



In the Missouri Court of Appeals Eastern District

DIVISION TWO

DONALD J. MARCKS,	)	No. ED108488
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
v.	)	15SL-CC01362
	)	
EDWARD W. WILSON	)	Honorable David L. Vincent, III
	)	
Respondent.	)	Filed: December 22, 2020

Introduction

Donald J. Marcks (“Marcks”) appeals from the judgment of the trial court denying his motion for judgment notwithstanding the verdict (“JNOV”), for additur, or for a new trial following a jury verdict in his petition for damages against Edward W. Wilson (“Wilson”). He asserts the evidence supported a finding of juror misconduct and argues the jury verdict rendered was against the weight of the evidence. We affirm.

Background

Marcks and Wilson were involved in an automobile collision in May of 2010. In April of 2015, Marcks filed a petition for damages for personal injuries, asserting that Wilson breached his duty of care to Marcks by negligently operating his vehicle, which resulted in the collision that caused permanent injuries to Marcks’s neck, back, and spine. The petition proceeded to a jury trial.

During voir dire, in response to a question from counsel for Marcks, several venirepersons disclosed having been involved in automobile accidents, including Venireperson Gassel. Venireperson Gassel stated she had been involved in four automobile accidents resulting in only minor injuries, including whiplash, and she agreed she would be able to put aside her prior experiences and render a fair verdict based on the facts of this case. In response to questions from counsel for Wilson, she agreed again she would look at the facts of this case, follow the law as directed by the judge, and be fair to both sides. As well, counsel for Marcks asked the venire panel if “there [was] anyone else here that considers a person getting injured in an automobile collision, and suing, that they consider it a payday?” Neither of the two venirepersons later accused of juror misconduct responded. Likewise, counsel for Marcks asked if “anyone ha[d] a belief that someone should not recover damages for pain and suffering, inconvenience or any other damages in a case?” Again, neither of the relevant venirepersons responded.

At trial, Marcks testified to the following, viewed in the light most favorable to the verdict.¹ He was driving home from work on a Friday afternoon, when there was a sudden slowdown on the highway. He was able to stop before colliding with the vehicle in front of him but he was rear-ended by the vehicle behind him, driven by Wilson. Although Marcks had pain behind his ear, he declined an ambulance at the scene and drove himself home. After the accident, he continued to experience neck pain, which he treated with medication and physical therapy. His condition did not improve, negatively impacting his life and work. He had to take time off from work for medical appointments and treatments, costing him \$1,928.88 in lost

¹ “[R]eview of a jury’s verdict begins with the recognition that the jury retains ‘virtually unfettered’ discretion in reaching its decision,” and thus we view the evidence in the light most favorable to the verdict and disregard contrary evidence. *Stewart v. Partamian*, 465 S.W.3d 51, 57 (Mo. banc 2015).

wages. He was unable to play golf, which he had previously played several times a week and planned to play extensively in retirement. In September of 2010, at the age of 60, he retired five years earlier than he planned to, resulting in a net reduced income of \$139,460 and increased medical insurance premiums of \$43,700 over that five-year period. He calculated his total loss of income from the automobile collision was \$185,143.00. At the time of trial, he still experienced some neck pain and reduced range of motion, but his symptomology was improved. On cross examination, Marcks agreed that at the time of trial he was no longer receiving medical care for injuries related to the accident; rather, his pain was caused by degenerative disc disease.

The deposition of Mark Howard, M.D., (“Dr. Howard”) was played for the jury, in which he testified to the following. He first saw Marcks in June of 2010, at which time Marcks complained of moderate to severe pain in his neck and shoulders with a demonstrated limited range of motion following an automobile collision in May of 2010. Dr. Howard initially diagnosed whiplash, or muscle strain, and prescribed physical therapy. At a follow-up appointment in September of 2010, Marcks still complained of intermittent moderate neck pain but the physical examination showed his neck was supple and non-tender, suggesting nerve impingement rather than muscle strain. Dr. Howard ordered an MRI, which, along with X-rays, revealed cervical degenerative disc disease and spondylosis, which are arthritic changes. Dr. Howard opined within a reasonable degree of medical certainty that Marcks’s neck pain was attributed to age-related degenerative disc disease that was probably aggravated or accelerated by the automobile accident. Dr. Howard continued to see Marcks periodically through December of 2012 for the same symptoms, which Dr. Howard attributed to “just the normal aging process.” After Dr. Howard relocated, Marcks continued seeing other doctors in the same practice.

Wilson testified to the following. There was a sudden slowdown on the highway at the same time as the sun was in his eyes, and, although he braked, he was unable to stop in time to avoid a collision with the vehicle in front of him, driven by Marcks. Wilson agreed he must have been following Marcks's vehicle too closely because he could not stop in time, despite keeping a careful lookout. He estimated that he was traveling five or ten miles an hour when the impact occurred, and he reported his airbag did not deploy. Wilson's theory of the case was that this was a minor accident with minor, if any, injuries, and that Marcks's complaints resulted from age-related degenerative disease in his neck and back rather than the automobile collision.

