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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001087-MR

PAUL RODNEY ROGERS;
AND BARBARA ROGERS — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 04-CI-00062

SCARLETT RAE COUNTS;
GEICO INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Paul and Barbara Rogers (Rogers) appeal from a judgment of the Pike Circuit Court awarding them nothing on their claim for medical expenses and pain and suffering. Having considered the written arguments of counsel, as well as the record of the trial court below, we affirm.

On April 24, 2002, Paul Rogers was driving his wife, Barbara Rogers, for an office visit with her physician. An automobile driving in front of them stopped suddenly. In turn, the Rogers stopped and successfully avoided a collision. Unfortunately, the car driven by Scarlett Counts did not stop quickly enough and subsequently collided with the rear of the Rogers' vehicle. Thereafter, Paul and Barbara both underwent numerous medical treatments and/or surgeries. As a result, Paul incurred past medical expenses totaling approximately $104,000 and Barbara incurred approximately $22,000 in past medical expenses. The Rogers filed suit against Counts in January 2004, and subsequently amended their complaint to include their own insurance carrier, GEICO, in November 2004. In turn, GEICO filed a cross-claim against Counts. The matter was ultimately tried before a jury. At the conclusion of the proof, each party made motions for directed verdicts, all of which were denied by the trial court. After a five-day trial, the jury returned a verdict finding Counts liable for the collision but awarding no damages to either of the Rogers.

Following the verdict, the Rogers filed a Motion for a New Trial and a Motion To Set Aside Verdict. Responses were filed by both Counts and GEICO and a reply was filed by the Rogers. On February 6, 2006, the trial court denied the Rogers' motions for a new trial and to set aside the verdict. The record reflects that the order denying relief was entered and copies mailed to all parties.

Following entry of the order denying the motion for a new trial and to set aside the verdict, the Rogers filed a "Notice of Objection" challenging the use

of an order drafted by GEICO. Several days thereafter, GEICO filed a surreply to the Rogers' reply to the motions. There was no action taken by the trial court on either motion.[1] Subsequently, this appeal followed.

The Rogers allege four grounds of error. The first two challenge the court's failure to grant the motion for a new trial based on the jury's failure to award damages for past medical bills as well as future medical expenses.[2] The Rogers also challenge the refusal of the trial court to allow the introduction of evidence to substantiate the Rogers' claim their insurer GEICO had breached its contractual responsibilities to them. Finally, they challenge the court's refusal to strike the testimony of Counts' medical expert or, in the alternative, to allow for the examination of Counts' trial counsel.

Counts and GEICO challenge the failure of the Rogers to properly designate those portions of the record showing where an issue has been properly preserved for review and how the issue was preserved. CR 76.12(4)(c)(v). It appears that the Appellees are correct that the Rogers failed to include such a statement at the beginning of each argument. However, "dismissal based upon a failure to comply with CR 76.12 is not automatic." *Baker v. Campbell County Bd. of Educ.,* 180 S.W.3d 479, 482 (Ky. App. 2005). Because we nevertheless find

[1] Contrary to this Court's holding in *Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918 (Ky. App. 1998) and Kentucky Rules of Civil Procedure (CR) 77.04(4), and over the objections of Counts and GEICO, relying on an alleged error of the circuit clerk, the trial judge set aside the initial judgment denying the Rogers' motion for a new trial and entered a second order on May 22, 2006, allowing Counts and GEICO to timely perfect this appeal.

[2] Appellants include additional grounds under the first delineated argument contrary to the mandate of CR 76.12(4)(c)(v). Further, there is no reference to where or if the issue was preserved pursuant to CR 76.12(4)(c)(v).

that the Rogers' claims fail on their merits, we decline to dismiss this appeal under CR 76.12 as to the first, second and fourth grounds.

The standard of review applicable to a denial of a motion for directed verdict and to set aside a veredict is the same. The appellate court is required to consider the evidence in the strongest light possible in favor of the opposing party. *Taylor v. Kennedy,* 700 S.W.2d 415, 416 (Ky. App. 1985). After completion of the evidentiary review, the decision must be affirmed unless the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" *Lewis v. Bledsoe Surface Mining Co.,* 798 S.W.2d 459, 461-62 (Ky. 1990). Despite the Rogers' attempt to persuade this Court that the evidence was conclusively in their favor on the issue of damages, the record reveals evidence to the contrary.

