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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001794-MR

LOLITA HOLBROOK — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 09-CI-00359

DOLLAR GENERAL STORE CORPORATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: In this premises liability action, Lolita Holbrook has appealed from the September 26, 2012, order of the Floyd Circuit Court denying her motion for a new trial against Dollar General Store Corporation. Holbrook was awarded $25,000.00 for an injury she sustained to her left knee when she slipped and fell at a Dollar General in Bypro, Kentucky. The amount of the judgment

represented one-half of the full amount awarded based on the jury's determination that she was 50% at fault. We have carefully considered the parties' arguments and the record, and finding no error, we affirm.

Holbrook filed a complaint on March 31, 2009, against Dollar General and Bypro Plaza, LLC,[1] the shopping plaza where a Dollar General in Floyd County is located. In her complaint, Holbrook alleged that on May 18, 2008, she was a business invitee at Dollar General, that an unreasonably unsafe and hazardous condition existed on the floor of Dollar General, that neither defendant warned of the hazardous condition, and that as a result she fell and suffered severe bodily injuries. She demanded a trial by jury; compensatory damages, including past and future medical expenses, past and future pain and suffering, and the diminution of her capacity to earn money; and costs and interest. In its response, Dollar General raised several affirmative defenses, including apportionment of fault, failure to mitigate damages, estoppel, waiver, failure of conditions precedent, comparative negligence, and the open and obvious doctrine.

The court entered an order in early 2011 scheduling a jury trial for later that year on the issues of damages/liability and causation. On Dollar General's motion, the trial was continued until June 2012. Several motions *in limine* were filed, including Dollar General's motion to exclude testimony of Dr. Ronald Mann, Holbrook's treating physician, as to the need for possible future

[1] While Holbrook moved for a default judgment against Bypro Plaza for failure to answer the complaint, the record does not contain a ruling on that motion. We note that Bypro Plaza did not participate in the trial and is not an appellee in the present appeal.

surgical evaluations and intervention to her left knee based upon his lack of orthopedic experience. During the trial, the court granted the motion in part and denied it in part, ruling that Dr. Mann could testify about future medical treatment and surgical consultation, but not about future surgical intervention, because he had testified about future surgical intervention in terms of possibility as opposed to probability.

A two-day trial commenced on June 4, 2012. Holbrook testified that on May 18, 2008, she was working around the house and went to Dollar General to get cleaning supplies. She was wearing thick flip-flops. She lived a mile and a half to two miles away from the Dollar General, and it took five to seven minutes to drive there. It was raining "pretty hard" when she got in the car to go to the store, and it was still raining when she got to the parking lot. She sat in her car for up to ten minutes until the rain tapered off to a sprinkle. She walked across the wet parking lot to get to the entrance of the store. Holbrook stated that she was familiar with the layout of the store, including the tile foyer area, which would get wet with rain. She said she opened the first set of doors to the store and started walking in, although she might have assumed that she opened the doors. Her best memory was that she could not recall whether the door was open or not. Holbrook stepped on a rug but did not shuffle her feet to dry the bottom of her shoes. She did not see any water as she walked into the foyer of the store, but she was not looking for any water. She was walking at a normal pace and did not imagine there would be that much water on the floor in the foyer. Holbrook did not know

how long the water had been there, and she did not see a sign or anyone coming to mop up the water on the floor. As soon as she stepped off of the rug, she slipped and fell and felt pain in her left knee.