After the trial, the jury returned a verdict in favor of Marcks and assessed his damages at \$1.00.² The trial court entered judgment in accordance with the jury verdict. Marcks filed a motion for JNOV, for additur, or alternatively for a new trial, asserting, as relevant to this appeal, that (1) juror misconduct occurred when several jurors failed to disclose during voir dire their antipathy towards monetary awards, which they voiced during deliberations, and (2) the verdict was against the weight of the evidence.

At a hearing on the motion, juror Kimberly Frost testified, over Wilson's objections, that the jury foreperson Rutz stated during deliberations and in the hallway outside the jury room that the case was ridiculous and a terrible thing, and that he did not believe in giving anybody money in lawsuits like this. Juror Frost likewise testified that juror Gassel stated that, in her experience, people do not sue or get compensation over "fender-benders," and elaborated that: "I don't think it is right that [Marcks] should get any money because [Wilson] couldn't see because the sun was

² The jury initially returned a verdict assessing \$0.00 in damages. However, when the trial court sent back the verdict with instructions that it could not be received in its current form because the jury had returned a verdict in favor of the plaintiff without assessing any damages, the jury returned a verdict of \$1.00.

in his eyes. These things happen all of the time.” After the hearing, the trial court denied the motion. This appeal follows.

Discussion

Point I

In his first point on appeal, Marcks argues the trial court abused its discretion in denying his motion for JNOV, for additur, or for a new trial on the basis of juror misconduct because two jurors failed to inform the trial court of biases during voir dire, compromising his right to have his case heard by an impartial jury. We disagree.

Whether to grant a new trial based on allegations of juror misconduct falls within the discretion of the trial court, and we review those determinations under an abuse-of-discretion standard. *Williams v. Daus*, 114 S.W.3d 351, 365 (Mo. App. S.D. 2003). Under this liberal standard of review, we give the trial court’s ruling great weight and will reverse only if it appears the ruling was against the logic of the circumstances or was so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. *Id.* at 366.

The constitutional right to a jury trial in civil cases contemplates a fair and impartial jury. *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 87 (Mo. banc 2010). Thus, “it is the duty of a juror on voir dire examination to fully, fairly and truthfully answer all questions directed to him (and to the panel generally) so that his qualifications may be determined and challenges may be intelligently exercised.” *Rinkenbaugh v. Chicago, Rock Island & Pacific RR. Co.*, 446 S.W.2d 623, 626 (Mo. 1969). Nevertheless, “[w]hile every party is entitled to a fair trial, as a practical matter, our jury system cannot guarantee every party a perfect trial.” *Fleshner*, 304 S.W.3d at 87. The party alleging juror misconduct bears the burden to show both misconduct and prejudice resulting from that misconduct. *Williams*, 114 S.W.3d at 366.

Showing jury misconduct is difficult, and Marcks has failed to do so here. Missouri follows the Mansfield rule, which is that jurors may not impeach their verdict by testifying to alleged misconduct or partiality by other jurors affecting deliberations. *Matlock v. St. John's Clinic, Inc.*, 368 S.W.3d 269, 271 (Mo. App. S.D. 2012). As long as a juror reaches the verdict on the basis of evidence presented at trial, that juror's motives, reasoning, beliefs, or mental processes may not be attacked by other jurors. *Fleshner*, 304 S.W.3d at 87. This rule both effects courts' objective to avoid endless litigation over the soundness of jury verdicts and recognizes the impossibility of corroborating or refuting a particular juror's mental processes. *Id.* at 87-88; *see also Matlock*, 368 S.W.3d at 273 (“[j]urors, as humans, are imperfect. It follows that jury deliberations also may be imperfect. Few deliberations, if seined and microscopically examined might not yield sound bites that skilled advocates could spin to raise *prima facie* doubt about a verdict, leading to evidentiary hearings where the deliberations and verdict itself are put on trial”).

The two recognized exceptions to the Mansfield rule are when a juror gathers evidence outside what has been presented at trial, *see e.g. Travis v. Stone*, 66 S.W.3d 1, 3-4 (Mo. banc 2002) (juror visited accident scene during trial recess), or where a juror makes statements during deliberations demonstrating ethnic, racial, or religious bias or prejudice against a party or witness, *see Fleshner*, 304 S.W.3d at 88-89 (juror made derogatory statements about witness's Jewish faith in weighing testimony). Only under these limited circumstances may the alleged juror misconduct then be examined to determine if it affected the verdict. *Id.*

Neither of these exceptions apply in this case. There is no allegation that any juror gathered extra-judicial evidence on their own, nor that any juror expressed an ethnic, racial, or religious bias or prejudice against a party or witness. Without evidence of these two exceptions

to the Mansfield rule, any allegations by other jurors of misconduct or partiality inside or outside the jury room are not cognizable evidence of juror misconduct, such that would allow a trial court to grant a new trial. *See Williams*, 114 S.W.3d at 369 (allegations that jurors acted on improper motives, reasoning, beliefs or mental operations provide no grounds for attacking verdict); *see also Matlock*, 368 S.W.3d at 274 (when evidence of alleged juror misconduct failed to implicate either Mansfield exception, trial court abused its discretion in granting new trial on such evidence). Thus here, juror Frost's testimony of statements by jurors Rutz or Gassel was not cognizable evidence of juror misconduct.

