

RENDERED: October 22, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002163-MR

KATHY HAYES GOODMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN O'MALLEY SHAKE, JUDGE  
ACTION NO. 02-CI-002584

STATE AUTO INSURANCE COMPANIES,  
CHARLES FICKENTSHER AND CANDACE  
FICKENTSHER, A MINOR

APPELLEES

OPINION  
AFFIRMING

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BEFORE: SCHRODER AND TACKETT, JUDGES; AND EMBERTON, SENIOR  
JUDGE.<sup>1</sup>

TACKETT, JUDGE: Kathy Goodman appeals from a judgment of the Jefferson Circuit Court which awarded her no damages for injuries allegedly suffered in an automobile accident and from the trial court's order denying her motion for judgment notwithstanding the verdict. On appeal, she alleges that the jury's verdict was the result of passion or prejudice and also

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that the jury was influenced by the misconduct of the prevailing party's attorney. We hold that the jury was not improperly influenced, and that its verdict was not the product of passion or prejudice, and affirm.

Goodman's appeal arises out of a trial to determine whether she suffered injuries in an automobile accident. The collision occurred as Goodman approached the intersection of Taylorsville Road and Breckinridge Lane in Louisville and a car, driven by Candice Fickentsher pulled out of a McDonald's parking lot and struck Goodman's car on the right rear passenger side. The impact spun Goodman's car, causing it to slide off the road and into a ditch. Goodman incurred \$41,254.90 in medical bills for treatment of whiplash, myofascitis and thoracic outlet syndrome.

On the morning of trial, Fickentsher, who was insured by State Auto Insurance Companies, admitted liability for the accident leaving the question of Goodman's injuries as the only issue before the jury. Goodman's surgeon, Dr. Erdogan Atasoy, testified for the plaintiff that all of her medical complaints were the direct result of injuries sustained in the car accident. Dr. Morton Kasdan was retained as a defense expert and testified that Goodman was not injured in the accident. Evidence was introduced that Goodman suffered symptoms in her upper extremities prior to the accident. In Kasdan's opinion,

the diagnosis of thoracic outlet syndrome was not supported by the medical evidence and the surgery performed by Atasoy had been unnecessary. Both doctors agreed that Goodman had suffered carpal tunnel syndrome for about twenty years before the accident, and Goodman admitted that she had undergone surgery for that condition in 1980 or 1981.

The jury deliberated and returned a unanimous verdict that Goodman had failed to show that she incurred the minimum \$1,000.00 in medical bills as a result of the injuries sustained in the accident and, thus, she was awarded no damages for her alleged injuries. Goodman's attorney obtained the trial court's permission to speak to any of the jurors who were willing to discuss their reasons for the verdict. According to counsel, two members of the jury who were willing to answer his question stated that they decided the case based on Goodman's answer to one question which they felt indicated that she was evasive and untrustworthy. Counsel brought this information to the trial court's attention in a motion for a new trial or judgment notwithstanding the verdict. The trial court denied the motion, and this appeal followed.

Goodman argues that she was entitled to a new trial or to judgment notwithstanding the verdict under Kentucky Rule of Civil Procedure 59.01 which states as follows:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

(b) Misconduct of the jury, of the prevailing party, or of his attorney.

(c) Accident or surprise which ordinary prudence could not have guarded against.

(d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.

(e) Error in the assessment of the amount of recovery whether too large or too small.

(f) That the verdict is not sustained by sufficient evidence, or is contrary to law.

