

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001396-MR

ROY TURNER

APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA H. ADAMS, JUDGE
ACTION NO. 04-CI-00672

DEREK W. FUGATE

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE AND NICKELL, JUDGES; GUIDUGLI, SENIOR JUDGE¹.

NICKELL, JUDGE: Roy Turner (“Turner”) appeals from the Madison Circuit Court’s June 21, 2006, denial of his motion for a new trial under Kentucky Rules of Civil Procedure (“CR”) 59.01. Because Turner has not demonstrated clear error, we affirm the trial court’s ruling.

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 Kentucky Revised Statutes (KRS) 21.580.

This case arises from a December 28, 2001, motor vehicle collision between vehicles driven by John Turner (“John”) and Derek W. Fugate (“Fugate”). Turner was a passenger in a 1987 Toyota pickup being driven by John, his cousin. Fugate admitted responsibility² for striking John’s truck, but at a two-day jury trial, contested Turner’s claim of nearly \$800,000.00 in damages for past and future medical expenses, lost wages, mental and physical suffering, and permanent physical impairment.

The facts surrounding the collision itself are undisputed. John testified he had been traveling on Interstate 75 when he maneuvered onto the Boonesborough exit ramp. He came to a complete stop at the end of the ramp and waited for traffic to clear so he could turn right onto Kentucky Highway 627. As a pickup truck crossed in front of him, John felt a jolt and his vehicle moved forward a few feet. Initially, John did not know what had happened but thought he might have hit the pickup that had just crossed in front of him. Turner, however, said they had been rear-ended. Upon close inspection, the only damage to John’s truck was a slightly bent rear bumper which was so minimal he was still able to drive the truck away from the scene. During the time he continued to own the truck he never had the bumper repaired.

Fugate, driving a mini-van, exited Interstate 75 at the Boonesborough exit just behind John. Fugate saw John’s pickup in front of him and came to a stop. He looked to the right and then to the left, and when he saw no approaching vehicles he began pulling forward and struck John’s truck. It was hard to detect any damage to

² Turner was granted a partial summary judgment in the pre-trial conference order dated December 5, 2005.

Fugate's mini-van, but there may have been a small scratch under the grill. The mini-van's airbags did not deploy. Fugate suffered no injuries and was able to drive away from the scene.

John was forty-seven at the time of the collision and claimed no injuries. He testified that a day or so after the impact he had a crick in his neck but that discomfort quickly dissipated and he noticed no other ill effects. Turner was fifty years of age at the time of the collision. Immediately after the impact, he was able to exit the truck and walk without assistance. His back felt sore and pinched, but he declined help at the scene when asked if he needed medical assistance or an ambulance. He attributed his soreness to old age. After the collision, Turner and his cousin tried to resume moving siding and sewage pipe to a new farm Turner had purchased. However, bending became too painful for Turner so he stopped.

Turner had no history of lower back pain or leg pain prior to the collision. However, a week after the incident, his pain had intensified to the point that his wife made him go to a doctor. At Pattie A. Clay Regional Medical Center on January 4, 2002, Turner mentioned having been in a motor vehicle accident and complained of lower back pain. He also described weakness, numbness and tingling in his right leg. A medical imaging report from that day revealed "L4/5 disc space narrowing compatible with degenerative disc disease versus herniated disc." The report also revealed "no fractures or subluxations;" "some degenerative spurring anteriorly in the lower thoracic spine;"

and “pelvic calcifications which appear vascular.” At his wife’s urging, and over his objection, Turner received an injection of Toradol and was sent home.

