

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002276-MR

KENNETH H. BAKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 06-CI-009995

PATRICK WAYNE BACK

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,¹ SENIOR
JUDGE.

TAYLOR, CHIEF JUDGE: Kenneth H. Baker brings this appeal from a July 14,
2009, judgment of the Jefferson Circuit Court upon a jury verdict in favor of
Patrick Wayne Back against Kenneth for legal malpractice and awarding \$45,839
in damages. We affirm.

¹ Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Patrick was involved in a motorcycle accident on July 14, 2003, and allegedly suffered injury to his cervical spine. Thereafter, Patrick retained Kenneth, an attorney licensed to practice law in Kentucky, to represent him in a negligence action against the tortfeasor. Kenneth failed to file Patrick's action against the tortfeasor within the allowable statute of limitations period. Kenneth notified Patrick of the failure to timely file the action by letter dated February 24, 2006.

Patrick filed the instant legal malpractice action against Kenneth on November 8, 2006. Patrick subsequently filed a motion for partial summary judgment on the issue of Kenneth's liability. The circuit court granted the motion and concluded that Kenneth committed legal malpractice by failing to timely file the negligence action. Thereafter, the issue of damages was presented to the jury. At trial, a dispute emerged upon causation. Kenneth presented evidence that Patrick was involved in a second and subsequent motor vehicle accident on October 18, 2003, and that Patrick's cervical spine injury and ensuing medical expenses were attributed to the October 18, 2003, accident or a pre-existing condition, rather than the July 14, 2003, accident. In particular, Kenneth argues that medical expenses related to a cervical spine fusion surgery were not attributed to the July 14, 2003, accident. Conversely, Patrick claimed total medical expenses of over \$81,447 and claimed that 45 percent, or some \$36,651, was due to the July 14, 2003, accident. Kenneth moved for a directed verdict; the motion was denied. The jury ultimately awarded Patrick damages in the total amount of \$45,839.70, of

which \$10,000 represented damages for pain and suffering and \$35,839.70 represented damages for past medical expenses. Judgment was entered in accordance with the jury verdict.² Kenneth then filed a motion for judgment notwithstanding the verdict. The motion was denied, and this appeal follows.

Kenneth contends that the trial court erred by denying his motion for directed verdict and motion for judgment notwithstanding the verdict. Kentucky Rules of Civil Procedure (CR) 50.01; CR 50.02. In support thereof, Kenneth specifically argues that the evidence did not support the jury's award of medical expenses. Kenneth points out that Patrick was involved in a second motor vehicle accident on October 18, 2003, and that Patrick's fusion surgery was attributed to the October 18, 2003, accident or to a pre-existing condition, rather than the July 14, 2003, accident. Essentially, Kenneth argues that Patrick failed to prove that the July 14, 2003, motorcycle accident caused Patrick's neck injury and ensuing surgical treatment.

Our standard of review upon denial of a motion for directed verdict and motion for judgment notwithstanding the verdict is as follows:

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

² Upon agreement of the parties, the award was reduced by \$10,000 for basic reparation benefits Patrick previously received.

issue of fact exists upon which reasonable men could differ. See *Sutton v. Combs, Ky., 419 S.W.2d 775 (1967).*

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985). Upon appellate review, the standard utilized for a motion for direct verdict and motion for a judgment notwithstanding the verdict is identical. *Dollar General Partners v. Upchurch*, 214 S.W.3d 910 (Ky. App. 2006).

During the jury trial upon damages, the testimony of Dr. Kenneth Oder and Dr. Kimathi Doss was introduced upon the issue of causation. Both were Patrick's treating physicians. Dr. Oder, Patrick's primary care physician, provided medical care to Patrick for the neck injury. Dr. Oder testified upon the causation issue as follows:

A. Yes, I do think he sustained an [in]injury to his neck in that accident, and it did worsen the condition of his neck.

He did have a problem with his neck prior to that. He had degenerative changes in his neck, which is documented in his record, but in my opinion it did worsen with that accident.

. . . .

