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ARKANSAS COURT OF APPEALS

DIVISIONS III & IV
No. CA12-391

Opinion Delivered February 20, 2013

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT
[CIV-2010-1364-2]

HONORABLE JON B. COMSTOCK, JUDGE

JAMES DEEN
APPELLANT

V.

JANICE HOPKINS ET AL.
APPELLEES

AFFIRMED

DAVID M. GLOVER, Judge

This case arises from the collision of two cars. Appellant, James Deen, admitted liability in the suit filed against him by appellees, Janice Hopkins, who was the driver, and her three minor children, Ian, Tiffany, and Phillip Hopkins, who were the occupants of her car. A bifurcated trial was held concerning compensatory and punitive damages. The jurors were given itemized verdict forms addressing the four Hopkinses' claims for compensatory damages, and the jury awarded designated amounts (totaling $30,000) for past medical expenses; zero damages for future-medical expenses; zero damages for the nature and extent of their injuries; and zero damages for pain and suffering. Janice Hopkins and her son, Phillip, were also awarded lost wages, to which the parties stipulated before the case went to the jury. In the punitive-damages portion of the trial, the jurors awarded Janice and each of her children $1000, for a total of $4000. On September 16,

2011, judgment was entered and fixed the damages as set by the jury. On October 4, 2011, a hearing was held on the Hopkins family's motions for JNOV and for a new trial. On October 13, 2011, the trial court entered an order granting the Hopkinses' motion for a new trial, and a separate order was entered denying their motion for JNOV. Deen then brought this appeal, contending that 1) the trial court erred in setting aside the jury's itemized verdicts and granting the motion for a new trial; and 2) the trial court erred in granting the Hopkinses' motion for new trial with respect to both compensatory and punitive damages. We affirm.

Background

With respect to each of the Hopkinses, evidence was presented concerning their medical expenses, and the jury awarded the amount of those medical expenses as part of the compensatory damages. Yet, with respect to the Hopkinses' claims for damages concerning "the nature, extent, and duration of any injury" and "pain and suffering," the jury returned verdicts of zero for each of them.

During the hearing on the Hopkinses' motion for new trial, the trial court granted the motion and explained its rationale in part:

> I would say where there's evidence of approximately $30,000 worth of medical bills and six to nine months of treatment, none of which was really in my mind attacked. There was no effort on the part of the defendant to suggest that these people were faking their injuries. And I realize Mr. Horton may have made reference to, Mr. Lambert, your closing. Just so the record's clear, I was curious to remind myself as to your comment, and it certainly wasn't as strong as Mr. Horton said. But the transcript at least that I've been provided by my court reporter, says, quote, let's talk about medical bills and lost wages. This is from Mr. Lambert. I tell you the truth, I don't have any problems at all or any dispute about the medical

> bills and the lost wages. I think you ought to award them. That's a natural sequence of events. It went on for about nine months or so and so we don't have any problem with that. We think that would be fair. And you go on to say Janice and Phillip ought to be awarded their lost wages. That was all in that sequence, and I don't have any problem with that. And then a little further down. And I'm not telling you that they didn't have some pain and suffering during that nine-month period and I'm not saying that they shouldn't be compensated a reasonable amount for that pain and suffering.
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> Mr. Lambert, I certainly don't take those last statements as being admissions by the defendant and I'm not suggesting that. But I am suggesting that to the Court, and I think to the defendant, there was a natural sequence of events. And if this jury concluded that the plaintiffs had met their burden of proof for them to have awarded the medical that had to have said that we find that these medical expenses were proximately caused by the negligence of the defendant. For them to at the same time say in effect, zero for pain and suffering to me it does not reflect a jury that actually followed the instructions of the court.
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> But because I do think to the defense side while there was six to nine months of treatment I think the jury could certainly have tempered any award with their own assessment as to how persuaded were they by the individual credibility of these plaintiffs. So I don't think I would've tried to second guess in terms of whether they awarded a hundred dollars or $5,000 or $20,000. I'm not sure I would've, but I don't want to say since that's not the circumstance I have in front of me. I just know in my own mind I think a zero at that point tells me that there was an illogical inconsistency in the verdict that I think in the exercise of the Court's discretion if I'm legally authorized to do so I believe warrants a new trial.

