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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002148-MR

CHAD WALLS AND
HOWARD WALLS — APPELLANTS

v. — APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 04-CI-01107

THOMAS E. ROBINSON — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, VANMETER AND WINE, JUDGES.

VANMETER, JUDGE: Chad and Howard Walls (collectively "the Walls") appeal from the Pike Circuit Court's judgment entered after a jury found Chad Walls 100% at fault for an automobile collision which resulted in Thomas Robinson being injured. For the following reasons, we vacate the trial court's judgment, and remand for a new trial.

On August 7, 2003, Chad Walls, driving a vehicle owned by Howard Walls, turned left and collided with a vehicle being driven by Cecil Howell. Walls' vehicle then

collided with a vehicle being driven by Thomas Robinson. Robinson filed suit against the Walls and Howell, seeking damages for past and future medical expenses, past and future pain and suffering, lost wages, and permanent impairment of his power to earn money. After a trial, the jury found Chad Walls to be 100% at fault for the collision and awarded Robinson $94,462.10. The trial court denied the Walls' motion for a new trial and entered judgment according to the jury's verdict, less $10,000 pursuant to KRS[1] 304.39-060(2)(a).[2] This appeal followed.

I. Robinson's Closing Argument

During closing argument, Robinson's counsel argued that Robinson had not

> done anything other than what everybody else who gets hurt in a car wreck has to do and that is to make the claim and file suit. Then [there are] the opposing attorneys who have been sent to prevent him from recovering for his injuries. And make no mistake about it, that's what the opposing attorneys are here for.

Robinson's counsel continued that the jury had not seen the defendants on the stand

> exhibiting any upsettedness at Tom Robinson. The only people are the opposing attorneys. In these car wreck cases there is a pot of money from which people are to be paid.

The Walls' counsel objected, arguing that Robinson injected insurance into the matter through his comment about a "pot of money." Robinson's counsel argued that in referring to the "pot of money," he was referring to the amount of money Robinson could

[1] Kentucky Revised Statutes.

[2] KRS 304.39-060(2)(a) "abolishes tort claims for lost wages and medical expenses of a person injured in an automobile accident to the extent that basic reparations benefits are paid or payable therefor." *Cincinnati Ins. Co. v. Samples*, 192 S.W.3d 311, 313 n.1 (Ky. 2006).

recover if it was awarded by the jury, but that the defense was there to prevent such an award. The trial court overruled the Walls' objection.

Later, Robinson's counsel stated that Robinson would be able to get medical treatment when he could pay for it, after "the opposing attorneys have been required to pay" him. Again, the Walls' counsel objected, arguing that the statement suggested that the defendants' attorneys, as opposed to the defendants, would have to pay any verdict. The trial court sustained the Walls' objection and, upon the Walls' request, further admonished the jury to disregard the statement.

On appeal, the Walls argue that a new trial should be granted in light of Robinson's counsel's statements which injected insurance into the matter. Specifically, the Walls point to the following statements: 1) the opposing attorneys were sent (implicitly by the insurance company) to prevent Robinson from recovering; 2) the defendants did not exhibit any "upsettedness" toward Robinson; 3) there is a "pot of money" from which car wreck plaintiffs are paid; and 4) Robinson will be able to obtain medical treatment "when the opposing attorneys" have been required to pay him. We agree.

Of course, the case law in Kentucky prohibits the mention of insurance in jury cases, even indirectly. *White v. Piles*, 589 S.W.2d 220, 222 (Ky.App. 1979). This rule

> is founded on the premises that [insurance coverage] is irrelevant to the issue of whether insureds tend to be less careful than uninsureds and, more importantly, that

> knowledge of insurance coverage might cause the jury to impose liability without regard to fault.

Id. Accordingly, "a reference to automobile liability insurance made in order to bias the minds of the jury at the trial is improper" and will constitute reversible error unless a clear showing of nonprejudice is made. *See Struetker v. Neiser*, 290 S.W.2d 781, 782 (Ky. 1956). Here, the statements Robinson's counsel made in the closing argument, particularly in regard to the "pot of money" from which car wreck "people" are paid, indirectly injected insurance into the matter. Further, rather than making a clear showing of nonprejudice, Robinson has merely asserted that the Walls have not shown prejudice, i.e., they have not shown that the verdict was anything other than conservative. Given the absence of the necessary showing of nonprejudice, we must hold that reversible error occurred, and a new trial is required.

