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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001987-MR

SAMUEL T. BARRETT, INDIVIDUALLY,
AND D/B/A DON'S AUTO CLINIC — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 06-CI-003827

JANET MULLIGAN AND BARBARA
SUE BROWN, CO-ADMINISTRATORS
OF THE ESTATE OF BERNARD MULLIGAN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, TAYLOR, AND VANMETER, JUDGES.

STUMBO, JUDGE: This is a wrongful death case in which Samuel Barrett and his business, Don's Auto Clinic (hereinafter collectively referred to as Appellants), appeal from a jury verdict in which $3,000,000 was awarded to the estate of

Bernard Mulligan for pain and suffering. Appellants argue that $3,000,000 is an excessive award and should be reversed. Appellants also claim that the jury should have found Mr. Mulligan was partly responsible for his injuries. Mr. Mulligan's estate argues that the pain and suffering award was not excessive due to the extent and nature of the decedent's injuries and that Appellants failed to meet their burden to prove comparative fault on behalf of Mr. Mulligan. We find there was no error in the jury's verdict and affirm.

In 2004, Mr. Mulligan brought his vehicle to Don's Auto Clinic for repair work. At some point, Mr. Barrett replaced the vehicle's engine. Mr. Mulligan began driving his vehicle with the new engine around November 4, 2004. On November 6, 2004, Mr. Mulligan was inside the vehicle while it was parked in a parking lot. Mr. Mulligan left the vehicle on. Approximately 30 minutes later, the car caught fire, but Mr. Mulligan did not exit the vehicle. Mr. Mulligan died of his injuries three days later.

Mr. Mulligan's estate brought suit against Appellants for negligence and claimed that they negligently repaired the car in such a way that caused the fire. The case proceeded to trial in March of 2008. Prior to the commencement of trial, the parties entered into a joint stipulation concerning hospital and medical expenses and funeral and burial expenses.

The issues for the jury to decide were the negligence of Appellants, any comparative fault on behalf for Mr. Mulligan, any award for the destruction of

Mr. Mulligan's power to labor and earn money, and any award for Mr. Mulligan's pain and suffering. The jury found the Appellants were negligent and that there was no comparative fault on behalf of Mr. Mulligan. The jury awarded $150,000 for the destruction of Mr. Mulligan's power to labor and earn money and $3,000,000 for pain and suffering.

After the judgment was entered against Appellants, they moved to alter or amend the judgment or for a new trial. Appellants argued that the pain and suffering award was excessive and based on passion or prejudice, that Mr. Mulligan's failure to exit the vehicle was a superseding and intervening cause, and that the jury should have attributed some fault to Mr. Mulligan. The trial court rejected all three arguments and denied the motion. This appeal followed.

Appellants' first argument is that the jury's pain and suffering award was excessive and given under the influence of passion or prejudice.

> In considering whether the verdict should be set aside as excessive, the trial court and appellate court have different functions. When presented with a motion for 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 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.

Davis v. Graviss, 672 S.W.2d 928, 932 (Ky. 1984).

> Upon reviewing the action of a trial judge . . . 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. Further, the action of the trial judge is presumptively correct and the appellate court will not hastily substitute its judgment for that of the trial judge, who monitored the trial and was able to grasp those inevitable intangibles which are inherent in the decision making process of our system.

Prater v. Arnett, 648 S.W.2d 82, 86 (Ky. App. 1983).

In short, it is up to the trial judge to use his or her discretion in determining whether the jury's award is excessive. We then review the evidence in the record and the decision of the trial judge to determine if there was an abuse of discretion.

Appellants argue that the pain and suffering award should correspond to the amount of medical expenses. In the case at hand, the pain and suffering award was almost 30 times the amount of medical expenses. Appellants argue that 30 times the medical expenses is excessive; however, they do not cite to any case law supporting this theory.

> We have many times written that no rule can be laid down by which damages for pain and suffering in a personal injury case may be accurately measured. At best, what is fair and right can only be left up to the judgment and discretion of the jury and this Court will not interfere with the verdict they render unless the assessment of damages was influenced by passion and

> prejudice, or it is so unreasonable as to appear at first blush disproportionate to the injuries sustained.

Stanley v. Caldwell, 274 S.W.2d 383, 385 (Ky. 1954).

We find no error here. Mr. Mulligan suffered severe burns over 45% of his body. He was also conscious when found at the scene of the fire and during the ambulance ride to the hospital. In total, approximately 60 minutes passed between the start of the fire and Mr. Mulligan's arrival at the hospital. It was not until he reached the hospital that he was able to receive pain medication. Mr. Mulligan also survived for three more days at the hospital's burn unit. We find that the trial judge did not abuse his discretion in upholding the jury's $3,000,000 award for pain and suffering.

Appellants next argue that the injuries and death of Mr. Mulligan were not proximately caused by any negligence on their part. They claim that it was entirely unforeseeable that someone would not try and exit a burning car. They alternatively argue that the inaction of Mr. Mulligan constituted a superseding and intervening cause and they are therefore not liable. These issues were brought before the trial court in a motion for new trial. The motion was denied by the trial court.

It is unclear as to why Mr. Mulligan did not exit the car once it caught fire. The Appellees introduced evidence that Mr. Mulligan was a diabetic and could have suffered a diabetic episode, leading to unconsciousness. They also

introduced evidence that smoke from the fire could have resulted in carbon monoxide poisoning and unconsciousness.

We find there was no error. Given the testimony heard by the jury, it is foreseeable that a person in Mr. Mulligan's circumstances might not be able to exit a burning vehicle. Major Henry Ott, of the Louisville Metro Arson Squad, testified at trial that he has investigated numerous cases in which a driver or passenger could not exit a burning vehicle.

We also find that Mr. Mulligan's inaction in not exiting the vehicle was not a superseding cause for the same reason, it was foreseeable. "[I]f the resultant injury is reasonably foreseeable from the view of the original actor, then the other factors causing to bring about the injury are not a superseding cause." *NKC Hosps., Inc. v. Anthony*, 849 S.W.2d 564, 568 (Ky. App. 1993).

Finally, Appellants argue that the jury should have placed some of the fault on Mr. Mulligan. We find no error with this issue. Appellants had the burden of proving comparative fault. *Prater*, 648 S.W.2d at 84; *Howard v. Howard*, 607 S.W.2d 119, 120 (Ky. App. 1980). As the trial court stated in its opinion denying the motion for new trial, "Mulligan offered testimony to the effect that he had not been under the influence of drugs or alcohol and that there were other potential reasons why he was unable to exit the car while it was burning. The jury chose to believe Mulligan's theory of the case and his evidence." We agree.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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