RENDERED: FEBRUARY 24, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001884-MR

PAMELA ADAMS AND THOMAS ADAMS — APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 08-CI-01709

RANDALL MILLER AND STATE FARM INSURANCE COMPANIES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

CAPERTON, JUDGE: Pamela and Thomas Adams appeal from the denial of their motion for a new trial following a jury verdict which found Randall Miller liable for the motor vehicle accident at issue on November 12, 2007. Said verdict did not award the full amount of damages sought and did not award any damages for pain and suffering. The Adamses argue that the jury verdict is not supported by the

evidence, that the jury was erroneously instructed on the doctrine of sudden emergency, and that a juror should have been excused for cause. After a thorough review of the record, the parties' arguments, and the applicable law, we do not find reversible error and, accordingly, affirm the jury verdict in question.

The facts of the case *sub judice* were testified to at a jury trial. In the early morning hours of November 12, 2008, Pamela Adams was stopped at a red traffic light. The road Adams was on had recently been reconstructed and consisted of four[1] lanes at the intersection where Adams was stopped. Randall Miller, the defendant, was traveling northbound and was directly behind Adams as he approached the intersection. Miller claimed that he saw his traffic light was about to turn green, i.e., he saw the perpendicular traffic light change from green to yellow, and elected to move into the left lane to go around Adams instead of stopping behind Adams at the red light. When Miller switched lanes he observed another vehicle behind him moving swiftly. Miller swerved back into the original lane and struck Adams's vehicle while she was stopped at the traffic light.[2]

The police arrived at the scene of the accident and Adams initially refused emergency treatment. When Adams's husband, Thomas, arrived at the scene, he took her to the emergency room where she was examined and released. The emergency room physician diagnosed Adams as suffering from an acute cervical and lumbar strain, noting her complaints of pain in her neck and back. A

[1] Two turn lanes and two straight-through lanes.

[2] Miller struck Adams at approximately 35 mph and did not apply the brakes before impact.

few days later, she sought treatment with a chiropractor, Shelia Bowling. Following two spinal adjustments with the chiropractor, Adams went to a family physician, Dr. Chan, because she began having numbness and tingling in her legs.

Based on Dr. Chan's notes, Miller argued that the treatments with the chiropractor caused Adams's pain. Miller alleged that, based on the medical records, Adams was pain free for two days after the accident and then required medical treatment following the second chiropractic visit. Additionally, the informed consent form for the chiropractor noted that the spinal adjustments Adams received could result in a disc injury. Miller also argued that the chiropractic treatments exacerbated a preexisting condition with her sciatic nerve.

Adams testified that she was in pain the evening of the accident and required pain medicine. The following days, Tuesday and Wednesday, Adams required more medication. She testified that even at trial she was still suffering from injuries sustained in the accident and that she had a prescription for pain medication and muscle relaxers up to a week before trial. Adams did not work the day of the accident, Monday, but did work less than a full day on Tuesday. On Wednesday, Adams only worked three hours because of the pain. Adams testified that she lost $220.50 as a direct result of the accident.

After hearing the evidence, the jury found Miller at fault and awarded Adams $200.00 (of $220.50) in lost wages; $9,800.00 (of $16,305.60) for past medical expenses; and $0 for pain and suffering. Adams moved the trial court for a new trial under Kentucky Rules of Civil Procedure (CR) 59.01(d). The trial

court denied the motion. In so doing, the trial court noted that the jury verdict was supported by the evidence since Adams told the officer at the scene of the accident that she was fine and declined ambulance service. The court noted that at the emergency room, Adams complained of pain in her neck and back and received medication. However, when she visited a family physician after the chiropractor visits, the record does not reflect neck pain but instead numbness and tingling in her arms. The evidence also showed that Adams had been treated for a sciatic nerve issue prior to the accident but had not received treatment for it since 2004.

The court determined that sufficient evidence was presented to the jury on the issue of whether Adams was entitled to recover damages for pain and suffering as a result of the accident. Thus, the court found that the verdict reflected that the jury considered the evidence and awarded damages for past medical expenses and lost wages, but made a conscious decision to award nothing for pain and suffering. The court did not find that the refusal to award pain and suffering represented inadequate damages appearing to have been given under the influence of passion, prejudice, or in disregard of the evidence or instructions of the court.

The court also declined to disturb the jury's assessment of damages with regard to past medical expenses and lost wages. The court instructed the jury it could award past necessary and reasonable medical expenses not to exceed $16,503.60. The court noted that while the jury awarded less than the full amount of damages sought, the evidence supported the jury's decision because the jury heard evidence that Adams did not see a second physician until seven months after

the accident. Further, the court found that the jury could have determined that some of the medical treatment expenses were not related to the accident. Likewise, the jury awarded less than the full amount sought for lost wages. The court reasoned that the jury may have factored into its assessment of damages that Adams was scheduled to be off work on November 14, 2007, or that she worked part of the day following the accident.

