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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000812-MR

VIENNA EDWARDS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 09-CI-00657

CHARLAINA M. LUMBLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Vienna Edwards appeals a defense verdict in her automobile negligence action against appellee, Charlania M. Lumbley. Edwards also appeals the trial court's decision to prohibit her witness, McCracken County Sheriff's Deputy Chad Shaw, from testifying about his opinion that Lumbley was at fault for the automobile accident at issue in this matter. After careful review, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On December 29, 2008, between 5:30 p.m. and 6 p.m., Edwards' 1999 Pontiac Montana minivan and Lumbley's 2005 Kia Spectra collided at the intersection of Clarks River Road and the private driveway of the Indian Oaks Mobile Home Park in Paducah, Kentucky. At this location, Clarks River Road curves slightly southward, and consists of two eastbound lanes, two westbound lanes and a center turn lane. Edwards would later testify that it was "pretty dark" at the time of the accident.

In her subsequent negligence action against Lumbley, Edwards alleged that Lumbley had caused the accident by entering Edwards' lane, *i.e.*, the inside, westbound lane of Clarks River Road, without yielding to Edwards' oncoming vehicle. At trial, Edwards conceded that she did not see Lumbley's vehicle enter the inside westbound lane of Clarks River Road. But, Edwards testified that Lumbley's vehicle must have entered the inside westbound lane and struck her vehicle because her vehicle had never left the inside westbound lane prior to the collision.

Lumbley, however, suggested that Edwards might have cut the southward curve in Clarks River Road too closely, entered the center turn lane where Lumbley's vehicle was stopped, and caused the accident. At trial, Lumbley conceded that she did not see Edwards' vehicle prior to the collision. But, Lumbley testified that Edwards' vehicle must have entered the center turn lane because her own vehicle had never left the center turn lane prior to the collision.

The record contains no pictures of the immediate aftermath of the accident or the damage that the accident caused to the parties' respective vehicles. But, neither vehicle was towed from the scene, no citations were issued, and Deputy Shaw, who investigated the accident, described the damage to both vehicles as "minor." The parties stipulated that Edwards' vehicle sustained damage to its driver's side cargo door and received some scuffs and scratches on its left, rear wheel. Additionally, Lumbley testified that the front of her vehicle was undamaged and that the only damage occurred on its side, near the front passenger tire.

Lumbley's passenger, Nesha Locust, testified that she could not recall whether any part of Lumbley's vehicle had entered the inside westbound lane. She also had no recollection of seeing Edwards' vehicle prior to the collision.

Deputy Shaw testified consistently with his report regarding the accident. Contrary to Lumbley's testimony, his police report stated that the front, right part of Lumbley's vehicle was sticking out into the inside westbound lane of Clarks River Road at the time of the collision. Contrary to Edwards' testimony, Shaw's report also stated that Edwards had seen the front, right part of Lumbley's vehicle pull out into the inside westbound lane of Clarks River Road prior to the collision, and that Edwards' vehicle had struck Lumbley's vehicle. Deputy Shaw also testified that, during his investigation, he observed a pile of debris knocked loose from the vehicles, approximately one foot in diameter, located in the inside

westbound lane immediately next to the line separating that lane from the center lane.

Deputy Shaw also testified that his report was a condensed version of his understanding of both his conversations with Edwards and Lumbley and what he had observed upon arriving at the scene of the accident. He did not recall how he had arrived at all of the conclusions contained in his report. He testified that he did not show what he had written in his report to Edwards or Lumbley prior to filing it. He admitted to stating, approximately two weeks prior to the date of giving his testimony, that he had no recollection of the accident. Finally, he testified that the date of the accident had been a particularly busy day for him.

At the close of the evidence, Edwards moved for a directed verdict on the issue of whether Lumbley was liable for causing the accident. The trial court denied Edwards' motion.

The matter was then submitted to the jury. The jury was instructed to find whether Lumbley had acted negligently and, if so, whether Edwards had been comparatively negligent. The jury found that Edwards had failed to prove by a preponderance of the evidence that Lumbley had acted negligently.

Edwards timely filed a CR[1] 59 motion for a new trial, asserting that the jury's verdict in favor of Lumbley was palpably and flagrantly contrary to the evidence. In relevant part, Edwards argued:

> Kentucky law is clear that a driver entering a superior highway from a private drive has the duty to yield the

[1] Kentucky Rule(s) of Civil Procedure.

right-of-way to traffic on the superior highway. KRS[2] 189.330(4) states:

> "After having stopped the operator shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such operator is moving across or within the intersection or junction of roadways."