Turner’s continuing search for pain relief included visits to several medical doctors, a neurosurgeon, a chiropractor, and a physical therapist. Along the way he tried various medications including anti-inflammatories, muscle relaxers, and over-the-counter drugs, as well as seven to nine epidural injections. He also used an electrical stimulation unit, a lumbar roll, and a cane. Surgery was recommended in 2002, but Turner declined because he was in his first year as a middle school teacher and football coach and feared job termination if he underwent surgery. In January 2006, after achieving tenure, he underwent a diskectomy to remove part of a herniated disc to relieve a pinched nerve. The surgery was performed under anesthesia, it lasted approximately one hour, and it required an overnight hospital stay. In May 2006, five months after the surgery, Turner was still using a cane occasionally. In addition to the pain described by Turner, objective medical evidence established Turner suffered from diabetes, degenerative disc disease, osteophytes (bone spurs), and spinal stenosis.

Turner filed suit against Fugate on June 4, 2004, alleging Fugate’s negligent driving caused the collision that seriously injured him. Fugate answered the complaint on May 17, 2005, denying any wrongdoing. Following a pre-trial conference in December 2005, Turner’s motion for a partial summary judgment as to Fugate’s negligence was granted and the parties prepared for trial on the limited issue of damages. A jury trial commenced on May 24, 2005, and concluded the following day. Jurors

awarded Turner zero on all five categories of damages submitted to them for consideration. Turner moved for a new trial on June 5, 2006, arguing the jury's verdict was inconsistent with the substantial and undisputed evidence developed at trial and that the verdict was the result of passion, prejudice or disregard of the trial court's instructions. Judgment was entered in conformity with the jury's verdict on June 7, 2006. Turner's motion for a new trial was denied without comment on June 8, 2006. This appeal followed.

Turner alleges the trial court erred in denying his motion for a new trial. CR 59.01(d) authorizes a circuit court to grant a new trial for inadequate damages when a jury verdict appears to have resulted from passion, prejudice, or a disregard of the evidence. Similarly, CR 59.01(f) permits a new trial to be granted when a jury's "verdict is not sustained by sufficient evidence, or is contrary to law." Turner alleged both grounds in his motion. As an appellate court, we review the circuit court's denial of the new trial motion for an abuse of discretion and will reverse only if there is clear error. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001); *Rippetoe v. Feese*, 217 S.W.3d 887, 890 (Ky.App. 2007) (citing *Thomas v. Greenview Hospital Inc.*, 127 S.W.3d 664 (Ky.App. 2004) *overruled on other grounds by Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005)). Our review is guided by several well-established principles of law. For example, an award of zero damages is not inadequate when the evidence is such that one could conclude the defendant did not cause the plaintiff's injury. *See Thomas, supra*. Whether Fugate caused Turner's injuries was vigorously contested at trial. Additionally, a jury is

not required to award damages to a plaintiff just because a defendant admits fault in causing a collision. *Carlson v. McElroy*, 584 S.W.2d 754, 756 (Ky.App. 1979). Finally, jurors are “not bound to accept as the absolute truth the testimony of either [Turner] or [his] doctors relating to [his] injuries.” *Id.*

At trial, Turner claimed five categories of damages: (1) past medical expenses for lower back and leg pain; (2) lost wages; (3) future impairment of earning ability; (4) future medical expenses; and (5) past and future pain and suffering. Our review of the record indicates a material issue of fact existed as to whether Turner was injured by the collision at all since it is entirely possible that Turner’s symptoms resulted from a host of other health factors including naturally occurring degenerative disease, diabetes, osteophytes, spinal stenosis, and the stresses of daily activities. While it is a close call, jurors could have reached the zero damages award by reasonably weighing the evidence and not necessarily as a result of passion or prejudice. Therefore, we hold the circuit court did not abuse its discretion in denying Turner’s new trial motion.

