

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000492-MR

FRANK PRINCE AND DIANE
PRINCE

APPELLANTS

v. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 01-CI-90317

JIMMY HOUNSHELL

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * * *

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: This is an appeal from a judgment for the plaintiff in a personal injury case involving a motor vehicle collision. Upon review of the record, we affirm in part, reverse in part and remand for entry of a judgment for Frank Prince of uncontested medical expenses incurred in the accident.

On December 15, 2000, the Appellee, Jimmy Hounshell, was driving behind the Appellant, Frank Prince, in a line of traffic in Morehead, Kentucky. Prince stopped his vehicle, but Hounshell was unable to stop his vehicle in time. Hounshell's

pick up truck struck Prince's car in the rear-end, causing moderate damage to Prince's vehicle. The collision also caused injury to Prince. Following the accident, Prince was taken via ambulance to the hospital and treated for injuries.

Prince had an extensive history of pre-existing accidents, surgeries, injuries, and chronic pain complaints, which predate this December 15, 2000, collision. Testimony elicited at trial indicated that Prince had experienced these health problems since 1988, when he initially fell from a scaffold. He also showed arthritis in various joints, not only limited to the neck, but also involving the collarbone, shoulder joints, and elbows. These prior injuries had caused him to have multiple surgical procedures, including a fusion in three levels of his neck. Additionally, despite having all of these surgical procedures, he continued to have problems with chronic pain.

Prince was also involved in a prior automobile accident, which occurred on September 2, 2000. His prior conditions worsened as a result of acute injuries he suffered from the accident on September 2, 2000. Dr. Allison Weaver, MD, a defense expert, testified that as a result of this accident, Prince suffered injuries including a mild closed head injury, cervical spine tenderness, head pain, back pain, and left shoulder and elbow pain.

However, Dr. Blaine Lisner, an Illinois neurosurgeon, testified that by December 2000, Prince had recovered sufficiently from the injuries suffered on September 2, 2000. Dr. Lisner as well as Dr. Allison Weaver testified that as a result of the second automobile collision on December 15, 2000, Prince had suffered an exacerbation of his prior injuries, as well as new injuries, including a brain injury. Prince sought medical treatment from various doctors for the exacerbation of these injuries.

Prior to trial, Hounshell stipulated to liability, and at trial, Prince sought recovery for medical expenses incurred for hospital and medical treatment resulting from the December 15, 2000, accident in the amount of \$40,620.17. Included in this amount was \$253.50 for the ambulance bill following the collision and \$1,041.70 for the emergency room visit. Furthermore, at trial Prince presented expert medical testimony, which tended to show that as a result of the December accident, he had fractured a bone in his shoulder resulting in at least one surgery. However, Dr. Allison Weaver disputed Prince's claims of permanent and significant injuries, which would negate the necessity for any surgery as a result of this accident. Hounshell did not dispute Prince's medical bills in their entirety. Of significance, neither Dr. Weaver nor Hounshell disputed that Prince received emergency medical attention in the form of ambulance transport and hospital emergency room services

immediately after the collision. Dr. Allison Weaver also testified that the hospital diagnosed him with cervical strain following the accident. Additionally, Dr. Anthony Weaver, Prince's expert witness, stated when asked which of the medical bills from the time period following December 15, 2000, were related to the December 15 collision, "I would say, just looking at them, many of them are . . . yes."

In a bench conference prior to trial, defense counsel moved for the exclusion of segments of a demonstrative video depicting the motion of the head and neck when rear-ended by another vehicle. An expert witness for Prince, Dr. Lisner, testified that he would use the video to demonstrate, on live human subjects, what the head strikes in an accident and the amount of flexion or extension of the neck. After reviewing the video, the trial court excluded these portions of the video. The trial judge stated that she would not allow the entrance of the clips of actual automobile accidents depicting the flexion of the head and neck because the vehicles used in the video were not the same type of vehicles driven in the accident in question and the speed in this case was unknown. For these reasons, the trial judge ruled that this video was not an accurate depiction of this accident. However, the judge did allow into the case clips from the same video involving animated demonstrations of the brain movement during an automobile accident.

