

IN THE COURT OF APPEALS

FILED
October 22, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

WILLIAM R. CROSS and wife,)	HAMBLEN CIRCUIT
LYNDA J. CROSS,)	C. A. NO. O3A01-9606-CV-00211
)	
Plaintiffs-Appellants)	
)	
)	
)	
)	
vs.)	HON. WILLIAM L. JENKINS
)	JUDGE
)	
)	
)	
CITY OF MORRISTOWN,)	MODIFIED AND REMANDED
)	
Defendant-Appellant)	

C. EDWARD DANIEL, Knoxville, for plaintiffs-appellants.

ROBERT W WILLINGHAM and PAMELA L. REEVES, Watson, Hollow & Reeves, Knoxville, for defendant-appellee.

O P I N I O N

McMurray, J.

The sole issue presented on this appeal is whether the trial court erred in his award of damages to the plaintiff, William R.

Cross. The plaintiff contends that the preponderance of the evidence requires an increase in the amount of damages awarded. Upon consideration of the record, we agree that the preponderance of the evidence requires a greater award of damages. Accordingly, we modify the judgment of the trial court to reflect an increase in damages.

The plaintiff, William J. Cross, was injured in a motor vehicle accident on November 21, 1994, when his truck was struck by a police car owned by the defendant, City of Morristown and driven by Morristown Police Officer, Tony Richardson. Officer Richardson was on duty at the time of the accident.

Immediately after the accident, Mr. Cross was transported to Lakeway Hospital in Hamblen County. He was admitted to the hospital but was released the following day. He then came under the care of his personal physician, Dr. Kenneth Allen. Dr. Allen referred him to Dr. Albert L. Meric, III, a neurosurgeon. Dr. Meric ordered several tests, and recommended that the plaintiff seek physical therapy.¹ The Plaintiff's medical bills for the accident, including physical therapy, totaled approximately \$16,000.

¹The plaintiff had several physical ailments prior to the accident, including diabetes, a ruptured disc which required surgery, a blood clot in his leg, a hand injury and spondylitic disease in his spinal cord.

Dr. Meric released the plaintiff to return to light work on February 1, 1995. Plaintiff's employer, however, had no light work available until June 1995, at which time the plaintiff began work as a security guard.²

Mr. Cross filed suit on May 19, 1995 against the City of Mrristown, Officer Richardson and the Mrristown Police Department, alleging that Officer Richardson was acting within the scope of his employment at the time of the accident, and that he was negligent in the operation of his vehicle.

Officer Richardson was dismissed from the case on August 14, 1995. At trial, the City of Mrristown stipulated liability and the case was tried on the issue of damages only. The trial court, sitting without a jury, awarded the plaintiff, William J. Cross, damages of \$48,000, and \$5,000 to the Plaintiff's wife, Lynda J. Cross, for loss of consortium. The amount of the award to Mrs. Cross is not an issue on appeal.

Our standard of review is de novo upon the record, with a presumption of correctness of the findings of fact by the trial court. Unless the evidence otherwise preponderates against the findings, we must affirm, absent an error of law. See Rule 13(d),

²Mr. Cross suffered a heart attack on August 18, 1995, for which he filed a workers' compensation claim. Mr. Cross does not claim that his heart attack was connected to the accident which is the subject of this appeal.

Tennessee Rules of Appellate Procedure. If the plaintiff is entitled to a judgment, appellate courts have a duty to render judgments which the lower court should have rendered. See e.g., Toomey v. Atyoe, et al, 32 S.W 254 (Tenn. 1895), and Perry v. Carter, 219 S.W2d 905 (Tenn. 1949). See also Rule 36(a), Tennessee Rules of Appellate Procedure.

At trial, the plaintiff presented testimony of several witnesses, including himself, his wife, his treating physician, a vocational rehabilitation expert, and an economist. The defendant presented no witnesses but chose to rely on cross examination of the Plaintiff's witnesses.

The plaintiff's neurosurgeon, Dr. Meric, testified that the plaintiff presented to him with complaints of neck pain, hand numbness and weakness following the accident. He examined the plaintiff and ordered an MRI, an EMG, a CT scan, a myelogram and nerve conduction tests. Dr. Meric, who described his treatment of the plaintiff as conservative, testified that the plaintiff's symptoms were a result of the accident, and that he had sustained a permanent injury. The plaintiff testified that he continues to have pain in his arms, hands and shoulders, and a loss of motion in his neck.

The plaintiff also presented testimony of Dr. John More, an economist, and Dr. Norman Hankins, a vocational rehabilitation expert. Dr. Hankins testified that due to the injuries sustained in the accident, the plaintiff would be eliminated from between 47% and 52% of the jobs that he would otherwise be qualified for. Dr. More testified that he conferred with Dr. Hankins, and that after the accident, the plaintiff had a residual earning capacity of approximately \$11,000. Dr. More's calculation was based upon Mr. Cross' life expectancy, his work life expectancy, his past earnings, and any potential Social Security benefits. Dr. More made allowances for potential future wage increases, and factored in a discount amount to arrive at a present value. As a result, he testified that Mr. Cross' economic losses were \$258,101.00.

