THIRD DIVISION
May 18, 2011

No. 1-10-3469



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| ABDELKADER SULIMAN,<br>Plaintiff-Appellee<br><br>v.<br><br>KMART STORES OF ILLINOIS, LLC, an Illinois Limited Liability Company, and ALPINE CREATIONS, LTD., a foreign company,<br>Defendants-Appellants<br><br>(Fiada Abdelghani,<br>Plaintiff). | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY<br><br>No. 06 L 11504<br><br>HONORABLE JAMES M. VARGA, JUDGE PRESIDING. |

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JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

**O R D E R**

*HELD*: The trial judge did not abuse his discretion in ordering a new trial on disability damages and lost wages in a products liability action. The trial judge could have reasonably concluded that the jury failed to make an award for proven elements of damages. The issues of liability and damages were not intertwined and the damages awarded did not indicate the jury reached a compromise verdict.

Plaintiffs, Abdelkader Suliman (Suliman) and Fiada Abdelghani[1], brought a products liability claim against defendants Kmart Stores of Illinois, LLC (Kmart) and Alpine Creations, Ltd. (Alpine), after his eye was injured by a coat Suliman bought from Kmart. Suliman sought a new trial after the jury returned a verdict awarding him damages for pain and suffering and medical expenses, but not for disability or lost wages. The circuit court granted Suliman a new trial limited to disability damages and lost wages. Kmart and Alpine now appeal, contending the trial judge abused his discretion in ordering a new trial. Alternatively, Kmart and Alpine argue any new trial must extend to both liability and damages. For the following reasons, we conclude the trial judge did not abuse his discretion and affirm the order of the circuit court.

BACKGROUND

The record on appeal discloses the following facts. During the jury trial, Suliman testified that in 2003, he started working as a professional truck driver when he bought his own truck. Suliman contracted his services to a company called Harbor Bridge.

On December 16, 2004, Suliman was injured while making a freight delivery. Suliman was stepping down from the cab of his truck when a cord lock or toggle on an elastic drawstring that went around the waist of his coat became caught between his seat and seatbelt in the cab. Suliman testified that when he turned to see what was holding him back, the toggle sprung free and struck him in his right eye.

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[1] Fiada Abdelghani's claims of loss of consortium were not an issue at trial, and thus, are not an issue in this appeal.

The record shows that Suliman's coat was manufactured by Alpine and sold to Suliman by Kmart. Kmart buyer Larry Hafner, who purchased the Adidas coat used to pattern the Athletech coat at issue, testified the design was common in 2002 through 2003 and remained common today. Hafner, Kmart designer Greg Mohr, and Kmart technical designer Kathryn Jensen all testified they were unaware of any other claims of injury from the coat. Alpine sales and business development director Andy Naraindas testified there was no reason to believe the coat was not manufactured to Kmart's specifications. Naraindas was also unaware of any other complaints of injury from the Athletech coat.

Christopher Pastore, who holds a doctorate in materials engineering with special expertise in braided structures like the elastic drawstring in Suliman's coat, testified he was aware of four similar incidents. Pastore opined the combination of the toggle and the elastic drawstring was unreasonably dangerous. Pastore also testified the unreasonably dangerous condition could be eliminated by using a small ribbon to tether the toggle to the coat. Pastore brought a sample coat with the alternative design, which was shown to the jury.

Jason Hertzberg, who holds a doctorate in engineering and works for an engineering and scientific consulting firm, testified on behalf of defendants. Hertzberg opined the coat was not unreasonably dangerous based on the applicable guidelines and standards, the lack of a manufacturer's recall, a review of the National Electronic Injuries Surveillance System database, and the materials involved. On cross-examination, Hertzberg acknowledged he did not have a degree in textile engineering and had no experience in clothing design.