Holbrook got up and walked into the store at that point with another customer, and three employees came over to look at her knee. She stated that Dollar General assistant manager Delonda Hall said she had just told "the girls" to clean up the water. One employee took pictures with a disposable camera. Holbrook drove home, but was unable to put pressure on her left leg. She propped it up on a coffee table when she got home. Her knee was bruised and swollen. Her husband took her to the emergency room, where her knee was x-rayed and wrapped in an ace bandage. She received crutches and was told to follow up with her family physician. She followed up with Dr. Mann, who prescribed pain medication, ordered an MRI, and referred her to Dr. Hall. She saw Dr. Hall in August 2008, and he performed surgery. Holbrook testified that her knee had continued to hurt since the surgery and physical therapy. She reported bad pain some days, brought on by weather or by standing or sitting too long. She had experienced pain every day since the date of the injury, pain that she had not had before the injury. She was not able to clean or work in her garden, or do what a normal forty-three year old woman would do. She could not sit on the floor to play with her grandchildren or pick any of them up. She stated that she had incurred approximately $27,000.00 in medical bills from this accident.

Holbrook called several lay witnesses who testified about the day of her injury and what happened afterwards. Dorothy Collins testified that she used to work as a cashier at the Dollar General where Holbrook was injured. The day of the accident, Dorothy was in the back of the store when Holbrook entered the store and fell. Dorothy and two other people were working that day: Delonda and Michelle Hall, who was another cashier. She described the entrance area as having two sets of doors; one set opened into a foyer and another set opened into the store. There was also a mat on the floor in the foyer area. She reported that it was hot that day, that the doors to the store were open before it rained, and that it rained for twenty minutes before they closed the doors. Dorothy also stated that it rained hard for thirty minutes and that the wind blew the doors to the store open. She stated that Delonda and Michelle had gone to the back to get a mop to clean up the floor when Holbrook entered the store ten or fifteen minutes after the rain had started. Dorothy could see standing water in the foyer, estimating that there was an inch and a half of water on the floor. She stated that a customer would not notice the standing water coming from the outside of the store. The rain would not have been able to get in if the doors had been closed.

Willetta Jackson was the representative for Dollar General for the trial. She is a district manager for fifteen Dollar General stores and was working in this capacity at the time of Holbrook's injury. She did not recall this particular accident specifically. She did not know where the incident report or photographs

Dorothy took of the scene were. She confirmed that Delonda was the manager at the time of the incident.

Jeff Hall is Holbrook's husband, and he testified about the effects of Holbrook's injury. He stated that her condition did not change very much after the surgery and that she was still experiencing pain in her knee.

In addition to lay testimony, Holbrook called three medical witnesses during her case-in-chief. Dr. Mann is a family physician in Prestonsburg and Pikeville. He first saw Holbrook on June 9, 2008. She provided a history of slipping and falling on a floor while entering a store and landing on her left knee. She complained of left knee, left hip, left leg, and low back pain. She also reported neck pain, which resolved. Dr. Mann performed a physical examination and determined that Holbrook had a torn meniscus in her left knee. He treated her with anti-inflammatory medication and limited her activities as she could tolerate them. He did not order any physical therapy prior to surgery. Dr. Mann ordered two MRIs, one for her knee and one for her back, which was all of the diagnostic testing he did because it was the definitive test to use. After an initial course of treatment, Dr. Mann referred Holbrook to an orthopedic surgeon for the meniscal injury to her knee. Following the surgery, Dr. Mann continued to see Holbrook, and her last visit was in April 2012. By that time, she had reached maximum medical improvement, although she continued to limp and experience pain in her knee and back. He continued to treat her with pain and anti-inflammatory medication. Walking and standing would continue to be an issue with her. He

described her condition as chronic and stated that she would continue to experience knee pain. Dr. Mann discussed chondromalacia, noting that Holbrook began experiencing problems with this later. He stated this could be caused by a traumatic injury or overuse. He believed that this condition was related to her injury and testified that physical therapy would help with this.

Regarding future medical treatment, Dr. Mann stated that Holbrook would need another surgical evaluation for her knee. He did not consider her knee to be perfectly aligned and believed she would sustain premature wear and tear on her knee because of the meniscectomy. He stated that she would continue to need the type of treatment he was providing in addition to the surgical evaluation and possible surgical intervention. He stated that all of his answers had been stated within a reasonable degree of medical probability or certainty. At the conclusion of Dr. Mann's testimony, and as a result of its ruling on Dollar General's motion *in limine*, the court clarified for the jury that Dr. Mann was not recommending that a surgery was needed in the future within the realm of reasonable medical probability.

