

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Jacob Vollmar

Court of Appeals No. E-08-007

Appellant

Trial Court No. 2005 CV 195

v.

Michael Dukeshire

DECISION AND JUDGMENT

Appellee

Decided: June 19, 2009

* * * * *

K. Ronald Bailey, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the January 18, 2008 judgment of the Erie County Court of Common Pleas, which adopted the decision of the magistrate and entered judgment for appellant, Jacob Vollmer. Upon consideration of the assignment of error, we reverse the decision of the lower court. Appellant asserts the following single assignment of error on appeal:

{¶ 2} "THE TRIAL COURT ERRED IN NOT AWARDING FOR PAIN AND SUFFERING, DISFIGUREMENT, AND LOSS OF ENJOYMENT OF LIFE, PUNITIVE DAMAGES, AND ATTORNEY FEES."

{¶ 3} Appellant filed a complaint against appellee, Michael Dukeshire, on March 21, 2004. Appellant alleged that appellee had maliciously assaulted appellant without provocation and hit appellant, with excessive force, in the face and caused permanent mental and physical injuries. Appellant sought \$2,804.32 for medical costs. He also sought future damages of \$25,000 for medical care, pain and suffering, economic loss, and loss of enjoyment of life, as well as interest, punitive damages, attorney fees, and costs. Appellee filed an answer to the complaint denying the allegations. Appellant then moved for summary judgment arguing that liability was clear because appellee had been criminally charged with assault and battery, pled no contest to the charges, and had been convicted and sentenced. The court granted appellant summary judgment on the issue of liability and proceeded to hold a hearing on the issue of damages.

{¶ 4} At the hearing, appellee was unrepresented by counsel. As a result, the magistrate continually reminded appellee to focus his questions to the issue of damages and not liability. Regarding the liability issue, appellee questioned appellant as to whether his lip piercing contributed to the damage to his lip. Appellant denied having a piercing in the area where the damage occurred. Appellant also questioned appellant about his employment at that time. Appellant testified that he worked for Barnes Construction and had missed three days of work after the incident. Based on a daily pay

of \$88 a day, appellant estimated that he had lost at least \$176 in wages. Appellee questioned whether appellant worked as a dishwasher for appellee's future son-in-law's parents at their restaurant and was paid \$5.00 an hour. Appellant was unable to produce any documentation of his lost wages. Appellant also testified that his medical bills were paid by the Victim's Advocate and that group would be reimbursed by any judgment against appellee. When appellee was permitted to make a statement in lieu of his direct examination, appellee testified, over appellant's objection, at great length about the relationship between appellant and appellee's son, appellant's conduct that day, and the events leading up to the assault.

{¶ 5} Following the hearing before a magistrate, the magistrate concluded that appellant's testimony regarding lost wages of \$176 were not substantiated and, therefore would not be awarded. The magistrate also found that there were no facts presented which justified an award of punitive damages or attorney fees. Appellant was awarded his medical expenses of \$2,809.32 and costs.

{¶ 6} Appellant filed objections to the magistrate's decision arguing that the magistrate erred by failing to award him additional damages for pain and suffering, loss of enjoyment of life because of the scarring, and disfigurement in the total amount of \$15,000. He also sought punitive damages of \$45,000 and attorney fees of \$20,000 for a total of \$80,000.

{¶ 7} The trial court considered appellant's objections and then adopted the decision of the magistrate and entered judgment for appellant in the amount of \$2,809.32. Appellant then sought an appeal to this court.

{¶ 8} In his sole assignment of error, appellant argues that the trial court erred by failing to award him his additional damages. Appellant contends that the failure of the magistrate to sustain appellant's objection to appellee's testimony during the hearing resulted in prejudice to appellant's case. Appellee, who was unrepresented by counsel, was permitted to testify on matters outside the scope of the issue of damages.

{¶ 9} We find appellant's sole assignment of error well-taken. Neither the magistrate nor the trial court judge addressed the issue of additional damages for pain and suffering, loss of enjoyment of life, and disfigurement. The magistrate specifically held that there was insufficient evidence to support a finding of economic loss from lost wages. However, the issue of whether appellant was entitled to additional damages was not mentioned despite the fact that there was some uncontroverted evidence to support such an award (the victim's testimony that he suffered pain from the injury and has permanent injuries and disfigurement). Since the court did not make a finding that appellant's testimony was not credible or that it was insufficient to establish significant damages, we must find that the failure to consider an award of additional damages in this case was contrary to the manifest weight of the evidence.

{¶ 10} Furthermore, we are concerned about the appearance that the court's decision could have been improperly influenced by irrelevant evidence the magistrate permitted to be admitted. Even though appellee was unrepresented by counsel, he was still required to comply with the procedural rules of the court. *Holman v. Keegan* (Sept. 22, 2000), 139 Ohio App.3d 911, 918, citing *Meyers v. First Natl. Bank of Cincinnati*

(1981), 3 Ohio App.3d 209, 210. We find that the magistrate erred when he allowed appellee to make statements during his direct examination relating to his liability for appellant's injuries when the only relevant issue was the amount of damages to be awarded. While appellant has failed to demonstrate that the court was unduly prejudiced in its determination of damages, we find that when the court reconsiders the damages issue on remand, it should be careful to eliminate any appearance of influence from appellee's irrelevant statements.

{¶ 11} Having found that the trial court did commit error prejudicial to appellant, the judgment of the Erie County Court of Common Pleas is reversed. This case is remanded to the lower court for re-determination of the damage award. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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