

No. 19-120043-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

JERRY BENNING
Plaintiff-Appellant

vs.

CHRISTINA PALMER
Defendant-Appellee

BRIEF OF APPELLEE CHRISTINA PALMER

Appeal from the District Court of Shawnee County, Kansas
Honorable Richard Anderson
District Court Case No. 2017-CV-000269

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NATURE OF THE CASE

This is a personal injury lawsuit arising out of a motor vehicle accident wherein Plaintiff's vehicle was rear-ended by a vehicle driven by Defendant. Ultimately, the matter proceeded to trial in Shawnee County District Court against Defendant under a negligence theory where fault was admitted. Plaintiff obtained a jury verdict in the amount of \$10,100.00. Plaintiff now appeals the amount of this verdict as being arbitrary and capricious. Plaintiff also appeals the Shawnee County District Court's denial of Plaintiff's Motion for New Trial. Defendant asserts none of the issues raised by Plaintiff on appeal have a legal impact on the actual damage verdict rendered by the jury and that the district court findings should be affirmed.

STATEMENT OF THE ISSUES

Defendant does not concur with Plaintiff's statement of the issues, but rather considers the following statement of the issues applicable for this appeal:

- Issue I:** **The jury's verdict is not arbitrary and capricious when Plaintiff's evidence was contradicted and challenged through cross-examination and argument, and when the jury exercised its ability to weigh the credibility of Plaintiff's witnesses.**
- Issue II:** **The district court did not abuse its discretion in denying Plaintiff's Motion for New Trial when Plaintiff did not contemporaneously object to Defendant's closing arguments and when the jury determined Plaintiff had not met his burden of proof.**

STATEMENT OF FACTS

Plaintiff-Appellant alleges he was injured in a motor vehicle accident on July 22, 2016. Plaintiff's vehicle was rear-ended by Defendant on North 6th Avenue in Topeka,

Kansas. (R. Vol. I, Pg. 13). After treating at the emergency room and with his primary care physician, Plaintiff began treating with Dr. Kyle Janssen, a chiropractor at Kansas Spine Center. (R. Vol. III, Pg. 36-37). Plaintiff treated with Dr. Janssen for about two months, but experienced no improvement, and was referred to a physical therapy regimen at the Center for Manual Medicine. (R. Vol. III, Pg. 38-39).

During the course of this litigation, Plaintiff underwent an independent medical evaluation performed by Dr. Sivakotiramakrishnareddy Katta, M.D. on August 4, 2017. (R. Vol. IX, Pg. 17). Dr. Katta concluded that Plaintiff suffered a cervical, thoracic, and lumbar sprain in the accident. (R. Vol. IX, Pg. 37). Dr. Katta characterized muscle sprains such these as soft-tissue injuries, which typically heal in six to eight weeks, even without treatment. R. Vol. IX, Pg. 66). Dr. Katta was unable to testify whether Plaintiff's muscle sprain would permanently impair him. (R. Vol. IX, Pg. 40).

In the course of his examination of Plaintiff, Dr. Katta also identified a number of pre-existing conditions that Plaintiff suffered from prior to the accident, including: degenerative disc disease and degenerative joint disease of the cervical and lumbar vertebrae (R. Vol. IX, Pg. 33); diabetic peripheral neuropathy (R. Vol. IX, Pg. 34); arthritic changes to his neck and back joints (R. Vol. IX, Pg. 34); probable ulnar nerve compression of the elbow (R. Vol. IX, Pg. 33); frozen left shoulder and associated pain (R. Vol IX., Pg. 65-66); and degeneration of the knee joints (R. Vol. IX, Pg. 66). Dr. Katta testified that these conditions generally cause a patient to experience pain, stiffness, numbness, and pinprick sensations. (R. Vol. IX, Pg. 65).

Plaintiff identified further pre-existing conditions during his trial testimony, including: a shoulder injury in 2005 that required multiple surgeries, and after which he began using a cane (R. Vol. III, pgs. 7 and 11); removal of his gallbladder in 2015 (R. Vol. III, Pg. 8); diabetes, and associated diabetic neuropathy (R. Vol. III, Pgs. 9-10); and a head injury from a slip and fall in 2005 (R. Vol. III. Pg. 11).

