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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002075-MR

STATE FARM INSURANCE COMPANIES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, JUDGE
ACTION NO. 04-CI-03688

MARCIA ASHLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

HENRY, SENIOR JUDGE: State Farm Insurance Companies appeals from a judgment entered upon a jury verdict that found State Farm was obligated to pay

[1] Senior Judges David C. Buckingham and Michael L. Henry, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the full underinsured motorist (UIM) policy limits to its insured Marcia Ashley as a result of a motor vehicle collision where Ms. Ashley was injured. Although the jury verdict was for a much larger amount, the judgment was entered for the limits of the UIM policy. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 24, 2002, Marcia Ashley was involved in a motor vehicle accident in Lexington, Kentucky, when the van she was driving was struck from behind by a pickup truck driven by James Akers. Akers' pickup truck and a trailer it was pulling were loaded with furniture. At the time of the accident a passenger named Overbee was riding in Akers' truck. Both vehicles were moving at the time of the impact, and Ashley's vehicle was struck on the rear left side of the vehicle. Ashley sought medical treatment immediately following the collision, and continued receiving treatment for some time thereafter. Due to injuries to her neck and shoulder sustained in the accident, Ashley was forced to terminate her career as a surgical technician at Baptist Regional Medical Center in Corbin, Kentucky.

In July of 2004, Ashley settled with Akers' insurance carrier, Kentucky Farm Bureau Insurance Company, for his liability policy limits of $50,000. On September 8, 2004, Ashley filed a complaint against State Farm for UIM benefits, seeking her full policy amount of $125,000 for lost wages, past medical expenses, future medical expenses, pain and suffering, permanent

impairment of her ability to earn money, inconvenience, and greater susceptibility to future injury.

Ashley filed a motion *in limine* to exclude and limit certain testimony and evidence. As a result Akers and Overbee were restricted to testifying about how the collision occurred and the force of the impact. They were not permitted to introduce proof that any of Ashley's losses had been paid by collateral sources. In response to this motion, State Farm contested the limitation of the scope of Akers' and Overbee's testimony, but explicitly stated that it had no objection to the exclusion of information regarding collateral payments.

A jury trial was held on July 25 and 26, 2006. During the trial, the judge refused to allow State Farm to introduce as evidence photographs that showed the side of the van that was not struck, which appeared undamaged. State Farm moved for a directed verdict on the issue of future medical expenses, as Ashley offered only one witness who testified as to what Ashley's future medical expenses would be. This was denied. Ashley moved for a directed verdict on the issue of past medical expenses, as State Farm offered no impeaching evidence of the past medical expenses. State Farm raised the issue of whether all of the expenses submitted by Ashley were related to the accident, as the medical bills included medication commonly used for treatment of sinus infections, antibiotics, and thyroid medication. The trial court granted a directed verdict for Ashley on this issue, but reserved the right to exclude any expenses that it deemed were not sufficiently related to the accident.

During closing arguments, Ashley's counsel made a remark regarding State Farm's corporate slogan ("here's how fair your good neighbor is," a reference to State Farm's corporate slogan "like a good neighbor, State Farm is there"), and State Farm objected. While the jury was not admonished, Ashley's counsel was told to abandon this line of argument, which he did. Ashley's counsel also argued that loss of a profession is akin to loss of identity, and proceeded to argue how jobs define a person's identity, naming off several professions, one of which was "minister." State Farm objected, as there was a minister on the jury. This objection was overruled.

The jury returned a verdict for Ashley in the amount of $706,902, most of which was based on future lost earnings. When added to the allowed past medical expenses ($26,810.45, which included all of the submitted medical bills), this increased the verdict to $733,712.45. However, because the limits of the policy in question were $125,000.00, and State Farm had already advanced Ashley $2,500.00, judgment was entered in the amount of $122,500.00. This appeal was filed after the denial of State Farm's Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend or vacate the judgment.

EXCLUSION OF EVIDENCE

The first issue that State Farm raises is that evidence was improperly excluded by the judge. "It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion." *Commonwealth v. King,* 950 S.W.2d 807, 809 (Ky. 1997).

"The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

State Farm contends that the trial court erred in limiting the testimony of Akers and Overbee to descriptions of how the collision occurred and the force of the impact. State Farm argues that Akers and Overbee should have been allowed to testify about their own lack of injuries and the minimal damage to their vehicle. State Farm asserts that this information was relevant to the extent of Ashley's injuries. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Kentucky Rules of Evidence (KRE) 401. However:

> Appeals courts recognize that trial judges are in a better position to make relevancy decisions and for that reason show substantial deference for their determinations. They often use the word "broad" to describe the trial court's discretion and say that they will not disturb decisions without a clear showing of abuse of discretion.