[Lumbley] claimed that she did not see [Edwards'] vehicle before running into the side of it. Failure to see a vehicle which is obviously present is no excuse in the law. In Vaugn v. Jones, 257 S.W.2d 583 (Ky. 1953), the Defendant failed to yield the right-of-way to the Plaintiff, who was proceeding on a superior highway. The trial court refused to direct a verdict in favor of the Plaintiff and the jury found for the Defendant.

The Kentucky high court reversed, holding that the trial court should have directed a verdict in favor of the Plaintiff.

> "The only excuse Jones offers is that he did not see the Vaughn car. We have said that testimony that one looked and did not see a train that was right on him was entitled to no reasonable credence; that 'he will not be heard to say that he looked but did not see' it."

The trial court denied Edwards' CR 59 motion.

Thereafter, Edwards timely appealed the trial court's decisions to deny her a directed verdict or a new trial.

Following a pre-trial *Daubert* hearing,[3] the trial court also made a ruling that Deputy Shaw was not qualified to testify as an expert capable of

[2] Kentucky Revised Statute(s).
[3] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

reconstructing motor vehicle accidents. Thus, the court precluded Deputy Shaw from testifying about his opinion that Lumbley was at fault for the automobile accident at issue in this matter. Edwards appeals this ruling, and we will address it in greater detail in our analysis.

II. DIRECTED VERDICT AND NEW TRIAL

To prevail in her negligence claim, Edwards was required to prove, by a preponderance of the evidence, the four elements of that tort: duty, breach, causation, and injury. *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 58 (Ky. 2010). As to directed verdicts, this Court stated the appropriate standard of review in *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 215-16 (Ky. App. 2009):

> When a directed verdict is appealed, the standard of review on appeal consists of two prongs. The prongs are: "a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). "A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky.1988), *citing Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (1944).
>
> Clearly, if there is conflicting evidence, it is the responsibility of the jury, the trier of fact, to resolve such conflicts. Therefore, when a directed verdict motion is made, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *National*, 754 S.W.2d at 860 (*citing Cochran v. Downing*, 247 S.W.2d 228 (Ky.1952)).

> In order to review the trial court's actions in the case at hand, we must first see whether the trial court favored the party against whom the motion is made, including all inferences reasonably drawn from the evidence. Second, "the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" If the answer to this inquiry is affirmative, we must affirm the trial court granting the motion for a directed verdict. *Id*. Moreover, "[i]t is well argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict." *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky.1968). Further, "a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman*, 967 S.W.2d at 18.

In a similar vein, for a court to grant a motion for a new trial based upon insufficiency of the evidence, such as the CR 59 motion at issue in this matter, the court must first

> ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party and . . . [o]nce the issue is squarely presented to the trial judge, who heard and considered the evidence, neither we, nor will the Court of Appeals substitute our judgment . . . for his unless clearly erroneous.

Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 821 (Ky. 1992) (internal citations and quotations omitted).

In support of her contention that she was entitled to either a directed verdict or a new trial regarding her negligence claim, Edwards restates the argument that she made before the circuit court in her CR 59 motion, as it appears above. Like the trial court, we find it has no merit.

The directed verdict rule of *Vaughn*, which Edwards cites as the basis of her argument, only applies when a vehicle has, indisputably, entered an intersecting roadway. Edwards' argument fails because the evidence conflicted on this point. Specifically, Edwards herself testified that she never saw Lumbley's vehicle enter the inside, westbound lane, and that it was "pretty dark" at the time of the accident. Contrary to what Edwards represents in her argument, Lumbley never testified that she ran into the side of Edwards' vehicle; rather, Lumbley testified that her own vehicle was within the boundaries of the center turn lane at the time of the collision. And, while Deputy Shaw's testimony might have supported the opposite conclusion, parts of it were disputed by both Lumbley and Edwards, and his own recollection of the incident was called into question.

Drawing all reasonable inferences in favor of Lumbley, we find that a directed verdict in favor of Edwards would not have been appropriate under the circumstances of this case. Similarly, we find that Edwards is not entitled to a new trial on the basis of her CR 59 motion.