Dr. Amy Cunningham, a board certified ophthalmologist, testified she saw Suliman on the day of his injury. At that time, Dr. Cunningham observed that Suliman's right iris was dilated, with blood in the front of the eye. Dr. Cunningham also observed swelling throughout the macula, which is a highly significant part of the retina. Dr. Cunningham concluded Suliman could not drive until his vision improved, and he would be continuously disabled as far as holding a commercial driver's license for four months and possibly longer.

Dr. Cunningham again treated and evaluated Suliman in April and May 2010, shortly before the trial. Dr. Cunningham opined Suliman had a permanently enlarged pupil and ordered a tinted contact lens to help Suliman's vision in bright outdoor light. Dr. Cunningham also observed Suliman was developing a cataract on his right eye and opined it was caused by the injury. Dr. Cunningham added that the trauma could cause Suliman to develop glaucoma, but this would have little effect on his vision because the vision in his right eye is extremely poor.

Dr. Cunningham further testified that Suliman has scarring in the center of his right macula and is missing vision in the central and upper portion of his right eye. Dr. Cunningham stated she expected the field tests to show more peripheral vision than reported, but added Suliman may be unable to keep his eye focused due to the loss of central vision. Dr. Cunningham opined Suliman's abnormal vision is permanent and caused by the trauma of the injury.

On cross-examination, Dr. Cunningham acknowledged that she could not rule out the possibility of "secondary gain," *i.e.*, that Suliman was exaggerating his injury for a monetary benefit. Dr. Cunningham testified there were times when she thought Suliman should have seen what she was doing, but he denied seeing her actions. Dr. Cunningham stated Suliman's denial of

having good vision in his left eye was a possible indicator of secondary gain. Dr. Cunningham further stated that while Suliman's vision did not meet the minimum federal legal standard for a commercial truck driver's license, Suliman could hold other jobs not requiring binocular vision.

Suliman testified his hypersensitivity to light now makes him uncomfortable in bright outdoor light, which can cause him headaches. Suliman also stated he is no longer able to play baseball and soccer with his sons. Suliman added that he used to read the Koran and Arabian newspapers for one or two hours daily, but he can now only read the headlines for a few minutes without pain. According to Suliman, he can only view a computer or television screen for an hour or less before getting a headache. However, Suliman acknowledged he had a valid Illinois driver's license and could drive a car. Suliman testified that after his disability payments ended, he worked as a convenience store clerk in Cicero, Illinois. He started at a weekly salary of $400, but was given a raise to $500 per week at the beginning of 2010.

Jim Whelan, who supervised Suliman at Harbor Bridge, testified Suliman was one of his best producers and earned more than most other drivers working for the company. Whelan also testified that Suliman worked many hours for the company at the end of 2004 and would be welcomed back if he was available. Whelan further testified that in 2008 and 2009, business declined about 20 percent due to declining imports coming into the Chicago area.

Prior to testimony from Suliman's vocational expert, the parties stipulated:

"1. The Plaintiff Abdelkader Suliman was unable to work at any job for a period of six months after his injury.

2. During the next twenty four months (104 weeks), the Plaintiff received disability benefits from an insurance policy he had purchased and paid for before his injury in the amount of $400.00 per week.

3. The Plaintiff did not work while receiving disability benefits.

4. If you find for the Plaintiff on the issue of liability, then the Plaintiff, as part of his claim for lost income during the 104 weeks he was receiving disability benefits, would be entitled to receive damages in a sum equal to the difference between the amount of his disability benefit of $400.00 per week and the amount of money he would have earned per week had he been able to continue working at his job as a truck driver. This would be in addition to any future income loss to the Plaintiff proved by the evidence."

Suliman's tax returns were admitted into evidence. In 2003, Suliman's gross revenue was $57,829, with a net profit of $16,769. In 2004, Suliman's gross revenue was $107,630, with a net profit of $28,891.

David Gibson, Suliman's vocational expert, testified that independent truck drivers earn on average $33,628 annually in the Chicago metropolitan area. Gibson agreed that Suliman's injury did not preclude him from earning the same as a binocular person of the same age, education and experience, but opined Suliman's work life expectancy would be reduced. Joseph Belmonte, defendants' vocational expert, opined that Suliman's visual impairment did not preclude him from obtaining gainful employment commensurate with his pre-injury earnings. Belmonte also opined there was no evidence to support the claim of a reduced work life expectancy.

