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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000121-MR
&
NO. 2010-CA-000151-MR

SABRA SCHULZE — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 06-CI-01011

MARY A. HINTON — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Sabra Schulze appeals and Mary A. Hinton cross-appeals from several orders of the Boone Circuit Court in a personal injury suit. Having carefully considered the record and the parties' respective arguments, we affirm the trial court's decisions.

Schulze filed suit against Hinton in 2006 seeking damages for personal injuries she sustained in a motor vehicle accident that occurred on October 15, 2002, in Boone County.[1] Schulze was traveling westbound in her vehicle on Ky. 18 in Florence when Hinton's vehicle ran into her while attempting to turn left from eastbound Ky. 18 onto Zig Zag Road. The airbag in Schulze's vehicle deployed, causing burns to her forearms. An ambulance took Schulze to the hospital where she was treated and released. Two and a half years later, Schulze underwent back surgery, which she attributed to the motor vehicle accident. As a result, Schulze sought $79,019.26 in medical expenses, $11,376.00 in lost income, and $250,000.00 for pain and suffering. Hinton stipulated to liability for the accident, and the case was tried on the issues of medical causation and damages.

The matter went to a trial by jury in September 2009. Schulze's theory of the case was that the 2002 accident aggravated a pre-existing back condition. On the other hand, Hinton argued that Schulze's problems were caused by her pre-existing condition, noting that she had been treated repeatedly for low back pain, hip pain, and leg pain for a year prior to the accident. Hinton asserted that she was only responsible for the minimal medical expenses and lost wages attributable to the motor vehicle accident. The parties presented both expert and lay testimony addressing the issues of causation and damages. At the conclusion

[1] Schulze also named her insurance company, Kentucky Farm Bureau Mutual Insurance Company, as a defendant, claiming underinsured motorists benefits. That party was later dismissed by agreement.

of the trial, a unanimous jury returned a verdict finding that Schulze had incurred the sum of $1,144.00 in medical expenses as a direct result of the accident and $144.00 in lost wages, but it awarded nothing for pain and suffering. The trial court entered a trial order and final judgment on September 25, 2009, in favor of Schulze in the amount of $1,288.00. The court then reduced the verdict to -0- pursuant to Kentucky Revised Statutes (KRS) 304.39-060(2)(a), and *Bohl v. Consolidated Freightways Corporation of Delaware*, 777 S.W.2d 613 (Ky. App. 1989), because those amounts were paid or were payable in basic reparation benefits and accordingly granted Hinton a credit on those amounts. Finally, the trial court entered judgment in favor of Schulze in the amount of $1,288.00.

On October 5, 2009, Schulze filed a motion for a new trial pursuant to Kentucky Rules of Civil Procedure (CR) 59.01, arguing that the -0- award for pain and suffering was inadequate in light of the medical testimony presented at trial. She also argued that Hinton's attorney made a prejudicial comment in his closing argument by mentioning Hinton's financial ability to pay an award. The same day, Schulze filed a bill of costs pursuant to CR 54.04 as the prevailing party, requesting $1,393.60 for the filing fee, service of summons, and deposition fees.

Hinton objected to the motion for a new trial, arguing that Schulze did not preserve her objection to the comment in the closing argument by making a timely objection, but rather waited until the end of the argument before lodging an objection. She also argued that any error was harmless because the trial court issued a curative instruction. Furthermore, Hinton argued that the jury was not

required to award damages for pain and suffering, asserting that the jury simply did not believe Schulze's evidence that her low back condition was worsened by the accident. In addition, Hinton filed a CR 60.02 motion to correct the judgment because it improperly reflected that Schulze was awarded $1,288.00, rather than showing that the award had been reduced to -0- by the applicable law. Therefore, Hinton requested that the judgment should be corrected to show a -0- verdict and that the complaint be dismissed. Hinton also objected to Schulze's bill of costs, arguing that she was not the prevailing party and was not entitled to recover her costs. In a later response, Hinton cited to this Court's prior opinion in *Lewis v. Grange Mutual Casualty Co.*, 11 S.W.3d 591 (Ky. App. 2000).

