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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001613-MR

MARSHALL BROWN — APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
v. HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 00-CI-01838

PAUL E. GONCHER, JR.;
THE TRAVELERS INDEMNITY COMPANY;
AND ALFRED O. FOUT — APPELLEES

AND NO. 2004-CA-001649-MR

ALFRED O. FOUT — APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
v. HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 00-CI-01838

PAUL E. GONCHER, JR. — APPELLEE

AND NO. 2004-CA-001686-MR

PAUL E. GONCHER, JR. APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
v. HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 00-CI-01838

MARSHALL BROWN;
AND ALFRED O. FOUT APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Marshall Brown appeals from a July 13, 2004, judgment of the Hardin Circuit Court confirming a jury verdict that denied his personal-injury claim against Paul E. Goncher, Jr. Goncher and third-party defendant Alfred O. Fout also cross-appeal from this judgment. We conclude that there was substantial evidence to support the jury's finding that Brown failed to prove reasonable and necessary medical expenses sufficient to bring a tort action. We also find no merit to Brown's other claims of error. Because we are affirming the judgment, the issues raised in the cross-appeals are moot.

On December 12, 1998, Brown was a passenger in a pickup truck owned and operated by Gary Yates which was

traveling north on US Highway 31W in Elizabethtown, Hardin County, Kentucky. Goncher was also traveling north on US 31W behind Yates's vehicle. Fout was driving his vehicle southbound on US 31W in the same area. Fout made a left turn into what he thought was the proper entrance to Freeman Lake Park. However, he misjudged the entrance and instead turned left onto the emergency lane adjacent to the northbound lanes. There is some dispute whether Fout got his vehicle completely off the roadway or the rear of his vehicle was partially obstructing the roadway. Yates slammed on his brakes and swerved hard to the left to avoid Fout's car. There is some indication that Goncher's truck may have struck Fout's car, but the evidence is conflicting. It is agreed that Goncher's vehicle rear-ended Yates's vehicle.

On December 12, 2000, Brown filed a personal-injury action against Goncher. Subsequently, Goncher's insurance company, Go-America Insurance, offered to settle the claim for the policy limits of $25,000.00. The underinsured motorist (UIM) carrier for Yates's vehicle, the Travelers Indemnity Company (Travelers), substituted its payment for the offered settlement pursuant to Coots v. Allstate Insurance Co.[1] Thereupon, Brown amended his complaint to assert a claim for

[1] 853 S.W.2d 895 (Ky. 1993). *See also* KRS 304.39-320(3), (4) & (5).

underinsured motorist benefits against Travelers. Brown did not name Fout as a party to the action.

On September 19, 2002, Goncher filed a motion to file a third-party complaint against Fout. Brown objected, pointing out that the statute of limitation on claims against Fout had run. Nonetheless, the trial court granted the motion on December 19, 2002, and Fout was added as a party. The third-party complaint alleged that Goncher was entitled to indemnity from Fout and, in the alternative, to apportionment of fault against Fout. The trial court subsequently denied Fout's motion for summary judgment, concluding that Goncher's claim against Fout for indemnity was not time-barred.

Following an extended period of discovery, the case proceeded to a jury trial on May 19-28, 2004. The jury returned a verdict for Goncher, finding that Brown had failed to prove that he had incurred more than $1,000.00 in reasonable and necessary medical expenses as a direct result of the accident. Thereafter, Brown filed motions for a new trial, for a judgment notwithstanding the verdict, [2] and to alter, amend, or vacate the judgment.[3] The trial court denied the motions and entered a final judgment on July 13, 2004. Brown appeals from this

[2] CR 50.02.

[3] CR 59.05.

judgment, and Goncher and Fout have each filed protective cross-appeals on other issues which may be implicated if a new trial is granted.

Brown primarily challenges the jury's conclusion that he failed to prove that he had incurred more than $1,000.00 in reasonable and necessary medical expenses as a direct result of the accident. The Motor Vehicle Reparations Act (MVRA) abolishes tort liability to the extent that basic reparation benefits are payable. Thus, a plaintiff may not bring a civil action for damages unless damages for medical expenses incurred as a result of the accident "exceed one thousand dollars ($1,000.00), or the injury or disease consists in whole or part of permanent disfigurement, a fracture to a bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of bodily function or death."[4]