Standard of Review

When a motion for new trial is made, the test to be applied by the trial court is whether the verdict is clearly against the preponderance of the evidence. *Lamons v. Croft*, 290 Ark. 341, 719 S.W.2d 426 (1986). If the trial court denies the motion, the test on appeal is whether the verdict is supported by substantial evidence. *Id.* If the trial court grants the motion, the test on appeal is whether the trial court manifestly abused its

discretion. *Id.* The abuse of discretion must be clear or manifest. *Bruce v. Hancock*, 2010 Ark. App. 171, 374 S.W.3d 138. Abuse of discretion means a discretion improvidently exercised, *i.e.*, exercised thoughtlessly or without due consideration. *Id.* A showing of abuse is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Id.*

As his first point of appeal, Deen contends that the trial court erred in setting aside the jury's itemized verdicts concerning each of the elements of compensatory damages and, therefore, erred in granting the Hopkinses' motion for new trial.

As explained above, in deciding whether to grant the motion for a new trial, the test to be applied by the trial court is whether the verdict is clearly against the preponderance of the evidence. *Lamons*, 290 Ark. 341, 719 S.W.2d 426. That is *not* the test applied on appeal. If the trial court *denies* the motion, the test we employ on appeal is whether the verdict is supported by substantial evidence. *Id.* If, however, the trial court *grants* a motion for new trial—as was done here—the test we employ on appeal is whether the trial court manifestly abused its discretion. *Id.* We find no abuse of the trial court's discretion in its decision to grant a new trial.

Here, in addressing the motion for new trial, the trial court candidly reviewed the evidence that had been presented and counsels' arguments for and against a new trial. The trial court noted that the evidence established that $30,000 had been awarded in total medicals and that there had been six to nine months of treatment, none of which had really been attacked by Deen's counsel, *i.e.*, there had been no effort by Deen to suggest

that the Hopkinses were faking their injuries. The trial court also had its court reporter transcribe Deen's counsel's closing argument in order to compare the record with the Hopkinses' counsel's characterization of defense comments. The trial court noted that Deen's counsel's comment

> certainly wasn't as strong as [the Hopkinses' counsel] said. But the transcript, at least that I've been provided by my court reporter, says, quote, let's talk about medical bills and lost wages. This is from [Deen's counsel]. I tell you the truth, *I don't have any problems at all or any dispute about the medical bills and the lost wages. I think you ought to award them. That's a natural sequence of events. It went on for about nine months or so and so we don't have any problem with that. We think that would be fair. And you go on to say Janice and Phillip ought to be awarded their lost wages. That was all in that sequence, and I don't have any problem with that. And then a little further down. And I'm not telling you that they didn't have some pain and suffering during that nine-month period and I'm not saying that they shouldn't be compensated a reasonable amount for that pain and suffering*.

(Emphasis added.) The trial court explained that it did not consider those comments to be defense admissions, but that defense counsel had essentially conceded that *some* pain and suffering had occurred and that defense counsel was not arguing against a *reasonable* amount being awarded for such pain and suffering. In *Bruce*, *supra*, our court explained that a circuit court may consider concessions made in opening statements or closing arguments in deciding whether to grant a new trial. Here, the trial court did just that. The trial court also expressed concern about the manner in which the jury had been instructed but concluded—after careful, thoughtful, and due consideration—that in the court's judgment, the preponderance of the evidence had established—and defense counsel had virtually conceded—that there had to be *some* past pain and suffering with the amount

of medical expenses awarded and the length of time that treatment was necessary. We find no abuse of discretion in the trial court's analysis and granting of the motion for new trial. We are therefore compelled to affirm.

For his final point of appeal, Deen contends that the trial court erred in granting the Hopkinses' motion for new trial as to both compensatory and punitive damages. We disagree.

In its order granting the motion for new trial, the trial court acknowledged Deen's counsel's questioning of whether the Hopkinses sought a new trial on all damages and whether the trial court intended that its grant of a new trial extend to all issues and damages in the case, including punitive damages. The trial court stated in its order, "For the record, the Court's view was that the argument by counsel . . . was focused on whether or not to grant a new trial on all damages and the Court's intent was that the new trial extend to all issues." Moreover, our appellate courts have held that in law cases, two issues may be so interwoven that an error with respect to one requires a retrial of the whole case, particularly with respect to compensatory and punitive damages. *See, e.g.*, *Life & Cas. Ins. Co. v. Padgett*, 241 Ark. 353, 407 S.W.2d 728 (1966). Deen has not convinced us that the fact that those issues were bifurcated in the instant case necessarily compels a different result. The trial court concluded that both issues needed to be tried again, and we find no basis to reverse that decision.

Affirmed.

HIXSON, WOOD, and BROWN, JJ., agree.

WHITEAKER and VAUGHT, JJ., dissent.

PHILLIP T. WHITEAKER, Judge, dissenting. I respectfully dissent and would reverse.