During closing arguments, Suliman's counsel asked the jury to award Suliman hundreds of thousands of dollars in lost earnings, $1 million dollars for Suliman's disability, $250,000 for pain and suffering, and $22,000 for medical expenses.

The jury deliberated and returned a verdict for Suliman, awarding him $25,000 for pain and suffering and $20,000 for medical expenses. The jury awarded no damages for disability or lost earnings. Suliman filed a posttrial motion seeking a new trial on damages for disability and lost earnings. Kmart and Alpine objected, defending the jury's verdict. Kmart and Alpine argued in the alternative that if a new trial was granted, it should be an entirely new trial because the issue of damages was not separable from the issue of liability. On October 27, 2010, following a hearing, the circuit court granted Suliman's motion for a new trial on damages for disability and lost earnings.

On November 29, 2010, Kmart and Alpine moved for an extension of time to file a petition for leave to appeal under Illinois Supreme Court Rule 306(a)(1) (eff. Sept. 1, 2006). On December 1, 2010, this court granted the extension of time. On December 13, 2010, Kmart and Alpine filed the petition for leave to appeal, which this court granted on January 10, 2011.

## DISCUSSION

### I. The Motion For a New Trial

On appeal, Kmart and Alpine argue that the trial judge abused his discretion in granting a new trial. A reviewing court will reverse a trial court's ruling on a posttrial motion for a new trial only if the trial court abused its discretion. *Dixon v. Union Pacific R.R. Co.*, 383 Ill. App. 3d 453, 470 (2008) (citing *Snover v. McGraw*, 172 Ill. 2d 438, 449 (1996)). "In determining

whether the trial court abused its discretion, the reviewing court should consider whether the jury's verdict was supported by the evidence. ***." *Maple v. Gustafson*, 151 Ill. 2d 445, 455 (1992). In making this determination, we are mindful that "[t]he presiding judge in passing upon the motion for a new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." *Id.* at 456 (quoting *Buer v. Hamilton*, 48 Ill. App. 2d 171, 173-74 (1964)). "If the trial judge, in the exercise of his discretion, finds that the verdict is against the manifest weight of the evidence, he should grant a new trial ***." *Id.* at 456. "A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any evidence." *Id.* at 454.

The determination of damages is a question of fact within the discretion of the jury, not the court. *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 490 (2008) (citing *Snover*, 172 Ill. 2d at 447). A jury's award of damages is entitled to substantial deference. A trial court can disturb a jury's award of damages only if it finds: (1) the jury ignored a proven element of damages; (2) the verdict resulted from passion or prejudice; or (3) the award bore no reasonable relationship to the loss sustained. *Snover*, 172 Ill. 2d at 447; see also *Stamp v. Sylvan*, 391 Ill. App. 3d 117, 123-25 (2009); *Dixon*, 383 Ill. App. 3d at 470-472.

Kmart and Alpine rely in part on *Snover*, in which our supreme court ruled that a jury may award pain-related medical expenses and may also determine the evidence of pain and suffering was insufficient to support a jury award. *Snover*, 172 Ill. 2d at 448. The *Snover* court reasoned that an award for pain and suffering may be especially difficult to quantify. *Snover*, 172 Ill. 2d at

448. However, the *Snover* court also emphasized that in other cases, an award of medical expenses without a corresponding award for pain and suffering might be inappropriate. *Id.* at 449. The court noted that if the evidence clearly indicates the plaintiff suffered serious injury, a verdict for medical expenses alone could be inconsistent and this determination is best made by the trial court in a posttrial motion. *Id.* In making this determination, the trial court "should consider the distinction between subjective complaints of injury and objective symptoms." *Id.* Our supreme court concluded that "[i]n cases in which a plaintiff's evidence of injury is primarily subjective in nature and not accompanied by objective symptoms, the jury may choose to disbelieve the plaintiff's testimony as to pain. In such a circumstance, the jury may reasonably find the plaintiff's evidence of pain and suffering to be unconvincing." *Id.*

