

IN THE COURT OF APPEALS OF TENNESSEE

FILED
January 26, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

VIRGINIA M. PINSON and)	C/A NO. 03A01-9508-CV-00256
husband, WILLIAM A. PINSON,)	KNOX COUNTY CIRCUIT COURT
)	
Plaintiffs-Appellants,)	
)	
)	
v.)	
)	HONORABLE HAROLD WIMBERLY,
)	JUDGE
)	
MARGARET DENNY BONNELL)	
and PAMELA MARIE PARSONS,)	
)	
Defendants-Appellees.)	AFFIRMED AND REMANDED

JAMES H. LONDON and ROY F. SATTERWHITE, III, of LONDON & AMBURN, P.C., Knoxville, for Appellants

FRED G. MUSICK and JAMES C. CONE of JENKINS & JENKINS, Knoxville, for Appellee MARGARET DENNY BONNELL

JAY ARTHUR GARRISON of KENNERLY, MONTGOMERY & FINLEY, Knoxville, for Appellee PAMELA MARIE PARSONS

O P I N I O N

Susano, J.

This appeal questions the adequacy of a jury's verdict. The plaintiff Virginia M. Pinson (plaintiff) alleged in her complaint that she sustained physical and emotional injuries¹ when the automobile in which she was riding as a guest passenger collided with another vehicle as the latter attempted to exit from a McDonald's restaurant onto Cumberland Avenue in Knoxville. The jury awarded the plaintiff \$500 and awarded her husband \$1,683.25 in his derivative action. The award was apportioned 75% to the driver of the exiting vehicle and 25% to Pamela Marie Parsons, the plaintiff's daughter, who was driving the vehicle occupied by the plaintiff at the time of the accident. The plaintiff and her husband filed a motion for a new trial or additur. The trial court denied their motion, and this appeal followed. The sole issue² on this appeal is whether the trial judge erred when he failed to grant the plaintiff and her husband a new trial due to the alleged inadequacy of the jury's award.

I

In this case, we must decide if there is "material evidence to support the [jury's] verdict." T.R.A.P. 13(d). Since the appellants claim that the jury's award is inadequate, our focus is on the "lower limit" of the "range of reasonableness." **Foster v. Amcon International, Inc.**, 621 S.W.2d 142, 146 (Tenn. 1981). We are instructed by the Supreme Court that

¹The complaint does not allege an aggravation of a pre-existing condition. There was material evidence to support a finding that there had been no aggravation.

²The Court of Appeals "does not have the authority to grant an additur" under T.C.A. § 20-10-101. **Wilkerson v. Altizer**, 845 S.W.2d 744, 749 (Tenn. App. 1992); **Poole v. Kroger Co.**, 604 S.W.2d 52, 54 (Tenn. 1980).

[a] reasoned examination of the credible proof of damages leads to a determination of the figure beyond which excessiveness or inadequacy lies and beyond which there is no evidence, upon any reasonable view of the case, to support the verdict.

Id. In reviewing the adequacy of the award in this case, we are ever mindful

that the amount of compensation in a personal injury case is primarily for the jury, and that next to the jury, the most competent person to pass on the matter is the trial judge who presided at the trial and heard the evidence.

Id. at 143-44.

The effect of a trial court's approval of the amount of a jury award is clear:

. . . the trial judge's approval of the amount of the jury's verdict invokes the material evidence rule, just as it does with respect to all other factual issues upon which appellate review is sought,

* * *

"[a]ll of the evidence in the record that tends to support the amount of the verdict should be given full faith and credit upon appellate review."

Poole v. Kroger Co., 604 S.W.2d 52, 54 (Tenn. 1980) (citing ***Ellis v. White Freightliner Corp.***, 603 S.W.2d 125 (Tenn. 1980)). We must decide "whether material evidence can be found in the record that would support [the jury's verdict] as being at or above the

lower limit of the range of reasonableness, giving full faith and credit to all of the evidence that tends to support [the verdict]." **Poole** at 54. Our mandate is clear. We must take the strongest reasonable view of all the evidence to uphold the verdict, assume the truth of all that tends to support the verdict, ignore all evidence against the verdict, and allow all reasonable inferences to sustain the verdict. *Id.* In our analysis, we do not weigh the evidence; we also do not determine the credibility of the witnesses. *Id.*

II

The dynamics of the accident as they relate to the plaintiff's injuries are not in substantial dispute. As the vehicle occupied by the plaintiff was proceeding east on Cumberland Avenue, it collided with the left side of another vehicle that crossed its path. The second vehicle was attempting to turn left from a McDonald's restaurant to go west on Cumberland. As a result of the collision, the plaintiff's head came in contact with and cracked a part of the windshield.

At the scene of the accident, the plaintiff indicated that she was not injured. The investigating officer testified that the plaintiff "had no injury that could be seen but had splinters of glass in her eyes and in her hair." She was taken to the emergency room because she was afraid she had glass in her eyes. Her eyes were flushed out as a precaution, x-rays were taken, and her head was examined. Apparently it was determined at the hospital that her eyes were free of glass. She was

released after treatment in the emergency room. At no time following the accident was she ever admitted to the hospital on an in-patient basis for any injuries received in this accident.

The only complaint that the plaintiff made to the emergency room personnel was possible glass in her eyes. At trial, she testified to some bruising caused by her seat belt, but this was not mentioned during her deposition when she was asked about her injuries.

