RENDERED: MARCH 7, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000676-MR

DANNY CURTIS — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 12-CI-00030

CLARENCE R. GRIGSBY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Danny Curtis appeals from a jury verdict awarding him damages in the amount of $3,600.00 for medical expenses. After careful review, we find no error and therefore affirm.

The appellant, Curtis, and the appellee, Clarence Grisbsy, were involved in a motor vehicle accident on January 18, 2011. Curtis alleges the

accident caused him to suffer injuries and damages. Grigsby admitted to liability for the accident, and a trial on the issue of causation and damages took place on February 25, 2013.

Both parties conducted *voir dire*. At the close of Curtis questioning the jury, the defense began *voir dire*. Defense counsel asked, "Does anyone believe there are not enough lawsuits as a result of car accidents?" No jurors responded to this question, but Curtis contends that several jurors could be seen shaking their heads yes and had disgusted facial expressions. Defense counsel completed *voir dire*, Curtis commenced with his opening statement, and the trial proceeded.

Curtis first called State Trooper Ronnie Long, II, the trooper who worked the accident. Curtis then called Sherry Young, a bystander who witnessed the car accident. Ms. Young testified that Curtis told her that his foot was hurt as result of the accident. Curtis next called Valerie Messer, ARNP, a nurse practitioner who treated him. Ms. Messer testified that she saw Curtis as a patient the day following the motor vehicle accident in question, and he complained of being in pain from the accident. Curtis then presented the testimony of Dr. James Chaney by video deposition. Dr. Chaney testified that an MRI performed on Curtis showed a herniated disc. Dr. Chaney also testified that he would be seeing Curtis in the future for his normal medical needs, but he did not testify regarding the type, duration, or cost of any future medical treatment. Further, he did not

testify to a causal connection between the accident and the necessity of any future medical treatment.

Curtis also testified. He testified that after the automobile accident in question, he was injured at the scene and incurred pain and suffering to his body, including his ankle, which he described as feeling like it was hit by a sledgehammer. Curtis also testified that he suffered injuries to his back, neck, and shoulder. Curtis indicated that he had never felt pain before like he felt from this accident.

At the close of Curtis's proof, defense counsel presented several directed verdict motions. Grigsby first moved to exclude damages for future medical expenses as not supported by the evidence. Curtis objected based on the testimony of Dr. Chaney. The trial court granted Grigsby's motion, finding that there was not enough evidence in the record to allow a jury to make a determination without speculation. Next, Grigsby moved to exclude damages for future impaired earnings, and Curtis did not object. Defense counsel then moved to limit Curtis's medical expenses to $12,000.00, the amount last claimed by Curtis in his answers to interrogatories, as well as to exclude his claim for damages for pain and suffering. Curtis objected, but the trial court granted the defense's motion in part. The trial court limited the claim for medical expenses allowable to $12,000.00, the last amount disclosed in written discovery responses. However, the court denied Grigsby's motion as to pain and suffering and allowed Curtis to claim damages for pain and suffering.

Grigsby then commenced his case and called Dr. Henry Tutt as a witness by video deposition. Dr. Tutt testified that he was not able to find any injuries to Curtis related to the accident other than the ankle strain. Following Dr. Tutt's testimony, Grigsby rested his case.

In his closing, Curtis argued that his total medical expenses were $28,000.00, but he was only asking for $12,000.00. Grigsby claimed that only a total of $3,519.94 in medical expenses was related to the accident for the claimed ankle injury. After deliberation of the case, the jury returned a verdict in Curtis's favor and awarded him past medical expenses in the amount of $3,600.00 and nothing for pain and suffering. This appeal now follows.

As his first assignment of error on appeal, Curtis argues that during *voir dire*, the jury was tainted as a result of an improper question by defense counsel. Curtis concedes that this issue was not properly preserved for this Court's review. *See Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) ("the trial court should first be given the opportunity to rule on questions before they are available for appellate review."). However, Curtis urges us to review for palpable error and manifest injustice. *Id*. Curtis contends that this issue qualifies as a manifest injustice, but provides absolutely no support for this argument. In *Fraley v. Rice-Fraley*, 313 S.W.3d 635, 641 (Ky. App. 2010), this Court stated, "[t]he task of the appellate court in review under [Kentucky Rules of Civil Procedure] CR 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result

of action taken *by the court*." (Emphasis added). In this case, Curtis has not identified what substantial rights have been affected or what resulting manifest injustice occurred. Equally important, Curtis has not complained about an action taken by the court. Instead, Curtis complains about an action taken by defense counsel. Accordingly, under the factors set forth in *Fraley*, Curtis's argument in this regard fails, and we find no reversible error.

Curtis next argues that the trial court erred by not allowing the jury to award future medical expenses as damages. This issue was properly preserved for review when counsel objected to Grigsby's motion to exclude damages for future medical expenses. The jury is able to consider giving future medical expenses when evidence is sufficiently probative to support an award for future medical expenses. *See Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 692 (Ky. App. 2009).

