

RENDERED: October 17, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 95-CA-3405-MR

SUSAN SUTTON HARRISON

APPELLANT

v

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE LOVELACE, JUDGE
CIVIL ACTION NO. 93-CI-000084

TABITHA DEEL

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. This is an appeal from a jury verdict and judgment rendered thereon by the Russell Circuit Court awarding Susan Sutton Harrison (Harrison) no damages as a result of an automobile accident. Harrison appeals from the judgment entered on November 2, 1995. We affirm.

The action arose out of an automobile accident which occurred on April 13, 1992. Tabitha Deel (Deel) was operating an automobile that struck Harrison's vehicle from the rear. Testimony conflicts as to the severity of the accident.¹

¹ Harrison testified at trial that the rear bumper of her car was pushed up into the sheet metal amounting to severe property damage. However, she stated that the car remained operational until June, 1993. The police officer who investigated the accident said that Harrison's car damage was

Prior to trial, Harrison served a request for admissions upon Deel. The requests were as follows:

REQUEST NO. 1: As a result of injuries received by Susan Sutton Harrison in the motor vehicle accident of April 13, 1992, which forms the basis of this action, Susan Sutton Harrison required medical care and treatment for which charges were made.

REQUEST NO. 2: The attached itemized list of medical expenses along with supporting documentation of individual bills/charges attached hereto are genuine and reflect the charges for treatment received by Susan Sutton Harrison as a result of the motor vehicle accident of April 13, 1992.²

Deel failed to file a timely response to the request for admissions. The requests were deemed admitted by order of the circuit court entered on September 2, 1995.

The trial court award partial summary judgment to Harrison on the issue of liability. The case was tried on the issue of damages. Harrison sought recovery for medical expenses, pain and suffering, future medical expenses and permanent injuries.

At trial, witnesses contradicted Harrison regarding the extent of her injuries and the appropriateness of the medical

classified as minor, only. In addition, an independent witness to the accident claimed that she noticed no severe damage to the bumper of Harrison' vehicle.

² The attached medical charges totaled \$10,561.00. The medical expenses included x-rays, a CAT scan, two MRI tests, pharmacy bills in excess of \$1,670.00, bills from at least three medical doctors, and visits to Russell County Hospital, St. Anthony Medical Center, Westlake Cumberland Hospital and the Clinic for Neuro Services. The charges included other various medical supplies and services and a bill for an eye exam and lenses.

treatment that she sought. Testimony by two physicians revealed that Harrison exhibited a long history of severe headaches. Normal CAT scans run before and after the accident revealed no abnormalities. Also, a physician testified that an EEG run after the accident reflected no evidence of seizure or slowing of electrical waves. He diagnosed Harrison's problem as being migraines and not necessarily trauma-induced headaches. A professor and practitioner of neurosurgery stated that appellant would not have been expected to develop any significant symptoms from this accident. Other testimony tended to show that a minor accident had occurred and that Harrison sought unnecessary treatment for injuries which appeared to be either pre-existing or non-existent. Finally, apparent inconsistencies in Harrison's own testimony reduced her credibility.

The court overruled Harrison's motion for a directed verdict for the full amount of the medical bills. Thereafter, the court read to the jury that the medical bills were admitted as part of the plaintiff's evidence in chief. Upon hearing the evidence, the jury returned a verdict of zero dollars (\$0.00). Harrison appeals.

Harrison alleges that the trial court erred by refusing to enter a directed verdict on her behalf for the full amount of the medical bills. She contends that the jury should not have been permitted to hear argument from counsel for Deel to the effect that the bills were not a result of the accident. Further, Harrison argues that when medical bills of over \$10,000

are admitted, there must also be a finding for pain and suffering. We disagree.

Matters deemed admitted under CR 36 do not necessarily entitle the appellant to a directed verdict thereon. CR 36.02 states that "[a]ny matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission." In Lewis v. Kenady, Ky., 894 S.W.2d 619, 621 (1994), the Supreme Court of Kentucky held that "[e]ven when the admissions are acknowledged to be conclusive, they simply do not resolve all factual and legal issues to the extent required for a directed verdict" noting Lee v. Tucker, Ky., 365 S.W.2d 849 (1963), (directed verdict requires a showing that reasonable persons could not differ on the conclusion to be drawn).