The plaintiff had many serious physical and emotional problems prior to this accident. In January, 1972, she was involved in an automobile accident and sustained a "whiplash" injury to her neck. She was told then that she had a neck of a 60-year old individual. At the time, she was only 29. She had an operation in 1977 to correct a ruptured disc, the site of which is not clear from the record. In 1988, she had surgery to repair two ruptured discs in her back.

Following the 1988 surgery, the plaintiff had substantial physical and emotional problems. Immediately prior to the time of the instant accident on May 14, 1990, she needed leg braces in order to walk. She used a walker around the house, but had to use a wheelchair when she went any significant distance outside the house. She had been under the care of Dr. Jeffrey S. Hecht, a rehabilitation doctor at Patricia Neal Rehabilitation Center since February 16, 1989. He was treating her for problems "below the waist" and emotional problems related to her physical condition. Prior to the instant accident, she

was on pain medication; had a "serious disability"; experienced headaches from time to time as well as sleeplessness, dizziness and vertigo; had complaints of pain in her hands and wrists; and was still having some problems with her neck. As a result of the 1988 back surgery, she had stopped outside gardening, had quit traveling "for the most part," and did only limited housework. In order to do her housework, she had to use a walker. She occasionally had occupational therapy at Patricia Neal to learn how to dress herself in spite of her disabilities. Her daughter testified that her outlook on life was adversely affected by the 1988 accident and surgery.

Prior to the instant accident, the plaintiff applied for and was approved for social security disability benefits on the basis of her back and leg condition.

When Dr. Hecht saw the plaintiff on May 4, 1990, ten days before the accident, he found her to weigh 276 pounds. He described her as being obese and acknowledged that this contributed to the problems she was experiencing before the accident.

On the day of the accident, the plaintiff had been to a medical specialist in circulatory problems to determine if she had a blood clot in her leg.

Following the accident, the plaintiff saw Dr. Hecht on June 5. She complained of pain in her arms, back, neck and head, shoulder girdle and hands. Dr. Hecht testified that these were

new injuries from the automobile accident. He assessed her anatomical impairment at nine to ten percent to the body as a whole. In his opinion, she had new physical and emotional problems as a proximate result of the automobile accident. He conceded that it was difficult to say that there had been a worsening of problems below the waist, "since there was so much damage before in the leg areas." He opined that 75 to 85% of her \$31,000 in medical expenses incurred after the accident were related to her new problems.

Dr. Hecht was subject to sharp cross-examination. He conceded that she suffered from carpal tunnel syndrome (a hand and wrist problem) before the accident and that a portion of his accident impairment rating was related to that same problem. In the course of his cross-examination, defense counsel alluded to MRI's conducted by another physician on the plaintiff's neck and back. A jury could conclude from that testimony that these objective tests were essentially normal with respect to injuries from this accident. There was also evidence from which a jury could conclude that the plaintiff saw a physician after the accident with respect to injuries received in the accident, but failed to mention any problems with her neck.

The parties had diametrically opposed theories regarding the plaintiff's injuries in this accident. Each side had material evidence to support that side's theory. Certainly, there was evidence submitted to the jury to support a substantial monetary award--one far in excess of the small award returned by the jury; however, much of the plaintiff's evidence depended upon

her credibility. Was this plaintiff experiencing *new* symptoms of pain; was she suffering *new* disabilities? Or were her problems a continuation of the same "serious" problems she had before the accident? The credibility of the witnesses was for the jury.

Reynolds v. Ozark Motor Lines, Inc., 887 S.W.2d 822, 823 (Tenn. 1994). As we have previously indicated, we are not in a position to assess credibility. That is uniquely the function first of the jury and then the trial judge. They see the witnesses, assess their demeanor, and decide which of the witnesses are entitled to belief. We cannot do this from a "cold" record.

We recognize that Dr. Hecht testified to injuries that would warrant a much larger award than that returned by the jury; however, much of Dr. Hecht's testimony was based on the plaintiff's symptoms. To the extent his testimony was tied to the plaintiff's subjective complaints, his testimony is also subject to the jury's assessment of the plaintiff's credibility. In any event, "juries are not bound to accept expert medical opinion as to the nature or extent of a permanent disability." **Poole** at 55.

The cases relied upon by the plaintiff are inapposite. Their factual patterns are substantially different from the one presented here. As one of those cases points out, a jury is permitted "within reasonable bounds" to "observe and, to some degree, be guided by its own impressions of the seriousness of the plaintiff's complaints." **Loftis v. Finch**, 491 S.W.2d 370, 376 (Tenn. App. 1972). In the instant case, the plaintiff was never hospitalized for her alleged injuries; to a large extent,

her complaints were purely subjective in nature; and she was substantially disabled before this accident. The jury obviously was not impressed with her testimony and her complaints of disabling pain resulting from new injuries. Not having seen her testify in person, we are not in a position to disagree with that body's assessment of her credibility.

The verdict in the derivative action filed by the plaintiff's husband was closely tied to medical expenses that were unquestionably related to the accident, such as the ambulance bill and eye care and x-rays in the emergency room. As in the case of the plaintiff's suit, we find that there is material evidence to support the award to the plaintiff's husband.

In evaluating the jury's verdict, we consider only the evidence supporting that award. While the jury's award was a small one, we cannot say that it was below the lower limit of the range of reasonableness when the evidence tending to support the verdict is isolated and considered without regard to the evidence to the contrary. There was material evidence to support the jury's award in this case.

The judgment of the trial court is affirmed. This cause is remanded for the collection of costs assessed below and for enforcement of the judgment. Costs on appeal are assessed against the appellants.

Charles D. Susano, Jr., J.

CONCUR :

Herschel P. Franks, J.

Don T. McMurray, J.