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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000482-MR

BONNIE MCCULLOCH — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 04-CI-05140

JANET T. SULLIVAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Bonnie McCulloch (hereinafter "McCulloch") appeals the trial verdict and judgment of the Fayette Circuit Court dated January 9, 2006, as well as the February 6, 2006, order of the same court overruling her motions for judgment notwithstanding the verdict (JNOV) and a new trial. We affirm.

McCulloch, a nurse, was driving home from work at about 8:00 a.m. on January 27, 2004. As she approached the intersection of North Limestone and West Second Streets in downtown Lexington, she collided with a vehicle driven by Janet

Sullivan (hereinafter "Sullivan"). Sullivan had just dropped off her daughter at Sayre School. Before exiting the school's driveway, Sullivan stopped, looked to her left, saw no one and proceeded across North Limestone. Sullivan crossed two lanes of traffic and was almost through the intersection when McCulloch's car struck her vehicle in the rear quarter panel and spun Sullivan's car around sending it onto the sidewalk and ultimately wedging it between a utility pole and a building.

McCulloch was transported to the hospital where she remained for about an hour. X-rays of her knees, back, wrists and elbows were normal. McCulloch was discharged and told she could return to work without restriction. That night, she worked her usual 12-hour shift. McCulloch took the pain medication prescribed by the emergency room doctor for only two or three days.

On March 6, 2004, McCulloch was in a second car accident. She testified she experienced no new pain as a result of this crash. On March 9, 2004, McCulloch saw her regular physician, Dr. Robert Davenport, for the first time since the collision with Sullivan. In response to her mention of lower back pain, Dr. Davenport prescribed physical therapy. Two months later, McCulloch was formally discharged from therapy having met all her goals and having achieved full functional activity.

In July 2004 McCulloch was in a third car accident. By this time she was experiencing numbness in her right leg and long road trips were painful. Still, in late July she made a round trip to Minnesota via car and in early September she traveled to Cincinnati, Ohio and back for a day long family outing at Kings Island amusement park.

McCulloch did not see her regular doctor again until September 3, 2004, when she complained of great hip pain and numbness. Dr. Davenport diagnosed her as

having a ruptured disc. While he did not restrict her work or prescribe pain medication, he did refer her to Dr. Henry Tutt, a neurosurgeon, for possible surgery.

When Dr. Tutt examined McCulloch on September 20, 2004, she complained of pain in her back, right hip and leg. He diagnosed her with a herniated disc and recommended a L5-S1 discectomy which he performed nine days later. After the surgery, McCulloch stayed in the hospital overnight and went home the next day. Dr. Tutt described McCulloch's surgery as a "good result" and released her to return to work as of December 1, 2004. Her only work restriction was no lifting for six weeks. She exhibited no post-surgery neurological deficit.

On December 23, 2004, McCulloch filed a complaint in the Fayette Circuit Court against Sullivan alleging she was injured in the collision due to Sullivan's negligence. Seeking damages for past and future medical expenses, past and future pain and suffering, lost wages and impairment of future earnings, McCulloch argued Sullivan either failed to see McCulloch's car approaching, or saw her and misjudged the amount of time it would take for her to safely cross North Limestone.

Jurors heard the case on December 21 and 22, 2005.[1] McCulloch, Dr. Tutt, Dr. Davenport, and Sullivan all testified during the plaintiff's case-in-chief. McCulloch moved for a directed verdict on the issue of Sullivan's liability at the close of her case. The trial court overruled the motion, however, finding Sullivan's liability was a question

[1] Without alleging impropriety in juror selection, McCulloch has mentioned it was difficult seating a jury. When asked whether they could award damages for pain and suffering, some potential jurors said doing so was too subjective, it was too hard to quantify and assign a dollar figure, or it was too difficult to apportion responsibility between individuals. Others said they generally disliked the filing of lawsuits, awarding damages for pain and suffering in addition to medical damages, and awarding money for pain and suffering absent proof of a defendant's intentional act or issuance of a police citation for inappropriate vehicle operation. Still others noted they had served on a jury the previous day, which, despite long and arduous deliberations, awarded damages for pain and suffering. We do not review the *voir dire* for error, but do note the trial court stated all jurors who tried the case indicated a willingness to consider awarding damages for pain and suffering before the trial began.

of fact for jurors to decide. Sullivan's motion for a directed verdict on McCulloch's claim of future medical expenses was granted.

