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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001186-MR

ARLENA CORNETT — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 07-CI-00099

LURA BRIGHT; JAMES V. CORNETT;
AND KENTUCKY FARM BUREAU
INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND STUMBO, JUDGES; WHITE,[1] SENIOR JUDGE.

NICKELL, JUDGE: Arlena Cornett appeals from a jury verdict entered by the Letcher Circuit Court in an automobile negligence case and an order denying her motion for a new trial. Cornett contends she was entitled to a new trial because the

[1] Senior Judge Edwin White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

jury awarded her zero dollars for pain and suffering despite awarding her damages for past medical expenses and lost wages. After a careful review of the record, the law, and the arguments of the parties, we affirm.

On September 10, 2005, Cornett was a passenger in a vehicle driven by her father, James V. Cornett, which was involved in a collision with a vehicle being driven by Lura Bright. As a result of the collision, Cornett received a contusion and skin laceration to her lower right leg. She presented to the emergency room for medical treatment shortly after the collision. Her wound required treatment with medicated ointment and antibiotics. Cornett presented to other medical professionals for follow-up testing in the months after the collision but no additional active treatment was deemed necessary. She saw no physicians from October 2006 to February 2008.

On March 23, 2007, Cornett filed suit against Bright, James Cornett, and Kentucky Farm Bureau Mutual Insurance Company[2] alleging simple negligence. The case was heard by a jury on August 4-6, 2008. The jury rendered a verdict awarding Cornett $3,500.00 in past medical expenses, $440.00 in lost wages, and $0.00 for future medical expenses, past and future pain and suffering, and permanent impairment of her earning capacity. Upon a reading of the verdict, Cornett objected to the verdict as inconsistent. The trial court heard arguments on the issue before overruling the objection. Bright then moved the court to dismiss

[2] Kentucky Farm Bureau was Mr. Cornett's underinsured insurance coverage carrier. At the trial of this matter, Kentucky Farm Bureau was named as a party to the jury, but did not participate in the trial and had no counsel involved.

the action based on the ground that the amount of the jury's verdict was less than the Motor Vehicle Reparations Act (MVRA) tort liability threshold of $10,000.00. *See* KRS 304.39-060, KRS 304.39-110, *Thompson v. Piasta*, 662 S.W.2d 223 (Ky. App. 1983), *Dudas v. Kaczmarek*, 652 S.W.2d 868 (Ky. App. 1983), and *Stone v. Montgomery*, 618 S.W.2d 595 (Ky. App. 1981). The trial court granted Bright's motion and dismissed the action with prejudice. Cornett's subsequent motion for a new trial was denied by separate written orders entered on May 26, 2009. That same day, the trial court entered an order denying Cornett's motion for costs and granting Bright's motion for costs in the amount of $1,732.61. This appeal followed.

Cornett raises four allegations of error in seeking relief. First, she argues the trial court erred in denying her motion for a new trial as the jury's award of zero dollars for pain and suffering was inadequate as a matter of law based on the evidence presented to the jury. Next, she contends the trial court erroneously offset the jury's award of past medical expenses and lost wages by the basic reparation benefits payable by statute when no evidence regarding such payments was presented at trial. Third, Cornett argues the trial court should not have awarded costs to Bright as her motion for costs was made more than ten days after the entry of the final judgment, thus depriving the trial court of jurisdiction over the matter. Finally, she argues the trial court erred in denying her own motion for costs.

First, Cornett argues the jury's award of zero dollars for pain and suffering was inadequate as there was "uncontroverted, unimpeached and undisputed evidence" presented that Cornett suffered pain from her wound. Thus, she contends the trial court should have granted her motion for a new trial. We disagree.

The standard of appellate review from the denial of a motion for a new trial is limited to whether the trial court's decision was clearly erroneous. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001) (citing *Cooper v. Fultz*, 812 S.W.2d 497 (Ky. 1991)). An award of zero damages for pain and suffering is not *per se* inadequate as a matter of law. *Id*. at 602. "*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 instructions of the court,' CR [Kentucky Rules of Civil Procedure] 59.01(d), *is a question dependent on the nature of the underlying evidence*." *Id*. (quoting *Cooper*, 812 S.W.2d at 501) (emphasis in original). Thus, "if the jury's verdict of zero damages for pain and suffering is supported by evidence, the trial court was not clearly erroneous in denying [Cornett's] motion for a new trial." *Id*. at 601.