III. DEPUTY SHAW'S OPINION REGARDING FAULT

As noted, Edwards sought to qualify Deputy Shaw as an expert witness in the field of accident reconstruction in order to elicit his opinions regarding how the accident occurred, where the vehicles were located when the impact occurred, and, ultimately, his opinion that Lumbley was responsible for causing the accident. Deputy Shaw based his opinions upon his observations of the damage to the vehicles, the debris patterns, and the locations of skid marks and

road damage at the scene of the accident. Lumbley moved in limine to exclude any expert testimony that Deputy Shaw proposed to offer on the subject of causation, and the trial court conducted a pretrial *Daubert* hearing regarding Deputy Shaw's qualifications.

At the hearing, Deputy Shaw testified that he had been a police officer since July, 1999, and that he had been employed as a deputy in the McCracken County Sheriff's Office since 2004. He testified that he investigated motor vehicle accidents as a regular part of his duties, that he typically responded to between five and ten automobile accidents per week, and that he had responded to around 2,500 to 5,000 accidents over the course of his career. He further testified that his investigations consisted of arriving at the scene, looking for physical evidence, speaking to the parties and any witnesses, reviewing footage from any cameras in the area, and completing accident report forms.

However, Deputy Shaw also testified that his department employed an accident reconstructionist; that he had no training as an accident reconstructionist; and that, unlike an accident reconstructionist, his own investigations did not involve evaluating or calculating exact speeds or impact points, or recreating the events leading up to an accident in any detail. Deputy Shaw further characterized his training, as well as his duties in responding to automobile accidents, as "basic." He testified that he had no more training in accident reconstruction than the basic level of training given to all police officers.

The trial court entered an order following the *Daubert* hearing. In relevant part, it states:

> Deputy Shaw testified he received standard automobile accident investigation training before becoming a Deputy, and that he has since worked numerous automobile accident investigations. However, he further testified he has no training in the reconstruction of automobile accidents, and he does not claim to be a reconstructionist.
>
> Based on the foregoing, IT IS HEREBY ORDERED as follows:
>
> 1. Deputy Shaw may testify as to statements made by the parties at the accident scene, his observations of the conditions, debris, skid marks, and damage to the automobiles.
>
> 2. Deputy Shaw may <u>not</u> opine regarding the parties' relative fault for the accident, the parties' relative credibility, his opinions as to the speed of a vehicle prior to collision, or his opinions about the positions of the vehicles at the time of the impact.

On appeal, Edwards argues that "[t]he trial court erred in excluding the opinions of an expert, experienced patrol officer simply because he does not hold the title of 'accident reconstructionist.'"

Our standard for reviewing a trial court's decision to admit or exclude evidence is limited to a determination of whether the trial court abused its discretion. *Goodyear Tire and 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)).

Moreover, "[t]he decision as to qualification of the witness as an expert rests in the discretion of the trial court." *Moore v. Wheeler*, 425 S.W.2d 541, 544 (Ky. 1968).

That said, the trial court did not exclude Deputy Shaw's testimony because he lacked the *title* of "accident reconstructionist." As its order recites, the trial court arrived at its decision and refused to qualify Deputy Shaw as an expert because Deputy Shaw only received standard training in accident investigation; received no training in accident reconstruction; and, because he "does not claim to be a reconstructionist," *i.e.*, a person whose duty it is to reconstruct accidents.

As such, we find no abuse in the trial court's decision. Kentucky jurisprudence holds that simply being a member of the police force does not qualify an individual to give opinion evidence as an expert. *Southwood v. Harrison*, 638 S.W.2d 706, 707 (Ky. App. 1982); *see also Eldridge v. Pike*, 396 S.W.2d 314, 316-17 (Ky. 1965); *Redding v. Independent Contracting Co.*, 333 S.W.2d 269, 271 (Ky. 1960). A police officer must qualify as an expert by virtue of special training and/or experience. *Ryan v. Payne*, 446 S.W.2d 273, 277 (Ky. 1969); *see also Redding*, 333 S.W.2d at 271 (holding that two state troopers with no qualifications beyond "[having] been in police work a good many years" were unqualified to testify as experts regarding estimates of a vehicle's speed prior to an accident, and that their opinions in that regard were "clearly incompetent and valueless.")

IV. CONCLUSION

For these reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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