

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001817-MR

CALVIN CUMMINGS

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 07-CI-00087

BURNICE W. STEELE;
STEELE'S AUTO SALES, INC.;
AND TRAVELERS CASUALTY
COMPANY OF CONNETICUT

APPELLEES

OPINION
REVERSING

** ** * ** * ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE¹, SENIOR JUDGE.

SHAKE, SENIOR JUDGE: In a personal injury action arising from an automobile accident, the Perry Circuit Court entered a judgment on a jury verdict awarding Calvin Cummings medical expenses and lost wages but not pain and suffering

¹ Senior Judge Ann O'Malley Shake 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.

damages. Cummings appeals from a Perry Circuit Court Judgment (Judgment), entered on January 20, 2009, and subsequent Order (Order), entered on September 15, 2009, denying Cummings motion for a new trial. Cummings requested a new trial based upon the jury's inconsistent awards. Following a careful review of applicable case law and the record, we agree and reverse the Perry Circuit Court Judgment and Order.

On January 3, 2005, Cummings was involved in a motor vehicle accident when the vehicle that he was driving was hit by a vehicle operated by Burnice Steele. Cummings filed a complaint in the Perry Circuit Court against Steele, the owner of the vehicle driven by Steele, Steele's Auto Sales, and his car insurance provider, Travelers Casualty Company. In his complaint, Cummings alleged that the accident was caused by Steele's negligence.

The matter went to trial on January 5, 2009. At the conclusion of Cummings' proof, Steele's Auto Sales moved the court to dismiss the claims against it. The trial court granted the motion. Following Steele's proof, Cummings moved the trial court to grant a directed verdict as to fault/liability of Steele. The trial court granted the directed verdict against Steele finding her at fault for the accident and liable for damages.

Following the directed verdict, the jury was left to make decisions concerning damages. The jury returned a verdict and awarded Cummings damages

for medical expenses and lost wages but did not award anything for pain and suffering. The trial court entered Judgment reflecting the directed verdict and the jury's award of damages. On January 28, 2009, Cummings moved the court for a new trial or a judgment notwithstanding the verdict. This motion was denied on September 15, 2009. This appeal follows.

I. Standard of Review

The decision of whether to grant a motion for a new trial based upon inadequate or inconsistent damages “. . . is a discretionary function assigned to the trial judge who has heard the witnesses first-hand and viewed their demeanor and who has observed the jury throughout the trial’.” *Cooper v. Fultz*, 812 S.W.2d 497, 501 (Ky. 1991) (quoting *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky.1984)), *abrogation on other grounds recognized by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky.2002). The trial court's ruling will be upheld unless it is clearly erroneous. *Id.* A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky.1998). Therefore, we must determine whether substantial evidence existed to support the trial court's decision to deny Cummings' motion for a new trial.

II. Adequacy of Award

A jury's decision to award damages for medical expenses and lost wages but not to award damages for pain and suffering is not a legal inconsistency. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001). Kentucky law does not require a

jury to award pain and suffering damages in every case in which it awards medical expenses. *Id.* Instead, the question of whether a jury's award of damages is inadequate requires an examination of the underlying evidence. *Id.* at 602.

Evidence that contradicts the jury's decision is not enough to show inadequacy. The jury is given the responsibility of evaluating the evidence and determining the credibility of witnesses. A jury is not bound to believe any particular witness. *Spaulding v. Sprinkle*, 774 S.W.2d 465, 467 (Ky. Ct. App. 1989).

Cummings bases his claim of inadequate damages upon the injuries that he sustained to his knee, facial injuries, and oral injuries. Cummings admits that he had a pre-existing knee injury but claims that he presented uncontroverted evidence that additional knee pain was incurred as a result of the accident. Despite his assertions, the record indicates that Steele presented impeachment evidence to indicate that the knee pain incurred could have been a natural progression of his pre-existing injury. Therefore, we decline to find the jury's award erroneous based upon Cummings' knee pain.

Cummings presented uncontroverted evidence of oral and facial pain. Cummings testified that he hit his face on the steering wheel during the accident. As a result, he bit through his lip and incurred a gash that stretched from the base of his bottom lip to the side of his face. In the Appellee's brief, Steele claims that, "[n]o doctor testified about actually seeing an open cut on [Cummings] face after the subject accident." The statement is incorrect.

In his deposition, which was played at trial, Dr. James Chaney testified that he was the on-call emergency room physician who treated Cummings following the accident. Dr. Chaney testified that he observed that Cummings had, “some abrasions and contusions and, particularly, had a laceration to the left side of his lip. . . .” Further, Dr. Chaney testified he referred Cummings to a plastic surgeon based upon the facial injury. Dr. Martin Luftman, the plastic surgeon, did not meet with Chaney immediately following the accident and did not see the open laceration. However, Dr. Luftman testified that Cummings complained of oral sensations in the affected areas. He testified that the facial scar could not be completely removed even with significant plastic surgery. He also claimed that Chaney grew a goatee to disguise the scar.

Steele argues that the testimony concerning Cummings’ facial injury was contradicted by Cummings’ admission of a pre-existing scar around his lip that Cummings incurred years before the accident. This evidence may have been confusing but was not contradictory. Cummings clearly stated that the lip laceration that he received in the military was on his upper lip while the laceration that he received in the automobile was on the lower lip. No evidence indicated that the laceration of which Cummings complained was actually the pre-existing scar. Cummings testimony was further supported by pictures of the scar.

While juries are not required to award pain and suffering damages each time a plaintiff is compensated for medical expenses, “. . . where a substantial personal injury is sustained, suffering is presumed.” *Schriewer v.*

Schworer, 296 Ky. 749, 178 S.W.2d 598, 599 (1944). Based upon the uncontroverted evidence of Cummings significant injuries and the inadequacy of the award, we conclude that the trial court's Order was clearly erroneous.

Contrary to Steele's assertions, Cummings was not required to request that the jury return to deliberation and reconsider the pain and suffering award in order to fully preserve his motion for a new trial. *Cooper v. Fultz*, 812 S.W.2d 497, 501 (Ky. 1991).

Accordingly, we reverse the Judgment and the Order denying Cummings motion for a new trial and remand the case to the Perry Circuit Court for a new trial to determine damages.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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