Dr. Keith Hall was the next medical witness to testify. Dr. Hall is board certified in orthopedic surgery and sports medicine. Dr. Mann referred Holbrook to Dr. Hall in July 2008 for evaluation of her left knee. Review of her MRI report revealed a torn medial meniscus and osteoarthritis in her left knee, which Dr. Hall described as mild. He performed surgery in August 2008 and successfully repaired the tear in her meniscus. During the surgery, Dr. Hall noted a

large amount of chondromalacia. He saw her three more times after the surgery. He stated that Holbrook's pain improved over that time. He believed that her continuing pain was a result of the chondromalacia, which was present before her injury. She would not need any future treatment with respect to her torn meniscus, but would due to the chondromalacia. At her last visit, Dr. Hall offered her an injection to address her continuing pain. He last saw her in late 2008.

Holbrook also called Dr. Phillip Corbett to testify. Dr. Corbett is board certified in orthopedic surgery, and he performed an independent medical evaluation of Holbrook's left knee on December 8, 2011. He described the history Holbrook gave him, the results of his physical examination, and his review of her medical records. As a result, Dr. Corbett found no evidence of a neurological condition in Holbrook's left leg. He believed the torn meniscus in her left knee, which was caused by Holbrook's fall, had been appropriately treated and had resolved. Dr. Corbett did not believe that she needed any additional future treatment or intervention on her left knee as a result of the meniscal tear. He did believe she had some limitations in the future, but attributed these to Holbrook's chondromalacia. Dr. Corbett stated that chondromalacia is evidence of an ongoing degenerative process that predisposes the meniscus to break down and be torn more easily.

At the close of Holbrook's case, Dollar General moved for a directed verdict on liability and future damages. The court denied the motion.

Dollar General called one witness during its case-in-chief. Delonda Hall testified that she was employed by Dollar General as an assistant manager in 2008. On May 8, 2008, she arrived early for her 12:30 p.m. shift and went to the back. Four other employees were in the store at that time, including Fern Johnson, the third key holder. When she arrived at the store between 12:00 and 12:30 p.m., Delonda reported that the outer doors were closed, but the doors from the foyer into the store were blocked open. The outer doors were usually closed all of the time, with exceptions for deliveries and if the air conditioner was not working. The rain storm began after Delonda's arrival. She reported that it was windy and that she and other employees saw a shopping cart being blown across the parking lot as they looked outside. When the storm started, the doors were closed, but they blew open when a customer she identified as Sam P. entered the store, causing rain to come into the lobby. Sam P. pulled the doors closed after he walked into the store. Rain poured into the foyer while the doors were open, filling it with water. Fern told two other employees to get the wet floor sign, the mop, and a mop bucket to clean up the floor.

Holbrook entered the store sometime after 1:00 p.m. while it was still raining, approximately four or five minutes after Sam P. entered the store, but before the floor had been mopped or the wet floor sign put up. The employees had not yet returned with the sign, mop, and mop bucket, although they had been told to go get them. Holbrook was the only customer to enter the store after Sam P. As soon as Holbrook stepped off of the rug, she fell. Delonda was at the register at the

front of the store at that time. She stated that there was not enough time to yell a warning to her before she fell. Holbrook had tried to catch herself by grabbing for the doors that were propped open. After the accident, she and other employees checked out Holbrook's leg and took pictures. She called risk management to report the accident, and two other employees cleaned up the water. There were no other accidents for the rest of the day with either customers or employees.