Here, Dr. William Robertson and Dr. S.C. Kotay testified by deposition that there was no reason for Cornett to suffer from pain. They further testified that her injury would not affect her ability to engage in any activities. In addition, her initial complaint upon presenting to the hospital was numbness in the area of her injury. Although Dr. Sujata Gutti testified by deposition that Cornett

suffered pain and nerve injury in her right leg, the jury "is not bound to believe a plaintiff or her doctors." *Bledsaw v. Dennis*, 197 S.W.3d 115, 118 (Ky. App. 2006) (quoting *Spalding v. Shinkle*, 774 S.W.2d 465, 467 (Ky. App. 1989)). Contrary to Cornett's assertion, the fact that the jury awarded damages for medical expenses and lost wages is legally insufficient to require an award of damages for pain and suffering. "The law in Kentucky, however, does not require a jury to award damages for pain and suffering in every case in which it awards medical expenses." *Miller*, 42 S.W.3d at 601. Based on our review of the record, we are unable to conclude the jury's verdict was unsupported by the evidence, or that the trial court clearly erred in denying Cornett's motion for a new trial.

Second, Cornett argues the trial court erred in offsetting the jury's award for medical expenses and lost wages by the basic reparation benefits payable by statute when no evidence regarding such payments was presented at trial. She claims that since her health care insurance provider paid some of her medical expenses and no evidence was presented regarding amounts paid under the basic reparation benefits coverage of her father's automobile insurance policy, the offset provisions of the MVRA do not apply. We disagree.

The tort limitations of the MVRA only deny payment for damages covered by basic reparation benefits. KRS 304.39-060(2)(a). There is no question that medical expenses and lost wages are loss damages payable as basic reparation benefits. KRS 304.39-020(5). The law is clear that one is not entitled to recover damages "to the extent the basic reparation benefits provided in this subtitle are

payable therefor." *Wemyss v. Coleman*, 729 S.W.2d 174, 181 (Ky. 1987) (quoting KRS 304.39-060(2)(a) (emphasis added)). "Read in its entirety, the MVRA must be construed as abolishing tort liability to the extent the injured party *has received or could receive* [basic reparation benefits] or [added reparation benefits] under his or her existing coverage." *Saxe v. State Farm Mut. Auto. Ins. Co.*, 955 S.W.2d 188, 191 (Ky. App. 1997) (emphasis added). However, we find no statutory foundation supportive of Cornett's contention that actual payment of these expenses by the basic reparation benefits carrier is required for the offset provisions of the MVRA to apply. Likewise, Cornett does not cite us to any precedent sustaining her position and we are convinced none exists.

Nevertheless, the record reflects that evidence was presented to the trial court regarding payments from the personal injury protection (PIP) carrier on behalf of Cornett for some of the medical expenses relating to the injury she sustained in this collision. It would have been wholly improper to introduce such evidence to the jury as the law of this Commonwealth clearly prohibits the introduction of evidence of collateral source payments. *See O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995). Cornett's argument to the contrary is without merit. Thus, we hold the trial court correctly applied the law when it applied the setoff provisions of the MVRA to the jury's award.

Third, Cornett contends Bright's motion for costs was untimely and the trial court erred in granting it. She argues such a motion is in essence a motion to amend the judgment and that CR 59.05 requires such filings within ten days

after the entry of the final judgment. Her argument is misplaced as CR 59.05 simply does not control in this instance. While it is true that a trial court loses jurisdiction to amend its final judgment ten days after its entry, CR 52.02, CR 59.05, the trial court does not lose *all* jurisdiction at that time. For example, CR 60.01 allows trial courts to correct clerical mistakes, and CR 60.02 permits mistakes, newly discovered evidence, etc., to be considered up to one year after entry of the final judgment.

In relation to the case at bar, CR 54.04 controls bills of costs, and that rule contains no limitation on when such motions must be filed. Costs must necessarily be awarded after a judgment is entered. Exceptions must be filed within five days after the bill of costs is tendered and the trial court must announce its ruling in a "supplemental judgment." A plain reading of this self-explanatory rule indicates this "supplemental judgment" has nothing to do with the lost jurisdiction to alter, amend or vacate the final judgment. Thus, the trial court correctly considered Bright's motion for costs which was filed within a reasonable time following the judgment.

Finally, Cornett argues the trial court erred in denying her motion for costs. It appears Cornett is arguing that she was the "prevailing party" as the jury awarded her damages for medical expenses and lost wages, and thus she was entitled to recovery of her costs pursuant to CR 54.04. She offers no legal or factual support for her contention. We hold Cornett's argument is without merit. Although she continues to assert that the trial court improperly utilized the offset

provisions of the MVRA to reduce her award and ultimately to dismiss her cause of action—without which alleged error she would have prevailed—our earlier discussion brings the fallacies of her argument to light. Cornett fails to grasp that the trial court dismissed her complaint with prejudice. Thus, by necessity, she could not be the prevailing party for any purpose, most especially for the purpose of the application of CR 54.04. There was no error.

Therefore, for the foregoing reasons, the judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

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No brief filed.