By order entered November 13, 2009, the trial court denied Schulze's motion for a new trial, but allowed Schulze time to respond to Hinton's CR 60.02 motion and as well as her objection to the bill of costs. In response to the CR 60.02 motion, Schulze pointed out that counsel for Hinton prepared the judgment, which she argued accurately reflected the law. She argued that CR 60.02 had no applicability to this issue, as this should have been raised in a motion for a new trial within ten days. Finally, Hinton filed her own bill of costs, claiming that the verdict was rendered in her favor and requesting $1,905.39 for deposition fees.

By order entered December 22, 2009, the trial court ruled that Schulze was entitled to recover costs as the prevailing party, distinguishing *Lewis*, *supra*, in that the jury in *Lewis* did not award any damages, whereas the jury in the present case did. The trial court then granted Hinton's CR 60.02 motion, citing *Bohl*,

supra, and in accordance with that ruling, it entered a corrected trial order and final judgment. In the corrected judgment, the trial court again reduced the jury's verdict to -0- pursuant to *Bohl*. It then amended the judgment portion to dismiss Schulze's complaint with prejudice "at costs of the Plaintiff." Schulze has now appealed from the original judgment, the corrected judgment, and the order denying her motion for a new trial. Hinton has cross-appealed from the order assessing costs against her.

On appeal, Schulze continues to argue that the trial court should have granted her motion for a new trial based upon inadequate damages and the prejudicial comment Hinton's attorney made during closing argument. On cross-appeal, Hinton contends that the trial court erred in awarding costs to Schulze as she was not the prevailing party.

We shall first consider Schulze's direct appeal; namely, whether the trial court properly denied her motion for a new trial. Schulze requested relief pursuant to CR 59.01(d), which provides in relevant part as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:
>
> . . . .
>
> (d) 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.

Our standard of review from the denial of a motion for a new trial "is limited to whether the trial court's denial of [the] motion was clearly erroneous[.]" *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001).

The first issue Schulze raises is whether the jury's decision not to award any damages for pain and suffering was made in disregard of the evidence or as a result of passion or prejudice, and is therefore improper. In *Miller*, the Supreme Court of Kentucky clarified its earlier holding in *Cooper v. Fultz*, 812 S.W.2d 497 (Ky. 1991), and reiterated that Kentucky law "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.

> In *Cooper*, this Court rejected the contention that a jury's pain and suffering award was automatically inadequate as a matter of law when a jury intentionally indicated no pain and suffering award but awarded damages for medical expenses or lost wages. Instead, the *Cooper* Court remanded the matter for the trial court to determine whether, based upon the evidence submitted at trial, the jury's pain and suffering award was adequate.

Miller, 42 S.W.3d at 602.

As in this case, one of the issues raised in *Miller* addressed whether the accident aggravated pre-existing pain, which the court described as an actively contested factual issue. The Court concluded that "[t]he civil justice system uses juries to decide exactly these types of factual disputes, and the testimony and evidence at trial in this case contained substantial support for the jury's verdict [awarding nothing for pain and suffering]." *Id*. at 603. *See also Bayless v. Boyer*,

180 S.W.3d 439 (Ky. 2005), and *Bledsaw v. Dennis*, 197 S.W.3d 115 (Ky. App. 2006) (both upholding -0- awards for pain and suffering when medical expenses had been awarded). Based upon this statement of the law, we must consider whether the evidence presented at trial supports the jury's decision to award no damages for pain and suffering. Therefore, we must closely review and consider the applicable trial testimony, specifically the medical evidence.