Based upon a response by Delonda during cross-examination, the court held a hearing outside of the presence of the jury related to whether Dollar General's counsel had told her to testify in a particular way about the air conditioning based upon the deposition testimony of another witness. Delonda explained that Dollar General's attorney asked her if she was aware of the witness's testimony and explained what that witness stated. She said that no one told her what to say about the doors, resolving the issue. Delonda's testimony continued at that point, after the court indicated that the last question would be re-asked because she had gotten a little bit confused. At the conclusion of her testimony, the court admonished the jury to disregard Delonda's testimony that her attorney told her what to say, stating that she had gotten confused.

At the close of its case, Dollar General renewed its motion for a directed verdict on liability and future damages, which was again denied. The parties then discussed jury instructions. Holbrook's counsel objected to the court's instructions, noting that she had tendered her own instructions, and specifically arguing that the open and obvious definition was not necessary. Counsel argued

that including the definition for open and obvious was redundant because the standard of ordinary care had already been defined in Instruction No. III and having to consider this placed an extra burden on Holbrook. The court overruled Holbrook's objection to that portion of the jury instructions.

The jury returned a verdict that was memorialized in the trial order entered on July 10, 2012, in which the court also set forth its rulings on the pre-trial motions *in limine* and its rulings on the motions for directed verdict. The jury found that Dollar General failed to comply with its duty and that such failure was a substantial factor in causing Holbrook's injuries; that Holbrook failed to use ordinary care and that such failure was a substantial factor in causing the accident; that Holbrook and Dollar General were each 50% at fault; and that the total amount of damages awarded was $50,000.00, representing $27,685.06 in past medical expenses (the whole amount claimed), $14,000.00 in past pain and suffering (Holbrook had requested $27,685.06), and $8,314.94 in future pain and suffering (Holbrook had requested $721,050.20). The jury did not award any amount for future medical expenses (Holbrook had requested $53,660.00). The court entered a final and appealable judgment on August 21, 2012, awarding Holbrook $25,000.00.

Holbrook filed a timely motion for new trial pursuant to Kentucky Rules of Civil Procedure (CR) 59.02. In her motion, Holbrook contended that the trial court should not have instructed the jury on the open and obvious doctrine because from her standpoint from the outside, she had no reason to be alert to the

possibility that there was standing water inside of the store. Holbrook also argued that the verdict was inadequate and inconsistent because she was only awarded $8,314.94 in damages for pain and suffering, stating that this amount had no relevance to any of the testimony of the medical or lay witnesses. She posited that the jury came up with this amount to render a verdict in round numbers, and it did not consider this as a separate element of damages, also pointing to the jury's decision to not make an award of future medical expenses. Dollar General objected to the motion. In an order entered September 26, 2012, the trial court denied Holbrook's motion, and this appeal now follows.

On appeal, Holbrook raises four arguments: 1) that the trial court erred in instructing the jury on the open and obvious doctrine; 2) that the trial court erred when it admonished the jury by limiting Dr. Mann's testimony related to future medical treatment, which led to an inadequate award of damages by the jury; 3) that the court erred in failing to *sua sponte* declare a mistrial for an intentional violation of Kentucky Rules of Evidence (KRE) 615 regarding the separation of witnesses; and 4) that the trial court erred in admonishing the jury as to the credibility of witness Delonda Hall.

Prior to filing its appellate brief, Dollar General filed a motion to dismiss the third and fourth assignments of error Holbrook raised in her brief. Dollar General argued that Holbrook failed to preserve those two issues for review. In her brief and response to the motion, Holbrook requested that this Court review those issues for palpable error. The motion was passed to the merits panel. This

Court has now considered Dollar General's passed motion to dismiss as well as Holbrook's response. We agree with Dollar General that those arguments are not properly before this Court because Holbrook failed to list these issues in her prehearing statement.

CR 76.03(4)(h) provides that a prehearing statement must include "[a] brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges[.]" CR 76.03(8) provides that "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." *See Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004) ("Since that issue was not raised either in the prehearing statement or by timely motion seeking permission to submit the issue for "good cause shown," CR 76.03(8), this matter is not properly before this court for review."). *See also Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 213 (Ky. 2012) ("Because that issue was not identified in the prehearing statement, pursuant to CR 76.03(8), the Court of Appeals could not properly reverse on that issue absent a finding of palpable error, CR 61.02, which it so found.").