After a four-day trial, the jury returned a verdict in favor of Prince. The jury awarded Prince pain and suffering damages in the amount of \$6,000, but awarded \$0 for economic damages. Prince moved for a new trial on damages, but the trial court denied this motion. Prince now appeals, arguing that the trial court erred in failing to grant a new trial on damages when the jury awarded non-economic damages, but failed to make an award for economic damages related to the December 15, 2000, automobile accident. Prince also argues that the jury's award for pain and suffering was inadequate and given under the influence of passion and prejudice. Lastly, Prince argues that the trial court erred in refusing to allow into evidence the video clips of live automobile crashes and the movement of the head and neck of live humans during these accidents.

Prince alleges that the trial court erred when it denied his motion for a new trial. Our review of a trial court's denial of a motion for new trial is limited to whether the trial court's action was clearly erroneous.¹ Accordingly, if the jury's verdict is supported by the evidence in this case, the trial court was not clearly erroneous in denying Prince's motion for a new trial.²

¹ *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001).

² *Id.*

Prince first argues that the jury award in this damages-only trial was inconsistent and insufficient because it awarded non-economic damages, but failed to award economic damages for the medical bills. In making this argument, Prince relies on CR 59.01(d), which states:

A new trial may be granted on the issue of inadequate damages where the verdict is the result of passion or prejudice and a disregard of the evidence or instructions of the trial court.

It is the responsibility of the jury to consider all the evidence under all of the facts and circumstances,³ and when it fails to do so, a new trial should be granted under CR 59.01. Alternatively, Hounshell argues that the award of pain and suffering damages without an award of medical expenses is not per se an inconsistent verdict. Hounshell asserts that medical expenses and pain and suffering damages do not necessarily go hand in hand.

Prince argues that the jury clearly disregarded the evidence and that it should have compensated him for at least some of his economic damages. Both parties presented evidence that Prince suffered injuries caused by the subject collision. Expert witnesses for both sides also stated that as a result of the collision, Prince had suffered an exacerbation of his prior injuries. Due to this exacerbation, Prince sought medical

³ *Smith v. McMillan*, 841 S.W.2d 172, 176 (Ky. 1992).

attention via various doctors, and he eventually underwent two surgeries for his injuries and pain. Additionally, Prince's expert witness, Dr. Anthony Weaver, testified that he believed that many of the medical bills claimed by Prince from dates following December 15, 2000, were related to that automobile collision. At a minimum, Prince presented the medical bills for the ambulance ride and emergency room visit on the date of the accident, and Hounshell presented no evidence to refute the validity of these documents.

In arguing that the trial court's decision was not clearly erroneous and the award of pain and suffering damages without an award for medical expenses was not an inconsistent verdict, Hounshell relies heavily on *Miller v. Swift*.⁴ However, Hounshell's reliance on this case is misguided. In *Miller*, the plaintiff sued the defendant following a two-automobile accident seeking to recover for injuries she had allegedly suffered as a result of the accident. Both parties asserted that the other was responsible for the accident, and the jury found both at fault and returned a verdict apportioning 60% of the fault to the defendant and 40% to the plaintiff. In addition to seeking recovery for her medical expenses and lost wages, the plaintiff sought damages for pain and suffering. The plaintiff had suffered pain prior to the accident from rheumatoid arthritis,

⁴ 42 S.W.2d 599 (Ky. 2001).

carpal tunnel syndrome, gastritis, and problems with her knee and shoulder, and she claimed that the accident had resulted in enhanced pain. The jury returned a verdict awarding the plaintiff \$3,570.67 for her past medical expenses, \$1,698.92 for her lost wages, and \$0.00 for her pain and suffering, and the plaintiff filed a motion for new trial claiming that the jury's award for pain and suffering was inadequate as a matter of law. The trial court denied the motion and entered judgment upon the jury's verdict.

On appeal, the plaintiff claimed that the trial court erred when it denied her motion for a new trial, arguing that the jury's failure to award her any money for pain and suffering was contrary to the evidence and inconsistent with its award for economic damages. Citing CR 59.01, the Supreme Court stated "whether the award represents 'excessive or inadequate damages appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instruction of the court,' is a question dependent on the nature of the underlying evidence."⁵ Affirming the ruling, the Supreme Court held that because the defendant solicited testimony which would support the jury's conclusion that no award for pain and suffering was necessary under these circumstances, the trial

⁵ *Id.* at 602; citing *Cooper v. Fultz*, 812 S.W.2d 497 (Ky. 1991).

court did not abuse its discretion in denying the plaintiff's motion for new trial.⁶

