

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002047-MR

JAMES GARNER

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NOS. 09-CI-00630 & 10-CI-00054

CITY OF GLASGOW

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, COMBS AND KELLER, JUDGES.

KELLER, JUDGE: James Garner (Garner) appeals from a judgment of the Barren Circuit Court awarding him zero damages as a result of an automobile accident.

For the following reasons, we affirm.

FACTS

On December 3, 2007, Garner's vehicle was rear-ended by a car driven by David Honeycutt (Honeycutt), an employee of the City of Glasgow (the

City). Following the accident, Garner was transported by ambulance to T.J. Sampson Hospital Emergency Room, was treated, and was released that day. Thereafter, Garner had two surgeries on his thoracic spine.

On January 20, 2010, Garner filed a lawsuit against the City alleging that his back injuries were the result of the accident. A trial was held in the Barren Circuit Court on October 5 and 6, 2010. Because the City admitted liability for causing the accident, the primary issue at trial was whether the accident had caused the injuries of which Garner complained. We summarize the relevant testimony from the trial below.

1. Dr. Lowe's Testimony

Dr. Robert Lowe (Dr. Lowe) testified by deposition that he is an orthopedic surgeon, and is Garner's treating physician. Dr. Lowe first saw Garner in August 2007, which was prior to the accident. Dr. Lowe testified that he performed Garner's two surgeries after the accident, and that Garner's surgeries and treatment were related to a disc herniation in his thoracic spine at T10 and T11. Dr. Lowe further testified that Garner had multiple prior back surgeries dating back to 1993. Additionally, Dr. Lowe testified that Garner had a prior disc herniation at T10 and T11, but that there was a clinical change between his visit in August 2007, and his visit after the accident. Dr. Lowe did note that, at the time of surgery, he noticed that the herniated disc was calcified. According to Dr. Lowe, calcification of a herniated disc shows that it has been there for some period of

time. Finally, Dr. Lowe testified that the motor vehicle accident exacerbated Garner's condition causing the need for the surgeries.

2. Garner's Testimony

Garner testified that his car seat broke as a result of the accident and that he immediately began to scream that his back was hurt and that he was going numb from the waist down. Garner further testified that he went to the emergency room and that an x-ray of his back was performed. Because it did not appear that he had any significant injuries, Garner was sent home with instructions to contact a doctor regarding his back pain.

Garner testified that he had seen Dr. Lowe prior to the accident and that he previously had an MRI done of his back. Before the accident, Dr. Lowe advised Garner that he thought his back would be fine as long as he did some exercise. Garner further testified that his pain in his back was persistent after the accident; therefore, he contacted Dr. Lowe. After the accident, Dr. Lowe advised Garner that he needed immediate surgery on his thoracic spine.

On cross-examination, Garner acknowledged that he: had back problems dating to 1975; that he had undergone four back surgeries prior to the accident; that he suffered from thoracic spine pain following a 2000 automobile accident; that he listed continuous lower and upper back pain on his 2002 application for social security disability benefits; that he treated with Dr. Frank L. Buono for thoracic pain in 2002; and that he treated with Dr. Vaughn Allen (Dr. Allen) from 2003 to 2005. Furthermore, Garner acknowledged that, in 2005, his MRI showed evidence

of a disc bulge or herniation at T10-11; his myelograms/CT scans showed a disc herniation and a “marked central stenosis at T10-11” and a large partially calcified disc protrusion/extrusion at T9-10 that significantly compressed the spinal cord; and that Dr. Allen recommended surgery at that time. Faced with the preceding evidence, Garner admitted that his deposition testimony denying any pre-accident thoracic spine pain was incorrect.

3. Dr. Smock’s testimony

Dr. William S. Smock (Dr. Smock) testified that he is a professor in the Department of Emergency Medicine at University of Louisville Hospital, and he specializes in emergency and forensic medicine. Dr. Smock testified that, based on his review of Garner’s medical records, Garner had suffered from disc disease for thirty-five years. Additionally, Dr. Smock testified that, according to Garner’s medical records, he was having problems in his thoracic spine in 2002. Further, at least two years before the accident, it had been noted that Garner had a thoracic disc that was bulging and pushing on his spinal cord.

Dr. Smock further testified that he did a comparison of a CT film of Garner’s thoracic spine from 2005 and an MRI done after the accident. In Dr. Smock’s opinion, both looked the same and showed a bulging disc between T10 and T11. Also, Dr. Smock testified that a radiologist’s reading of the 2005 CT film reflected that the herniated disc was partially calcified, meaning that it had been there for a long period of time. According to Dr. Smock, the herniated disc between T10 and T11 was present years before the accident. Additionally, Dr.

Smock testified that it is unusual to get a herniated disc from being rear-ended. Dr. Smock explained that this type of motor vehicle accident does not cause the thoracic spine to move backwards. Finally, Dr. Smock noted that, in his twenty years of experience, he has never seen a herniated disc in the thoracic spine caused by a rear-end collision.

Dr. Goldman's Testimony

Dr. Martyn Goldman testified by deposition that he is an orthopedic surgeon, and he evaluated Garner in February 2010. Dr. Goldman testified that Garner's medical records reflected that Garner had a bulge or herniated disc in 2005 and that Garner had significant abnormalities at T10 and T11 prior to the accident. However, Dr. Goldman noted that he only reviewed the medical reports and did not have a copy of any films. Dr. Goldman testified that, based on the MRI results, he agreed with Dr. Lowe that the motor vehicle accident exacerbated the problems Garner was having with his thoracic spine. Finally, Dr. Goldman testified that he had not seen a herniated disc in the thoracic region of the spine caused by a rear-end collision.

At the close of the two-day trial, the jury returned a verdict awarding Garner zero damages. Garner subsequently filed a motion for a judgment notwithstanding the verdict and for a new trial. Both motions were denied, and this appeal followed.

ANALYSIS

On appeal, Garner argues that the jury's verdict was so "palpably and flagrantly against the evidence" that it must have been influenced by passion or prejudice and should therefore be overturned. We disagree.

As set forth in *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461-62 (Ky. 1990):

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 184 S.W.2d 111 (Ky. 1944), and *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988).

There certainly was conflicting evidence in this case. All three doctors testified that Garner had a pre-existing condition in his thoracic spine. Drs. Lowe and Goldman testified that the motor vehicle accident exacerbated Garner's condition. However, Dr. Smock testified that Garner's herniated disc between T10 and T11 was present years before the accident, and that there was no change between the 2005 CT film and the post-accident MRI. Both Dr. Smock and Dr. Lowe testified that the herniated disc was partially calcified, meaning that it had

been there for a long period of time. Further, both Dr. Smock and Dr. Goldman testified that they had never seen a herniated disc in the thoracic spine which was caused by a rear-end collision.

Although there was evidence to support each party's position, when looking at the evidence as a whole, we believe the jury could reasonably have found that the accident did not cause Garner's injuries to his thoracic spine. *Lewis*, 798 S.W.2d at 461. Thus, we simply cannot conclude that the jury's verdict was palpably and flagrantly against the weight of the evidence so as to be the result of passion or prejudice. *Id.* at 461-62.

CONCLUSION

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott Basil
Glasgow, Kentucky

BRIEF FOR APPELLEE:

Scott D. Laufenberg
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