In the present case, Holbrook listed the issues she planned to raise on appeal as follows:

> [(1.)] Plaintiff asserts that the "open and obvious" doctrine/defense did not apply due to the fact that the Plaintiff did not have the same vantage point of perception as did the Defendant. (2) Damages verdict was internally inconsistent in that it awarded some future

> pain and suffering but made no award for future medical benefits for the cure or relief of that pain. (3) The amount of the award for future pain and suffering is insufficient and bears no rational relationship to any evidence presented.

She did not list the trial court's failure to declare a mistrial or its admonishment as issues, and she did not file a motion to include additional issues. Therefore, those issues are not properly before this Court. We recognize that "CR 61.02 permits this court to correct palpable errors which affect the substantial rights of a party, notwithstanding that the issue may have been insufficiently raised or preserved for review, if the court determines that manifest injustice has resulted from the error." *Slone v. Calhoun*, 386 S.W.3d 745, 748 (Ky. App. 2012). Here, we agree with Dollar General that no palpable error exists, and we shall decline to address those arguments any further. Accordingly, Dollar General's passed motion shall be denied as unnecessary by separate order of this court.

Turning to the remaining issues, we shall first address Holbrook's argument that the trial court erred in instructing the jury on the open and obvious doctrine. In *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006), this Court set forth the applicable standard of review:

> Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). "The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a

> correct verdict. If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury." *Ballback's Adm'r v. Boland–Maloney Lumber Co.*, 306 Ky. 647, 652–53, 208 S.W.2d 940, 943 (1948).

The trial court instructed the jury regarding the open and obvious doctrine in two instructions. Instruction No. V provides as follows:

> It was the duty of Defendant and its employees to exercise ordinary care in maintaining and keeping its premises in a reasonably safe condition for the use of its customers, including to discover dangerous conditions on its premises and to either correct any such conditions or warn customers of any such conditions. Defendant, however, is under no duty to warn customers of a dangerous condition that is open and obvious to the customer.
>
> You will find for Plaintiff if you are satisfied from the evidence that Defendant failed to satisfy its duty and that such failure was a substantial factor in causing Plaintiff's injuries. Otherwise you will find for Defendant.

Instruction No. III provided definitions for ordinary care, substantial factor, and open and obvious. The instruction defined "open and obvious" as "with respect to a particular condition, [open and obvious] means that condition is apparent to and would be recognized by a reasonable person exercising ordinary perception, intelligence, and judgment."

Holbrook contends that the trial court should not have instructed the jury on the open and obvious doctrine because the evidence did not support that the hazardous condition was open or obvious. She points to Dorothy's testimony that

a person coming into the store from the parking lot would probably not have been able to see the water on the floor in the foyer from that direction. Dollar General, on the other hand, states that whether a condition is open and obvious may be presented to the jury as a fact issue, citing *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006) ("Our Supreme Court has stated that the obviousness of a hazard may be an issue of fact depending upon the facts of the particular case." (Footnote omitted)). The Court in *Reese* held that "[b]ecause of the conflicting testimony on the obviousness of the drop-off as a hazard and Patricia's knowledge thereof, the issue of whether the drop-off was open and obvious was a proper question for the jury." *Id*. Dollar General goes on to cite to testimony about the specific circumstances of the day, including the hard rain, that would have highlighted the obviousness of the danger. Based upon our review of the trial, we agree with Dollar General that it was appropriate for the trial court to instruct the jury on the open and obvious doctrine. However, our holding on this issue does not rest on this determination.

When this case was tried, the Supreme Court of Kentucky had not yet rendered its opinions in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013), as corrected (Nov. 25, 2013), and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013), as corrected (Nov. 25, 2013), which modified the holding in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010).