With regard to Turner’s claim for past medical expenses, there was proof from which a jury could have found the claimed expenses, totaling \$36,319.55, were reasonably incurred as a result of the collision. However, there was also proof from which they could, and did, reach an opposite conclusion. Based upon Turner’s testimony alone, one would believe his health changed dramatically after the collision. He testified that before the December 28, 2001, collision he enjoyed an active outdoor life, taught middle school social studies, coached football, tutored homebound students, helped his

wife around the house, gardened, and operated a backhoe and a Bobcat both as a side business and for friends and family. After the collision, however, he described a life marred by constant pain. He can no longer walk the property lines of his farm. He still drives forty minutes to school each morning and each evening, but he gave up tutoring homebound children because it was too physically demanding. Likewise, he decided to give up coaching middle school football because he could no longer demonstrate the appropriate stances and techniques to the players and he could not lift them if they were injured. Similarly, he closed his heavy equipment business and sold his backhoe and Bobcat because he could no longer maintain them.

Jurors, however, did not hear Turner's testimony in a vacuum. They also heard from Dr. Leon Ravvin,³ the neurosurgeon who performed Turner's diskectomy in January, 2006, and from Dr. Timothy Kriss,⁴ a neurosurgeon who performed an independent medical examination (IME) of Turner at the request of the defense on March 2, 2006. Jurors also had copies of Turner's medical records from Pattie A. Clay Regional Medical Center, his chiropractor, and his physical therapist available for their review.

³ Dr. Ravvin testified his first office visit with Turner occurred November 16, 2005. At that time he took a patient history, performed a physical exam and looked at imaging studies. Dr. Ravvin did not review medical records from Turner's chiropractor or family doctor. The only other medical record provided to Dr. Ravvin for review was an independent medical examination by another neurosurgeon. Dr. Ravvin's physical exam revealed a herniated L4-5 disc and he performed a lumbar diskectomy on January 26, 2006, to remove pressure from a nerve root.

⁴ Dr. Kriss met with Turner for about an hour on March 2, 2006. At that time he took a patient history and then performed a standard physical exam followed by a neurological exam. Before issuing a report he reviewed records from six treating physicians and from Dr. Ravvin regarding the diskectomy. As part of his review he considered records from Turner's chiropractor and physical therapist, Pattie A. Clay Regional Medical Center, St. Joseph's Hospital and the Lexington Clinic, and radiology reports.

Evidence from these sources did not paint nearly so bleak a life as Turner described from the stand. This evidence established that when Turner finally went to the hospital on January 4, 2002, some seven days after the collision, he was diagnosed with “L4-5 disc space narrowing compatible with degenerative disc disease versus herniated disc.” Dr. Ravvin testified that degenerative changes in the spine are naturally occurring as part of the aging process and are not caused by a single traumatic event like a car collision. On cross-examination he explained:

Q Is degenerative disc [sic] disease something that is naturally occurring as well?

A Yes. By naturally we mean aging process. Yes.

Q Yes. Okay. As far as some of these conditions we’ve talked about, such as spinal stenosis, the degenerative disc [sic] disease, osteophytes [sic], can you render an opinion about whether those are conditions that were caused by a motor vehicle accident, or whether those were conditions that occurred naturally in Mr. Turner’s body on their own?

A They do occur naturally, but they may also be accelerated by a pro—another process such as a motor vehicle accident. I think it would be better if I kind of clarified the situation here. I think you’re sort of trying to imply that he had degenerative disc [sic] disease and therefore the automobile accident is not at all responsible. That is not the case. When a person herniates a disc [sic] it’s generally due to a combination of two causes. One is aging of a disc [sic] and the other is traumatic events that might occur. And it’s usually a combination of the two. Yes, a normal, completely normal disc [sic] usually doesn’t herniate. It doesn’t herniate. So, yes, there has to be an aging process, but certainly traumatic events of the spine play a role as well. When you’re born your discs

[sic] are normal and as they age they have these degenerative changes. But if after birth you were placed horizontal and never moved, your, your spine would age but you'd never get a herniated disc [sic]. But when you move and walk and stress your spine, that plus the aging process weakens a disc [sic] and causes a disc [sic] herniation. So it's a combination of things that's responsible for the process.

Q And I think when Mr. Davis had asked you your opinion on whether this accident had caused Mr. Turner's problems, I think you said it played a role in them; is that correct?