However, this case is distinguishable from *Miller*. In *Miller*, the jury made an award for past medical expenses and for lost wages, but failed to make any award for pain and suffering. In this case, the jury has done the opposite by awarding damages for pain and suffering but failing to make an award for medical bills. The evidence in *Miller* did not clearly establish that the plaintiff had suffered any additional pain and suffering as a result of the accident, and the jury was free to award \$0 for this element of the damages if it so desired. However, the jury in this case believed that the evidence showed that Prince had suffered pain and suffering resulting from the December 15, 2000, collision, but it failed to give credit to the evidence relating to the medical bills incurred following the accident. Because Prince presented evidence as to at least two undisputed medical bills, the jury was not free to disregard this evidence when it made an award for pain and suffering for the same accident. As such, *Miller* is not controlling in this case.

Despite the holding in *Miller*, other Kentucky cases hold that an award of non-economic damages in absence of an award for economic damages is reversible error. In *Hazelwood v.*

⁶ *Id.*

Beauchamp,⁷ the plaintiff sustained an injury to his hand when it was caught in the internal workings of a John Deere hay baler. The plaintiff was immediately taken to Jewish Hospital in Louisville where surgery was performed, and he subsequently underwent two additional surgeries to the hand. He suffered permanent impairment as a result of the accident and later sued his employer and co-employee for damages. The jury awarded the plaintiff all of his medical expenses, which amounted to \$9,440.99, but put a "0" in the blanks provided for pain and suffering and for past and future lost earnings. The trial court required the jury to deliberate further, instructing it that it had to make an award for pain and suffering. The jury ultimately awarded to the plaintiff \$250 for pain and suffering, but the plaintiff moved for a new trial because of the jury's failure to award for past and future lost earnings. The trial court overruled this motion and the plaintiff appealed to this Court.

On appeal, the plaintiff argued that the trial court erred when it overruled his motion for a new trial due to the inadequacy of the damages. This Court stated that 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 the

⁷ 776 S.W.2d 439 (Ky.App. 1989).

court would have reached a different conclusion.⁸ If the verdict bears any reasonable relationship to the evidence of loss suffered, it is the duty of the trial court and the appellate court not to disturb the jury's assessment of damages.⁹ However, the Court held that the trial court abused its discretion in failing to grant the motion for a new trial on damages because the jury's decision to award nothing for lost wages bore no relationship at all to the losses suffered by the plaintiff and were not supported by the evidence in the record.¹⁰ The Court then held the jury was free to disregard the plaintiff's testimony regarding pain he claimed to have endured, but it was not free to disregard the uncontroverted evidence of the nature of the accident itself and of the medical procedures performed.¹¹ The jury's failure to award any sum for lost earnings was contrary to the evidence because the uncontroverted evidence before the jury was that the plaintiff was earning an average of \$250 per week prior to the accident and that he was not released to work for nearly five months after the accident.¹² Therefore,

⁸ *Id.* at 440.

⁹ *Id.*

¹⁰ *Id.* at 441.

¹¹ *Id.*

¹² *Id.*

the court reversed the ruling and remanded for a new trial on the issue of damages.¹³

This case is analogous to *Hazelwood*. The jury was free to disregard Prince's evidence regarding the pain associated with the accident, but it was not free to disregard the undisputed medical bills. Because the evidence clearly shows that Prince did in fact incur at least some medical expense as a result of the accident, the jury was not free to disregard this evidence and it was not free to award \$0 for this element of the damages. As such, the trial court erred in not directing a verdict in favor of Prince as to uncontested medical expenses incurred as a result of the accident.

Prince next argues that the jury's award of \$6,000 for pain and suffering was inadequate and given under the influence of passion and prejudice, and therefore, the trial court erred in failing to grant his motion for a new trial on the issue of non-economic damages as well. Prince claims that if the jury disregarded the uncontested evidence and awarded zero damages for the medical bills, then it must have also disregarded the same uncontested evidence in arriving at its verdict for pain and suffering damages.

¹³ *Id.*

In *Spalding v. Shinkle*,¹⁴ this Court held that an award of damages is not inadequate if it is supported by substantial evidence. Additionally, a jury is not required to believe the testimony of the plaintiff or his doctors.¹⁵ Therefore, as long as there was evidence presented at trial to support the jury's award of \$6,000 for pain and suffering, this judgment must be upheld.

