CORNELIUS GLEASON v. AMERICAN STEAMSHIP COMPANY

No. 94-CV-74932

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN
(SOUTHERN DIVISION)

1996 AMC 2861

May 3, 1996

HEADNOTES:

DAMAGES--1212. Future--EVIDENCE--1123. Scintilla of Evidence--19. Expert Testimony.

A doctor's testimony that "in terms of percentages, the highest probabilities, that would be the highest percentage" by the time the plaintiff reached the age of 50 he would "have some degree of arthritis in his knee resulting in limitation of his activities" was sufficient for a jury to conclude that it was "likely" or "more than possible" that he would suffer a decrease in earning capacity and that his injuries had "narrowed his range of employment opportunities" and thus award damages for lost future income.

DAMAGES--1212. Future--122. Pain and Suffering.

The likelihood of future loss of wages is not necessarily inconsistent with an absence or failure of proof of past loss and pain and suffering and a jury may therefore choose to award damages for the future only.

NEGLIGENCE--151. Contributory Negligence--PERSONAL INJURY--135. Contributory Negligence.

Although an issue of contributory negligence cannot be put to the jury solely on the question of the credibility of the plaintiff's testimony, it may be put on the basis that the jury may believe the plaintiff and still find contributory negligence.

COUNSEL:

Dennis M. O'Bryan (O'Bryan Baun) for Gleason

Thomas W. Emery (Garan, Lucow, Miller, Seward & Becker) for Amer. S.S.

OPINIONBY: DUGGAN

OPINION:

[*2862] PATRICK J. DUGGAN, D.J.:

Before this Court is defendant's renewed motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b). This matter was tried to a jury and on February 8, 1996, the jury rendered a verdict in favor of plaintiff.

At the close of plaintiff's proofs, defendant made a motion for judgment as a matter of law with respect to plaintiff's claim for loss of future earning capacity. Defendant argued that plaintiff had not presented sufficient evidence to support a jury verdict on the issue. The Court denied defendant's motion. The parties agreed on the verdict form including the following question which the jury answered in the affirmative:

> Do you find that plaintiff has proven by a preponderance of the evidence that he will suffer any decrease in earning power or capacity by plaintiff in the future?

The jury awarded plaintiff $ 75,000 n1 in damages for decrease in earning power or capacity. Defendant now renews its motion for judgment as a matter of law, again arguing that there was insufficient evidence in the record to allow the issue to go to the jury. The Court disagrees.

> n1 This amount was reduced by the jury to $ 60,000 based on its finding that plaintiff was 20% at fault.

In *Imperial Oil v. Drlik, 1956 AMC 1862, 234 F.2d 4 (6 Cir. 1956)* n2, the Sixth Circuit addressed the propriety of an award of lost future earning capacity as an element of damages in personal injury actions:

> One who is injured in his person by the wrongful act of another may recover loss of time resulting therefrom and consequent loss of earnings, including future earnings, provided they are shown with reasonable certainty and are not merely speculative in character. The measure of damages in this field is fairly definite, and the amount awarded is controlled by what the evidence shows concerning the earning capacity of the injured person before and after the accident.

[*2863] *1956 AMC at 1871, 234 F.2d at 11.* Plaintiff has the burden of proving lost future earning capacity by a preponderance of the evidence.

> n2 Which, coincidentally, like the present case was also a Jones Act case.

> The [plaintiff] must first establish his normal annual earning capacity, which, in the absence of evidence of special circumstances indicating an ability to rise beyond his prior level of employment, would consist of a projection of [plaintiff's] earnings history, taking into account all available data relevant to wage adjustment. Next the claimant must establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for gainful activity.

United States Steel Corporation v. Lamp, 1971 AMC 914, 932-33, 436 F.2d 1256, 1270 (6 Cir. 1970). The critical question is whether plaintiff has "produced competent evidence suggesting that his injuries have narrowed the range of economic opportunities available to him." *Gorniak v. National R.R. Passenger Corp., 889 F.2d 481, 484 (3 Cir. 1989).*

> This means that a plaintiff need not, as a prerequisite to recovery, prove that in the near future he will earn less money than he would have but for his injury. Rather, a plaintiff must show that his injury has caused a diminution in his ability to earn a living. Such a diminution includes a decreased ability to

> weather adverse economic circumstances, such as discharge, or lay-off, or to voluntarily leave the defendant employer for other employment.