Mark Turner, a tow truck driver who was taking a break nearby at the time of the crash, was the only witness called by the defense. He testified McCulloch's car was traveling faster than other traffic just prior to the crash. Both McCulloch and Sullivan moved for directed verdicts at the close of all the proof. Both motions were overruled. The trial court considered instructions tendered by both parties but ultimately prepared and submitted its own version.

Jurors found both McCulloch and Sullivan were negligent and both were equally liable for the collision. Jurors awarded McCulloch a total of $31,630.77 in damages; $17,727.65 in past medical expenses and $13,903.12 in lost wages. They awarded McCulloch "$0" for permanent impairment of her ability to earn money and "$0" for past and future pain and suffering. On January 9, 2005, the trial court entered judgment consistent with the jury's verdict. Following trial, McCulloch moved for a JNOV or alternatively, a new trial. The trial court overruled McCulloch's motions in an order dated February 6, 2005. This appeal followed.

McCulloch asserts three allegations of error on appeal. She first contends the trial court abused its discretion and erred as a matter of law when it overruled her motion for a JNOV or, alternatively, a new trial. She claims the jury's award of zero damages for pain and suffering, as well as permanent impairment of her earning capacity, was inadequate and contrary to the evidence since she and two doctors gave unrefuted testimony about her pain. Sullivan counters by arguing there was sufficient evidence from which jurors could, and did, conclude McCulloch had a high threshold for pain and,

consistent with that proof, awarded her nothing for pain and suffering. We agree with Sullivan and affirm the trial court's decision.

In considering a new trial motion, a trial court is guided by Kentucky Rule of Civil Procedure (CR) 59.01 which specifies eight reasons for granting such relief. One of these grounds is "[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." CR 59.01(d). McCulloch claims her own testimony, as well as that of two physicians, none of which was controverted, established that she experienced pain and suffering and therefore an award of "$0" was inadequate and in total disregard of the proof. As a reviewing court, however, we focus not on what the jury did, but rather on what the trial court did. We will presume the trial court's denial of a JNOV or a new trial to be correct and will reverse only upon a finding of clear error. *Bayless v. Boyer*, 180 S.W.3d 439, 444 (Ky. 2005); *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky.App. 2001); *Prater v. Arnett,* 648 S.W.2d 82, 86 (Ky.App. 1983). If, after reviewing the evidence and the jury's verdict, we find the two are not reasonably related, only then may we find the trial court's denial of McCulloch's motions was an abuse of discretion and clearly erroneous. *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667, 669 (Ky. 1992); *Cooper v. Fultz*, 812 S.W.2d 497, 501 (Ky. 1991); *Hazelwood v. Beauchamp*, 766 S.W.2d 439, 440 (Ky.App. 1989).

Our review of the evidence in this case reveals a woman with a high tolerance for pain. She was transported to the hospital after the collision with Sullivan but she remained there only an hour and was released without any work restrictions. McCulloch worked her regular 12-hour nursing shift that night and she took the medicine

prescribed by the emergency room physician for only a couple of days because she wanted to be alert while caring for her patients. She did not see her regular physician, Dr. Davenport, until more than a month later, and only after being involved in a second car accident. Dr. Davenport prescribed physical therapy which McCulloch successfully completed in two months. While she may have experienced some discomfort, her work did not suffer, nor did she curtail her travel plans. Following a third car accident, McCulloch took round trip drives to Minnesota and Ohio. In September 2004 Dr. Davenport referred McCulloch to Dr. Tutt, a neurosurgeon. Dr. Tutt diagnosed her with a herniated disc and performed a L5-S1 discectomy a few days later. After an overnight hospital stay, McCulloch returned home to recuperate. Dr. Tutt pronounced her surgery a "good result" and released her to return to work on December 1, 2004. She had no post-surgery neurological deficit and the only work restriction was to refrain from lifting for six weeks.

While there was testimony from which jurors could conclude McCulloch experienced pain as a result of the collision with Sullivan, there was also sufficient evidence from which they could just as easily conclude she did not. Keeping in mind that jurors are "not bound to believe a plaintiff or her doctors," *Spalding v. Shinkle,* 774 S.W.2d 465, 467 (Ky.App. 1989), we cannot say the jury's verdict was unrelated to the evidence. We therefore cannot say the trial court abused its discretion and clearly erred in overruling the motions for a JNOV or, alternatively, for a new trial.