A That's right. That's why you notice I didn't say it caused it. I said it played a role in it.

Based upon Dr. Ravvin's testimony, jurors could have rejected Turner's theory that the minor impact from Fugate's mini-van caused his injuries.

Dr. Kriss agreed with Dr. Ravvin that the accident "played a role" in Turner's ailments. However, he also stressed the role of diabetes in Turner's overall health especially in terms of numbness and recovery time. As Dr. Kriss explained it:

Something that you can't see, but which is still important in Mr. Turner, is the diagnosis of diabetes. Diabetes can create problems for people and the x-rays look normal, okay. So you aren't going to see diabetes changes on the CT scan, the MRI scan, or the x-rays, or even at surgery. But we know from experience patients that have diabetes have decreased nerve function in the legs, typically sooner or later develop numbness in the legs, and they have very poor healing. A diabetic patient has about twice as many complications as the same patient would for the same procedures with no diabetes. That's a pretty hefty statement that every time you do something to a diabetic patient, medically the risk of a problem is twice as it would be for other patients. Usually infection, but things pertinent to Mr. Turner would be recovering from the surgery with Ravvin. The nerve healing

and the bone healing and the disc healing are all going to be decreased in a diabetic patient after surgery and they are going to be decreased after the accident. People like Mr. Turner are not going to heal as well as other people who don't have diabetes.

When asked whether he had formed an opinion "as to what role the car accident with Derek Fugate played in Roy Turner's symptoms and injuries," Dr. Kriss responded,

Right. Mr. Turner from what I could tell didn't have this back or leg pain or this severe numbness prior to the car accident. And he developed – he started to develop these things after the car accident. So I think – by history I think, you know, something happened in that car accident that contributes to his symptoms. I believe him; okay? It makes sense to me.

On the other hand, he's got all of these degenerative changes which is really the emphasis of the CAT scan and the lumbar MRI and the x-rays and was really what Ravvin operated on, okay. And he's got the diabetes, which is going to make him more – have more troubles, more problems than you have with other patients. So I think it's a combination. I really do. You know, I think that if he hadn't had the car accident, these degenerative changes and the diabetes, I think that they would cause symptoms for him eventually but maybe not this early and maybe not this bad. If he didn't have the diabetes, I think he would be better off. I seriously doubt that he would be complaining so bitterly of all of the numbness and tingling if he didn't have diabetes. I think it is a big part of that. And I think if he didn't have, you know, rather advanced and diffuse, or kind of in multiple places, degenerative changes, arthritis changes, joint changes, disc changes, wear and tear on his body, if he didn't have those, I don't think he would be quite in the same position that he is today.

So in my opinion, it is really a combination of those three, and I think that you have to acknowledge that the car accident played a role in it because that's when it all started. But you have to acknowledge that these other things are

pretty important factors and most people who have this type of car accident get better, okay.

...

One thing I do want to kind of point out is that when Ravvin did do the surgery, okay, he didn't find anything that was classic or typical for trauma for a car accident. He didn't find a fracture. He didn't find an unstable joint that moves or wiggles. He didn't find a big disc that had slipped out of place and was pressing on the nerve and neither did the CAT scan, the MRI scans, or the x-rays done after the car accident. They did not find the type of major changes that are seen sometimes with car accidents, big – the type of things that would say, *ooh, that's why this guy is in so much pain or that's why this guy has so much numbness and that's why he is still having problems several years down the road.* Those types of problems were nowhere to be seen. What we found were the degenerative changes. But the way I think of it is, they were kind of activated or kind of synergistically together to cause his symptoms. (Emphasis in original).