Id.

In the present case plaintiff presented sufficient evidence to submit the question of lost future earning capacity to the jury. Included in the evidence submitted to the jury was the testimony of Dr. Kohen by deposition. In his deposition, Dr. Kohen testified as follows:

> Q. Would you agree that or at least anticipate that at least by the time Mr. Gleason reaches his fifth decade that he will have some degree of arthritis in his knee resulting in limitation of his activities and to avoid strenuous work activities?
>
> A. Yes, in terms of percentages, the highest probabilities, that would be the highest percentage.
>
> Q. What are strenuous work activities anyway, Doctor?
>
> A. Well, things that are knee intensive tend to be things like kneeling and squatting. Things like climbing up and down ladders [*2864] and standing in one position for a long period of time, these are the kinds of things that bother people when they have knee problems, what they complain of so that is more or less what we are talking about. n3
>
> n3 The jury, of course, had all of Dr. Kohen's testimony including his testimony that 75% of the patients who sustained the type of injuries sustained by plaintiff will develop arthritic changes and that he was in the "75% category."

In this Court's opinion, the jury had before it competent evidence from which they could determine, by a preponderance of the evidence, that by the time plaintiff reached age 50, his injuries would prevent him from performing strenuous activities which are currently part of his job.

Defendant relies on *Mayhew v. Bell S.S. Co., 917 F.2d 961, 1991 AMC 2112* [DRO] (6 Cir. 1990) to support its claim that there was not sufficient evidence to allow the jury to award damages for future loss of earning power or earning capacity. In this Court's opinion, *Mayhew* does not support defendant's position. The Court in *Mayhew,* after acknowledging that "speculative medical testimony" is not admissible, stated:

> However, because of the relaxed standards applied in FELA and Jones Act suits, we do not believe that a medical expert must be able to articulate to a "reasonable degree of medical certainty" that the defendant's negligence had a causal relationship with the injury and disability for which the plaintiff seeks damages. Instead, we believe that such a medical expert must be able to articulate that it is likely that the defendant's negligence, or more than possible that the defendant's negligence, had a causal relationship with the injury and disability for which the plaintiff seeks damages.

Id. at 964.

Applying this standard to the case at hand, this Court is satisfied that there was sufficient evidence from which the jury could conclude that it was "likely" or "more than possible" that plaintiff will suffer a decrease in earning power or capacity in the future as a result of the injury suffered by plaintiff which the jury found was due, at least in part, to defendant's negligence.

In this Court's opinion, the evidence presented was sufficient to allow a rational factfinder to conclude that plaintiff's injuries "have [*2865] narrowed the range of economic opportunities available to him." *Gorniak, 889 F.2d at 484.*

For the reasons set forth above, it is ordered that defendant's renewed motion for judgment as a matter of law is denied.

DISSENTBY: DUGGAN

DISSENT:

PATRICK J. DUGGAN, D.J.:

Before this Court is plaintiff's motion for judgment notwithstanding the verdict regarding contributory negligence and/or for a new trial regarding compensatory damages only pursuant to Fed.R.Civ.P. 50(b) and 59(a).

Plaintiff first argues that he is entitled to a new trial because the jury failed to grant any award of damages for past pain and suffering:

> The jury verdict did not award the Plaintiff any damages for past harm which the Plaintiff suffered. This verdict is erroneous and defective. If the Plaintiff suffered future damages from the injury alleged, it is illogical and incongruous for the jury to have determined that the Plaintiff suffered no past damages as a result of the same accident.

The jury was asked the following question regarding damages to plaintiff for lost future earning capacity:

> Do you find that plaintiff has proven by a preponderance of the evidence that he will suffer any decrease in earning power or capacity by plaintiff in the future?

The jury found plaintiff had satisfied his burden with respect to loss of future earning capacity and awarded plaintiff $ 75,000. n1 The jury was then asked the following question:

> What sum of money do you find from a preponderance of the evidence to be the amount of damages to be awarded plaintiff for other than decrease in earning power or capacity by plaintiff in the future?