Plaintiff suffered another motor vehicle accident in July of 2017, approximately one year after the accident that was the subject of this lawsuit. (R. Vol. III, Pg. 47). Plaintiff suffered a third motor vehicle accident in December 2017. (R. Vol. III, Pg. 48). Plaintiff suffered additional pain and injuries, particularly from the December 2017 accident. (R. Vol. III, Pg. 48).

At trial, Defendant did not contest liability, only damages. The jury awarded Plaintiff medical expenses of \$7,246.96 and non-economic damages of \$2,853.04, for a total award of \$10,100.00. (R. Vol. I, Pgs. 74-76). Plaintiff now appeals from this verdict.

ARGUMENTS AND AUTHORITIES

Issue I: The jury’s verdict is not arbitrary and capricious when Plaintiff’s evidence was contradicted and challenged through cross-examination and argument, and when the jury exercised its ability to weigh the credibility of Plaintiff’s witnesses.

A. Standard of Review

Plaintiff challenges the jury verdict as being contrary to the evidence. “When a verdict is challenged for insufficiency of evidence or as being contrary to the evidence, it is not the function of this court to weigh the evidence or pass on the credibility of the witnesses. If the evidence, with all reasonable inferences to be drawn therefrom, when

considered in the light most favorable to the prevailing party, supports the verdict, it will not be disturbed on appeal.” *Cerretti v. Flint Hills Rural Elec. Co-op. Ass’n*, 251 Kan. 347, 361-62 (1992).

B. Argument

Plaintiff has the burden to prove that his claims were more probably true than not true. Further, “[t]he burden of proving the damages incurred rests on the plaintiff. It is the function of the trier of fact to determine the amount of damages that should be awarded to a party, based upon evidence of the loss suffered.” *Cerretti v. Flint Hills Rural Elec. Co-op. Ass’n*, 251 Kan. 347, 362 (1992). Further, Kansas law requires that medical expenses be necessary and reasonable. *Lewark v. Parkinson*, 73 Kan. 553, 85 P.601 (1906). The reasonableness and necessity of medical bills are questions for the jury. See *Cansler v. Harrington*, 231 Kan. 66, 643 P.2d 110 (1982).

In this case, the jury’s verdict is supported by the testimony of Dr. Katta and of Plaintiff himself. In light of Plaintiff’s pre-existing medical conditions and his additional motor vehicle accidents in July and December 2017, a rational jury could reasonably believe that not all of Plaintiff’s claimed medical expenses were reasonable and necessary to treat for the injuries alleged to have been caused by Defendant. Additionally, the jury was free to ascribe whatever weight it felt was necessary to the testimony of various witnesses, including Plaintiff, Dr. Janssen, and Dr. Katta, based on the jury’s own assessment of the respective witness’s credibility.

- i. The jury’s verdict is supported by the testimony and evidence presented at trial.**

Plaintiff carried the burden of proving that his medical expenses were reasonable and necessary. See *Cansler v. Harrington*, 231 Kan. 66 643 P.2d 110 (1982); *Cerretti v. Flint Hills Rural Elec. Co-op. Ass'n*, 251 Kan. 347, 837 P.2d 330 (1992). Plaintiff argues that because Defendant offered no affirmative evidence of damages or specific alternative dollar amount, the jury must be bound by Plaintiff's own requested amount. (Appellant's Brief, pgs. 9-10). This argument is contrary to the law of Kansas.

Cansler v. Harrington provides the definitive statement of how the burden of proof relates to damages. In *Cansler*, Defendant argued the trial court erred in permitting Plaintiff to reopen her case and introduce additional medical bill exhibits after Defendant moved for directed verdict because Plaintiff failed to offer evidence of medical treatment reaching the threshold amount set forth in K.S.A. 40-3117. *Cansler* 231 Kan at 68-69. Defendant argued no evidence of reasonableness or necessity of the medical bills was offered, and therefore, the admitted exhibits were not relevant. *Id.* However, the record revealed Plaintiff testified about her injuries, hospitalization, the medical providers she saw, and about the bills she received for medical treatment of the injuries resulting from the accident, and two doctors testified her treatment was necessary; however, she forgot to offer the identified exhibits prior to resting her case. *Id.* The Court disagreed with Defendant's argument and found the exhibits tended to prove the threshold amount had been met, and therefore, the evidence was properly admitted. *Id.* The Court noted that "[t]he questions of reasonableness and need for the medical care were questions for the

jury which they resolved by finding appellee had proven her medical care exceeded the threshold amount [...]”. *Id.*

