RENDERED: OCTOBER 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000014-MR
AND
NO. 2013-CA-000050-MR

ARTHUR L. MASTERSON — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 11-CI-002973

SIEMENS INDUSTRY, INC.; AND
PHILLIP D. CARSWELL — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an appeal and cross-appeal from an action that was heard in the Jefferson Circuit Court. Based on the following, we affirm in part, and reverse in part the decision of the trial court.

BACKGROUND INFORMATION

Appellant, Arthur Masterson, was involved in an automobile accident on May 8, 2009, in Louisville. Masterson's vehicle was hit in the rear by a vehicle driven by Appellee Philip D. Carswell who was driving a vehicle owned by his employer, Appellee Siemens Industry, Inc.

Masterson brought an action in Jefferson Circuit Court against Carswell and Siemens for damages he alleged he sustained as a result of the accident. Specifically, he contended that he sustained a herniated disc at L3-4. Masterson saw Dr. Steven Reiss, a neurosurgeon, for his injuries. Dr. Reiss testified at trial.

The Appellees used Dr. Martin Schiller as their expert witness at trial. He was the only witness for the defense. The jury found in favor of the defense, i.e., that Masterson's injuries were preexisting. Masterson then made a motion for a new trial. The trial judge granted Masterson's motion relating to pain and suffering of limited duration, but denied it on the issue of medical expenses. Masterson then filed a Motion to Alter, Amend or Vacate the Order, which the trial court denied. This appeal followed. The Appellees filed a cross-appeal on the failure of the trial court to either bifurcate, exclude, or dismiss the vicarious liability claim; the failure to instruct the jury on the duties of a driver in a sudden emergency; and the trial court's order limiting Dr. Schiller's testimony.

DISCUSSION

Masterson first contends that the defendants' sole witness, Dr. Schiller, conceded all the critical medical issues in this case and that, therefore, there were no factual disputes to be resolved. Specifically, Masterson argues the following points:

> 1.) Schiller conceded that the motor vehicle accident produced a new and distinct injury, i.e., a herniated disc at L3-4;
>
> 2.) Schiller conceded that surgery was necessary to treat the herniated disc that was caused by the accident;
>
> 3.) Schiller conceded that Masterson's post surgical pain was related to the disc injury from the motor vehicle accident;
>
> 4.) Schiller conceded that Masterson's referral to Dr. Nelson, a pain specialist, was reasonable;
>
> 5.) Schiller conceded that epidural injections were reasonable and necessary because of the motor vehicle accident; and
>
> 6.) Schiller conceded the spinal cord stimulator was reasonable.

While Dr. Schiller's testimony established the part of his medical treatment which was a result of the accident, at issue was a lumbar disc herniation which had been successfully treated with surgery. Masterson's neurosurgeon, Dr. Reiss, testified that his treatment was for degenerative disc disease which he had had since 2008, rather than from the time of the accident. With this conflicting evidence, the jury found in favor of the Appellees and determined that the accident did not cause Masterson's injuries.

As fact-finders, "[t]he jury [is] not bound to accept as absolute truth the testimony of the plaintiff or his doctors." *Thompson v. Spears*, 458 S.W.2d 1, 2 (Ky. 1970). The plaintiff in a personal injury case bears the burden of proving his case. *Consolidated Coach Corporation v. Hopkins*, 228 Ky.184, 14 S.W.2d 768, 770 (Ky. App. 1929). In the present case, the jury did not find Masterson's evidence and argument persuasive. The jury did have, however, information upon which to base its decision. Thus, the jury's determination must stand.

Next, Masterson argues that the trial court correctly precluded Dr. Schiller from changing his opinions on causation contained in his Kentucky Rules of Civil Procedure (CR) 26.02 expert disclosure and his discovery deposition. He contends that, with that pretext, it was improper to allow defense counsel to argue preexisting conditions as causing his post-surgical pain. Finally, he asserts that there was no competent medical opinion offered to support this conclusion.

Appellees also argue in their cross-appeal that the testimony of Dr. Schiller was erroneously limited by the trial court. They contend that the trial court erred by granting the Appellant's motion before they had an opportunity to respond.

Evidentiary matters are reviewed for abuse of discretion. *Kerr v. Commonwealth*, 400 S.W.3d 250, 260 (Ky. 2013). Masterson's assertion that Dr. Schiller's testimony was in conflict with the pretrial testimony, however, is in error. In fact, Dr. Schiller explained when examined that there were varying causes for Masterson's complaints and that the accident could have been one of them. He set forth that it was a factor to be considered. Pursuant to *Calhoun v.*

Provence, 395 S.W.3d 476, 482 (Ky. App. 2012), evidence of causation may be proven not only by expert testimony, but by lay testimony as well. The jury was allowed to hear evidence from Masterson regarding his injuries and from Dr. Reiss as well as from Dr. Schiller. It was within the purview of the jury to decide whether the accident caused his injuries based upon all of this testimony. Therefore, the trial court did not err on this ruling.