Finally, Dr. Kriss stated in his March 2, 2006, report:

I also think that although Mr. Turner has legitimate structural changes and legitimate back and leg symptoms, there is also a very significant component of non-organic (psychosomatic) symptom magnification, most probably related to secondary gain. Clearly, Mr. Turner's subjective symptoms are dramatically out of proportion to the objective findings. I see dozens of patients exactly like Mr. Turner in my neurosurgical practice every week; lumbar disc herniation and surgically treated radiculopathy, in the absence of civil litigation or workers compensation, is very, very rarely so totally debilitating and incapacitating, as claimed by Mr. Turner. For example, when Mr. Turner's "entire leg" intermittently goes completely numb, this is a very non-anatomic and non-organic pattern, which does not occur naturally, but is absolutely classic for a somaticized or factitious pattern. Mr. Turner's claimed inability to do "anything" is a similar exaggeration.

Based upon testimony from Dr. Kriss, jurors could have concluded Turner exhibited none of the injuries one would expect after being in a car accident, he greatly exaggerated his complaints, and he had a number of medical conditions, including diabetes and degenerative disc disease, that were adversely affecting his health in a significant way.

Turner's own words didn't help his case. He testified he was in too much pain to do any physical labor, but he had revealed to his physical therapist on July 19, 2003, that "he has been loading lumber & that's probably what caused his back to ache." To put it mildly, Turner's subjective testimony conflicted greatly with the objective medical evidence. So much of what the doctors did and the conclusions they drew depended entirely upon the history Turner provided to them. Drs. Ravvin and Kriss acknowledged they had no way of verifying the veracity of that history. Other factors weighing against Turner may have been his seven-day delay in seeking medical treatment after the impact and the five-year delay between the impact and his surgery. During that five-year period, any number of events could have aggravated or exacerbated Turner's lower back and leg pain. Furthermore, when Turner presented to the emergency room seven days after the collision, the diagnosis was "degenerative disc disease" without any evidence of a traumatic event such as a car collision. The diagnosis closest in time to the collision may have carried the greatest weight with the jury.

Even the treating physician, Dr. Ravvin, would not say the accident caused Turner's symptoms. He was emphatic in saying only that the accident "played a role." Dr. Kriss agreed that the collision was only a contributing factor. He stressed the

relevance of Turner being a diabetic and said he had no way of determining how great a role the accident played in Turner's health. His "best guess" was fifty percent, but he had previously said it was only one-third of the equation. As a result of all the evidence, much of it contradictory, the jury could have believed Turner's pain was not as severe as Turner had described it, and that his pain resulted not from a minor jolt in a truck, but rather from the natural aging process and the daily stresses of living coupled with several other health factors. Given the multitude of inferences that could be drawn from this conflicting proof, we simply cannot say the circuit court erred in choosing to leave the jury's verdict intact.

With regard to Turner's claim for \$10,252.00 in lost wages, the proof is again conflicting. Turner attempted to show he was earning less money after the accident than before the accident. However, his W-2 forms and income tax returns established he earned more, not less, with each passing year. In fact, Turner's income continued to rise despite the fact that he was no longer earning \$2,500.00 per year for coaching middle school football,⁵ he was no longer tutoring homebound students, and he had closed his heavy equipment business⁶ and sold his backhoe and Bobcat. Again, the record supports

⁵ Turner claimed he could no longer coach middle school football because it was too painful. However, Turner is the only person who testified he could no longer coach. Dr. Kriss testified Turner's post-collision health might change *the way* he coaches, but not *whether* he coaches. Dr. Ravvin testified Turner's only restriction was lifting in excess of twenty-five pounds and bending or stooping on a repetitive basis. Thus, there was no doctor's order prohibiting Turner from coaching.

⁶ Turner was depreciating his equipment purchases and performing non-paying jobs for family and friends. Between 2000 and 2005, the heavy equipment operation never generated a profit.

the jury's zero verdict for lost wages and therefore, the circuit court did not err in denying the new trial motion.