Here, Defendant elected not to present her own expert to establish the incurred medical treatment and associated medical bills were not reasonable and necessary and instead relied on other evidence to support this contention, which is a fairly common method of defense. Nor was Defendant required to present her own expert. *Pope v. Ransdell*, 251 Kan. 112, 833 P.2d 965 (1992). In *Pope*, the Court held that it was appropriate for one party to rely on cross-examination of the other party’s expert witnesses: “[g]reat latitude is necessarily indulged in the cross-examination of an expert witness in order that the intelligence and powers of discernment of the witness, as well as capacity to form a correct judgment, may be submitted to the jury so it may have an opportunity for determining the value of his or her testimony.” *Id.* at 123.

In this case, Defendant relied on cross-examination of Plaintiff and Dr. Janssen, and the cross-examination portions of Dr. Katta’s deposition that was played to the jury to challenge the reasonableness and necessity of Plaintiff’s medical expenses.

Dr. Katta expressed his opinion that Plaintiff suffered a cervical, thoracic, and lumbar sprain in the accident. (R. Vol. IX, Pg. 37). Dr. Katta characterized muscle sprains such these as soft-tissue injuries, which typically heal in six to eight weeks, even without treatment. (R. Vol. IX, Pg. 66). Dr. Katta was unable to testify whether Plaintiff’s muscle sprain would permanently impair him. (R. Vol. IX, Pg. 40). This testimony directly calls

into question Plaintiff's assertion that chiropractic and physical therapy was required for several months after the accident.

Additionally, Defendant also adduced, through cross-examination of both Plaintiff and Dr. Katta, testimony about Plaintiff's numerous pre-existing medical conditions. These conditions include: degenerative disc disease and degenerative joint disease of the cervical and lumbar vertebrae (R. Vol. IX, Pg. 33); diabetic peripheral neuropathy (R. Vol. IX, Pg. 34); arthritic changes to his neck and back joints (R. Vol. IX, Pg. 34); probable ulnar nerve compression of the elbow (R. Vol. IX, Pg. 33); frozen left shoulder and associated pain (R. Vol IX., Pg. 65-66); degeneration of the knee joints (R. Vol. IX, Pg. 66). Plaintiff himself provided further testimony that a prior slip and fall in 2005 had caused him a head and shoulder injury, and that he had begun walking with a cane after that incident. (R. Vol. III, pgs. 7 and 11). These conditions in particular can have the same signs and symptoms as soft-tissue injuries from a motor vehicle accident (R. Vol. IX, Pg. 65), making it difficult for a jury to determine which symptoms are attributable to the accident, whether some symptoms overlap with the pre-existing condition, or to what extent the accident aggravated a pre-existing condition.

In light of Dr. Katta's testimony that Plaintiff's injury was a soft-tissue injury of a kind that typically heals by itself after about six weeks, and the testimony of Plaintiff's numerous pre-existing conditions, it is not unreasonable for a jury to find that not all of Plaintiff's medical expenses were reasonable and necessary as a result of the subject loss. This testimony, adduced through cross-examination and expounded upon during closing

argument, challenges and contradicts Plaintiff's claim that all \$12,798.96 in medical expenses was reasonable and necessary. If the jury determined that Plaintiff had not met his burden of proving that the full amount was reasonable and necessary, it was not required to award the full amount. An unfavorable verdict does not mean the verdict was contrary to the evidence, arbitrary or capricious; rather the jury, as trier of fact, rendered a verdict based upon the valid evidence presented and made the determination to award certain damages based upon the loss they believed Plaintiff suffered.

ii. The jury is free draw its own conclusions on the credibility of Dr. Janssen.

Plaintiff specifically argues that the jury's decision to not award the expenses related to Dr Janssen's treatment was arbitrary and capricious. (Appellant's Brief, pg. 9). However, "[a] jury cannot arbitrarily or capriciously refuse to consider the testimony of any witness, but it is not obliged to accept and give effect to evidence which, in its honest opinion, is unreliable, even though such evidence is uncontradicted." *Schroeder v. Richardson*, 196 Kan. 363, 370 (1966). It is not the place of the appellate court to second-guess the credibility determinations of the jury. See *Id.* (Stating "[a]ppellate courts cannot nullify a trial court's disbelief of evidence, nor can they determine the persuasiveness of testimony which a trial court may have believed.").