In *Shelton*, the Supreme Court altered the analysis in premises liability cases where a condition is open and obvious:

> We alter the analysis performed in this and future cases of this sort such that a court no longer makes a no-duty determination but, rather, makes a no-breach determination, dismissing a claim on summary judgment or directed verdict when there is no negligence as a matter of law, the plaintiff having failed to show a breach of the applicable duty of care. This approach places the reasonable-foreseeability analysis where it belongs—in the hands of the fact-finders, the jury. This approach continues Kentucky's, along with a growing number of states', slow, yet steady, progress to modernize our tort law and eliminate unfair obstacles to the presentation of legitimate claims. And this approach brings transparency and consistency to the decision-making and reasoning of Kentucky's judges.

Shelton, 413 S.W.3d at 904. In *McIntosh*, the Court had previously softened the effect of the open and obvious doctrine and adopted Restatement (Second) of Torts Section 343A. In doing so, the Court explained, "The lower courts should not merely label a danger as 'obvious' and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable." *McIntosh*, 319 S.W.3d at 392 (Ky. 2010).

The *Shelton* Court clarified its holding in *McIntosh* as follows:

> Today's case presents us with an opportunity to clarify *McIntosh* and emphasize that the existence of an open and obvious danger does not pertain to the existence of duty. Instead, Section 343A involves a factual determination relating to causation, fault, or breach but

> simply does not relate to duty. Certainly, at the very least, a land possessor's general duty of care is not eliminated because of the obviousness of the danger.

Shelton, 413 S.W.3d at 907. Only if a landowner has fulfilled its duty of care will it be shielded from liability for an open and obvious condition: "No liability is imposed when the defendant is deemed to have acted reasonably under the given circumstances." *Id*. at 911. In *Webb*, the Court held that "with no *known* or *obvious* danger present, a landowner owes a duty of reasonable care to those individuals invited onto the landowner's property, and the landowner must inform invitees of or eliminate any unreasonable dangers that would otherwise be undetected." *Webb*, 413 S.W.3d at 898 (footnotes omitted, emphasis in original).

Here, the jury was instructed that Dollar General had "no duty to warn customers of a dangerous condition that is open and obvious to the customer." Based upon the new holding in *Shelton*, this is no longer a correct statement of the law because the inquiry must address whether the land owner's duty was breached, not whether a duty existed at all. However, this is immaterial to our analysis because as Dollar General states in its brief, the jury did not find that the condition was open or obvious. Rather, the jury found that Dollar General had breached its duty of care to Holbrook in failing to maintain and keep its premises in a reasonably safe condition for its customers. Had the jury found the condition to be open and obvious, the jury would have returned a verdict in favor of Dollar General pursuant to Instructions No. V and VI. Therefore, we find no reversible error in the jury instructions related to the open and obvious doctrine.

Next, Holbrook argues that the trial court erred in limiting the testimony of Dr. Mann regarding future medical treatment and that this limitation confused the jury by causing it to return an inadequate and inconsistent verdict. We review evidentiary rulings for abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. at 581, citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Holbrook argues that Dr. Mann's testimony related to future medical treatment was made within a reasonable degree of medical probability or certainty in compliance with *Sakler v. Anesthesiology Associates, P.S.C.*, 50 S.W.3d 210, 213 (Ky. App. 2001) ("the opinion of a medical expert [testifying for the party with the burden of proof] must be based on reasonable medical probability and not speculation or possibility."). In this case, the only testimony the trial court excluded from the jury's consideration was related to future surgical intervention, not other medical treatment or even a surgical evaluation. On page 24 of Dr. Mann's trial deposition, the following exchange between Dr. Mann and Holbrook's counsel took place:

> Q. 63 Doctor, do you believe she'll – she'll continue to need the – type of treatment you're providing as well?
>
> A. Yes.
>
> Q. 64 In addition to –