Furthermore, prior to 2001, Kentucky jurors could not award medical damages without also giving some amount of money for pain and suffering. *Prater, supra.* That changed, however, when the Kentucky Supreme Court overruled *Prater* "to

the extent it holds that a '0' award of pain and suffering damages, regardless of the evidence, is inadequate as a matter of law when accompanied by awards for medical expenses and lost wages." *Miller v. Swift*, 42 S.W.3d 599, 602 (Ky. 2001). Now, Kentucky juries need not award damages for pain and suffering just because they award medical damages. *Miller, supra,* at 601.

Miller was a two-car accident much like the one we review today. Miller filed suit against Swift seeking damages for medical expenses, lost wages, and pain and suffering. Miller claimed the accident "enhanced" the pre-existing pain she already suffered as a result of rheumatoid arthritis, carpal tunnel syndrome, gastritis and problems with her knee and shoulder. Both Miller and Swift claimed the other was at fault. At trial, there was much testimony about Miller's pain and suffering; specifically, her right upper anterior chest and shoulder were discolored, her acromioclavicular joint was bruised, and there were several problems associated with her right knee including pain, swelling, and a sprain of the coronary ligaments of the lateral meniscus. *Miller, supra,* at 603 (Graves, J., dissenting). Jurors found both drivers were to blame and apportioned 60% of the responsibility to Swift and 40% to Miller. Jurors awarded Miller full damages for all her claimed medical expenses and lost wages but awarded "$0" for pain and suffering. Miller's new trial motion claimed the award of zero damages for pain and suffering was inadequate as a matter of law, but the trial court overruled the motion and entered judgment in conformity with the jury's verdict. Since there was substantial evidence showing Miller did not experience pain and suffering as a result of the collision, the Supreme Court held there was no abuse of discretion in denying the new trial motion. In the wake of *Miller,* there is no longer a legal presumption in Kentucky that a jury

verdict of "$0" for pain and suffering is inadequate as a matter of law where the jury has awarded damages for medical expenses incurred for the cure of or relief from the effects of an injury.

McCulloch has cited us to *Pratt v. Mountain Utilities Company, Inc.,* 594 S.W.2d 881 (1980) and an unpublished opinion styled *Hash v. City of Corbin,* 1984 Ky.App. LEXIS 591*,* two cases dealing with inadequate damages. However, both cases precede *Miller, supra.* Thus, while we may disagree with *Miller,* and even believe it may unjustly punish dedicated workers with high pain tolerance, like McCulloch, or inordinately enrich malingerers and less able workers with low pain tolerance, it is nonetheless the current state of the law in the Commonwealth and we are bound by it. Thus, it is our holding that no error occurred and the trial verdict is affirmed.

McCulloch's second claim of error is that the jury's zero award for permanent impairment of her power to earn money was inadequate. Again, we disagree. When reviewing a judgment based upon a jury verdict, "[a]ll evidence which favors the prevailing party must be taken as true and [we are] 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." *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (1990). Additionally, "[t]he prevailing party is entitled to all reasonable inferences which may be drawn from the evidence." *Id.* We will affirm the trial verdict unless our review of the record shows it was "'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).

We find no evidence in the record that McCulloch's earning power was impaired in any way. The testimony at trial indicated she missed no work until she underwent surgery some eight months and two additional car wrecks after the collision that is the subject of this appeal. McCulloch's supervisor testified McCulloch had received no reprimands and had no work issues related to the accident. McCulloch's job responsibilities actually increased between the time of the collision and the trial. Thus, we affirm the trial court's denial of a directed verdict on the issue of permanent impairment of future earnings. *Hornung, supra*.

McCulloch's third and final contention is that she was entitled to a directed verdict on the limited issue of Sullivan's liability.[2] McCulloch claims Sullivan had an absolute duty to operate her vehicle safely and believes that duty was breached in one of two ways: (1) either Sullivan failed to see McCulloch's car coming toward her on Limestone and pulled in front of her thereby causing the collision, or (2) Sullivan saw McCulloch's vehicle and misjudged the amount of time it would take for her to safely travel through the intersection. Either way, McCulloch says reasonable minds must agree that Sullivan breached her statutory duty under Kentucky Revised Statutes (KRS) 189.330(10) and the trial court should have found Sullivan negligent as a matter of law instead of submitting the issue to jurors. We disagree.

