IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 8, 2003 Session

CAROLE J. TAYLOR, ET AL. v. ANDREA B. SMITH, ET AL.

Appeal from the Circuit Court for Hamilton County
No. 00C188 Jacqueline E. Schulten, Judge

FILED JUNE 24, 2003

No. E2002-01158-COA-R3-CV

This is a personal injury action that arises out of a two-vehicle accident. Carole J. Taylor and her husband, George Taylor, sued the driver and owner of the uninsured vehicle that hit Mrs. Taylor's vehicle in the rear. They also caused process to be served on their uninsured motorist carrier. The jury returned a verdict in favor of Mrs. Taylor for $10,000. It declined to award Mr. Taylor any damages on his loss of consortium claim. The plaintiffs appeal, asserting that the jury's verdicts are not supported by material evidence; that the trial court gave an incomplete jury charge regarding aggravation of a pre-existing condition; and that the trial court erred in failing to grant a new trial. We hold that the jury's verdicts are not supported by material evidence. We vacate the trial court's judgment and remand for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

J. Taylor Walker, Chattanooga, Tennessee, for the appellants, Carole J. Taylor and George Taylor.

Daniel J. Ripper, Chattanooga, Tennessee, for the appellee, Allstate Insurance Company.

OPINION

I.

This accident occurred on January 19, 1999. Mrs. Taylor had stopped her vehicle at a red light. While she was waiting for the light to change, her vehicle was struck in the rear by a vehicle being driven by the defendant Andrea Smith. Ms. Smith's vehicle was owned by the defendant Robyn R. White. Mrs. Taylor claimed injuries to her right knee, back and arm.

From the scene of the accident, Mrs. Taylor drove herself to the emergency room of North Park Hospital where she was seen, treated with a sedative, and released. Over a period of time following the accident, she was seen by several physicians. On January 13, 2000, Dr. Alan Odom performed arthoscopic surgery on her right knee to correct a degenerative condition that he determined was aggravated by the accident.

II.

The plaintiffs filed suit on January 18, 2000. Process against the driver and owner of the uninsured vehicle was returned "not to be found." The Taylors' uninsured motorist carrier, Allstate Insurance Company, defended the Taylors' suit in the name of the defendant Andrea Smith. Allstate admitted liability and the case proceeded to trial on the issue of damages, resulting in the verdicts previously mentioned.

III.

The plaintiffs raise several issues. The Taylors' primary focus is on their claim that the jury's verdicts are not supported by material evidence. Because we find this issue dispositive, we will concentrate our discussion on it.

IV.

Immediately following the accident, Mrs. Taylor began to complain of back and right knee pain. She had earlier complained of pain in her right knee in 1996. At that time, she sought treatment from an orthopaedist, Dr. William Donaldson, who diagnosed arthritis in her right knee and prescribed anti-inflammatory medicine. Mrs. Taylor testified that she took the drug for a short period of time, and that afterwards, her knee did not cause her any significant problems until the accident.

Two days after the accident, Mrs. Taylor consulted her family physician who recommended that she see an orthopaedist for her back and knee pain. For the next several months, she was seen by an orthopaedic surgeon, Dr. Robert Sendele, who treated her conservatively with respect to her back and right knee. She claims that there was no improvement in her condition. Almost one year after the accident, she consulted Dr. Odom, an orthopaedist specializing in knees, for a second opinion. Dr. Odom, who testified at trial by deposition, recommended arthroscopic surgery. Dr. Odom reported that the surgery went according to plan. He testified that he discovered a tear in Mrs. Taylor's medial meniscus and that he removed a portion of it. Dr. Odom opined that the tear was related to a pre-existing degenerative condition in Mrs. Taylor's knee. However, Dr. Odom was also of the opinion that the condition was aggravated by the accident. He expressed the further opinion that the nature of the degenerative condition was such that it was possible that an individual could have such a condition without pain.

Despite some initial improvement in the condition of Mrs. Taylor's knee following the surgery, her pain returned. She has been assigned a 20% permanent physical impairment to her right lower extremity and an 8% whole person impairment as a result of her injuries. Dr. Odom testified that the knee condition for which he treated Mrs. Taylor is permanent in nature and will never improve. Dr. Odom did not treat or offer testimony regarding the condition of Mrs. Taylor's back.

At trial, Mrs. Taylor produced an itemized list of medical expenses that she claimed were causally related to the accident. Some of these expenses related only to the right knee while others pertained to both the knee and the back. The expenses totaled $19,649.43. The UM carrier did not dispute that these charges were actually incurred.

Dr. Odom was the only expert who testified in this case. The UM carrier did not call any witnesses, electing instead to rely upon its cross examination and what it perceived to be weaknesses in the plaintiffs' case.

In her complaint, Mrs. Taylor seeks damages for her injuries, pain and suffering, loss of enjoyment of life, loss of earning capacity, and medical bills.

V.

Our standard of review of a jury's verdict is well-settled. It was addressed by the Supreme Court in a 1994 opinion as follows:

> Rule 13(d) of the Tennessee Rules of Appellate Procedure provides that "[f]indings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." As this Court stated in the recent case of ***Hodges v. S. C. Toof & Co.***, "It is well established that when reviewing a judgment based on a jury verdict, appellate courts are limited to determining whether there is material evidence to support the verdict." 833 S.W.2d [896,] 898 [(Tenn. 1992)].
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> > It is the time honored rule in this State that in reviewing a judgment based upon a jury verdict the appellate courts are not at liberty to weigh the evidence or to decide where the preponderance lies, but are limited to determining whether there is material evidence to support the verdict; and in determining whether there is material evidence to support the verdict, the appellate court is required to take the strongest legitimate view of all the evidence in favor of the verdict, to assume the truth of all that tends to support it, allowing all reasonable inferences

> to sustain the verdict, and to discard all to the contrary. Having thus examined the record, if there be any material evidence to support the verdict, it must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury.
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> ***Crabtree Masonry Co. v. C. & R. Constr., Inc***., 575 S.W.2d 4, 5 (Tenn. 1978).