The majority correctly notes that the standard of review from a trial court's grant of a new trial is whether the circuit court abused its discretion. *Lamons v. Croft*, 290 Ark. 341, 719 S.W.2d 426 (1986). In deciding whether to grant a new trial, however, a circuit court may not substitute its view of the evidence for that of the jury unless the verdict is clearly against the preponderance of the evidence. *Bailey v. McRoy*, 99 Ark. App. 185, 258 S.W.3d 388 (2007).

Here, the circuit court concluded that the jury failed to follow its instructions, which were given without objection. The jurors were instructed to apply the law as contained in the instructions to the facts before them and render their verdict upon that evidence. They were instructed that they were not required to set aside their common knowledge but could consider all of the evidence in light of their own observations and experiences in the affairs of life. They were instructed that they were the sole judges of the weight of the evidence and the credibility of the witnesses. They were instructed that, if the evidence appeared to be equally balanced on any issue, they must resolve that question against the party who had the burden of proving it. They were instructed that whether the elements of damage—i.e., the nature, extent, and duration of any injury; necessary

medical expenses; future medical expenses; pain and suffering; and lost wages—had been proved by the evidence was for them to determine. Finally, they were given itemized verdict forms with the specific instruction from the court:

> What I want to be sure you understand is simply because I list these elements of damage and provide a dollar sign with a blank line does not mean that I'm commenting to you about what you should do. I'm not. I'm not telling you, and I don't want you to make any conclusions as to whether you should or should not award on any of these elements of damage. The point is, I'm trying to give you a verdict form that allows you to do your job, which is to evaluate the evidence and make the best judgments that you can following these instructions and weighing the evidence that you've heard.

In granting a new trial, the circuit court stated, "I will genuinely say that I remain persuaded that I don't know what happened in that jury room, but for some reason I think they ignored part of the Court's instruction." The circuit court never specifically addressed which instruction the jury ignored. Instead, it made the following comments on the jury's assessment of the evidence:

> They either had to give this plaintiff zero across the board—but to give them the $30,000 approximately of medical expense after six to nine months of medical treatment and not a dollar for pain and suffering, for past pain and suffering, to me it's not only just inconsistent and it's not just to me that the plaintiff finds it undesirable, it represents, in my judgment, a failure to follow the jury instructions. At some point there was a breakdown.
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> And if this jury concluded that the plaintiff had met their burden of proof for them to have awarded the medical, they had to have said that we find that these medical expenses were proximately caused by the negligence of the defendant. For them to at the same time say, in effect, zero for pain and suffering to me . . . does not reflect a jury that actually followed the instructions of the court.

I believe, however, that the jury did exactly what the court instructed. It weighed the evidence and the credibility of the witnesses. It simply did not credit the evidence presented regarding future medical damages, nature and duration of their injuries, and damages for pain and suffering. Accordingly, the jury awarded zero damages for these claims consistent with the instructions and the itemized verdict forms. In granting the new trial, the circuit court substituted its judgment of the evidence for that of the jury and concluded that an award for past pain and suffering was mandated because of the award for past medical damages. The court stated:

> And it may have been that the way we worded the instructions didn't get this jury the help they needed. So I'm not faulting them, but I am concluding that *in my judgment*, the preponderance of the evidence, is that there *had to have been* some award of pain and suffering, at least as it relates to the past.

(Emphasis added.)

The circuit court's substitution of its view of the evidence for that of the jury, when the verdict was not clearly against the preponderance of the evidence, was an error of law. I would also conclude that the circuit court committed an error of law in finding that an award for past pain and suffering was mandated because of the award for past medical damages. *See Depew v. Jackson*, 330 Ark. 733, 740, 957 S.W.2d 177, 181 (1997) (The mere fact that a plaintiff incurred medical expenses and the defendant admitted liability does not automatically translate into a damage award equivalent to those expenses.). An error of law in itself can constitute an abuse of discretion. *See Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995); *Crowder v. Flippo*, 263 Ark. 433, 565

S.W.2d 138 (1978); *Downum v. Downum*, 101 Ark. App. 243, 274 S.W.3d 349 (2008). Because I believe that the circuit committed an error of law, I would hold that the circuit court abused its discretion in granting the Hopkinses' motion for new trial, and I would reverse.

VAUGHT, J., joins.

Roy, Lambert, Lovelace & Bingaman, LLP, by: *Robert J. Lambert, Jr.* and *James H. Bingaman*, for appellant.

Nolan, Caddell & Reynolds, PA, by: *Bill G. Horton*, for appellees.