The jury did not award any damages for past and future medical expenses, nor for pain and suffering which, the Rogers contend, indicates that the jury either ignored the evidence or acted as the result of passion or prejudice. Although it is not common, a zero damage award is not the basis for a new trial if the evidence sufficiently supports the jury's conclusion that the plaintiff did not suffer any damages as a result of the defendant's tortuous conduct. *Thomas v. Greenview Hosp., Inc.,* 127 S.W.3d 663, 672 (Ky. App. 2004), *overruled on other grounds by Lanham v. Commonwealth,* 171 S.W.3d 14 (Ky. 2005).

The Rogers argue that, pursuant to Kentucky Revised Statutes (KRS) 304.39-020(5)(a), their medical expenses are presumed to have been reasonable.

They cite to three cases for the proposition that the submission of a medical bill is enough to establish its reasonableness. Having reviewed those cases, we do not find them dispositive of the causation question before us. *Daugherty v. Daugherty,* 609 S.W.2d 127 (Ky. 1980), deals with evidentiary issues concerning the admissibility of medical bills. *Bolin v. Grider,* 580 S.W.2d 490 (Ky. 1979), addresses whether the plaintiff's medical expenses exceeded the statutory threshold. In a third case relied upon by the Rogers, *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963), there was a question of liability. Here, Counts concedes she collided with the Rogers' auto; however, she denies that the collision caused the physical injuries claimed by the Rogers. Medical expenses must not only be reasonable but they must be incurred as a result of the accident and when the evidence is not conclusive, a jury is not required to accept the medical bills submitted by the plaintiff. *Thompson v. Piasta,* 662 S.W.2d 223 (Ky. App. 1983). The statutory presumption does not remove from the jury the ability to weigh the evidence and testimony and decide whether the medical expenses are reasonable *and* incurred as a result of the accident. *Lewis v. Grange Mutual Casualty Co.,* 11 S.W.3d 591 (Ky. App. 2000). There was countervailing evidence of a substantial nature; therefore, the jury was not bound to believe the Rogers' versions, and they did not, as evidenced by no damages being awarded for the claimed medical damages. Instead, they apparently relied on testimony from several witnesses, including the Rogers themselves, that there were pre-existing medical conditions from which both Rogers suffered. The jurors apparently further believed that those

pre-existing conditions either were not aroused or exacerbated by the collision on April 24, 2002. While the Rogers argue the treating physicians they called to testify are more competent or knowledgeable than the experts hired by Counts and GEICO, it is the sole responsibility of the jury to weigh the evidence and judge the credibility of all the witnesses. Jurors are not bound to accept the testimony of any witness as true. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-65 (1941). It is within the province of the jury to choose to believe or disbelieve any or all of a witness's testimony. *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926). Although the medical testimony differed as to what extent the Rogers' pre-existing conditions caused their complaints, the jury considered the evidence and found that the collision did not cause them to suffer any additional damages. A jury is not bound to believe a plaintiff or her doctors. *Spalding v. Shinkle*, 774 S.W.2d 465, 467 (Ky. App. 1989). *See also* *Carlson v. McElroy*, 584 S.W.2d 754 (Ky. App. 1979); *Davidson v. Vogler*, 507 S.W.2d 160 (Ky. 1974); and *Thompson v. Spears*, 458 S.W.2d 1 (Ky. 1970).

The Rogers do not cite, nor can we find, any case law which holds the decision of GEICO to pay the limits of the Rogers' no fault benefits constitutes some form of admission against interest or concession to the claim that the expenses are reasonably necessary.

Because there was a material issue of fact as to whether the Rogers were damaged by the collision, we find that the trial court did not abuse its

discretion by denying the motion for a directed verdict and the Rogers' post-trial motions as to damages.

