RENDERED: JULY 17, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001232-MR

JANICE ALMON — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 17-CI-00789

MARY BULLOCK and
SAFECO INSURANCE
COMPANY OF ILLINOIS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Janice Almon has appealed from the July 18, 2019, judgment of the Hopkins Circuit Court awarding Mary Bullock $81,539.80 pursuant to the jury's verdict for injuries she sustained in a motor vehicle accident. We affirm.

On February 7, 2017, Almon and Bullock were involved in a motor vehicle accident. Bullock, who at the time of the accident was a minor, sustained personal injuries. In December of that year, Bullock's father, as her next friend,[1] filed a complaint against Almon and Safeco Insurance Company of Illinois, Bullock's insurance company, alleging causes of action for common law negligence, statutory negligence, and underinsured motorist benefits. She alleged that Almon negligently, carelessly, and recklessly operated her motor vehicle, which caused Almon's vehicle to collide with Bullock's vehicle. Bullock sought compensatory damages for her injuries, including damages for mental and physical pain and suffering as well as past and future medical expenses. She claimed that she had incurred a loss of her ability to lead and enjoy a normal life. Almon filed an answer to the complaint, in which she raised various defenses, including that Bullock was at fault in causing her injuries and damages, that her damages were the result of a pre-existing condition, and that she failed to mitigate her damages. Safeco filed an answer and subrogation cross-claim to recover any benefits it might be required to pay to Bullock from Almon.

In her Kentucky Rules of Civil Procedure (CR) 26.02(4) disclosures filed December 27, 2018, Bullock identified several witnesses she might call to

[1] Bullock was substituted as the plaintiff once she reached the age of 18, and we shall refer to her, rather than her father, as the plaintiff in this opinion.

offer expert testimony, including Registered Nurse Shirley A. Daugherty and treating neurosurgeon Christopher Taleghani, MD. Nurse Daugherty was expected to testify consistently with her report, which had been provided to Almon's counsel. Dr. Taleghani was expected to testify about the treatment he provided to Bullock due to the motor vehicle accident and as to his opinion of her diagnosis, treatment, prognosis, future treatment, bills, the expected costs of her future treatment, and causation. This testimony would include the reasonableness and necessity of the treatment Bullock received as well as the reasonableness of her past and future medical bills. In her supplemental CR 26.02(4) disclosures, Bullock identified Margaret MacGregor, MD, who is also a neurosurgeon and took over Bullock's care once Dr. Taleghani retired. She was expected to offer the same opinions as Dr. Taleghani. Almon did not identify any expert witnesses in her disclosure filed March 25, 2019.

By order entered April 15, 2019, the court scheduled a jury trial for May 29, 2019. The parties had until May 10, 2019, to complete all discovery, file any motions for summary judgment or regarding the limitation of damages, and motions *in limine*. All documentary evidence and exhibits to be presented at trial were to be made available to opposing counsel for inspection and copying at the final pre-trial conference on May 16, 2019.

On May 10, 2019, Bullock filed a notice of her intent to use a medical bill summary pursuant to Kentucky Rules of Evidence (KRE) 1006. She attached to the notice both the summary and the corresponding bills. She stated that, because the bills "contain extraneous, inadmissible information in addition to the medical charges themselves, this is the exact scenario envisioned by KRE 1006 for the use of a summary." In her proposed jury instructions, Bullock indicated that she was seeking $36,539.80 in past medical expenses and treatment, up to $50,000.00 in past physical pain and suffering, up to $119,284.58 in future medical expenses and treatment, and $40,000.00 in future physical pain and suffering. Bullock later amended her proposed instructions to request $1.5 million in past and future physical pain and suffering. The final amounts were included in her supplemental answer to Almon's interrogatories filed May 17, 2019.

In her proposed jury instructions, Almon sought a comparative fault instruction and argued that the jury should determine whether Bullock was also negligent and breached her duty to Almon in operating her vehicle. Almon also objected to the use of the medical bill summary and Bullock's supplemental discovery response as that response was untimely filed.

The jury trial commenced on May 29, 2019. In their opening statements, the parties set forth their respective theories of the case. Bullock maintained that she had been injured in the accident and that, while she had

recovered from her injuries to her neck and head, she was continuing to experience pain in her back for which she would eventually need to have surgery. Based upon her physician's advice, she was continuing to be as active as she could. Bullock could stand for less than thirty minutes before she experienced back pain. Bullock introduced the Life Care Plan prepared by Nurse Daugherty through her testimony. Nurse Daugherty calculated that Bullock's future medical care would total $119,284.58, including back surgery. On the other hand, Almon asserted that Bullock had a good recovery from the accident and was not under any doctor's restrictions. Bullock had been able to maintain her active lifestyle and continue her softball and singing pursuits while attending school and pursuing her degree. Bullock had a good recovery and had no restrictions. Almon requested and received an apportionment instruction that would permit the jury to apportion some fault to Bullock.