The court in its order also addressed Adams's issue with Juror #172. The court acknowledged that during voir dire Juror #172 expressed her belief that a person should not bring lawsuits but should bear the responsibility for what happens to her. When Adams's counsel asked the juror if her feelings would prevent her from being fair in the case, she replied, "Possibly." At the bench conference Miller's counsel asked Juror #172 if she could compensate Adams for her injuries if the evidence warranted it and the juror replied "I really don't know. I would have to hear it before I could make a decision." The court then asked her if she could listen to the evidence, keep an open mind, and, if she believed that Adams had suffered injuries, could she find Miller at fault and award Adams monitary damages. The juror answered, "I think I could, yes." The court then overruled Adams's challenge to excuse Juror #172 for cause.

The court noted that at no time during voir dire did Juror #172 express that she had already formed an opinion about the case. She did not affirmatively state that she could not be impartial In fact, she only affirmatively answered the final question the court presented after the juror was unable to answer whether she

could or could not be fair in the case. She did not demonstrate any pervasive prejudice. Thus, based on the totality of the circumstances, the court concluded that she did not show she should be disqualified from serving because of bias or prejudice. Moreover, all jurors who stated that they could not award money for pain and suffering were excused for cause. Adams had four peremptory challenges to use on remaining jurors that concerned her. Thus, the court overruled Adams's motion for a new trial. It is from this and the underlying jury verdict that Adams now appeals.

On appeal, the parties present three arguments which, for the sake of clarity,[3] we have concisely recharacterized as three issues, namely: (1) whether the jury's award of zero dollars for pain and suffering and less than the amount sought at trial for lost wages and past medical expenses requires a new trial; (2) whether the court erred in giving the jury an instruction on the sudden emergency doctrine;

[3] Adams specifically argued:

> (1) Was the verdict of the jury awarding $0 for pain and suffering; $200.00 (of $220.50) in lost wages; and $9,800.00 (of $16,305.60) for past medical expenses supported by the evidence? (2) Did the court erroneously instruct the jury on the sudden emergency instruction to the prejudice and damage of plaintiff, resulting in a compromised jury verdict? (3) Was the jury's verdict prejudiced prior to the commencement of the trial due to the jurors' expressing as a group a predetermination that they could not award damages for pain and suffering, and despite a challenge for cause on Juror #172?

Miller specifically argues:

> (1) Does a simple award of medical expenses require the jury to award pain and suffering when the jury has ample evidence of lack of pain and suffering or that any pain and suffering was not caused by the subject of the lawsuit? 2) Is a sudden emergency instruction proper when another automobile operator's negligence causes or contributes to the accident? (3) Does the court have to disqualify a juror for cause when the juror indicates that after hearing all evidence, the juror can conform his/her views to the requirements of the law and render a fair and impartial verdict?

and (3) whether the court erred in not excusing for cause Juror #172. With this in mind we now turn to our applicable jurisprudence.

At the outset we note that our review of a trial court's ruling on a motion for a new trial under CR 59.01 is limited to whether the denial of the motion was clearly erroneous. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001).

In *Miller* the Kentucky Supreme Court reiterated that "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 Miller's motion for a new trial." *Id.* Moreover, "a CR 59.01 ruling [is described] as 'a discretionary function assigned to the trial judge who has heard the witnesses firsthand and observed and viewed their demeanor and who has observed the jury throughout the trial.'" *Id.* quoting *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984)(*Davis* was overruled on other grounds by *Sand Hill Energy, Inc. v. Ford Motor Co.*, Ky., 83 S.W.3d 483, 493–95 (2002). *Sand Hill* was later vacated by *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028, 123 S. Ct. 2072, 155 L. Ed. 2d 1056 (2003)). Accordingly, we now review the issues presented by the parties in light of this standard.

First, we must address whether the jury's award of zero dollars for pain and suffering and less than the amount sought at trial for lost wages and past medical expenses requires a new trial. As noted in *Miller*, *supra,* "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 59.01(d), is a question dependent on the nature of the

underlying evidence." *Id.* at 602 (internal citation omitted). Moreover, the fixing and assessment of damages is exclusively a matter for the jury. *DeBuyser v. Walden*, 255 S.W.2d 616 (Ky. 1953). Determining whether a jury's award of damages meets this standard is a discretionary function assigned to the trial judge, who heard the witnesses firsthand, viewed their demeanor, and observed the jury throughout the trial. *Miller* at 601.

An award of zero dollars for pain and suffering is not automatically inadequate as a matter of law merely because it was accompanied by awards for medical expenses and lost wages. *Miller* at 602. Instead, the trial court must assess whether the award was inadequate, which requires evaluation of the evidence submitted at trial. *Id.* We must also bear in mind that a jury is not required to believe a plaintiff or her doctors. *Bledsaw v. Dennis*, 197 S.W.3d 115, 118 (Ky. App. 2006).