Forrester v. Stockstill, 869 S.W.2d 328, 329-30 (Tenn. 1994).

VI.

In a personal injury case tried to a jury, the issue of damages addresses itself to the sound discretion of that body. ***Transports, Inc. v. Perry***, 414 S.W.2d 1, 5 (Tenn. 1967); ***Hunter v. Burke***, 958 S.W.2d 751, 757 (Tenn. Ct. App. 1997). There is no mathematical rule or formula that can be applied in determining an appropriate damage award. ***Brown v. Null***, 863 S.W.2d 425, 429-30 (Tenn. Ct. App. 1993). An injured claimant is entitled to "reasonable compensation for bodily injuries, pain and suffering, disability, loss of earnings and expenses." ***Id***. at 430. Once a jury verdict has been approved by the trial judge – as is the case now before us – the verdict is entitled to deference on appeal unless there is no material evidence in the record to support it. ***D. M. Rose & Co. v. Snyder***, 185 Tenn. 499, 508, 206 S.W.2d 897, 901 (1947).

VII.

The UM carrier argues that there is substantial evidence to support the jury's verdicts. It points to a number of weaknesses in the plaintiffs' case. It urges us to consider a number of matters, *i.e.*, (1) that Mrs. Taylor gave conflicting testimony regarding the nature of her 1996 knee problem, finally conceding at trial that she had been told by her then-treating physician that she had an arthritic right knee; (2) that her tax returns and testimony did not support her claim of a significant loss of income from her craft of doll making; (3) that she had last seen Dr. Odom regarding her right knee in January, 2001, and had missed an appointment with him in March, 2001; and (4) that some of her claimed expenses of $19,649.42 relate to treatment for her back and there was no medical proof connecting her back problem to the accident. In general terms, the UM carrier argued to the jury, and now argues to us, that Mrs. Taylor and her husband exaggerated her injuries and damages.

Much of what the UM carrier argues is true. There was a great deal of evidence which tends to support its position that, on the evidence before us, the plaintiffs are not entitled to recover damages in the amount sought by them in this case. However, having said this, we are compelled to conclude that there is no material evidence to support an award *as low as* $10,000.

While Dr. Odom testified that the degenerative condition that prompted the surgery on Mrs. Taylor's right knee was not caused by the accident, he was just as adamant that the accident aggravated this pre-existing condition. It goes without saying that aggravation of a pre-existing condition is a compensable element of damages. *See* ***Elrod v. Town of Franklin***, 140 Tenn. 228, 239-42, 204 S.W. 298, 301-02 (1918). No expert testimony was offered by the defense establishing that surgery was not a necessary procedure to address Mrs. Taylor's right knee problem. In fact, there is no serious argument made by the defense as to whether the surgery was performed, whether it was necessary, or whether the accident aggravated a pre-existing condition.

The Taylors' evidence pertaining to expenses reflects the following two bills associated with Dr. Odom's treatment of Mrs. Taylor, including the surgery:

Dr. Alan Odom (1/5/00 – 1/18/01)	$ 5,771
Chattanooga Surgical Center	9,124
	$14,895

Dr. Odom testified that these bills were for treatment that was necessary; that they were reasonable in amount; and that they related exclusively to the right knee. The defense did not seriously challenge Dr. Odom's opinion as to these two bills.

In the face of undisputed, necessary and reasonable expenses related to the accident of at least $14,895, the jury awarded Mrs. Taylor $10,000. There is no material evidence to support an award less than these two medical bills. While some of the other bills claimed by the Taylors were not tied to the accident by medical proof, it should also be noted that there were still other bills, such as the emergency room treatment, that were essentially undisputed by the defense.

Finding no material evidence to support an award less than the "hard-core" medical bills, we are compelled by law to vacate the trial court's judgment entered on the jury's award to Mrs. Taylor. We also find no material evidence to support the jury's award of zero damages to Mr. Taylor on his loss of consortium claim. Accordingly, we vacate the judgment as to the jury's verdict in Mr. Taylor's case as well.

VIII.

The plaintiffs also argue on appeal that the trial court erred in giving an incomplete jury instruction on the subject of aggravation of a pre-existing condition and that it erred in failing to grant a new trial.

We find no error in the subject charge. Even if the charge was not complete – a concession we make only for the purpose of argument – the plaintiffs are still not entitled to a new trial on this basis. They did not submit a proposed written charge on the subject, *see* ***Rule v. Empire Gas Corp.***, 563 S.W.2d 551, 554 (Tenn. 1978), and arguably acquiesced in the trial court's refusal to expound

upon its already-given charge. Even if there was an error in the charge, it was not such as would require a vacation of the award on that basis alone. *See* Tenn. R. App. P. 36(b).

With respect to the issue of failing to grant a new trial, we find this issue without merit, except to the extent it encompasses the plaintiffs' lack of material evidence argument.

IX.

The judgment of the trial court is vacated and this case is remanded to the trial court for a new trial. Costs on appeal are taxed against Allstate Insurance Company.

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CHARLES D. SUSANO, JR., JUDGE