[4] KRS 304.39-060(2). "Basic reparation benefits" are "benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle, subject, where applicable, to the limits, deductibles, exclusions, disqualifications, and other conditions provided in this subtitle." KRS 304.39-020(2). "Loss" is defined by the statute as "accrued economic loss consisting only of medical expense, work loss, replacement services loss, and, if injury causes death, survivor's economic loss and survivor's replacement services loss. Non-economic detriment is not loss." KRS 304.39-020(5). The maximum amount of basic reparation benefits available in one accident to a person under the Act is $10,000.00. KRS 304.39-020(2). For purposes of this action,

In his brief, Brown points out that the trial court's threshold instruction required the jury to find only that Brown had incurred more than $1,000.00 in medical expenses as a result of the accident, but the instruction did not allow the jury to proceed if it found that Brown had sustained a permanent loss or disability as a result of the accident. However, Brown did not raise this specific objection while he was before the trial court. He only asserted that the instruction was improper because the evidence did not raise an issue of fact concerning the threshold for bringing a tort action. A general objection to the sufficiency of the evidence supporting an instruction does not preserve objections to the instruction based on other grounds.[5] Likewise, an objection made in a post-trial motion to the wording of an instruction does not preserve the objection.[6] Therefore, Brown has waived any objection to the content of the instruction.

Rather, the only question properly before the Court is whether there was sufficient evidence to warrant an instruction

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however, only the $1,000.00 threshold for medical expenses is relevant.

[5] Scudamore v. Horton, 426 S.W.2d 142, 146 (Ky. 1968).

[6] CR 51(3); Young v. DeBord, 351 S.W.2d 502 (Ky. 1961). *See also* Ellison v. R & B Contracting, Inc., 32 S.W.3d 66, 72-73 (Ky. 2000); and Burke Enterprises, Inc. v. Mitchell, 700 S.W.2d 789, 792 (Ky. 1985).

to the jury on this issue.[7] This is the same issue that Brown presents in his arguments that he was entitled to a directed verdict or to a judgment notwithstanding the verdict on this issue. Consequently, we shall address these issues together.

A trial court is precluded from entering either a directed verdict or judgment notwithstanding the verdict (JNOV) unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable persons could differ.[8] 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. 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. If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred

[7] *See* Smith v. Langley, 410 S.W.2d 151 (Ky. 1966), holding that "[t]o justify an instruction on a particular issue, the evidence must raise the issue." Id. at 153.

[8] Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App. 1985).

in failing to grant the motion for directed verdict. Otherwise, the judgment must be affirmed.[9]

In this case, the jury obviously determined that Brown's claimed medical expenses were not incurred due to the accident. Because Brown bore the burden of proof and the risk of non-persuasion on this issue, the jury was not bound to accept the medical bills submitted as reasonable and necessary.[10] However, the jury was not free to disregard uncontroverted evidence regarding the extent of injuries which Brown suffered as a result of the accident.[11]

Brown presented substantial medical evidence that he suffered injuries as a result of the accident and that he incurred medical expenses well over $1,000.00 for treatment of those injuries. In rebuttal, Goncher presented the testimony of Dr. James Harkess, an orthopedic surgeon who reviewed Brown's medical records and examined Brown prior to trial. Dr. Harkess testified that he found no objective evidence that Brown suffered a significant injury to his neck as a result of the accident. He also noted that Brown had been treated for pre-

[9] Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 787 (Ky. 2004); *citing* Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461 (Ky. 1990).

[10] Spalding v. Shinkle, 774 S.W.2d 465, 467 (Ky. App. 1989).

[11] Hazelwood v. Beauchamp, 766 S.W.2d 439, 441 (Ky.App. 1989).

existing neck injuries and headaches prior to the accident. Based on these findings, Dr. Harkess concluded that almost all of Brown's claimed medical expenses (particularly those for chiropractic care) were not reasonably related to the accident.[12] Given Dr. Harkess's testimony, there was substantial evidence upon which the jury could find that Brown did not incur more than $1,000.00 in medical expenses as a result of the accident. Therefore, the issue was properly submitted to the jury.

Likewise, the trial court did not err by denying Brown's motion for a new trial. CR 59.01 sets out the grounds upon which a court may grant a new trial, including "[e]xcessive 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."[13] But 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

[12] In his brief, Brown states that Dr. Harkess conceded that "the first couple of weeks of chiropractic care and the consultations with Dr. Raque and Dr. Harpring (excluding the MRI's) were reasonable given the automobile accident and the Appellant's injuries." However, Brown gives no citation to the video record or Dr. Harkess's deposition to show where this testimony appears. This Court is not obligated to search the record to identify relevant testimony where the brief fails to make an adequate reference to the record. Robbins v. Robbins, 849 S.W.2d 571, 572 (Ky.App. 1993); *citing* CR 76.12(4)(c)(iii), CR 76.12(4)(iv), and CR 98(4)(a).