In the case *sub judice*, the trial court undertook an assessment of the evidence presented by both parties and concluded that there was countervailing evidence concerning Adams's pain and whether it was attributable to the car accident given the chiropractic treatments, the timing of her physician visits, her past medical history, and the length of time between physician visits. Thus, the trial court determined that the jury's verdict of zero dollars for pain and suffering was supported by the evidence. We agree with the trial court that in light of *Miller, supra,* the jury verdict was supported by the evidence and does not appear to have been rendered under the influence of passion or prejudice or in disregard of

the evidence or the instructions of the court. Accordingly, the award of zero dollars was not inadequate and the denial of the motion for a new trial was not clearly erroneous.

Similarly, we agree with the trial court that the jury was not required to award the full amount of damages sought for past medical expenses or lost wages. The jury instructions stated:

> If you find for the Plaintiff, what sums of money do you find from the evidence will fairly and reasonably compensate the Plaintiff, Pamela Adams, for such of the following items of damage as she may have sustained as a direct result of the accident?
> (c) Necessary and reasonable expenses for hospital and medical services she incurred in the past, not to exceed $16,305.60?
> (d) Necessary and reasonable expenses for hospital and medical services she is reasonably certain to incur in the future, not to exceed $50,000?
> (e) Loss of wages and income, not to exceed $220.20?

By the terms of the instructions, the jury was to assess the evidence presented and compensate Adams fairly and reasonably, not to exceed the stated full amount of damages sought. As the trial court noted, the jury could have considered the fact that Adams did not see another physician after the week of her accident until seven months later. Thus, the jury could have determined that some of the medical treatment expenses were not related to the accident and correspondingly awarded less than the full amount sought for past medical expenses and zero for future medical expenses. Likewise, the jury could have considered testimony concerning the number of hours worked by Adams and her scheduled time off in awarding her

less than the full amount sought for lost wages. Thus, we agree with the trial court that the jury verdict was supported by the evidence and does not appear to have been rendered under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court. Accordingly, the award for less than the full amount of the damages sought was not inadequate and the denial of the motion for a new trial was not clearly erroneous.

We now turn to the second issue presented, namely: whether or not the court erred in giving the jury an instruction on the sudden emergency doctrine.

The sudden emergency doctrine relates only to the question of whether a duty was breached and has no effect on the means by which damages are allocated. Thus, we believe any error to be harmless because the jury found Miller to be liable and it is only the amount of damages with which Adams takes issue. *See Henson v. Klein*, 319 S.W.3d 413, 422 (Ky. 2010), *and City of Louisville v. Maresz*, 835 S.W.2d 889, 894 (Ky.App. 1992). Accordingly, the trial court did not err in denying Adams's motion for a new trial based on this alleged error.

We now address the third and last issue of whether the court erred in not excusing for cause Juror #172. Adams argues that Juror #172 should have been excused for cause since she clearly expressed her opinion and bias about awarding monetary damages for pain and suffering. At the bench conference, Juror #172 indicated that she thought she could be fair and, thus, Adams argues, was unsuccessfully rehabilitated. Adams had to use a peremptory challenge to excuse Juror #172 after the trial court overruled her challenge for cause. Adams

argues that there were not enough peremptory challenges to strike all the jurors who had expressed opinions indicating inability to award damages for persons injured, like Adams, in an auto accident; however, Adams does not specify which additional jurors would have been challenged. Adams also argues that Miller used all of his peremptory challenges to remove all prospective jurors who had personal injury claims or upon prospective jurors who had a good result with a chiropractor, leaving Adams with a jury that felt there were too many lawsuits and that pain and suffering cannot be equated with an award of monetary damages. Thus, Adams argues that she was prejudiced by having to use a peremptory challenge on Juror #172.

We first note that the excusal of jurors for cause is a matter within the sound discretion of the trial court. *Thompson v. Commonwealth*, 147 S.W.3d 22, 51 (Ky. 2004). "The test for determining whether a juror should be stricken for cause is 'whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.'" *Id.* quoting *Mabe v. Commonwealth*, Ky., 884 S.W.2d 668, 671 (1994). The decision to exclude a juror for cause is based on the totality of the circumstances, not on a response to any one question. *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). After a review of voir dire concerning Juror #172, we believe that the trial court did not abuse its discretion in not excusing Juror #172. In light of the totality of the circumstances, Juror #172 indicated that she could, after hearing all the evidence, conform her views to the requirements of

the law and render a fair and impartial verdict.[4] Accordingly, the trial court did not abuse its discretion in failing to excuse Juror #172 for cause.

In light of the aforementioned, we affirm the trial court's denial of Adams's motion for a new trial and the corresponding jury verdict.

LAMBERT, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEES:
Robert E. Blau Cold Spring, Kentucky	Frank V. Benton, IV Newport, Kentucky

[4] We also note that Adams did not indicate upon which additional juror she would have used a peremptory challenge. We believe that better practice on the preservation of error concerning peremptory challenges may have been presented in *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009), wherein the Kentucky Supreme Court held that to preserve the alleged error and to show prejudice, a defendant who wishes to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike must identify on his strike sheet any additional jurors he would have struck.