Grigsby argues that the trial court did not err in excluding future medical expenses because there was no evidence presented at trial casually linking future medical expenses to the automobile accident. Dr. Chaney testified only that he would continue to treat Curtis and his family "for a plethora of medical issues," but did not relate any of the future treatment to the injuries allegedly sustained in the accident.

Curtis relies on *Burnett*, *supra*, in support of his argument that future medicals were warranted. In *Burnett*, the expert witness actually testified that the plaintiff would need certain medication as a result of his claimed injuries. The

Court concluded that while the jury may need to speculate on the cost of the medication, there was sufficient evidence to warrant future medical expenses for the ongoing use of the medication. However, this Court only reversed the trial court's decision as it related to "future prescription medication expenses" but did not allow this testimony to open the door for any possible future medical expenses.

In the case at bar, we agree with Grigsby and the trial court that Dr. Chaney did not testify about the type, frequency, or cost of treatment Curtis would need in the future as a result of the accident. Absent such testimony, the trial court properly excluded damages for future medical expenses, and there was no error in this regard.

Curtis next argues that the trial court erred by limiting him to expenses contained in the interrogatories. Curtis contends that Grigsby was on full notice of the medical expenses he was seeking. CR 8.01(2) states:

> In any action for unliquidated damages the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court; provided, however, that all parties shall have the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence. When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories. If this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories; provided, however, that the trial court has discretion to allow a supplement to the answer to interrogatories at any time where there has been no prejudice to the defendant.

In *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474, 477 (Ky. 2002), the Kentucky Supreme Court noted "the purpose of the rule is to notify the opposing party of the amount of unliquidated damages at stake." In that case, the plaintiff failed to timely supplement the claimed damages disclosed in answers to interrogatories. The trial court allowed the untimely supplementation, and the plaintiff was awarded over $14,000.00 in medical expenses. However, based on the clear language of CR 8.01(2) and the decision in *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999), the Court of Appeals held, and the Supreme Court affirmed, that the medical expenses should not have exceeded the amount last disclosed in answers to written discovery of $5,563.72.

Curtis argues that this case is more like *Tennill v. Talai*, 277 S.W.3d 248, 251 (Ky. 2009), where defense counsel had waived strict interpretation of CR 8.01(2) when he conducted a deposition specifically seeking to find out what damages the Plaintiff was seeking and when during settlement negotiations, it was clear what the Plaintiff was seeking. Curtis claims that in the instant case, Grigsby and his counsel knew all of the medical expenses prior to trial even without a modified interrogatory. Grigsby argues that Curtis's claimed medical expenses were not easily ascertainable, as the allegedly related expenses were co-mingled with admittedly non-related medical expenses.

The trial court ruled that allowing medical expenses beyond the $12,000.00 amount disclosed in answers to written discovery would be an unfair surprise because it was unclear from the record which expenses were directly related to the

accident. We agree and are not persuaded that *Tennill* is controlling here. The trial court's decision was fully in line with Kentucky case law, and Curtis is not entitled to a new trial. We also note that the jury only awarded Curtis one-third of the allowable medical expenses in this case. Therefore, the limitation on the maximum medical expenses did not actually limit the damages recoverable in this case.

Curtis next argues that *Fratzke* and *LaFleur*, *supra* should be overturned. Curtis contends that in those cases, the Kentucky Supreme Court adopted a harsh interpretation of CR 8.01(2) and did not allow a plaintiff to amend their interrogatories near or during trial. Curtis contends that this resulted in a plaintiff being denied the ability to claim damages suffered because of an oversight in not amending an interrogatory in a reasonable amount of time.

Grigsby argues that the language of CR 8.01(2) is clear and unambiguous and that the rule states that "the amount claimed shall not exceed the last amount stated in answers to interrogatories." Grigsby contends that since the rule is still in effect, the Kentucky Supreme Court's holdings in *LaFleur* and *Fratzke* should be upheld. Clearly this Court does not have the authority to overturn Kentucky Supreme Court precedent, and we will not address this issue further.

Finally, Curtis argues that the jury erred in failing to award him damages for pain and suffering after awarding him past medical expenses and contends that *Miller v. Swift*, 42 S.W.3d 599 (Ky. 2001), should be overturned. Again, Curtis concedes that this argument was not preserved for review by this Court, as the trial

court did not rule on the issue. Again, Curtis urges this Court to review for palpable error and manifest injustice, but provides no argument as to how a manifest injustice occurred. We therefore decline to address this issue, as it is not properly before us on appeal. We note that even if the issue were properly before us on appeal, the Kentucky Supreme Court examined the issue of whether a jury is required to award damages for pain and suffering in every case in which it awards medical expenses and answered that question in the negative. *See Miller v. Swift*, *supra*.

Discerning no reversible or palpable error, Curtis was not entitled to a new trial. We therefore affirm the jury verdict and judgment of the Perry Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

David A. Johnson
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BRIEF FOR APPELLEE:

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