Schulze, who was twenty years old at the time of the accident, testified that she had a 9th grade education and that she was currently working for Medical Business Services in billing. She testified about the circumstances of the October 15, 2002, accident, which occurred while she was on the way to work at Florence Urgent Care. Schulze stated that the air bag deployed, causing burns to her forearms, and that her arms and chest hurt. An ambulance was called, and Schulze was taken to the hospital on a backboard with a neck brace in place. At the hospital, she was examined and x-rayed, and she had the air bag burns on her arms treated. She was then sent home, where she spent time on the couch to recover from the effects of the impact. She returned to work a few days later.

Schulze sought treatment at Florence Urgent Care from her employer, Dr. Mohamed Zineddin, on October 18th for her back. She indicated that prior to the injury she had only been experiencing muscle pain without any radicular pain into her legs. Because her symptoms did not improve, Schulze underwent surgery in May 2005 with Dr. Jonathan Borden. She testified that she still had pain every day and that she had problems playing with her child and sitting at her desk.

Dr. Zineddin testified at trial via video deposition. He testified that he specializes in internal medicine and works at Florence Urgent Care. He also has an office in Florence Medical Group. Dr. Zineddin had known Schulze since approximately 2001 in her capacity as an employee at Florence Urgent Care. He also treated her for medical problems. Schulze's medical records reflect that Dr. Zineddin saw her on October 9, 2002, six days prior to the motor vehicle accident. Dr. Zineddin saw her for low back pain that day, which he described as on-and-off and mild according to Schulze's assessment. She related that her pain increased upon bending and with prolonged standing and sitting. She denied having any leg numbness or shooting pain in her legs. The straight leg raise test for both legs was negative for either a pinched nerve or radiculopathy. The only positive finding was tenderness in the lumbo-sacral spine indicating a strain or muscle spasm. Dr. Zineddin had given her some samples of medications to control inflammation and pain, including Vioxx. He also ordered an MRI scan to rule out a disc herniation. Schulze underwent the MRI scan on October 11, 2002, four days prior to the accident. The MRI showed a mild disc protrusion, or herniation, at L5-S1. He opted to treat her medically rather than refer her to an orthopedist or neurosurgeon because that type of disc protrusion responded well to medical treatment, such as physical therapy, trigger shots, and medication.

Dr. Zineddin next saw Schulze when she came to work on October 18, 2002, three days after the accident. At that time, Schulze complained of lower back pain that was so severe she was unable to move or walk. She also reported

numbness and shooting pain in her legs, mainly on the right side. Upon examination, the straight leg raise test was positive in both legs. Dr. Zineddin stated that these were positive signs for radiculopathy and a pinched nerve. He opted to treat Schulze medically, including using trigger shots to relax her lower back muscles and giving her a prescription for Vioxx and Skelaxin, a muscle relaxer. Dr. Zineddin testified that the radiculopathy was not present before the accident, but was a new diagnosis after the accident.

On cross-examination, Dr. Zineddin was questioned about and testified more extensively regarding Schulze's complaints of low back pain prior to the October 15, 2002, accident. The office records show a first visit date of September 29, 2001, when Dr. Zineddin prescribed Tylenol 3, a narcotic pain medication, for her low back pain. He later prescribed other medications as well. He also saw Schulze on October 10, 2001, and ordered an x-ray taken on October 18, 2001, which showed asymmetrical facet orientation and configuration at L4-5 and L5-S1. He ordered chiropractic care. He saw her twice in November and then three times in January 2002, and at each visit she either complained of, or demonstrated on examination, low back pain. In January, Dr. Zineddin refilled her prescriptions and provided her with a back brace as well as heat compressions. By that time, Dr. Zineddin's diagnosis was low back pain with muscle spasm. He saw Schulze again in March, May, August, and October, the last visit a few days prior to the accident. At the last visit, Schulze had complaints of low back pain, and he ordered an MRI scan.