The jury found that plaintiff was not entitled to any other damages other than lost future earning capacity.

n1 The jury found plaintiff 20% at fault and thus reduced the award to $ 60,000.

The Court disagrees with plaintiff's argument that the jury verdict was "illogical and inconsistent." The jury was presented with competent evidence which suggested that by the time plaintiff reached the age of [*2866] 50, it was highly likely that he would experience an arthritic change in his knee which would prevent him from performing certain strenuous activities which are currently part of his present job. This was the evidence which supports the jury's award of lost future earning capacity. Such evidence, however, has absolutely no relevance to whether plaintiff was entitled to any damages for past pain and suffering. While plaintiff did present some evidence of pain and suffering, it is clear from the jury's verdict that it rejected that evidence. The evidence presented by plaintiff regarding pain and suffering was not so overwhelming that the Court could find that no reasonable jury could have failed to award any damages. Since the Court finds no inconsistency between the jury's award of lost future earning capacity and its refusal to award damages for past pain and suffering, plaintiff's motion for a new trial will be denied.

Plaintiff moves in the alternative for judgment notwithstanding the verdict on the issue of contributory negligence. At the close of defendant's proofs, plaintiff moved for a directed verdict on the issue of contributory negligence, arguing that defendant offered no independent evidence of plaintiff's contributory negligence. The Court denied the motion.

Plaintiff contends that "a defendant is *not* entitled to reach the jury on the contributory negligence issue based on nothing more than the believability or unbelievability of a plaintiff's testimony." In support of this position, plaintiff cites *Borough v. Duluth, Missabe and Iron Range Railway Co., 762 F.2d 66, 69 (8 Cir. 1985).* In *Borough,* the Eighth Circuit held that the district court did not err in directing a verdict for plaintiff on the issue of contributory negligence:

> The railroad specifically instructs its employees on the method of stepping off a moving locomotive... The uncontradicted testimony was that Borough stepped off in the proper manner and did not violate any safety rules. Although two persons witnessed the accident, there was no testimony that Borough acted carelessly or stepped off improperly.
>
> Apparently it is the railroad's position that Borough acted negligently, and that the jury could have disbelieved plaintiff's testimony and inferred, from the fact the accident occurred, that Borough failed to exercise due care.

Id. at 69. The *Borough* court quoted the Sixth Circuit's opinion in *Dixon v. Penn Central Co., 481 F.2d 833 (6 Cir. 1973),* to support its contention [*2867] that defendant had not met its burden of proving contributory negligence:

> [A] defendant is not entitled to reach the jury on an issue on which he bears the burden of proof on nothing but the incredibility of the plaintiff's testimony. Other evidence of the matter to be proved must be adduced. Thereafter, defendant may be assisted in sustaining his burden by the jury's disbelief of plaintiff's testimony.
>
> * * *
>
> We have searched carefully for some evidence of contributory negligence because an appellate court should be reluctant to conclude from afar that the trial judge on the scene erred in a factual determination. Nevertheless, we find no evidence of contributory negligence here, and conclude it was error to submit that issue to the jury. Plaintiff's request for a peremptory instruction eliminating contributory negligence should have been granted.

Id. at 837.

Both *Borough* and *Dixon* are distinguishable from this case. In the present case defendant did not ask the jury to find plaintiff contributorily negligent because plaintiff's testimony was incredible. Instead, defendant asked the jury to believe what plaintiff testified happened and to still find plaintiff contributorily negligent. Unlike the plaintiff in *Borough,* the present case did not involve a plaintiff whose "uncontradicted testimony was that [he acted] in the proper manner and did not violate any safety rules." *Borough, 762 F.2d at 69.* The present case is not a case completely devoid of evidence of contributory negligence; the evidence of plaintiff's negligence was his own testimony. Given the facts of the incident as plaintiff testified to them, it was reasonable for the jury to conclude that plaintiff did not exercise due care and that his own negligence was a proximate cause of his injuries. Plaintiff's motion for judgment notwithstanding the verdict on the issue of contributory negligence will be denied.

Therefore, for the reasons set forth above, it is ordered that plaintiff's motion for judgment notwithstanding the verdict and/or for a new trial is denied.