A. I did not see him in 2003 prior to the date of the accident for neck pain.

Q. All right. Within a reasonable degree of medical certainty what opinion do you have as to whether the neck pain that you have described, the headaches and the radiation into the arms are related to the July 13, '03, auto accident.

A. I definitely think those symptoms were related to that accident.

Dr. Oder's Deposition at 13-14. Dr. Oder further testified that 25 percent of the treatment he provided to Patrick was attributed to a pre-existing condition; 45 percent was attributed to the July 14, 2003, motorcycle accident, and 30 percent was attributed to the October 18, 2003, accident.

Kenneth maintains that Dr. Oder's opinion upon causation only related to the percentage of Dr. Oder's medical treatment attributable to each accident. Kenneth argues that Dr. Oder did not provide an opinion upon whether Patrick's cervical fusion was attributable to the July 14, 2003, accident. However, the jury is free to draw reasonable inferences from the evidence. *Bailey v. N. Am. Refractories Co.*, 95 S.W.3d 868 (Ky. App. 2001). Although Dr. Oder did not specifically testify concerning Patrick's cervical fusion, it was reasonable for the jury to have inferred from Dr. Oder's testimony that his opinion upon causation was, likewise, applicable to other medical treatment Patrick received for his neck injury, including the cervical fusion. *See id.* And, all reasonable inferences from the evidence must be viewed in a light most favorable to Patrick when considering a directed verdict. *See Zapp v. CSX Transp., Inc.*, 300 S.W.3d 219 (Ky. App. 2009).

Additionally, Dr. Doss testified upon causation and performed a cervical fusion on Patrick. Upon the issue of causation, Dr. Doss testified as follows:

Q. All right. I got a couple of opinion type questions to ask you.

Within a reasonable medical probability based on the history you obtained from Patrick what is your opinion as to the cause of his neck condition that necessitated the surgical treatment?

A. He had neck pain in '96, so we know he has that. I don't know if he -- I never saw imaging before the imaging that he got. He then had an auto accident, this neck pain got significantly worse.

Auto accident may not have been the initial instigating cause of the neck pain, because he did have some beforehand, but looking at the imaging and his symptomatology it is reasonable to believe that this played a role in leading to a surgical treatment for this.

....

Q. Patrick is in his late 40s now, and so had done - - has done this up until I think 2003, 2004, but had done it for many years. And at the end of that period of time or toward the end of it in the later '90s as you indicated he had some symptoms in his neck.

And, then on 7/14/03 he was in this motorcycle car accident that I previously described to you.

Then on - - his good luck continued, and October 18, '03, he was in another rear-ender where he was rear-ended, this time being an auto versus auto collision.

With that information or those assumptions of his history in mind does that information change anything about your opinion as to what is the cause of his cervical stenosis?

A. He was doing reasonable before he had the accidents. He had the accidents, then he wasn't. I mean it would be reasonable with a 40-mile an hour rear-end job that aggravated any problem that he had at that point in time.

If he hadn't had the auto accident he probably would have stayed where he was at. No one can say that

you get degenerative disease and maybe things progress on their own, but certainly that played a very key role in his neurological and physiologic complications after that.

Dr. Doss's Deposition at 19-22.

Kenneth attempts to discredit Dr. Doss's testimony by arguing that Dr. Doss was unaware of Patrick's second motor vehicle accident on October 18, 2003; thus, any opinion by Dr. Doss upon causation is flawed. However, from the above testimony, it is clear that Dr. Doss was informed of the October 18, 2003, accident at the time of his testimony. Moreover, it is ultimately the function of the jury, as fact-finder, to weigh and judge the credibility of evidence. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003).

Taking the above evidence together, we conclude there was sufficient evidence upon causation to present to the jury. Simply put, reasonable jurors could differ upon whether Patrick's neck injury and resulting surgery were caused by the July 14, 2003, accident, a pre-existing condition, or the October 18, 2003, accident. Thus, we cannot say that the jury verdict was flagrantly against the evidence. *See Louisville Ry. Co. v. Prather*, 162 S.W.2d 780 (Ky. 1992). In sum, we hold that the circuit court properly denied Kenneth's motion for directed verdict and motion for judgment notwithstanding the verdict.

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

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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