Following the accident, Dr. Zineddin saw her on October 18, 2002, for complaints of back pain. He saw her again in November for a problem related to her left eye, but she did not complain of back pain during that visit. She was seen again in December for a birth control shot. At visits in February, March, April, and early May, Schulze did not complain of low back pain, although during her May 16, 2003, visit she reported pain in her low back with acute flare-ups on and off. At visits in late May, June, and September, she again did not relate any back pain, although at a September 18th visit she did. Dr. Zineddin last saw Schulze in December 2003, and she did mention low back pain at that time. He testified that he ordered a second MRI in May and again in September, but he did not know if she ever had one performed.

Neurosurgeon Dr. Borden also testified at trial via his videotaped deposition. Dr. Borden first saw Schulze on February 7, 2005, when she presented with severe back and right leg pain. He took her history and examined her as well as reviewed the MRI results. After determining that she had not responded to non-surgical treatment, they discussed the types of surgeries that would be available. Dr. Borden performed a transforaminal lumbar interbody fusion on Schulze on February 25, 2005, at the L5-S1 level. He saw Schulze for reevaluation in July 2006, and at that time he found no problems with her low back, but he did diagnose a sacroiliac strain. Dr. Borden testified that Schulze's low back condition, for which he was treating her and performed surgery to correct, was

related to her accident on October 15, 2002. When asked to review the MRI taken days prior to the accident, Dr. Borden could not identify any surgical lesion.

On cross-examination, Dr. Borden admitted that he had not reviewed the records of Florence Urgent Care, including Schulze's treatment prior to the accident, nor was he aware that she had sought treatment for low back pain prior to the accident, although he was aware that she had had some low back pain earlier. He admitted that the basis for his opinion relating her back pain to the October 2002 accident was Schulze's statement to him. He further admitted that if her medical records differed from the history Schulze told him, it would affect his opinion regarding whether the surgery was ultimately related to the accident. He testified that Schulze had a good result from the surgery.

Dr. Arthur Lee, an orthopedic surgeon, testified on behalf of Hinton. Dr. Lee performed an independent medical examination of Schulze on November 13, 2009. Schulze related a history of a motor vehicle accident, during which she received transient air bag burns on her arms that resolved without any treatment beyond the initial evaluation. Schulze told Dr. Lee that her low back became symptomatic on an ongoing basis following the accident. She also related the treatment she received in the years following the accident, but denied having any previous low back injuries or problems. Based upon his physical examination, Dr. Lee testified that Schulze made an excellent recovery from the 2005 surgery. Dr. Lee also reviewed Schulze's medical records, noting specifically the MRI scan performed just prior to the accident, which showed a herniated disc at L5-S1 as

well as degenerative changes. He specifically noted the continuum of low back symptoms for a year prior to the accident.

Dr. Lee also reviewed office notes from Dr. Lester Duplechan of the Mayfield Clinic, a physical medicine and rehabilitation physician, from whom Schulze sought treatment beginning in early 2004. At that point in time, Schulze had a negative straight leg raise test, excellent muscle strength, and no sign of muscle weakness; in other words, a normal neurological evaluation. At a visit four months later, Schulze had another normal neurological exam. Regarding the 2005 surgery, Dr. Lee testified that the fusion addressed Schulze's degenerative disc disease, which was present prior to the 2002 accident based upon the MRI scan. Dr. Lee testified that he believed Schulze sustained a lumber strain as a result of the 2002 accident when she pulled the muscles in her low back.

Based upon our review of Schulze's testimony and the medical evidence presented, we must agree with Hinton that the jury's decision not to award damages for pain and suffering is supported by the record. Clearly, causation was a highly contested issue at this trial, and the jury believed Hinton's theory of the case, as it was free to do. Schulze had an obvious low back condition prior to the accident established by the medical records of Dr. Zineddin. Furthermore, her post-accident medical records did not always identify low back pain as a complaint, and Dr. Lee pointed out the lack of radicular pain following the accident and the presence of her pre-existing degenerative changes. While we certainly sympathize with Schulze's situation in being involved in a traumatic

motor vehicle accident, we must conclude that the jury had a sufficient basis upon which to find that her complaints were not causally related to the accident, but were related instead to her pre-existing problems. Accordingly, the trial court did not commit error in denying Schulze's motion for a new trial on this issue.