There is also conflicting evidence regarding Turner's claim of \$273,000.00 for future impairment of earnings. To prove this claim, Turner offered testimony from Dr. John Tierney, a vocational economic analyst, who projected the financial toll of the collision on Turner's ability to continue earning a living. Dr. Tierney's figures were based on the beginning premise that Turner was earning more than \$45,000.00 *prior* to the collision based on his education, job title, years of teaching and fringe benefits. However, Turner's W-2 forms and income tax returns indicated he earned only \$25,000.00 the year before the collision. Since Dr. Tierney's beginning premise was flawed, it was unlikely future projections which built upon the initial calculation could be correct. Thus, it was perfectly reasonable for jurors to reject Dr. Tierney's testimony. Therefore, the trial court did not err in denying the new trial motion.

Turner's fourth claim was for \$36,000.00 in future medical expenses, the same amount sought by Turner for past medical expenses. There was no medical testimony indicating what type of future treatment, if any, was needed. He merely surmised that because he had incurred that amount previously he would likely incur a similar amount in the future. However, Dr. Ravvin specifically ruled out the need for any future treatment and testified Turner was recovering nicely from the diskectomy. Based upon this testimony, jurors could reasonably conclude there was no basis for awarding

any damages for future medical expenses. Once again, we cannot say the circuit court abused its discretion in denying the new trial motion.

Turner's final claim was for \$200,000.00 in damages for pain and suffering. Again, the evidence developed at trial was a study in contrasts. John described the impact as being “jolted” and his truck moved forward a few feet. Turner, on the other hand, testified the truck was thrust into the air and the cell phone on which he was talking at the moment of impact became airborne. The damage to the vehicles, documented in photographs, was insignificant; a bent bumper on a fourteen-year-old rusted pickup truck and a barely detectable scratch on a mini-van’s front grill. Immediately after the impact, Turner got out of his cousin's truck and walked without difficulty. He attributed some soreness in his back to old age and delayed seeing a doctor for a full week. When he finally went to the hospital it was only at his wife's insistence. When surgery was first suggested to him in 2002, he declined it, but five years later, in January 2006, he underwent a discectomy to remove a small portion of a herniated disc. According to the neurosurgeon, this common procedure was performed under anesthesia and only an overnight hospital stay was required. Turner testified he was in so much pain he was unable to perform any physical labor. Yet, during a physical therapy session in 2002 he told the therapist his backache was probably the result of loading lumber. Turner testified he gave up tutoring homebound students because it was too painful. Yet, he drives forty minutes to Powell Middle School and back each day in order to teach. Finally, Dr. Kriss testified Turner was exaggerating his symptoms because the severity of

his complaints far outweighed the pain experienced by other similarly situated patients. Contrary to Turner's argument, a reasonable jury could have awarded zero damages for pain and suffering simply by considering the evidence and without being influenced by prejudice or passion.

As fact finders, jurors are free to believe and disbelieve witnesses. They may even believe or disbelieve portions of testimony given by the same witness. *See Stroka-Calvert v. Watkins*, 971 S.W.2d 823, 828 (Ky.App. 1998) (citing *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977)). Here, the evidence painted two vastly different views of an apparently minor collision. Either the jolt aggravated and accelerated Turner's latent diabetes, degenerative disc disease, osteophytes and spinal stenosis, or it did not. Based upon the evidence, jurors may have believed Turner was not injured by the impact at all and that Turner had "greatly exaggerated" his condition as stated by Dr. Kriss. It was not unreasonable for jurors to believe that even without the collision Turner would have encountered the same health challenges. In light of the conflicting proof, the jury could have reached its zero-damages verdict based upon reason and common sense evaluations. Upon reviewing the entire record, the proof in favor of Turner's claims was not such that only passion, prejudice or disregard of the evidence could explain the jury's decision.

In conclusion, while the evidence presents a close call, we hold the circuit court's denial of Turner's motion for a new trial is supported by substantial evidence.

Therefore, the circuit court did not commit clear error in refusing to disturb the jury's verdict.

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

ALL CONCUR.

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