IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

January 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

SHARON LEINART and PAUL LEINART	)	ANDERSON COUNTY 03A01-9508-CV-00260
Plaintiffs-Appellants	)	
v.	)	HON. JAMES B. SCOTT, JR., JUDGE
GARY LYNN WHITE	)	
Defendant-Appellee	)	AFFIRMED AND REMANDED

BRUCE D. FOX OF CLINTON FOR APPELLANTS

GREGORY F. COLEMAN OF KNOXVILLE FOR APPELLEE

OPINION

Goddard, P.J.

Sharon Leinart and her husband Paul Leinart appeal a judgment rendered in their case seeking damage for her injuries and for his loss of consortium and companionship as a result of injuries she received in a vehicular accident. She insists the jury award, approved by the Trial Court, totaling $15,000 was so inadequate that the Trial Court was in error in not granting her

a new trial. Mr. Leinart insists that the jury award of zero for his damages was likewise inadequate.

By way of background, it appears from the record that the case was tried on two occasions to a jury. In the first trial, Mrs. Leinart received a judgment in the amount of $25,000. She filed a motion for a new trial or an additur, and the Trial Court granted her "a new trial or in lieu thereof the Court will grant an additur of $20,000" which would have increased her judgment to $45,000.

The Defendant declined to accept the additur and a new trial was granted.

At the second trial Mrs. Leinart was awarded $15,000. A second motion for an additur or a new trial was denied by the Trial Court.

The Defendant's answer admitted liability and the only question presented to the jury was the amount of damages to be awarded Mr. and Mrs. Leinart.

Because this is a jury verdict approved by the Trial Court, we must determine whether there is any material evidence to support the jury's verdict. Reynolds v. Ozark Motor Lines,

Inc., 887 S.W.2d 822 (Tenn. 1994); Whitaker v. Harmon, 879 S.W.2d 865 (Tenn. App. 1994).

Mrs. Leinart, who was 35 years of age on May 7, 1992, the date of the accident giving rise to this suit, was employed by Martin-Marietta as a senior reports and data assistant. While she was driving her vehicle in a westerly direction on Dutch Valley Road near Lake City, it was struck by one being operated by Gary Lynn White traveling in the opposite direction. The impact knocked her vehicle off the travel portion of the road and afterwards she experienced pain in the region of her neck. She was taken by ambulance to the hospital, treated and released, and on May 12 was seen by her family physician, Dr. A. Matthew Ellison because of continuing difficulty with pain in her shoulders and neck. She was later referred to Dr. John T. Purvis, a neurological surgeon, and then to Dr. Dennis G. Harris at the Baptist Hospital Pain Clinic.

Dr. Ellison diagnosed her as having a neck and shoulder strain. All of the medical tests given by the doctors proved negative, although Dr. Purvis testified that in view of her history that he could not "predict that she will get over it."

Mrs. Leinart was involved in several accidents prior to the one for which she now sues:

1. Automobile accident 1975. Injury to neck and back, from which she testified she had recovered.

2. Automobile accident 1981. Neck and back injuries for which she brought suit contending that she sustained serious, painful and permanent injuries from which she testified she had also recovered.

3. Work related injury 1986. Lower back injury while moving heavy fabric at what she termed was a "fake fur plant." This resulted in lower back surgery. After her surgery, her physician testified she suffered a permanent partial disability of 10 percent.

There is also proof that she was involved in still another accident between the first trial, which was held on September 16, 1993, and the second held on January 26, 1995. She also had occasion to visit with a doctor some nine days before the accident in the case at bar, although it is her position that the complaints incident to this visit--the radiation of pain down one arm to her elbow--was considerably different from the injuries for which she seeks recompense in this suit.

It is obvious from the jury's award that it did not believe that all the medical expenses incurred and all the wages claimed to have been lost resulted from the injuries received in the accident of May 7, 1992.

Indeed, Dr. Harris, who practices at the Baptist Hospital Pain Clinic, to whom Mrs. Leinart was referred by Dr. Purvis, a neurological surgeon, and was called on behalf of Mrs. Leinart, gave proof from which the jury could well have made such an inference:

> Q It's a fair statement then to say, Doctor, that this lady, as of 4-30-92, some seven days prior to the accident, had noted the exact or very, very similar problems that she reported to you in October of 1992?
>
> A I would have to say that that's very similar, yes.

In Smith v. Shelton, 569 S.W.2d 421 (Tenn.1978), our Supreme Court held that the standard of review in determining whether a jury verdict is so inadequate as to require a new trial is whether it falls below the range of reasonableness. Although not specifically citing Smith, this Court, in Wilkerson v. Altizer, 845 S.W.2d 744, 749 (Tenn.App.1992), followed the same rule and, in doing so, said the following:

> This Court does not have the authority to grant an additur. Tenn.Code Ann. § 20-10-101. We review the action of the trial court in suggesting an additur pursuant to Tennessee Rule of Appellate Procedure 13(d). Tenn.Code Ann. 20-10-101(b)(2).
>
> However, the statute does not provide any guidance when the trial court refuses to grant an additur. See Foster v. Amcon International, Inc., 621 S.W.2d 142, 146 (Tenn.1981).
>
> Here, the jury's verdict was not within the "range of reasonableness." Therefore, the trial court should have suggested an additur or granted a new trial. Foster v. Amcon International, Inc., 621 S.W.2d 142 (Tenn.1981). We are of the opinion that the trial

> court abused its discretion in failing to suggest an additur or, in the alternative, failing to grant a new trial.

Upon applying the foregoing standard to the view of the facts we must take as hereinbefore set out, we conclude the award of $15,000 for Mrs. Leinart's injuries and that of zero for Mr. Leinart's damages was within the range of reasonableness.

Moreover, the jury might well have discounted the proof relative to Mrs. Leinart's injury in view of the allegation in this suit, filed 25 days after the accident, that the injuries Mrs. Leinart received resulted in "permanent and physical impairment" on the ground that such a conclusion could not have been determined so soon after the accident.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of Mrs. Leinart's judgment and the costs below. Costs of appeal are adjudged against the Leinarts and their surety.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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Charles D. Susano, Jr., J.