A. Yes, sir.

Q. 65 -- the surgical evaluation –

A. Yes, sir.

Q. 66 -- and possible intervention?

A. Yes.

Additionally, on page 31, Dr. Mann again agreed with Holbrook's counsel when he asked, "And you believe that [treatment] will be necessary in the future and the possibility of surgery and a surgical evaluation. Do you believe, within reasonable medical probability, that that treatment will be required in the future?" We must agree with Dollar General that Dr. Mann's testimony related to future surgical intervention did not meet the standard of a reasonable degree of medical probability to be considered by the jury. His opinion was made in terms of possibility rather than probability, and Holbrook's argument that she cured this by asking if his answers were made within a reasonable degree of medical probability or certainty cannot work to alter his answers. Therefore, the trial court did not abuse its discretion in limiting Dr. Mann's testimony regarding future surgical intervention.

In addition, we disagree with Holbrook's argument that there was any confusion in the jury's verdict. In *Humana of Kentucky, Inc. v. McKee*, 834 S.W.2d 711, 725 (Ky. App. 1992), this Court set forth the applicable standard of review of an award of damages:

> This issue is governed by the supreme court's decisions in *Cooper v. Fultz*, Ky., 812 S.W.2d 497 (1991), and *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984). As explained in *Hazelwood v. Beauchamp*, Ky.App., 766 S.W.2d 439 (1989), the *Davis* standard on appeal for determining whether the trial court abused its discretion by not awarding a new trial on the ground that the award of damages was excessive is as follows:
>
> > The amount of damages is a dispute left to the sound discretion of the jury, and its determination should not be set aside merely because we would have reached a different conclusion. If the verdict bears any reasonable relationship to the evidence of loss suffered, it is the duty of the trial court and this Court not to disturb the jury's assessment of damages.
>
> *Hazelwood*, *supra* at 440. It therefore follows that this court may reverse the trial court's order only if the latter was clearly erroneous. *Cooper*, *supra*.

See also Pratt v. Mountain Utilities Co., Inc., 594 S.W.2d 881, 883 (Ky. 1980) ("inadequacy of damages is a legitimate ground on which the trial court may, in its discretion, grant a new trial. CR 59.01(d). *May v. Francis*, Ky., 433 S.W.2d 363 (1968).").

Holbrook contends that the jury was confused because it awarded $8,314.94 in damages for future pain and suffering, but nothing for future medical expenses, and that she is therefore entitled to a new trial. We disagree. In *May v. Holzknecht*, 320 S.W.3d 123, 128 (Ky. App. 2010), cited by Dollar General, this Court explained the award of damages for future pain and suffering and for future medical expenses:

> Future pain and suffering because of an injury is an element of damages for which the injured party is entitled to recover—if there is evidence establishing that it is reasonably certain that pain and suffering will occur. *American States Ins. Co. v. Audubon Country Club*, 650 S.W.2d 252 (Ky. 1983). If future medical expenses are awarded by a jury, there is a strong indication that a corresponding award for future pain and suffering must be considered. *Id*. However, there is no rule to suggest that where no future medical expenses are indicated, the jury is precluded from making an award. The test is whether there is evidence to indicate that the plaintiff's pain and suffering are *likely* to continue to occur. [Emphasis in original.]

The *May* Court went on to state, "[w]hether an award represents excessive or inadequate damages turns on the nature of the underlying evidence." *Id*. citing *Miller v. Swift*, 42 S.W.3d 599 (Ky. 2001). Here, both Dr. Corbett and Dr. Hall testified that Holbrook would not need any future medical treatment for her torn meniscus. Rather, any future medical treatment would be due to chondromalacia. That the jury concluded that Holbrook would continue to experience pain as a result of her fall does not mean that she would necessarily require future medical treatment for it. Accordingly, we hold that the trial court did not abuse its discretion in limiting Dr. Mann's testimony or in denying Holbrook's motion for a new trial.

For the foregoing reasons, the judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jonah L. Stevens
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Matthew Lockaby
Lexington, Kentucky