At the close of the case, the court directed a verdict on past medical expenses in the amount of $36,539.80, and the jury deliberated on the questions of liability and the remaining damages claims. The jury determined that Almon was liable for Bullock's injuries and that Bullock was not at fault. It then awarded Bullock $40,000.00 in future medical expenses and nothing for past and future mental and physical pain and suffering. Because the jury awarded future medical expenses and thus had returned an inconsistent verdict, the court had the jury

return to deliberate on the question of pain and suffering damages. The jury returned with a verdict of $15,000.00 for that item of damages. The court entered a judgment on July 18, 2019, awarding Bullock a total of $81,539.80. This amount included an offset of $10,000.00 for PIP recovery. This appeal now follows.

For her first argument, Almon contends that the trial court abused its discretion in permitting the Life Care Plan to be entered into evidence. "Our standard of review in matters involving a trial court's rulings on evidentiary issues and discovery disputes is abuse of discretion." *Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4, 8 (Ky. App. 2006) (citations omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Almon argues that the trial court should not have permitted the introduction of the Life Care Plan because it was hearsay, cumulative, and prejudicial. In support of this argument, Almon cites to *Wright v. Premier Elkhorn Coal Co.*, 16 S.W.3d 570 (Ky. App. 1999). In *Wright*, this Court addressed the introduction of various expert reports that the jury was permitted to take with it to the jury room, including the argument raised by objection at trial that such reports constituted inadmissible hearsay:

We have examined the objection and the grounds stated. We agree with appellants that the reports constitute hearsay and that they were thus inadmissible. KRE 801(c) defines hearsay as follows:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The reports, prepared in anticipation of litigation by experts retained for the trial, constitute out-of-court statements utilized to prove the truth of the matter asserted. KRE 801(a) defines a statement as "an oral or written assertion." These reports contained written assertions of the experts in order to prove the truth of the matter asserted (*e.g.*, that specific damage had/had not occurred to the property as the result of blasting along with the dollar amount required to repair or to constitute diminution in value). The law of evidence distinguishes between testimonial and non-testimonial uses of out-of-court statements; the hearsay rule applies only to the testimonial use. *See* Robert Lawson, *Kentucky Evidence Law Handbook* § 8.05 (3rd ed. 1993). As utilized at trial, these experts' reports were testimonial in nature. They were employed to prove the truth of the assertions they contained.

In general, testimonial evidence (such as a copy of a deposition) is not allowed in a jury room. The rationale behind banning such testimonial evidence from the jury room is the likelihood that the triers of fact may place more emphasis on written rather than spoken words since the written words are readily before them physically while the spoken words uttered at trial can only be conjured up by memory. We agree that there is a possibility that the jury gave more weight to the reports of the defense experts which were taken into the jury room as opposed to the results of those reports heard only

> through testimony recounted on the witness stand and heard only through testimony.
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> It was error for the jury during its deliberations to possess and examine exhibits which were erroneously admitted into evidence over objection. *Evola Realty Co. v. Westerfield*, Ky., 251 S.W.2d 298 (1952). The evidence was hearsay that was erroneously admitted, and such an error cannot be said to be harmless.

Wright, 16 S.W.3d at 572. *See also Welborn v. Commonwealth*, 157 S.W.3d 608, 614 (Ky. 2005) ("Generally, a jury is not permitted to take even a sworn deposition to the jury room because jurors might give undue weight to the testimony contained in such a document, and not give adequate consideration to controverting testimony received from live witnesses.").

Almon states that the admission of the Life Care Plan meant that the jury placed undue reliance on it, in light of the testimony from Bullock's treating physician that she did not have any appointments, surgeries, or other procedures scheduled. The jury ultimately awarded Bullock $40,000.00 in future medical expenses.

In response, Bullock argues that Almon failed to preserve two of the three reasons she asserts for reversal; she only argued that the introduction of the report was cumulative, not that it was inadmissible hearsay or inadmissible testimonial evidence. Therefore, those two arguments should be deemed waived pursuant to KRE 103(a)(1):

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
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> > (1) Objection. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

Bullock points to the editors' notes to the 2007 amendment to this rule regarding the need for a party to make a specific objection to offered evidence:

> The first of the changes involves the requirement that a party make " specific" rather than "general" objections when the party desires exclusion of offered evidence. Under the 1992 version of this rule, a party was required to give grounds for objection only when requested to do so by the trial court; under the 2007 amendment, a party is required to state grounds for an objection in order to preserve error for review (and not just when requested to do so by the court) unless the ground for the objection was apparent from the context. The reasons for making this change include all of the following:
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> > (1) One of the reasons for requiring specific objections is to impose on lawyers an obligation to assist the trial judge with difficult issues of evidence law so that the judge may rule intelligently and quickly on those issues. This policy is sufficiently sound to require a statement of grounds in all instances and not merely upon request by the court.