Next, Schulze contends that she is entitled to a new trial due to an allegedly prejudicial comment Hinton's attorney made during closing argument.[2] The comment at issue is: "She's trying to do the right thing here. But the right thing has its limits, ladies and gentleman. She is taking responsibility for this accident, but she is not in a position to write a blank check." At the end of the closing argument, Schulze objected to this comment because it injected Hinton's ability to pay a judgment into the jurors' minds. Schulze requested a mistrial or, in the alternative, a curative instruction. The trial court did not grant a mistrial, but opted instead to grant Schulze's alternative request and provided a curative instruction, which included Schulze's request that the specific comment be mentioned. The curative instruction provided as follows:

> Ladies and gentleman of the jury, before we move on to the closing arguments of counsel for the Plaintiff, let me remind you that what comes from the mouths of the attorneys is not evidence in the case as I indicated to you before. The evidence in the case comes from the witnesses who are under oath and take the witness stand. I also indicated to you that you must weigh and consider

[2] Counsel for Schulze raised the same issue in a pre-trial hearing, referring (as in Schulze's appellate brief) to a similar statement counsel for Hinton had made in another case in which counsel for Schulze had represented the plaintiff. We note that the plaintiff in that case appealed the judgment, but our review of this Court's unpublished opinion does not reveal that the comments made during the closing argument were addressed or raised as an issue on appeal. *See Smallwood v. Schneider*, 2007 WL 2142413 (2006-CA-000719-MR)(Ky. App. 2007).

> the evidence without regard to sympathy, prejudice, or passion. You can base your case solely on the evidence that comes from the witnesses. The purpose of closing statements is to allow the attorneys to summarize the evidence, to draw fair inference from the evidence, and argue to you how they view the evidence supports their position in this case. There was one comment made during the first closing statement about the financial inability of Ms. Hinton to write a blank check. The financial ability of a party to pay a damage award is not a factor that you will find in your jury instructions. So, I ask you to disregard that and award any compensation that you feel is appropriate under the evidence as presented to you. So when I tell you that you must weigh and consider the evidence without regard to simply prejudice or passion, that applies to all the parties in the case. Thank you very much for your consideration.

First, Hinton argues that Schulze did not preserve this issue by timely objecting to the comments but instead waived her right to object or appeal this issue by waiting until the end of the closing argument. Our review of the trial reveals that at the conclusion of Hinton's closing argument, counsel for Schulze approached the bench to make his objection, indicating that he chose not to object during the argument out of courtesy. Based upon this specific circumstance, we decline to hold that a six-minute delay in objecting to comments near the end of a forty-five-minute closing argument renders the objection untimely or unpreserved.

However, we do agree with Hinton that the admonition Schulze requested and received cured any alleged error. First, Schulze obtained the relief she requested; namely, a curative instruction from the trial court specifically mentioning the "blank check" comment. Second, Kentucky law is clear that "a jury is presumed to follow an admonition to disregard evidence; thus, the

admonition cures any error." *Hoppenjans v. Commonwealth*, 299 S.W.3d 290 (Ky. App. 2009). Therefore, because Schulze actually received the relief she requested, we cannot identify any reversible error and hold that the trial court did not err in denying Schulze's motion for a new trial on this issue.

Turning to the cross-appeal, Hinton argues that the trial court erred by awarding Schulze costs as the prevailing party. As we explained above, the trial court reduced the $1,288.00 verdict to -0- pursuant to KRS 304.39-060(2)(a) and *Bohl*, *surpa*, because those amounts were paid or were payable in basic reparation benefits and accordingly granted Hinton a credit on those amounts. Because this reduction of the verdict resulted in Schulze receiving nothing, Hinton contends that Schulze was not the prevailing party and is not entitled to recover her costs.