This Court has said, "[t]he penalty for failure to respond is that the matters are deemed admitted, not entry of judgment against the non-responding party." Brown v. Kentucky Lottery Corp., Ky. App., 891 S.W.2d 90, 91 (1995). Therefore, we must look at the facts, as admitted, to determine whether a directed verdict was appropriate in the present case.

Because Deel failed to respond to the request for admissions, she admits that Harrison received injuries requiring medical care and treatment as a result of the accident. Further, she agrees that charges were made for the medical care and treatment. Finally, Deel admits that the bills totaling \$10,561 were "genuine" and were received "as a result" of the accident.

These admissions are narrowly construed. Lewis, 894 S.W.2d at 622. In addition, the Supreme court has stated that "[t]he factual dispute as to the proper significance of appellant's authorization is not eliminated by the admissions." Lewis, 894 S.W.2d at 621. The Court held that "[r]egardless of the conclusiveness of the admissions...allowing explanation of the facts and context surrounding those admissions was a perfectly reasonable exercise of the trial court's discretion." Id. at 622.

It is for the jury to decide the extent of medical expenses to which Harrison is entitled. "The general rule of damages is that necessary and reasonable expenses for medical services may be recovered in a suit for personal injuries." Langnehs v. Parmelee, Ky., 427 S.W.2d 223, 224 (1967) (emphasis in original).

It cannot be said that Deel has admitted that the accident was the proximate cause of the medical bills. Nor has she admitted that the treatment obtained by Harrison was necessary. The admissions in no way aver to the credibility of the plaintiff. Therefore, a directed verdict for the total amount of medical expenses would have been inappropriate. The trial court correctly overruled Harrison's motion. Accordingly, it was within the discretion of the court to admit testimony concerning these matters.

Finally, Harrison argues that the jury's subsequent failure to award damages for pain and suffering is inadequate.

In Cumberland Quarries, Inc. v. Gibson, 312 Ky. 802, 229 S.W.2d 978, 981 (1950), the Court said:

It is always difficult to determine what damages are proper in this character of case, as there is no rule of law fixing the monetary measure of damages for pain and suffering in personal injury cases. The matter must be left to the sound discretion of the jury, whose verdict will not be disturbed unless it appears to have been influenced by prejudice or passion, or unless the jury has been misled as to the merits of the case.

Id. at 981, citing Croley v. Huddleston, 304 Ky. 811, 202 S.W.2d 637, 640 (1947). We are not persuaded that the jury made its decision based on passion or prejudice. Additionally, the jury was not misled. The court recognized the admissions and correctly instructed the jury as to their significance.

Verdicts of zero damages have been upheld where evidence of medical expenses was allegedly conclusively established. See, Hayes v. Hayes, Ky., 357 S.W.2d 863 (1962). In Hayes, supra, the Court responded to appellant's claim that the verdict disregarded the evidence by holding, "[i]n weighing evidence, the jury may take into consideration all the surrounding facts and circumstances in the case, including the conduct of the [plaintiff] and his or her seeming sincerity and honesty or lack of same." Id. at 866. It is apparent that the jury had serious doubts about the credibility of Harrison's testimony at trial. The jury is in a better position to make a determination as to the amount of damages for pain and suffering to which she is entitled. We will not disturb its judgment

absent a showing of prejudicial influence as described in Gibson,
supra.

Since the issue of liability had already been established, nominal damages could have been awarded; presumably for initial testing or minor treatment. However, the jury's failure to do so does not require a reversal. Hayes, 357 S.W.2d at 866.

For the foregoing reasons, the judgment of the Russell Circuit Court awarding zero damages and the court's order overruling the plaintiff's motion for a new trial and judgment notwithstanding the verdict is affirmed.

DYCHE, JUDGE, CONCURS.

EMBERTON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

M. Gail Wilson
Bertram & Wilson
Jamestown, KY

BRIEF FOR APPELLEE:

Joel R. Smith
Wilson & Smith Law Offices
Jamestown, KY