KRS 189.290(1) requires a driver to operate her "vehicle in a careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway." KRS 189.330(10) says, "[t]he operator of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way

[2] At trial, Sullivan requested a partial directed verdict as to McCulloch's liability. The motion was overruled. Sullivan prevailed at trial and does not allege error on appeal.

to all vehicles approaching on the roadway to be entered or crossed." Both Sullivan and McCulloch had a statutory duty to operate their vehicles safely which included keeping a proper lookout and obeying posted speed limits.

The evidence at trial showed McCulloch left work, picked up food at McDonald's and proceeded down Limestone. She had traveled the same route for about four years and was usually stopped by a couple of red lights on her drive home. On the morning of the collision, she glanced in her rear view mirror, looked back at the road and saw Sullivan's vehicle just in time to swerve. Nevertheless, she hit the rear quarter panel of Sullivan's car. McCulloch said she was traveling at about 25 mph and did not see any vehicle exit the Sayre School driveway. McCulloch testified she was practically on top of Sullivan's car before she saw it.

Sullivan testified she dropped off her daughter at Sayre School and was headed home at the time of the collision. Sullivan stopped at the end of the school's driveway, looked to her left down Limestone, saw no one, and began to cross North Limestone. She safely crossed two lanes of traffic and at the last second she saw a flash out of the corner of her eye. Sullivan testified she thought, "oh my gosh, she's gonna hit me" and had no time to avoid the crash. Sullivan described McCulloch's car as "closing fast" on her. She believed McCulloch was speeding but could not explain why she did not see McCulloch's vehicle when she looked down North Limestone, nor could she say why she thought McCulloch was speeding when she did not see her car until just before impact.

Mark Turner, a tow truck driver, was taking a break nearby at the time of the crash. Called to testify by the defense, he said he heard a car traveling on Limestone

with an elevated engine RPM. He looked toward the noise and saw a car moving "pretty fast" as it crossed Main Street. Turner testified he saw the car, turned away from it, and then heard, but did not see, the crash. He testified the car he had seen traveling on Limestone before the crash, which turned out to be McCulloch's car, was traveling faster than other traffic.[3]

Both McCulloch and Sullivan testified they did not see the other vehicle until they were practically on top of each other. Citing *Couch v. Hensley,* 305 S.W.2d 765, 767 (Ky.App. 1957), McCulloch says no credence can be given to Sullivan's statement that she looked but did not see McCulloch when McCulloch had to have been traveling down Limestone just before the collision. However, in *Gorman v. Hunt,* 19 S.W.3d 662 (Ky. 2000), a motorist did not see a pedestrian in the roadway in sufficient time to avoid hitting her. Still, the Supreme Court of Kentucky held the trial court properly denied the request for a directed verdict and submitted the issue to jurors. We see no practical difference here. As in *Gorman*, whether Sullivan's failure to see McCulloch (and McCulloch's failure to see Sullivan) until just before the crash was a significant factor in causing the collision was a decision for jurors to make. And, in fact, they found Sullivan to have been negligent and 50% liable for the crash. If jurors believed Sullivan, which they were certainly entitled to do, they could reasonably find Sullivan kept a proper lookout, but because of other traffic or perhaps McCulloch's excessive speed, Sullivan's actions or inactions were not a substantial cause of the

[3] The weight jurors gave Turner's testimony is debatable. Before trial he signed an affidavit about the collision prepared by Sullivan's attorney. On cross-examination, he admitted parts of his affidavit were untrue. Specifically, Turner admitted he was too far away to actually see Sullivan look for oncoming traffic and he did not see Sullivan pull out of the Sayre School driveway. However, his testimony at trial, that McCulloch was traveling at a high rate of speed before the crash, never wavered. While McCulloch argued Turner's testimony was too incredible to be admitted at trial, Turner's testimony actually benefited McCulloch since he testified he saw McCulloch's car cross Main Street and travel along Limestone before the crash. McCulloch argued that since Turner saw the car when it was at a distance, Sullivan should have seen it too.

accident. Jurors also could have found that even if Sullivan breached her statutory duty to drive safely or yield the right-of-way, her conduct was still not a substantial factor, or even a factor, in causing the accident.

Ultimately, jurors found both Sullivan and McCulloch to be negligent and equally liable for the collision. Thus, any error by the trial court was harmless at best. However as *Hornung, supra,* directs, we must view the evidence in the light most favorable to Sullivan and when we do so, we find no error at all.

For the foregoing reasons, we affirm the trial verdict and judgment of the Fayette Circuit Court dated January 9, 2006, and the February 6, 2006, order of the same court overruling McCulloch's motions for a JNOV or, alternatively, a new trial.

ALL CONCUR.

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