Robert G. Lawson, *The Kentucky Evidence Law Handbook*, 2.05 at 83 (4th ed. 2003).

The trial court found the absence of injury to Akers or Overbee and the lack of damage to their vehicle or cargo not relevant to Ashley's injuries. In the absence of a showing by State Farm that the limitation of this testimony

constituted an abuse of the trial court's discretion, we find that the limitation was proper.

State Farm also asserts that photographs depicting the undamaged side of Ashley's vehicle were improperly excluded. State Farm argues that these photographs were relevant because they showed that the vehicle could still be driven and that the damage sustained by the vehicle was minimal. However, property damage was not at issue in this case. The point that State Farm was trying to prove with the photographs (that the van could still be driven) was admitted by Ashley at trial, as Ashley testified that she drove the vehicle home after she was released from the hospital. These photographs would have been cumulative to that testimony. "Although relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of . . . needless presentation of cumulative evidence." KRE 403. "[T]he admissibility of photographs is within the sound discretion of the trial court, and its ruling . . . will not be interfered with on appeal except upon clear showing of an abuse of discretion." *Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969). As State Farm has not shown how exclusion of these photographs constituted an abuse of discretion, we hold that exclusion was proper.

EMPHASIS OF DISPARITY

State Farm argues that, throughout the trial, Ashley wrongfully emphasized the disparity between herself as a natural person and the corporate defendant. Although State Farm states this was "a recurrent drumbeat theme

throughout the trial," State Farm points to only two specific instances of this in the record. CR 76.12(4)(c)(v) requires that a brief contain "ample supportive references to the record" and "a statement with reference to the record showing whether the issue was properly preserved for review." Accordingly, we limit our review to the two instances cited by State Farm.

State Farm first contends that the remark about State Farm's corporate slogan made by Ashley's counsel during closing arguments was intended to prejudice the jury and constitutes reversible error. We disagree. Although remarks and arguments appealing to passion and prejudice are improper, the isolated sarcastic comment made here did not rise to the level of a serious breach of the rules. Although no admonition was given, State Farm's objection was sustained and Ashley's counsel abandoned that line of commentary when warned by the trial court and did not return to it. While we do not find that the trial court committed error, even if it had, any error would have been harmless. CR 61.01.

State Farm also argues that that Ashley's testimony that she always paid her insurance premiums on time constitutes reversible error. KRE 103(a)(1) requires that an objection must be made in a timely manner or that a motion to strike must appear in the record. The time to object is "when the damaging evidence [is] offered, and before it [has] been heard by the jury." *Williams v. Commonwealth*, 602 S.W.2d 148, 149 (Ky. 1980). The record indicates that no objection to this statement was made during the trial. State Farm contends that the objection was preserved for review on appeal by objecting to Ashley's counsel's

"line of questioning during his closing argument." This objection was made the day after the testimony occurred. As this does not constitute a timely objection, the objection was waived.

FUTURE MEDICAL EXPENSES

State Farm argues that the trial court improperly denied its motion for directed verdict on the issue of Ashley's future medical expenses.

> [W]hen an appellate court is reviewing evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence.

Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998).

Ashley offered testimony by her treating physician that the effects of her injuries would be life-long, and that her medical bills for the past year would be a bottom line for her future medical expenses. State Farm offered no counterproof, but argued that this testimony did not show with reasonable probability that these expenses would be incurred in the future. Uncertainty as to the injury itself prevents recovery, but when it is certain that injury has resulted, uncertainty as to the amount will not preclude recovery. *Kellerman v. Dedman*, 411 S.W.2d 315, 317 (Ky. 1967). "[P]laintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford

a reasonable basis for estimating his loss." *Id.* "[I]t is enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result is only approximate." *Id.* The evidence was sufficient to avoid a directed verdict on this issue. We find no error in this regard.

PAST MEDICAL EXPENSES

State Farm contends that the trial court erred in granting a directed verdict on the issue of Ashley's past medical expenses, while reserving the right to review the bills for expenses not associated with the collision and determine the amount to which Ashley was entitled. When reviewing whether or not a directed verdict was correct, we must view the evidence in the light most favorable to the party opposing the directed verdict. *Vitale v. Henchey*, 24 S.W.3d 651, 653 (Ky. 2000). "Once medical bills have been introduced they place on the defendant the practical necessity of going forward with impeaching proof . . . ." *Bolin v. Grider*, 580 S.W.2d 490, 491 (Ky. 1979). While State Farm offered no direct evidence, it did call into question whether all of the medication that was included in the medical bills was associated with the collision. Ashley stated in her testimony that some of the medication was for a thyroid supplement, stemming from a partial thyroid removal some years before the collision. The total amount of medical bills that State Farm disputed as being unrelated to the collision was $1,924.06.

"Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman*, 967 S.W.2d at 18-19.

Because reasonable minds could differ as to whether all of the past medical expenses that were submitted were related to the collision, we hold that the trial court erred in granting a directed verdict on the issue of past medical expenses. However, in light of the disputed amount, $1,924.06, the size of the jury verdict, $706,902.00, and the actual judgment, $122,500.00, we hold that this was harmless error in accordance with CR 61.01, as this error does not affect substantial rights of the parties.

GOLDEN RULE

State Farm contends that Ashley's counsel violated the "golden rule" during his closing arguments when he stated "We define ourselves by who we are. I am a lawyer, a minister, a doctor...whatever we are. That's who we are. Our jobs mean many things to us. They mean money. They also mean self-esteem." State Farm contends Ashley's counsel gestured towards one of the jurors, who is a minister, as he was making these statements. Ashley's counsel denies making this gesture, and the trial court did not find that Ashley's counsel gestured toward one particular juror. State Farm argues that this was an appeal to passions and prejudice, and that this resulted in an excessively large verdict.

> The "Golden Rule" argument is one which, either directly or by implication, tells the jurors that in assessing damages they should put themselves in the injured person's place and render such a verdict as they would wish to receive were they in the plaintiff's position.

75A Am. Jur. 2d *Trial* § 650 (1991). Statements that have been found violative of the "golden rule" include those that urge the jury "to make the rich defendants pay." *Murphy v. Cordle*, 303 Ky. 229, 197 S.W.2d 242, 243 (1946).

> [P]revious cases finding violations of the golden rule standard are also premised upon the combination of the argument and mention of the defendant's financial condition. It was the combination of the two, coupled with repetition, that was particularly invidious.

First and Farmers Bank of Somerset, Inc. v. Henderson, 763 S.W.2d 137, 142 (Ky. 1988). "It is beyond question that the trial judge is in the best position to assess any actual prejudicial effect." *Id.*

The trial court did not find that this statement had any prejudicial effect, and the statement itself does not rise to the level of statements in previous cases that have been held to be violations of the "golden rule." Ashley made no mention of State Farm's financial condition, nor was this line of argument directed at damages or how much the jurors would like to receive in similar circumstances. State Farm urges us to consider the verdict as being the result of prejudice based on the size of the verdict and the fact that only 10 of the 12 jurors agreed with the damage amount. We decline to do so. The statements made by Ashley's counsel during closing arguments regarding how people identify themselves through their jobs were not prejudicial, and it was not error to allow them.

EXCESSIVE DAMAGES

State Farm argues that the verdict was excessive for the nature of the injuries that Ashley sustained. State Farm argues that this is evidence that the jury

accorded more weight and value to the testimony of the witnesses for Ashley than its maximum probative value warranted. Again we must disagree.

> The amount of damages is a dispute left to the sound discretion of the jury, and its determination should not be set aside merely because we would have reached a different conclusion. If the verdict bears any reasonable relationship to the evidence of loss suffered, it is the duty of the trial court and this Court not to disturb the jury's assessment of damages.

Hazelwood v. Beauchamp, 766 S.W.2d 439, 440 (Ky.App. 1989).

The verdict here was supported by substantial evidence, as Ashley introduced testimony as to her impaired ability to earn money in the future, which comprised roughly 66% of the verdict amount. Ashley introduced evidence to support each element of damage, and the issue of excessive damages was submitted to the trial court in a motion to alter, amend or vacate. We find no abuse of discretion, and therefore no error, in the trial court's rulings on this issue. *See Morrow v. Stivers,* 836 S.W.2d 424, 431 (Ky.App. 1992).

COLLATERAL SOURCE RULE

State Farm contends that the trial court erred in its refusal to instruct the jury as to other compensatory sums of money received by Ashley with regards to this collision – the collateral source rule. Specifically, this rule provides that "damages recoverable for a wrong are not diminished by the fact that the injured party has been wholly or partly indemnified for his loss by insurance . . . ." *Schwartz v. Hasty*, 175 S.W.3d 621, 626 (Ky.App. 2005). In Ashley's motion *in limine*, she specifically requested that no mention be made of the fact that any of

her losses had been paid by collateral sources. In response to this motion, State Farm explicitly stated that it did not object to this. Because the trial court did not rule on this issue and State Farm did not object to the trial court's instructions to the jury regarding this matter, this "constitutes a waiver and precludes appellate review." *See Abuzant v. Shelter Insurance Co.*, 977 S.W.2d 259, 262 (Ky. App. 1998).

CONCLUSION

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

ALL CONCUR.

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