Kmart and Alpine note the jury's choice to award no damages for disability while awarding something for pain, suffering and economic loss is not proof, by itself, that the jury "ignored" that element. *Dixon*, 383 Ill. App. 3d at 470-71 (and cases cited therein). However, unlike *Snover*, the evidence at trial here included objective symptoms of Suliman's injury. An impairment of eye function interfering with a plaintiff's daily functions is a disability in some way and, if sufficiently significant, requires a damages award. *Morescki v. Leuschke*, 217 Ill. App. 3d 456, 459 (1991). Even if the jury discounted Suliman's subjective reporting of his disability, the undisputed medical evidence shows that Suliman suffered a permanent loss of central vision in his right eye sufficient to bar him from his prior profession as an independent truck driver. Moreover, the parties stipulated that Suliman was unable to work at all for six months after his injury.

Kmart and Alpine suggest that the jury nevertheless could have awarded no damages for disability and lost wages because the jury heard the stipulation that Suliman received temporary disability benefits. However, the $400 weekly disability benefit was less than what Suliman earned immediately prior to the injury, when Suliman was considered a valuable contract trucker for Harbor Bridge. Kmart and Alpine note that Suliman's income was less in prior years, but Suliman was not employed as a truck driver for the majority of those years. Kmart and Alpine also note Whelan's testimony about the decline in the trucking industry, but they fail to note this decline started in 2008, years after Suliman's injury and at least a year after the end of the benefit payments.

In short, given the evidence of Suliman's disability and lost wages, the trial court did not abuse its discretion in concluding the jury ignored proven elements of damages and ordering a new trial.

II. Separability

In the alternative, Kmart and Alpine argue the trial judge abused his discretion in ordering a new trial on disability damages and lost wages alone. Generally, a new trial limited to the question of damages will be granted only where: (1) the jury's verdict on the question of liability is amply supported by the evidence; (2) the questions of liability and damages are sufficiently distinct such that a trial limited to the question of damages would not be unfair to the defendant; and (3) the record suggests neither that the jury reached a compromise verdict nor that, in some identifiable manner, the error which resulted in the jury's awarding inadequate damages also affected its verdict on the question of liability. *Winters v. Kline*, 344 Ill. App. 3d 919, 925 (2003)

(citing *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 319-20 (1987) and *Robbins v. Professional Construction Co.*, 72 Ill. 2d 215, 224 (1978)).

Kmart and Alpine first argue the issues of liability and damages are inextricably intertwined in this case. They rely heavily on *Glassman v. St. Joseph Hospital*, 259 Ill. App. 3d 730 (1994), in which Gloria Glassman sued the hospital and two surgeons – Drs. Monson and Weinberg – for medical malpractice related to heart surgery on Sheldon Glassman which led to brain damage. Following a lengthy trial the jury returned a verdict in favor of both surgeons, but against the hospital, assessing damages for Gloria, individually, of $1,764 for medical expenses, and nothing for loss of services or companionship. The jury also assessed damages in favor of Sheldon's estate in the amount of $50,000 for pain and suffering resulting from the injury caused by the hospital's negligence, but assessed no damages for disability or lost earnings. *Glassman*, 259 Ill. App. 3d at 738. The trial court entered judgment on the jury's verdicts. *Id.* at 734-35. In rejecting the argument that a new trial on damages was warranted, the *Glassman* court reasoned that since the jury awarded Glassman nothing for lost earnings or disability, both of which are clear consequences of Sheldon's brain damage, the jury apparently found that the hospital's negligence did not cause most of Sheldon's brain damage. *Id.* at 766. The jury apparently attributed most of the brain damage to microemboli released during surgery without any negligence on the part of the defendants. *Id.* at 768. The jury then apportioned liability to the hospital for only that part of the brain damage resulting from the nurses' negligence, using expert testimony as a rough guide for apportioning the damages. *Id.* The court ruled the evidence could support the jury's assessment:

