingly, the circuit court's decision to deny Rogers' motion for a new trial is not clearly erroneous.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas K. Herren
Lexington, Kentucky

BRIEF FOR APPELLEE:

E. Douglas Stephan
Lexington, Kentucky