RENDERED: August 15, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-0836-MR

BOBBY J. ATCHLEY APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM E. McANULTY, JR., JUDGE
ACTION NO. 94-CI-0859

RICKY W. COULTER APPELLEE

OPINION AFFIRMING

* * * * * *

BEFORE: DYCHE, GUDGEL, and HUDDLESTON, Judges.

DYCHE, JUDGE. Bobby Atchley appeals from a judgment awarded to her in Jefferson Circuit Court for damages resulting from an automobile accident. She claims that the damages awarded were inadequate and that the verdict was inconsistent. We disagree, and affirm the lower court.

Bobby Atchley's vehicle was struck from behind by a vehicle driven by Ricky Coulter on March 30, 1993. Both drivers were taken from the scene by emergency vehicles to the hospital. Ms. Atchley complained of pain in her neck and the back of her head, and was diagnosed by the emergency room doctor with a neck

sprain and skull contusion. She was treated for these injuries and released the same evening.

One week later, April 6, 1993, she went to an orthopedic surgeon, Dr. Rudy Ellis, Sr., complaining of headaches and pain in her neck, her upper and lower back, and her knee.[1] He diagnosed a sprain of the cervical, thoracic, and lumbar areas, and a sprain and contusion of her left knee. He prescribed medication as well as physical therapy, advised her not to return to work as a teacher for at least a week, and scheduled a follow-up visit two weeks later. She returned to the doctor on April 20, 1993, and again on May 11, 1993. Each visit saw continuing improvement in the pain in her back and neck. On May 11, however, her knee remained swollen and painful. She returned to work on May 10.

A June 14 visit to Dr. Ellis reported continued improvement with her neck and back, but her left knee was still swollen. During this visit Dr. Ellis drew fluid off her knee and injected a steroid preparation. She continued her physical therapy from April 7 to June 16, receiving treatment for her neck, back, and knees. On June 28, 1993, she saw Dr. Ellis's partner, Dr. Badenhausen, and complained only of the knee problem. The knee showed no obvious swelling. She informed Badenhausen that she was going to San Francisco for a teachers' conference. He warned her

[1] She originally injured her left knee in June, 1992, in a bowling accident. She saw Dr. Ellis in July, 1992, at which time he drew fluid off her knee and gave her some pain medication, with instructions to return if she had any problems. She did not return until after the car accident.

to be careful walking on hills and that, if necessary, he would see her when she returned.

Ms. Atchley went to the Methodist Hospital emergency room during the first week of August complaining of swelling in her left knee. The knee was placed in an immobilizer, and she made her final visit to Dr. Badenhausen around August 11, 1993. He offered to aspirate any fluid on her knee, but she declined.

On August 19, 1993, Ms. Atchley consulted Dr. Richard Sweet about her knee. He diagnosed her with chrondomalacia patella, a softening and fraying of the cartilage on the back of the kneecap, and determined that the condition had existed prior to the accident, but had been aggravated by the crash. He offered her four options: live with the condition as it was, take oral anti-inflammatory medication, have an occasional cortisone-type injection, or have arthroscopic surgery. She chose the oral medication to treat her condition. Her only other visit to Dr. Sweet came eight months later, on April 5, 1994, when the knee problem appeared again, and she received a cortisone-type injection.

Appellant filed a complaint on February 22, 1994, for damages resulting from the automobile accident of March 30, 1993. Appellee's answer cited as defenses plaintiff's negligence, contributory negligence, and/or comparative negligence as a complete or partial bar to recovery.

Trial was held on January 11-12, 1996. Appellant sought $1,586.87 in lost wages, $5,919.00 for the loss of the car,

$3,265.96 for medical expenses, and a reasonable amount for pain and suffering. The jury found appellee 100% liable for the accident, and awarded appellant the amounts requested for lost wages and the vehicle, $2,796.91 for past medical expenses, and $0 for pain and suffering. On appellant's motion, the court instructed the jury to return some amount for pain and suffering, and after further deliberation, the jury awarded $1.00. Judgment was entered by the court for this amount on January 19, 1996.[2]

Appellant filed a motion for a new trial on the grounds that: (1) the damages awarded were inadequate, and (2) the verdict was inconsistent. Appellee objected, stating that appellant did not complain of a knee injury initially following the accident, that there was conflicting testimony at trial as to how the knee was injured in the accident, and that the jury had weighed the testimony and credibility of appellant in reaching its verdict. Appellant's motion was denied by the trial court, and this appeal ensued.

Appellant relies principally on Cooper v. Fultz, Ky., 812 S.W.2d 497 (1991), in support of her contention that this case should be remanded for trial solely on the issue of damages. Cooper involved an automobile accident where the jury awarded plaintiff's medical expenses, but deliberately inserted $0 for pain

[2] Liberty Mutual Insurance Company, appellant's insurance carrier, filed an intervening complaint against Generali-U.S. Branch, appellee's carrier, to recover for amounts paid to appellant as reparations. Liberty Mutual's amended complaint also sought subrogation from appellee. Damages awarded at trial were apportioned between appellant and Liberty Mutual as an intervening plaintiff.

and suffering. While appellant quotes correctly from Cooper in her brief, the ultimate holding is misconstrued. Cooper held that a claimant did not waive the right to object to an inconsistent verdict by failing to make the objection when the verdict was returned; that the trial court should consider the substance of the new trial motion, namely, whether $0 was an adequate award for pain and suffering considering the evidence presented to the jury; and that the trial court's decision, if later appealed, was subject to review under the "clearly erroneous" standard. Id. at 502.

The trial court was not bound to ask the jury to reconsider its award of $0 for pain and suffering, and appellant's counsel was not required to request this reconsideration. The conscious insertion of $0 in a verdict is a completed verdict. Cooper, 812 S.W.2d at 499; Hazelwood v. Beauchamp, Ky. App., 766 S.W.2d 439, 440 (1989); Spalding v. Shinkle, Ky. App., 774 S.W.2d 465, 466 (1989). Nevertheless, the trial court will not be faulted for acceding to appellant's request that the jury reconsider, and the trial court's refusal to grant a new trial will be reviewed as if the jury's final verdict had been its original. Shortridge v. Rice, Ky. App., 929 S.W.2d 194, 196 (1996).

The decision of the trial judge is presumptively correct, and will not be reversed unless the decision is clearly erroneous. Davis v. Graviss, Ky., 672 S.W.2d 928 (1984); McVey v. Berman, Ky. App., 836 S.W.2d 445 (1992); Prater v. Arnett, Ky. App., 648 S.W.2d 82 (1983). The function of appellate review is merely to determine whether there has been an abuse of discretion. After reviewing the

record, we are not convinced that the jury returned an unreasonable verdict, based on the evidence presented at trial.

The bulk of evidence presented to the jury centered around the problems of appellant's knee, and the causal relationship to the accident. Courts have previously stated that "the jury was not bound to accept as the absolute truth the testimony of either the appellant or of [her] doctor[s] relating to appellant's claimed pain and suffering. . . ." Davidson v. Vogler, Ky., 507 S.W.2d 160, 162 (1974)(citation omitted). The jury apparently was not persuaded by appellant's testimony or by the medical testimony that the lingering pain and suffering claimed were so related to the accident as to merit more than the award given.

> 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, 766 S.W.2d at 440 (citation omitted). The jury's verdict is not unreasonable, and the trial court did not abuse its discretion in denying appellant's motion for a new trial.

The judgment of the Jefferson Circuit Court is affirmed.

GUDGEL, JUDGE, CONCURS.

HUDDLESTON, JUDGE, DISSENTS.

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