In *Cerretti v. Flint Hills Rural Elec. Co-op. Ass'n*, the Court upheld a jury's verdict, based on the jury's apparent finding that a plaintiff expert witness was not credible. 51 Kan. 347, 363, 837 P.2d 330 (1992). In *Cerretti*, the plaintiff relied upon an expert economist to provide evidence of future economic damages. *Id.* at 362. This expert's

opinion was challenged through cross-examination, which revealed that his opinion was based on erroneous assumptions about the plaintiff-decedent's work history, as well as based on "conjectural or speculative" estimates of future loss. *Id.* at 363. The Court held "[t]he jury was not obligated to give credence to Baker's testimony. Even where such expert testimony on extent of future loss is admitted, the trier of fact will not be bound by the expert's testimony and may accord the testimony as little or as much weight as it deems appropriate." *Id.*

In this case, Dr. Janssen was cross-examined as to his qualifications as a chiropractor, and how that differs from the qualifications of a medical doctor. (R. Vol. VII, pgs. 47-49). Specifically, Dr. Janssen is not qualified to administer pain injections, perform surgery, or prescribe medications, nor does he have any hospital qualifications. (R. Vol. VII, pgs. 47-49). It is not difficult to imagine that a jury might ascribe more weight to Dr. Katta, who is qualified as a medical doctor, when it comes to opinions of what medical treatments and expenses are reasonable and necessary, than to Dr. Janssen, a chiropractor without a medical license.

Additionally, Dr. Janssen admitted on cross-examination that he was unaware of many of Plaintiff's pre-existing conditions or how much of Plaintiff's complaints, if any, were related to those pre-existing conditions as opposed to his motor vehicle accident with Defendant. (R. Vol. VII, pg. 69-70). Similarly, Dr. Janssen admitted on cross-examination that he is unable to tell to what extent Plaintiff's two subsequent motor vehicle accidents may have affected his condition. (R. Vol. VII, Pg. 73). The jury was not bound to accept

Dr. Janssen's testimony and opinions as absolute fact, especially considering the deficiencies revealed through cross-examination, and the availability of alternative opinions from a medical doctor in the form of Dr. Katta's deposition testimony.

Finally, Plaintiff argues that because the jury "relied" on Dr. Janssen's referral of Plaintiff to physical therapy at the Center for Manual Medicine and awarded Plaintiff his physical therapy bills, the jury must have found Dr. Janssen to be a credible witness. This argument is not logically sound. The fact that Dr. Janssen referred Plaintiff to another provider is irrelevant to any determination of Dr. Janssen's credibility or the reasonableness and necessity of the subsequent provider's treatment. Plaintiff's treatment at the Center for Manual Medicine is wholly independent of any treatment or recommendation of Dr. Janssen.

Issue II: The district court did not abuse its discretion in denying Plaintiff's Motion for New Trial when Plaintiff did not contemporaneously object to Defendant's closing arguments and when the jury determined Plaintiff had not met his burden of proof.

A. Standard of Review and Preservation of the Issue

"An appellate court reviews the district court's decision on a motion for new trial for an abuse of discretion." *State v. Butler*, 307 Kan. 831, 852 (2018). The granting of a new trial ordinarily rests in the sound discretion of the trial court. See, e.g., *Grace v. Martin*, 182 Kan. 33, 37-38, 318 P.2d 1007 (1958). Further, "[...] the granting of the motion for a new trial rests so much in the trial court's sound discretion that its action will not be held to be reversible error on appellate review unless it can be said the party complaining thereof has clearly established error with respect to some pure, simple and

unmixed question of law.” *Grace*, 182 Kan. at 38 (citing *Gould v. Robinson*, 181 Kan. 66, 70 309. P.2d 405 (1957)); See also *King v. Consol. Prod. Co.*, 159 Kan. 608, 157 P.2d 541 (1945) (stating mere fact that a new trial with propriety might have been granted does not mean trial court abused its discretion in denying it, where upon consideration of entire record trial court finds a new trial probably would not change the verdict).