[13] CR 59.01(d).

differ, the jury's verdict may not be disturbed.[14] On appeal, our review of a trial court's denial of a motion for new trial is limited to whether the trial judge abused his discretion.[15] Further, the trial judge's decision is presumptively correct, and we will not reverse that decision unless it is clearly erroneous.[16] As there was substantial evidence to support the jury's verdict, the trial court did not abuse its discretion by denying Brown's motion for a new trial.

Because the jury concluded that Brown failed to meet the $1,000.00 medical-expenses threshold, Brown's other issues relating to the content of other instructions are moot. Brown also contends that the trial court erred by allowing Dr. Harkess to testify at trial in person. Prior to trial, Goncher identified Dr. Harkess as a witness and indicated he would present Dr. Harkess's deposition in lieu of in-person testimony at trial.[17] However, the trial took longer than anticipated, and Goncher informed the court that Dr. Harkess was available to testify in person. Brown contends that the trial court abused its discretion by allowing the change.

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[14] Bierman v. Klapheke, 967 S.W.2d 18-19 (Ky. 1998).

[15] McVey v. Berman, 836 S.W.2d 445, 448 (Ky.App. 1992).

[16] Id.

[17] CR 32.01(c).

It is difficult to discern the basis for Brown's objection to Dr. Harkess's testimony. In his brief, Brown contends that the trial court erred by failing to grant his pre-trial motion strike to Dr. Harkess's testimony due to "misconduct" and for failure to comply with the discovery rules. However, Brown does not raise any specific grounds which would render Dr. Harkess's testimony inadmissible.

Brown also suggests that he was prejudiced by Dr. Harkess's in-person testimony because he had already released his experts and could not recall them to rebut Dr. Harkess. But Goncher identified Dr. Harkess as a witness prior to trial, and Brown does not point to any specific testimony by Dr. Harkess that differed from his deposition testimony which he was unable to effectively rebut. In the absence of any showing of unfair prejudice, we cannot find that the trial court abused its discretion by allowing Dr. Harkess to testify in person.

Brown next argues that the trial court erred by failing to grant a mistrial or to admonish the jury based on improper statements made by Goncher's counsel during opening statements, trial and closing arguments. For the most part, however, Brown does not identify the specific objections to arguments or testimony, nor does he provide specific references to the record showing whether and in what manner the issue was

properly preserved for review.[18] Consequently, these issues are not properly presented on appeal.

Brown's only specific objection concerns a statement by Goncher's counsel during opening statements that it was necessary to add Fout as a party to apportion fault. However, counsel is entitled to inform the jury of the legal effect of apportionment of liability.[19] The brief statement by Goncher's counsel was an accurate statement of law. Moreover, since the jury concluded that Brown failed to prove sufficient damages to meet the threshold for bringing a tort action, counsel's statements regarding apportionment of fault cannot be considered prejudicial.

Lastly, Brown asserts that the trial court abused its discretion by reducing the deposition fee of his expert witness, Dr. Ray Roberts, from $800.00 to $400.00. CR 26.02(4)(c) allows a trial court to require that the party seeking discovery pay the expert a reasonable fee for time spent responding to discovery. In his affidavit, Dr. Roberts stated that his normal fee was $400.00 an hour and $400.00 for any part of an additional hour. After reviewing Dr. Roberts's deposition, which was taken over the course of approximately 65 minutes, the

[18] CR 76.12(4)(c)(v).

[19] Young v. J.B. Hunt Transportation, Inc., 781 S.W.2d 503, 507 (Ky. 1989).

trial court concluded that $400.00 was a reasonable fee given the time taken for the deposition and Dr. Roberts's area of expertise. We cannot find that determination to constitute an abuse of discretion.

In conclusion, there clearly was evidence which would have supported a finding that Brown incurred more than $1,000.00 in medical expenses as a result of the accident. However, there also was evidence that most, if not all of Brown's claimed expenses were neither reasonable nor related to the accident. Consequently, the matter was properly submitted to the jury. Because the jury found that Brown failed to meet the $1,000.00 threshold for medical expenses necessary to bring a tort action, and because that finding was supported by substantial evidence, any issues related to the other instructions are moot. Brown has failed to identify any specific objections to evidence or to arguments of counsel which would warrant granting a new trial. In addition, the trial court did not abuse its discretion in determining a reasonable expert-witness fee. Finally, as we are affirming the trial court's judgment in its entirety, the issues raised in Goncher's and Fout's cross-appeals are moot and need not be addressed.

Accordingly, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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