Our review of the trial confirms that Bullock is correct.

During Nurse Shirley Daugherty's testimony, Almon objected to the introduction of both her curriculum vitae and the Life Care Plan as duplicative. She argued that the Life Care Plan was not a medical record and that Nurse Daugherty could testify about it, but that it would be prejudicial to allow the jury to take it to the jury room. The trial court permitted the Life Care Plan to be admitted, stating that its purpose was not to treat or recommend any medical treatments, but rather to project the costs of future treatment based on treatment that Bullock had received. Because Almon did not raise the issue of hearsay or argue that the report was testimonial in her objection, but only specifically objected to the introduction of the report based upon it being duplicative or cumulative, that is the only ground that is properly before this Court for review.

Almon only briefly raises the cumulative argument in her brief. She merely states that Nurse Daugherty's testimony was duplicative while also stating that the witness did not discuss the majority of the report during her testimony. On the other hand, Bullock argues that "the erroneous admission of cumulative evidence is a harmless error" pursuant to *Torrence v. Commonwealth*, 269 S.W.3d 842, 846 (Ky. 2008) (citations omitted). *See also Meadows v. Commonwealth*, 178 S.W.3d 527, 538 (Ky. App. 2005) ("the admission of inadmissible hearsay testimony that is cumulative is harmless error"). We agree with Bullock that, if the

introduction of the Life Care Plan into evidence and permitting the jury to take it to the jury room constituted error, such error was harmless.

"Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial." *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000), *abrogated on other grounds by Winstead v. Commonwealth*, 283 S.W.3d 678 (Ky. 2009) (citation omitted). In *Winstead*, the Supreme Court of Kentucky stated that "[a] non-constitutional evidentiary error may be deemed harmless, the United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." 283 S.W.3d at 688-69 (citing *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). Here, we must agree with Bullock that the jury was not substantially swayed by the Life Care Plan. The jury rejected the estimated future care costs of $119,284.58 when it only awarded Bullock $40,000.00 in future medical expenses. In addition, Almon was able to cross-examine Nurse Daugherty about the Life Care Plan. We hold that the introduction of the Life Care Plan did not affect Almon's substantial rights, nor did it cause her any injustice. Therefore, we find no reversible error on this issue.

Next, Almon argues that the trial court erred in directing a verdict on past medical expenses in Bullock's favor. Our standard of review is set forth in *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998):

> On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, Ky., 840 S.W.2d 814 (1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984).
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> In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented. 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. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. *Cf. Taylor v. Kennedy*, Ky. App., 700 S.W.2d 415 (1985). The reviewing court, upon completion of a consideration of the evidence, must determine whether the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. If it was not, the jury verdict should be upheld. *Cf. Lewis v. Bledsoe Surface Mining Co.*, [798

S.W.2d 459 (Ky. 1990)]; [*NCAA v. Hornung*, 754 S.W.2d 855 (Ky. 1988)].

Almon contends that there was conflicting evidence as to what the medical bills were related to, meaning that it should have been the jury's responsibility to determine which bills were related to the motor vehicle accident or whether a bill was related to a pre-existing condition. Almon also argues that the jury should have been permitted to determine whether Bullock had been exaggerating the severity of her injuries.

Bullock, on the other hand, points out that Almon did not impeach the medical expenses once they were admitted and cites to *Bolin v. Grider*, 580 S.W.2d 490 (Ky. 1979), in support of her argument that the directed verdict was properly entered. In *Bolin*, the Supreme Court stated that "[o]nce medical bills have been introduced they place on the defendant the practical necessity of going forward with impeaching proof if he would avoid a directed verdict on these issues." *Id*. at 491 (citation omitted).

We agree with Bullock that Almon failed to impeach the medical expenses introduced into evidence. Dr. MacGregor, a neurosurgeon and Bullock's current treating physician, testified that she had reviewed Bullock's prior records and the list of medical treatment reports referenced in the summary. She testified that all of the treatment Bullock received was reasonable, necessary, and related to the motor vehicle accident. Regarding the listed charges, Dr. MacGregor stated

that these were the usual and customary charges for the services that were provided to Bullock. Almon's assertion that a portion of the medical treatment and the associated costs of that treatment were related to Bullock's pre-existing Chiari malformation is purely supposition as she did not present any evidence to establish this was the case. In light of Dr. MacGregor's unimpeached testimony that the expenses were all reasonable, necessary, and related to the accident, we hold that the trial court properly entered a directed verdict on past medical expenses.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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