Moreover, the facts here do not support Marcks's allegation that jurors Rutz and Gassel concealed biases during voir dire. The challenged statements do not reveal biases and instead express opinions based on the particular facts of this case. Juror Rutz is alleged to have stated, after the jury had begun hearing evidence, that this case was ridiculous and a terrible thing, and that he did not believe in giving anybody money "in lawsuits *like this*." Similarly, Juror Gassel stated that, in her experience, people do not sue or get compensation over "fender-benders," and further stated: "I don't think it is right that [Marcks] should get any money because [Wilson] couldn't see because the sun was in his eyes. These things happen all of the time." Certainly, it is the job of the jury to weigh the evidence presented to them, and jurors are encouraged to voice their common knowledge and beliefs during deliberations. *See Fleshner*, 304 S.W.3d at 90. We see no abuse of discretion in the trial court denying Marcks's motion for a new trial on the basis of juror misconduct.

Point I is denied.

Point II

In his second point on appeal, Marcks argues the trial court erred in denying his motion for JNOV, for additur, or for a new trial because the jury's verdict was against the weight of the evidence. We disagree.

We will reverse the trial court's denial of a motion for additur or a new trial on the basis of an alleged inadequate jury award only if we find the trial court abused its discretion. *Root v. Manley*, 91 S.W.3d 144, 146 (Mo. App. E.D. 2002); *Tomlin v. Guempel*, 54 S.W.3d. 658, 659 (Mo. App. E.D. 2001). An abuse of discretion occurs only if the verdict is so "shockingly inadequate" that it suggests the verdict resulted from the jury's passion and prejudice or a gross abuse of discretion. *Id.* The particular amount of the award alone does not establish that the verdict resulted from bias or passion. *Tomlin*, 54 S.W.3d. at 659. The determination of damages is primarily the jury's decision. *Id.* The jury verdict must fairly and reasonably compensate the plaintiff for the injuries sustained and, in making this determination, the jury is tasked with judging witness credibility and weighing the testimony. *Root*, 91 S.W.3d at 146. The jury may believe or disbelieve any, all, or none of a witness's testimony, including the plaintiff's claimed expenses and damages. *See Ball v. Allied Physicians Group, L.L.C.*, 548 S.W.3d 373, 388 (Mo. App. E.D. 2018); *see also Tomlin*, 54 S.W.3d. at 659 ("[t]he jury's discretion includes accepting or rejecting all or part of the plaintiff's claimed expenses").

While Marcks here claimed \$185,143.00 in lost income from lost wages and his early retirement with corresponding increased medical costs, the jury awarded him only \$1.00 for his damages. Here, the evidence at trial was that Wilson's vehicle was moving at five to ten miles an hour when it collided with Marcks's vehicle, Marcks declined an ambulance at the accident scene, and both parties drove their vehicles home. Marcks did not seek professional medical care for his neck until approximately a month following the accident. Notably, when Marcks

gave notice of his intent to retire early, he was at the very beginning of his treatment for his injuries allegedly stemming from the accident: he had only seen Dr. Howard one time and had not yet completed a full course of physical therapy. Moreover, although Marcks stated his neck pain from the automobile collision forced him to retire early in September 2010, Dr. Howard's examination notes from that same month suggest other explanations: the notes report that Marcks complained only of intermittent moderate neck pain and that the physical examination showed his neck was supple and non-tender, suggesting nerve impingement rather than muscle strain from any collision-induced whiplash. In accordance with Dr. Howard's suspicions, Marcks's X-rays and MRI revealed the cause of his neck and spinal pain was cervical degenerative disc disease and spondylosis, or arthritic changes. Accordingly, Dr. Howard opined Marcks's degenerative disc disease and arthritis were age-related but possibly aggravated or accelerated by the automobile accident.

On this evidence, the jury could have believed that although Wilson was at fault in causing the automobile collision, the accident was not the cause of Marcks's neck pain. Rather, the evidence supported the conclusion that Marcks's neck pain was caused by his degenerative disc disease and arthritis, which were in turn due to his age, and not caused by whiplash from the automobile collision. Likewise, the jury could have disbelieved that Marcks's decision to retire early from his job was due to the automobile collision. Simply because a jury believes enough of the evidence to find liability for plaintiff does not mean the jury is also required to believe the plaintiff's assessment of his own damages. *See Davidson v. Schneider*, 349 S.W.2d 908, 913 (Mo. 1961). The record does not support a finding that the jury's decision to award Marcks only \$1.00 was evidence of bias or passion, rather than an assessment of the strength of Marcks's

evidence supporting his claims. The trial court, therefore, did not abuse its discretion in denying Marcks's motion for additur or new trial on the issue of damages.

Point II is denied.

Conclusion

The judgment of the trial court is affirmed.

A handwritten signature in dark ink, appearing to read "Ransom", with a large, stylized initial "R" that loops around the first part of the name.

Robin Ransom, Presiding Judge

Sherri B. Sullivan, J., and Lisa P. Page, J., concur.