(g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

(h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

Goodman contends that the jury improperly based its decision on the nondispositive issue of whether she had a pre-existing medical condition rather than on whether she sustained injuries in the car accident. Counsel states that he asked the jury members why they had found the defendant's medical expert more

persuasive than Goodman's own doctor. According to Goodman's attorney, the jurors responded that they did not discuss the medical testimony during deliberations. Instead, they focused on Goodman's answer during cross-examination to the question of whether she would dispute medical records from 1984 indicating neck pain and from 1991 showing complaints of shoulder pain. Rather than giving a yes or no answer, Goodman asked defense counsel, "You have those records?" The jurors allegedly felt that her answer was evasive and that she was surprised to learn that the defense possessed records which might cast doubt on her claims that her injuries resulted from the car accident in 2000. Goodman's counsel said that the two jurors stated that her answer caused them to determine that she was untrustworthy, thus they did not believe her claims that she was injured in the accident.

Both doctors who testified gave detailed accounts of Goodman's prior medical history and opined that her pre-existing condition likely played a role in her symptoms after the accident. Where the experts differed was in whether she suffered injuries in the accident and whether she was properly diagnosed with thoracic outlet syndrome. Goodman contends that the jury ignored the dispositive issue in the case, which was whether she suffered from thoracic outlet syndrome as a result of the accident, in favor of the irrelevant question of whether

she had pre-existing medical conditions. Further, she argues that medical causation cannot be determined by a jury absent competent opinion testimony from an expert. Baylis v. Lourdes Hospital, Ky., 805 S.W.2d 122 (1991).

The Kentucky Supreme Court's holding in Baylis does support the contention that expert testimony is necessary to prove medical causation. In other words, if Goodman had attempted to prove thoracic outlet syndrome suffered as a result of the car accident without introducing expert medical testimony, the trial court would have been required, under Baylis, to grant a directed verdict that no such injury was proven. Nevertheless, Goodman's subjectively reported physical symptoms were the basis for the medical diagnosis, and the jurors were entitled to disbelieve her account of those symptoms. The standard of review on appeal compels us to uphold the jury's findings of fact unless they are clearly erroneous. Goodman has not shown that the jury's decision not to believe her account of her symptoms resulted from prejudice or passion, thus, we cannot say that the trial court abused its discretion in denying her motion for a new trial or a judgment notwithstanding the verdict.

Goodman's second argument on appeal is that the defendant's attorney repeatedly violated the trial court's pretrial evidentiary rulings in such a way that she was denied a

fair trial. Fickentsher responds that Goodman failed to preserve these alleged errors for appellate review. The trial court had granted motions in limine excluding any mention of the fact that Goodman was not wearing her seatbelt at the time of the accident and that she had initially obtained legal representation from the law firm of Isaacs & Isaacs. Nevertheless, during cross-examination, defense counsel asked Goodman whether she was wearing her seatbelt at the time of the accident. With regard to the matter of Goodman's prior representation by a different law firm, this information was introduced to the jury during the reading of Atasoy's deposition. Goodman herself placed the deposition into evidence without redacting the mention of her prior legal counsel. Her final complaint of defense counsel misconduct involves statements made during the defense's closing argument. Fickentsher's attorney argued to the jury that, if the impact from the accident had been as severe as Goodman testified, there should have been photographs introduced of the left side of her car to support this claim. Goodman made no objection to defense counsel's statement during closing argument, but now argues that Fickentsher's counsel had lost the photographs and was attempting to create an impression in the minds of the jurors that Goodman had concealed photographs that might not have supported her testimony.

The trial court sustained Goodman's objections to both the seatbelt evidence and the evidence that she had initially been represented by a different law firm from the one which represented her at trial. In each case, the trial court gave Goodman the choice between crafting an admonition to the jury and having a mistrial declared with selection of a new jury to follow immediately. In both cases, Goodman elected to have the jury admonished to disregard the excluded evidence. The Kentucky Supreme Court has previously held that "failure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted." West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989). Since Goodman accepted the trial court's offer of an admonition in the first two instances and failed to object to defense counsel's alleged misrepresentation of the lack of photographic evidence during closing argument, she failed to preserve her objections for appellate review.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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Louisville, Kentucky

BRIEF FOR APPELLEE CANDICE  
FICKENTSHER, A MINOR:

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