There was evidence presented by both sides that Prince had suffered from prior injuries. He also underwent two surgeries after the accident. Either the prior injuries or the surgeries could have led to the pain Prince suffered, and the jury was free to determine that his pain was not caused by the accident.

In *Spalding*, the plaintiff was injured in an automobile collision, and the jury awarded her money for past medical expenses, future medical expenses, past lost wages, future lost wages, and past pain and suffering, but it awarded her \$0 for future pain and suffering. The plaintiff moved for a new trial arguing that the jury's award of \$0 for future pain and suffering damages was inconsistent with the evidence, but the trial court denied the motion. The plaintiff appealed, arguing that the jury verdict was clearly erroneous. The

¹⁴ 774 S.W.2d 465, 467 (Ky.App. 1989).

¹⁵ *Id.*

plaintiff claimed that the testimony of her expert witness showed that she would suffer future pain and suffering.

The Court of Appeals stated that the question is whether the trial court ruled upon the plaintiff's motion for a new trial based on inadequacy of damages, and the test shifts to whether the verdict is supported by substantial evidence.¹⁶ Because there was countervailing evidence of a substantial nature, the jury was not bound to believe the plaintiff's version.¹⁷ The Court further stated that a claimant is entitled to compensation for damages caused directly by the injuries received, and no damages for a pre-existing condition, except to the extent such condition was aggravated.¹⁸ The case boiled down to which of the experts the jury believed, and the Court held there was no error in overruling the plaintiff's motion for a new trial on future pain and suffering because there was substantial evidence to support the trial court's ruling.¹⁹

Just as in *Spalding*, this case turns on which expert witness the jury believed. Because there was sufficient evidence to show that Prince had suffered pain in the past and that he would suffer pain in the future, the jury was not

¹⁶ *Id.* at 467.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

required to find that all of his pain was attributable to the accident in question. As the Court of Appeals stated, a claimant is entitled to compensation for damages caused directly by the injuries received, and no damages for a pre-existing condition except to the extent such condition was aggravated.²⁰ Both expert witnesses stated that Prince did suffer an exacerbation of his injuries, but Dr. Allison Weaver testified that in her opinion Prince did not suffer any significant or permanent injuries in the December accident. As such, the jury's award was supported by sufficient evidence, and the trial court's ruling denying Prince's motion for a new trial on pain and suffering damages was not clearly erroneous.

Finally, Prince argues that the trial court erred in excluding video clips using live human subjects which demonstrate the movement of the head and neck during automobile accidents. In Kentucky, the admissibility of evidence is within the sound discretion of the trial court, and its ruling will not be interfered with on appeal except upon a clear showing of an abuse of discretion.²¹

In *Stevens v. Commonwealth*,²² the former Court of Appeals held that the results of out-of-court experiments may be

²⁰ *Id.*

²¹ *Gorman v. Hunt*, 19 S.W.3d 662, 668 (Ky. 2000).

²² 462 S.W.2d 182, 185 (Ky. 1970).

admissible if such evidence tends to enlighten the jury and enable it to more intelligently consider the issues or if the experiments provide evidence more satisfactory than oral testimony. However, such evidence is not admissible unless the conditions under which the experiment was performed were substantially similar to the case under consideration.²³ In this case, the trial judge determined that the types of vehicles used in the demonstrative clips were different than those driven in the case at hand, and she also determined that the speed at the time of the accident was unknown. Because the speed in this case was unknown and the vehicles used in the video were different than those driven in this case, the demonstrative video and experiments that Dr. Lisner sought to show the jury were not performed under substantially similar circumstances as the case under consideration. Therefore, it was proper to exclude this evidence under the rule articulated in *Stevens*. As such, the trial court did not abuse its discretion by excluding these video clips.

Additionally, even if we were to hold that the trial court did in fact abuse its discretion by excluding this evidence, this would create harmless error. Dr. Lisner was permitted to testify at trial regarding the motion the head and neck undergo in an automobile accident, and he also introduced

²³ *Id.*

animated video clips portraying the motion the brain undergoes in such a case. This evidence alone would be sufficient for the jury to make a determination in this case.

For the foregoing reasons, the judgment of the trial court in this case is affirmed in part and reversed in part. The case is remanded to the trial court for entry of a judgment for Prince in the amount of medical expenses resulting from the accident that were uncontested.

ALL CONCUR.

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