As we stated earlier, the defendant presented no proof, but did cross examine the witnesses presented by the plaintiff. The defendant argues that little, if any, weight should be given to the testimony of the economist, Dr. More. The defendant argues that Dr. More's figure was based upon assumptions, speculation and statistics, rather than first-hand knowledge. We respectfully disagree with the defendant's position. The fact that Dr. More had never personally met with Mr. Cross is of little significance. See Tennessee Rules of Evidence, Rule 703. The significant question is whether Dr. More based his opinion on information made known to him either before or at the hearing. As has been shown,

in addition to conferring with Dr. Hankins, Dr. More also considered Mr. Cross' life expectancy, his work life expectancy, his past earnings, and any potential Social Security benefits. Defendant also argues that Dr. More's method of calculating the plaintiff's average wage was flawed because he used Mr. Cross' W2 forms only for the years 1993 and 1994, even though the W2 form for 1992 was available. Defendant contends that had Dr. More factored in the 1992 form, he would have arrived at a significantly lower average wage, and consequently a lower figure for economic loss. The plaintiff testified that he was off from work in 1992 for 13 weeks due to back surgery. Dr. More testified that he did not use the 1992 W2 because he felt the figures from 1993 and 1994 represented the appropriate measure of the Plaintiff's earning capacity. Since the defendant presented no proof and did not demonstrate that using the 1992 W2 would have provided a more accurate measure of damages, we do not accept the defendant's argument in this respect.

The defendant also argues that the plaintiff's credibility was undermined on cross examination. Defendant first argues that the plaintiff chose to be unemployed immediately after he was released to go to work because he waited until his previous employer had light duty work available rather than seeking a different employer. While an injured party does have a duty to mitigate his damages, we do not believe that seeking employment from the employer for whom

the plaintiff worked at the time of the accident was a violation of that duty. Rather, we believe that it was reasonable and natural to look to his employer for a light duty position before attempting to find work elsewhere.

Defendant finally argues that the plaintiff was able to return to work at a higher paying job than he had prior to the accident. We find this argument unpersuasive. Plaintiff returned to work as a security guard. Although the plaintiff had extensive experience in electronics (including some supervisory experience), most of his prior work involved factory work on an assembly line. Plaintiff testified that as a result of the accident he was restricted from twisting, turning, stooping, repetitive use of his hands, and lifting more than fifteen (15) pounds. All of these activities are of the type he had previously done in electronic manufacturing. Thus, because of the accident the plaintiff was prevented for the most part from working in the areas of his experience. Defendant argues that plaintiff actually earned more money when he returned to work as a security guard. However, the proof shows that the plaintiff was earning \$10.65 per hour before the accident, but only \$7.25 an hour as a security guard. The fact that he earned more money after returning to work can be attributed to longer work hours in his new job. The record also shows that the position as a security guard was not a permanent one.

We find that the cross examination of the various witnesses by the defendant did not substantially or materially affect the credibility of any of the witnesses. Since we find no issue relating to credibility, we are of the opinion that this is a proper case to be considered pursuant to the provisions of Rule 36, Tennessee Rules of Appellate Procedure.

As to the award of damages, we find that the trial court's judgment of \$48,000 is inadequate. We think the preponderance of the evidence, as outlined above, supports a substantially larger award. Although the plaintiff presented proof that his economic loss was \$258,101.00, the ad damnum clause of the complaint seeks only \$100,000. A judgment that exceeds the ad damnum clause is invalid. See T.R.C.P. 15.02; Millins v. Greenwood, 6 Tenn. App. 327 (1927); and Gaylor v. Miller, 166 Tenn. 45, 59 S.W2d 502 (1933). Accordingly, we are limited by the ad damnum clause in rendering a judgment for damages.

For the reasons stated above, the judgment of the trial court is modified to increase the amount of damages to the plaintiff, William Cross, to \$100,000.00, the amount of the ad damnum which we find to be in accord with the preponderance of the evidence. Costs are taxed to the appellee, and the cause is remanded to the trial court for entry of a judgment consistent with this opinion. Costs are taxed to the appellee.

Don T. Murray, J.

CONCUR:

Houston M. Goddard, Presiding Judge

Herschel P. Franks, J.

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)	
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ORDER

This appeal came on to be heard upon the record from the Circuit Court of Hamblen County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was no reversible error in the trial court, however, the preponderance of the evidence requires a modification of the judgment.

The judgment of the trial court is modified to increase the amount of damages awarded to the plaintiff, William Cross, to \$100,000.00. Costs are taxed to the appellee, and the cause is remanded to the trial court for entry of a judgment consistent with this opinion. Costs are taxed to the appellee.

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