II. Evidentiary Matters

As we have held above, a new trial is warranted in this matter due to the mention of insurance coverage. Still, we will address the Walls' remaining allegations insofar as we believe they are likely to occur again on retrial.

First, the Walls argue that the trial court erred by failing to permit them to cross-examine Robinson regarding his pending wrongful discharge lawsuit against his former employer. More specifically, the Walls argue that since Robinson sought damages for loss of income and the permanent impairment of his power to earn money, they should

have been permitted to question Robinson regarding his wrongful discharge claim seeking the same damages. We disagree.

The trial court did not abuse its discretion, *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001), by concluding that the evidence the Walls sought to introduce was irrelevant and thus inadmissible pursuant to KRE 402. Typically, an injured party "cannot receive more than one recovery as compensation for the same harm or element of loss." *Schwartz v. Hasty*, 175 S.W.3d 621, 625 (Ky.App. 2005). However, under the collateral source rule exception to the rule against double recovery, the benefits an injured party receives "for his injuries from a source wholly independent of, and collateral to, the tortfeasor will not be deducted from or diminish the damages otherwise recoverable from the tortfeasor." *Id.* at 626. The evidentiary effect of this rule is that "evidence of collateral benefits is not generally material[,]" as is the case here, *McCormack Baron & Associates v. Trudeaux*, 885 S.W.2d 708, 711 (Ky.App. 1994).

In any event, Robinson testified that had he not been injured, he would have earned $20,000 in 2003. If he worked for thirty more years at that rate, he would earn $600,000 over his lifetime. Nevertheless, Robinson demanded $300,000 in damages for the permanent impairment of his power to earn money in the automobile collision case,[3] and $200,000 in the same damages in his wrongful discharge claim. Given that the amounts claimed totaled less than his potential earnings, it appears that he could not have recovered double benefits.

[3] Further, the jury only awarded Robinson $30,000 on this element.

Further, assuming that the evidence the Walls sought to introduce was relevant, the trial court did not abuse its discretion, *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998), by excluding the evidence pursuant to KRE 403. Whatever probative value the evidence might have had is substantially outweighed by the prejudice Robinson could have suffered if the jury viewed him as being litigious in nature.

Next, the trial court permitted Robinson to testify regarding his medical expenses which arose out of the automobile collision at issue by reading from copies of his medical bills and/or a one-page summary of his medical bills, apparently prepared by his counsel. The Walls argue that the trial court erred by permitting Robinson to read the amounts from the bills and by further entering as an exhibit the one-page summary of the bills.[4]

KRE 803(6), the business records hearsay exception, governs the admissibility of medical records. *Matthews v. Commonwealth*, 163 S.W.3d 11, 26 (Ky. 2005). As this exception historically was known as the "shopbook rule" because it applied mostly to books of account, Robert G. Lawson, *The Ky. Evidence Law Handbook* § 8.65[2] (4th Ed. 2003) (citing *Galbraith v. Starks*, 25 Ky. L. Rptr. 2090, 79 S.W. 1191 (Ky. 1904)), it logically follows that the business records exception also governs the admissibility of medical bills.

KRE 803(6) "usually requires a live witness foundation to be laid before the records will be admitted into evidence, but also provides that such records may be

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[4] The trial court did not permit Robinson to enter the actual medical bills as an exhibit.

authenticated without extrinsic evidence if they meet one of several authentication exceptions, i.e., the exceptions provided in KRS 422.300, KRE 902(11), or other unspecified statutes." *Matthews*, 163 S.W.3d at 26. On remand, any medical bills must satisfy KRE 803(6)'s foundation requirement to be admitted under that provision.[5]

The Pike Circuit Court's judgment is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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[5] Further, the admissibility of any summary of Robinson's medical bills is governed by KRE 1006. A party proffering a summary as evidence must, inter alia, "lay a proper foundation as to the admissibility of the material that is summarized and show that the summary is accurate." Robert G. Lawson, *The Ky. Evidence Law Handbook* § 7.30[3] (4th Ed. 2003) (quoting *Needham v. White Lab., Inc.*, 639 F.2d 394, 403 (7th Cir. 1981)).