The Rogers sought to introduce evidence of the contractual terms of GEICO's policy. In the amended complaint filed approximately 11 months after the original complaint, the Rogers named GEICO as a co-defendant. The insurance policy issued by GEICO provided for underinsured coverage. A few days prior to trial, GEICO filed a cross-claim against Counts, asserting a subrogation claim for any amounts paid to the Rogers, subject to the underinsured motorist coverage. On the morning of trial, the parties discussed, outside the jury's presence, various motions *in limine*. All parties recognized the difficulty of presenting the Rogers' claims as well as GEICO's cross-claim for subrogation against Counts. Rogers' counsel agreed not to mention the amount of coverage or introduce the documents to which GEICO objected. Then counsel for the Rogers decided they should have the right to present their claims separately, allowing for two openings, etc., to balance the effect of both defendants questioning witnesses and making separate openings and closings. The court denied the Rogers' motion. The court then advised Rogers' counsel he could advise the jury the Rogers had sued both the tortfeasor and the underinsured carrier and that GEICO would seek to enforce its subrogation rights against Counts. None of the parties objected to this procedure.

We agree with the Rogers that the decision, under these facts, to try the negligence claims and contract claims together, is unusual. It must be

presumed that the damages sought by the Rogers exceeded the coverage provided by the tortfeasor's insurer. We make this assumption because the Rogers do not provide us with any reference to the record; rather, they argue that GEICO breached its contractual obligations as the underinsured motorist carrier. If the Rogers had settled with Counts and her carrier, they could have then proceeded against GEICO for any excess damages. Pursuant to *Coots v. Allstate Ins. Co.,* 853 S.W.2d 895 (Ky. 1993), GEICO could have advanced its own monies for the settlement amounts offered by Counts' carrier. GEICO would have been the real party in interest and would have been named for the jury in any subsequent trial. *Earle v. Cobb*, 156 S.W.3d 257, 261 (Ky. 2004). However, there is no evidence the Rogers ever settled with Counts. Rather, they elected to proceed directly against both Counts, the tortfeasor and their own carrier, GEICO. It is not uncommon for the underinsured motorist carrier to then make a motion to bifurcate the proceedings to avoid any discussion of insurance coverage or policy limits during the trial of the negligence claim. *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993). Neither the Rogers nor Counts or GEICO refer to any portion of the record to show any of the parties made a motion to bifurcate. Nor do the Rogers refer to the record to show the court ruled on such a motion if in fact it was made. The Rogers' objection based on inadequate time to complete discovery is not an adequate substitute for a motion to bifurcate. As such, a failure to properly preserve the record or to designate the appropriate portion of the record is fatal to the Rogers' claim before this Court. CR 76.12 (4)(c)(v).

Finally, the Rogers seek to strike the testimony of Dr. Pomeranz or, in the alternative, allow for the cross-examination of attorney Lee Smith, counsel for Counts. During his pre-trial deposition, Dr. Pomeranz was questioned as to why Paul's MRI results were referred to him. An entry in Dr. Pomeranz's report indicated that the referral had been made by Dr. John Eldridge. However, Dr. Pomeranz conceded that the results had been referred to him by Smith. Dr. Pomeranz explained how the transcriptionist created the error. Dr. Pomeranz was thoroughly cross-examined by the Rogers' attorney and the entire deposition was played back for the jury.

While the Rogers again fail to properly designate the record pursuant to CR 76.12(4)(c)(v), there were two readily discovered portions of the record which dealt with this issue. During the hearing prior to trial, Rogers' counsel challenged one question asked of Dr. Pomeranz during his pre-trial deposition. The court sustained the objection. No challenge was made to the referral to Dr. Pomeranz being made by Smith and not Dr. John Eldridge. Nor was there a request to cross-examine attorney Smith.

Further, immediately prior to the deposition of Dr. Pomeranz being played for the jury, Rogers' counsel reminded the parties and court of the ruling to strike the one question referred to previously. While the portion of the deposition dealing with Dr. Eldridge was challenged, the court ruled because timely objections had not been made prior to trial, any objections by any party had been

waived. Again, there was no motion to permit cross-examination of Counts' attorney.

Even if this issue had been properly preserved, the trial court enjoys broad discretion in deciding when and how to limit either direct or cross-examination. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). Considering the lengthy cross-examination of Dr. Pomeranz conducted during the pretrial deposition, as well as the stipulation offered by Smith agreeing that he had referred the MRI report to Dr. Pomeranz, we do not find the trial court abused its discretion when it refused either to strike Dr. Pomeranz's testimony or, in the alternative, to allow for cross-examination of Counts' trial counsel, Smith.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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