In this case, Plaintiff failed to make a contemporaneous objection to the closing argument which is the subject of this point on appeal. "In assessing whether improper argument amounts to reversible error Kansas courts have always given great weight to the presence or absence of an objection and the curative effect of a well-phrased admonition to the jury." *Klinzmann v. Beale*, 9 Kan.App.2d 20, 29, 670 P.2d 67 (1983). "Under normal circumstances, because Kansas does not recognize the plain error rule a contemporaneous objection is required to preserve an issue of improper closing argument for appeal." *State v. Gray*, 25 Kan.App.2d 83, 88, 958 P.2d 37 (1998). Without a contemporaneous objection, Plaintiff should not be allowed to raise this issue on appeal as a ground for a potential new trial.

B. Argument

If the Court determines that this issue was properly preserved for appeal, the district court's denial of Plaintiff's Motion for a New Trial should be affirmed. First, Plaintiff's contention that the district court "committed manifest error by making an incorrect statement and denying Plaintiff's Motion on a non-factual conclusion" is without basis. As argued more fully in the previous section, and which is incorporated herein by reference,

Defendant successfully and challenged the reasonableness and necessity of Plaintiff's medical expenses through cross-examination, which is permitted under Kansas law.

Plaintiff specifically argues that the defense closing argument invited the jury to be arbitrary and capricious by ignoring instruction number four of the jury instructions. (Appellant's Brief, pg. 12-13). Instruction number four contained the standard instruction that: "Statements and arguments of counsel are not evidence, but may help you understand the evidence and apply the law. However, you should disregard any comments of counsel that are not supported by the evidence." (R. Vol. V, pg. 10).

The defense's closing argument emphasized that Plaintiff carried the burden of proving that his medical expenses were reasonable and necessary. (R. Vol. V, pg. 38). Counsel argued that the jury should only award the amount that the jury believed had been proven by a preponderance of the evidence. Counsel specifically stated that "you could award him all his medical bills if you believe all the treatment was reasonable and necessary." (R. Vol. V, pg. 38). Counsel offered alternatives of what the jury's verdict would look like if they found some medical bills to not have been reasonable and necessary: "You can decide for medical expenses to give him the AMR bill, the radiology bill, and the ER bill, and that's about \$6,000." (R. Vol. V, pg. 37). This was offered only as an example of what the verdict would be *if* the jury found only those particular bills to have been reasonable and necessary. Moreover, Counsel's argument that Plaintiff had not met his burden of proof was invariably phrased as an opinion: "we don't believe that Plaintiff has met his burden of proof as to the necessity of all these treatments." (R. Vol. V, pg. 38);

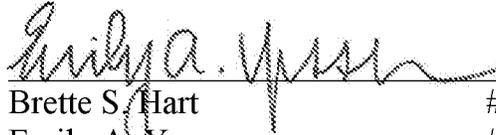
“we don’t believe he’s met his burden of proof as to the permanency of these injuries” (R. Vol. V, pg. 38). The jury was free to decide for itself whether Plaintiff had met his burden of proving specific expenses were reasonable and necessary.

Appellant’s Brief cites to no authority supporting his position that any of these closing arguments are improper, and has not identified any way in which the jury acted arbitrarily or capriciously. These arguments correctly set out the law regarding the burden of proof and informed the jury of its role in weighing the evidence. See *Cansler v. Harrington*, 231 Kan. 66, (1982); *Cerretti v. Flint Hills Rural Elec. Co-op. Ass’n*, 251 Kan. 347, 362 (1992). As noted herein *supra*, the simplest reason the jury did not award Plaintiff his full medical expenses is because the jury did not believe that all of those expenses were reasonable and necessary as a result of alleged injuries incurred from the subject accident. If the jury determined that Plaintiff had not met his burden of proving that the full amount was reasonable and necessary, it was not required to award the full amount. The fact that the jury agreed with the defense’s argument that Plaintiff failed to meet his burden does not make the closing argument improper nor the jury award arbitrary and capricious.

CONCLUSION

For the aforementioned reasons, the district court's rulings should be affirmed and the jury verdict upheld.

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CERTIFICATE OF SERVICE

I, the undersigned, Emily A. Yessen, do hereby certify that this Brief of Appellee was filed with the Court using the Court's electronic filing system this 25th day of November, 2019; a copy was transmitted via e-mail and a copy sent via U.S. Mail, postage prepaid, to the following parties of interest on this 25th day of November, 2019:

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