Before we address the merits of this issue, we must address a discrepancy between two of the orders that are before us. The trial court entered three orders on December 22, 2009: 1) the order overruling Hinton's objection and granting costs to Schulze; 2) the order granting Hinton's CR 60.02 motion; and 3) the corrected trial order and final judgment. The first and third rulings are the ones that appear to conflict as far as the issue of costs is concerned. In the first order, the trial court distinguished *Lewis* from the facts in the present matter and specifically awarded costs to Schulze. However, in the second order (the corrected judgment), which we presume was tendered by counsel for Hinton, the trial court dismissed Schulze's complaint "at costs of the Plaintiff."

We believe this is similar to a situation involving statutes that conflict with one another, in which the more specific statute controls:

> Since we have two statutes whose provisions are in conflict, the conflict must be resolved under the doctrine of *in paria materia*. *Economy Optical Co. v. Kentucky Board of Optometric Examiners*, 310 S.W.2d 783 (Ky. 1958). It is incumbent upon courts to resolve the conflict between the two statutes so as to give effect to both. *Id*. In harmonizing the conflict between two statutes that relate to the same subject, Kentucky follows the rule of statutory construction that the more specific statute controls over the more general statute.

Light v. City of Louisville, 248 S.W.3d 559, 563 (Ky. 2008). Here, the more specific order is the one ruling on Schulze's bill of costs. In that order, the trial court specifically held that Schulze was entitled to recover costs. In the corrected judgment, it appears that the phrase "at costs of the Plaintiff" was inserted in the paragraph for some unknown reason, when such language was not included in the original judgment nor requested by Hinton in the CR 60.02 motion. Therefore, we hold that the December 22, 2009, order specifically awarding costs to Schulze is the one that should be followed.

Turning now to the merits of the issue, KRS 453.040(1)(a) provides that "[t]he successful party in any action shall recover his costs, unless otherwise provided by law." Likewise, CR 54.04(1) provides that "[c]osts shall be allowed as of course to the prevailing party unless the court otherwise directs[.]" The term "prevailing party" is defined in the latest edition of Black's Law Dictionary as: "A party in whose favor a judgment is rendered, regardless of the amount of damages

awarded <in certain cases, the court will award attorney's fees to the prevailing party>. — Also termed *successful party*." BLACK'S LAW DICTIONARY (9th ed. 2009).

The case of *Lewis v. Grange Mutual Casualty Co.*, 11 S.W.3d 591 (Ky. App. 2000), cited by both parties and the trial court below, provides some guidance in this area. In *Lewis*, this Court addressed a situation where a jury found in favor of the plaintiff on liability, but did not award any damages. The *Lewis* Court looked to other jurisdictions for guidance as this situation represented an issue of first impression in the Commonwealth, and we have reviewed and considered the cases cited therein. In reviewing this issue, the Court held that "a plaintiff in a negligence action who succeeds in obtaining a liability verdict against a defendant but is not awarded damages has not prevailed for the purposes of awarding costs. A judgment in such an action is, in effect, meaningless unless it is accompanied by an award of damages." *Id*. at 594. The Court went on to state, "[a] plaintiff who proves liability but receives no damages has not succeeded in her ultimate goal and purpose for filing suit." *Id*.

In the case before us, we are presented with a situation where the parties stipulated liability prior to trial and the jury actually awarded damages to Schulze, distinguishing the result in *Lewis* from this case as the trial court stated in its order. Because she was awarded damages by the jury, Schulze is by definition the "prevailing party." It is of no consequence for purposes of this analysis that Schulze did not actually receive any of the damages the jury awarded to her, as that

was controlled by operation of law. While Schulze did not receive the amount of damages she requested, she nonetheless was awarded a portion of what she claimed. Therefore, Schulze is properly considered the "prevailing party" for purposes of awarding costs, and the trial court did not commit any error or abuse its discretion in awarding her costs as she requested.

For the foregoing reasons, the orders and judgment of the Boone Circuit Court are affirmed.

ALL CONCUR.

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