

No. 18-CI-003317

JEFFERSON CIRCUIT COURT
DIVISION TWELVE (12)
JUDGE SUSAN SCHULTZ GIBSON

WAYNE MICKENS

PLAINTIFF

v.

PLAINTIFF'S TRIAL MEMORANDUM

PAULA COLEMAN, Et. Al.

DEFENDANTS

INTRODUCTION

This motor vehicle case arises out of a car wreck which occurred in 2017. Paula Coleman rear ended Wayne Mickens because the brakes in her car didn't work at the time of the wreck. Ms. Coleman claims she came to a complete stop before hitting Mr. Mickens, then her car rolled forward on its own and impacted him. She admitted that her brakes had been slipping for a few weeks before the wreck occurred.

Mr. Shaffer sought medical treatment quickly after the wreck and has developed a permanent head injury. The Defendant alleges that Mr. Mickens is not hurt as badly as he claims or that his injuries were caused by some other event.

LEGAL AND FACTUAL ISSUESGeneral Issues of Liability, Causation, and Damages

Liability should not be at issue in this wreck. The wreck was a rear end collisions and Ms. Coleman has admitted that her brakes were not properly working. The sticking points alleged by the defendants surround causation and damages.

Mr. Mickens sought treatment from emergency care, Kentucky Pain Associates, and After Accident Care.

The defendants will likely raise issues surrounding Mr. Shaffer's medical treatment as their DME doctor, Dr. Zerga, has stated that Mr. Mickens just couldn't have been hurt from the wreck and that he saw his primary care doctor the day after the wreck and failed to mention his injuries while refilling his blood pressure medication. However, Dr. Changaris, one of Mr. Mickens' treating doctors, will testify that Mr. Mickens' treatment was reasonable and necessary and that he suffered a permanent injury following the 2017 wreck.

Mr. Mickens and others are expected to testify that his head injury has affected his life and ability to work effectively following the 2017 wreck.

Legal Principles Regarding Damages

The general rule of damages is that necessary and reasonable expenses for medical services may be recovered in a suit for personal injuries. *Langnehs v. Parmalee*, 427 S.W.2d 223 (Ky. 1967). Where plaintiff presented vouchers of payment, testified that all medical bills were incurred incident to treatment of the injury she sustained in the accident and introduced an itemized list of the medical expenses, this was a prima facie showing of the reasonableness of the medical expenses. *Townsend v. Stamper*, 398 S.W.2d 45, 48 (Ky. 1965).

Once the medical bills have been introduced into evidence they place on the defendant the practical necessity of going forward with impeaching proof if he would avoid a directed verdict on these issues. *Bolin v. Grider*, 580 S.W.2d 490, 491 (Ky. 1979). "...the probative force of the medical bills is so persuasive on the issue of the reasonableness of the amount of charges for 'medical expense' that there is nothing for the jury to decide and the issue should not have been submitted to them." *Id.*, holding that the plaintiff is entitled to a directed verdict on medical expenses.

“[O]ne may recover for injury which aggravates an existing one, or develops a latent one so as to increase the pain and suffering or result in permanent impairment of the injured person” *Drury v. Spalding*, 812 S.W.2d 713, 715 (Ky. 1991).

A person who suffers physical injury is entitled to recover for conscious pain and suffering. *Vitale v. Henchey*, 24 S.W.3d 651, 659 (Ky. 2000). Mr. Shaffer’s damage award for pain and suffering is sustainable given that there is substantial evidence establishing that pain and suffering actually occurred. *Worldwide Equipment, Inc. v. Mullins*, 11 S.W.3d 50, 61 (Ky. 2000). Further, where “a substantial personal injury is sustained, suffering is presumed and need not be proven.” *Schriewer v. Schworer*, 178 S.W.2d 598, 599 (Ky. 1944).

Diminished enjoyment of life “is recoverable...in the recognized category of mental suffering.” *Adams v. Miller*, 908 S.W.2d 112, 116 (Ky. 1995). Although not recoverable as a separate category of damages, loss of enjoyment of life is recoverable in the recognized category of mental suffering.

It is appropriate to give separate instructions on past pain and suffering and future pain and suffering. *McVey v. Berman*, 836 S.W.2d 445, 450 (Ky. App. 1992). Future pain and suffering due to an injury is an element of damage for which the injured party is entitled to recover when there is evidence establishing that it is reasonably certain that pain and suffering will occur. *American States Ins. v. Audubon Country Club*, 650 S.W.2d 252, 254 (Ky. 1983). Future pain and suffering is inferred if plaintiff is still suffering pain at the time of trial. *Williams v. Kirtley*, 263 S.W.2d 119, 121 (Ky. 1953). In *Williams* the Court stated, “since he had not completely recovered seven months after the injury, it is reasonably certain he will endure future pain and the court correctly instructed thereon.”

Where there is substantial evidence of probative value to support it, the jury may consider and compensate for the increased likelihood of future complications, such as Mr. Mickens' head injury. *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984). *Davis* also held that when likely future complications initiate serious mental stress, this too is compensable.

Plaintiff is entitled to a jury instruction allowing damages for permanent injury because there is expert medical testimony that the injury is permanent, within a reasonable degree of medical probability. *Rogers v. Sullivan*, 410 S.W.2d 624, 628 (Ky. 1966).

Punitive Damages

KRS 411.184(2) provides that “[a] plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.”

KRS 411.184(1)(c) defines "malice" as: “[E]ither conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.”

Kentucky courts have ruled that drunk driving¹, driving 24 miles per hour over the speed limit and ignoring warnings to slow down², and multiple flagrant safety violations³ all fit this definition.

Here, the defendant knew her brakes did not function properly, she had known this for weeks, and she failed to correct it until causing an injury. This conduct certainly rises to the level of a punitive damage instruction.

¹ *Shortridge v. Rice*, 929 S.W.2d 194 (Ky. App. 1996)

² *Gersh v. Bowman*, 239 S.W.3d 567 (Ky. App. 2007)

³ *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003)

Respectfully submitted,

/s/Rob Astorino, Jr._____

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was filed via Kentucky's e-filing system which will forward copies to all attorneys who have elected e-service, I further certify that a true and accurate copy of the foregoing was served via US mail on the 1st of March, 2022 to any of the following who have not elected to receive electronic service:

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