> "The jury considered only four allegations of negligence against the hospital: the nurses failed to take Sheldon's temperature as often as ordered, failed to put on the cooling blanket in a timely manner, failed to administer phenobarbital as [consulting neurologist Dr.] Horwitz ordered and failed to notify doctors of the seizures overnight. The jury could have found for the hospital on the first two charges, which relate to conduct before 4 p.m. on November 6, 1979, and found that the nurses' first negligent acts occurred after 10 p.m. that evening. The surgeons' experts consistently testified that the surgeons at all times met the applicable standard of care. Thus, the jury could conclude that the defendants committed no negligent acts prior to 10 p.m." *Id.* at 766.

The court concluded:

> "Here, the precise acts for which the hospital is to be held liable are crucial to determining the extent of its liability: if the hospital was negligent at 2 p.m., it may have contributed to much greater damage than its acts at 10 p.m. could have caused. The questions of liability and damages are here inextricably intertwined. Since a limited retrial might be prejudicial to the hospital, the trial court did not abuse its discretion by refusing the request for a retrial on damages only." *Id.* at 769.

Suliman correctly notes that *Glassman* is easily distinguishable from this case. As a simple products liability case, there is no question about the precise act giving rise to Kmart and Alpine's liability. The instant case also raised no issue of misuse or comparative fault. As in *Decker v. St. Mary's Hospital*, 249 Ill. App. 3d 802, 816 (1993), none of the reasons set forth by the trial court for ordering a new trial related to the issue of liability.

Kmart and Alpine claim the issues are intertwined because the jury awarded Suliman slightly less than he requested in medical expenses and much less than he requested for pain and suffering. However, where the issue of liability is clear (notably, Kmart and Alpine do not argue there was no ample evidence of liability), the jury awarding Suliman less than the amount his counsel requested during closing argument does not make the issues of liability and damages inextricably intertwined. Kmart and Alpine cite no authority to support their argument, which runs contrary to Illinois case law allowing new trials limited to particular elements of damages. See, *e.g.*, *Stamp*, 391 Ill. App. 3d at 126-27 (and cases discussed therein).

Lastly, Kmart and Alpine argue the trial judge's conclusion that the jury verdict was inconsistent with the evidence would indicate the jury reached a compromise verdict. They note that "[w]hile a verdict of zero damages is proper if there is evidence no damages were suffered, an award of damages that does not bear a reasonable relationship to the evidence is an indication of a compromise verdict." *Winters*, 344 Ill. App. 3d at 926. However, in *Winters*, the jury's award of zero damages for each of the separate elements of damages, with the exception of loss of financial support, benefits, goods, and services to the widow, suggested the jury may have been motivated by sympathy for decedent's widow." *Id.* at 926. Such is not the case here. Ultimately, "[t]he standard to test whether a verdict resulted from a compromise is whether the verdict on the issue of liability was amply supported by the evidence." *Cardona v. Del Granado*, 377 Ill. App. 3d 379, 385 (2007) (quoting *Vacala v. Village of LaGrange Park*, 260 Ill. App. 3d 599, 618 (1994)). As noted earlier, Kmart and Alpine do not argue on appeal the jury's verdict on liability

was not amply supported by the evidence. Thus, Kmart and Alpine have failed to show the trial court abused its discretion in ordering a new trial on disability damages and lost wages.

CONCLUSION

In sum, the trial judge did not abuse his discretion in ordering a new trial on disability damages and lost wages. The trial judge could have reasonably concluded that the jury failed to make an award for proven elements of damages. The issues of liability and damages were not intertwined and the damages awarded did not indicate the jury reached a compromise verdict. For all of the aforementioned reasons, the order of the circuit court of Cook County is affirmed. The case is remanded to the circuit court for further proceedings consistent with this order.

Affirmed and remanded.