Masterson also contends that the trial court erroneously denied his Motion for a Directed Verdict on the issue of medical expenses. He argues that Kentucky case law allows for medical expenses to be introduced to the jury through the testimony of the plaintiff. *See Townsend v. Stamper*, 398 S.W.2d 45 (Ky. 1966). He also asserts that, once the medical bills were admitted into evidence, Kentucky Revised Statutes (KRS) 304.39-020(5)(a) requires that the defendant rebut the presumption that the bills were reasonable in amount and reasonably necessary. *Tharpe v. Illinois Nat. Ins. Co*., 199 F.R.D. 213 (W.D. Ky. 2001).

Kentucky Rules of Evidence 301 provides that:

> In all civil actions and proceedings when not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

In other words, it was up to Masterson to convince the jury of the validity of the medical bills and that they were a direct result of the accident at issue. The jury was not persuaded by the evidence and we find no reason to overturn that verdict.

Masterson next asserts that only $2,816.00 of his $212,347.80 in medical bills was actually disputed by Dr. Schiller. Neither Dr. Reiss nor Dr. Schiller, however, disputed the amounts of his medical bills. The Appellees set forth evidence that the claims were exaggerated by Masterson and the jury believed the bills were not valid. We find no error in the jury's verdict on this issue.

Finally, Masterson argues that the trial court erroneously limited his new trial on the issue of pain and suffering to the period from May 8, 2009, until December of 2009. In reviewing the denial of a motion for a new trial, we review for abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). In determining that a new trial was required, the trial court based this upon the fact that the proof established that Masterson had sustained a herniated disc. Thus, for the jury to find no pain and suffering was in error. The trial court then limited the pain and suffering finding that the evidence supported to the jury's conclusion that Masterson had no medical expenses or pain and suffering relating to the accident after December 2009, but that it did not suggest there was no new pain and suffering at least through December 2009.

In this case, the trial court acted within its discretion in limiting the pain and suffering to specific dates from which the jury could conclude he had pain and suffering based upon the automobile accident at issue. Having determined that the

trial court committed no error as to the Appellant, we now address the arguments in the cross-appeal.

Appellees first assert that the vicarious liability claim against Siemens Industry should have been bifurcated, excluded from evidence and dismissed. In reviewing an issue of law, we review *de novo*. *Phelps v. Wehr Constructors, Inc.*, 168 S.W.3d 395, 397 (Ky. App. 2004). Appellees contend that it became clear during discovery that Carswell was not acting within the scope of his employment at the time of the accident. Pursuant to evidence presented, Carswell was driving home from the Arts Council of Louisville at the time of the accident, which was not part of his employment. Siemens made a motion for summary judgment on this issue; however, the trial court denied it. Siemens now asserts that it was reversible error to deny the motion.

In a vicarious liability claim against an employer, the plaintiff bears the burden of proving that the employee was acting within the course and scope of his employment at the time of the accident. An employer may only be found liable for acts of his employee if the accident occurred while the employee was working. *Dillion v. Harkleroad*, 295 Ky. 308, 174 S.W.2d 419, 420 (Ky. App. 1943).

Siemens argues that the trial court erred in using workers' compensation law in determining whether or not summary judgment should be granted on the issue. The trial court relied on *Receveur Construction Company/Realm, Inc. v. Rogers*, 958 S.W.2d 18 (Ky. 1997), in its holding. In *Easterling v. Man-O-War*

Automotive, Inc., 223 S.W.3d 852, 856 (Ky. App. 2007), a panel of our court held as follows:

> [W]e detect a recurring theme in respondent's reasoning: the mere fact that a demonstrator on the street is of benefit to the dealer is enough to make the dealer answer for the faults of his salesman who drives it. This asks too much, for it would hold the dealer responsible at all times. We are not aware of any rule or policy of agency law requiring such a sweeping application of the doctrine of respondeat superior.

We agree with Siemens. The trial court was in error when it used the law set forth in workers' compensation cases in determining whether vicarious liability would apply. Thus, the trial court must reexamine the issue with the law of vicarious liability rather than workers' compensation law prior to the retrial of the issues before it. We, therefore, reverse this issue of whether vicarious liability is applicable in this action.

The Cross-Appellants also argue that, on retrial, the jury should be instructed on the duties of a driver in a sudden emergency. The Cross-Appellants argue that a blinding sheet of water suddenly engulfed Carswell's windshield and that this was a sudden emergency.

In Kentucky, a "sudden emergency" is "[w]hen a defendant is confronted with a condition he has had no reason to anticipate and has not brought on by his own fault, but which alters the duties he would otherwise have been bound to observe, then the effect of that circumstance upon these duties must be covered by the instructions." *Regenstreif v. Phelps*, 142 S.W.3d 1, 4 (Ky. 2004),

citing *Harris v. Thompson*, 497 S.W.2d 422 (Ky. 1973). Carswell argues that the sudden downpour of rain made it difficult to see what was around him and that the accident was the result of his vision being impaired. We agree with the Cross-Appellants. The conditions of the road and Carswell's sight given his assertion that there was a flood of rainwater across his windshield should be given to the jury as such could be considered a sudden emergency.

Based upon the above, we affirm the decision of the trial court in part, and reverse in part.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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