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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002684-MR

CHARLENE T. SHAFFER — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 00-CI-005497

SHERI L. STEWART; RUMPKE OF KENTUCKY, INC.; AND KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLEES

& NO. 2003-CA-002753-MR

RUMPKE OF KENTUCKY, INC. — CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 00-CI-005497

CHARLENE SHAFFER AND SHERI L. STEWART — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR JUDGE.[1]

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

COMBS, CHIEF JUDGE: Charlene Shaffer appeals from the judgment of the Jefferson Circuit Court after a jury awarded her compensation for injuries that she sustained in an automobile accident. She argues that the trial court erred in its evidentiary rulings in two respects: the improper exclusion of certain evidence and the incorrect admission of other evidence. She also challenges the court's instruction on damages.

In its cross-appeal, Rumpke of Kentucky, Inc., whose employee was driving a garbage truck involved in the accident, argues that the trial court erred in failing to direct a verdict in its favor on the issue of liability. After a review of the record, we affirm both as to the appeal and the cross-appeal.

The accident at issue occurred in the mid-afternoon of December 3, 1998, on U.S. 42, a four-lane highway. Shaffer testified that while she was driving eastbound in the left/passing lane of the highway, she was being tailgated by a Jeep driven by the appellee, Sheri Stewart. Shaffer stated that upon looking to her right, she saw a school bus which prevented her from moving aside in order to allow Stewart to pass. She then looked forward and noticed a pick-up truck stopped in her lane. A man, who was later identified as a Rumpke employee, was walking along the roadway to retrieve a bag of garbage that had fallen from the truck. A van had stopped behind the truck.

When Shaffer applied her brakes to avoid hitting the van, she was struck in the rear by Stewart's Jeep.

On August 28, 2000, Shaffer filed suit against Rumpke and Stewart, seeking damages for the injuries that she sustained in the accident. She also asserted a claim against her own insurer, Kentucky Farm Bureau Mutual Insurance Company (KFB), for underinsured motorist coverage. The claim against KFB was bifurcated. The lawsuit against Rumpke and Stewart proceeded to trial to determine the issues of liability and the cause of Shaffer's post-accident symptoms.

After several continuances, a trial was conducted in October 2003. Shaffer testified that as a result of the accident, she continued to suffer from debilitating headaches, short-term memory loss, inability to multi-task, fatigue, and depression. She also told the jury that her symptoms had profoundly impaired her relationships with her husband, her children, and her friends. She testified that she was unable to return to the job that she had held at the time of the accident or to maintain any other employment due to her physical and mental impairments.

Shaffer's experts, Dr. Charles Oates, a neurologist, and Dr. Richard Edelman, a neuropsychologist, testified that Shaffer suffered from post-concussive syndrome with neck strain, recurrent migraines, memory loss, and brain dysfunction. Dr.

Oates testified that her condition was permanent and that she would need continued treatment -- including epidural injections and Botox injections for her neck pain and pain medication for the migraines. Dr. Edelmen also said that her cognitive dysfunction was permanent. He recommended that she take anti-depressant medications and that she undergo psychotherapy in order to cope with her condition.

The appellee's experts, Dr. James Harkess, an orthopedic surgeon, and Dr. William Olson, a neurologist, disagreed with the diagnosis of Shaffer's doctors. Both testified that there was no evidence that Shaffer had lost consciousness or that she had sustained a significant blow to her head to support a diagnosis of post-concussive syndrome. Dr. Harkess testified that in his opinion, Shaffer suffered a serious whip-lash injury that should have resolved itself within six months of the accident. He attributed her continued symptoms to a psychogenic overlay and/or depression. Dr. Olson agreed that Shaffer's headaches were caused by muscle spasms, and he concurred with the Botox treatments prescribed by Dr. Oakes. However, he did not believe that Shaffer sustained any brain dysfunction due to the whiplash injury suffered in the accident.

At the close of the proof, the trial court permitted the jury to apportion fault among all four drivers, including

the unknown driver of the van. The jury determined that neither Shaffer nor the unknown driver was at fault in causing the accident, apportioning fault as follows: 15% to Stewart and 85% to Rumpke. It awarded Shaffer damages as follows:

> (1) $37,302.32 for the reasonable and necessary medical expenses incurred to date. (This was the total amount sought for past medicals.)
>
> (2) $25,000, for past and future physical pain and mental suffering. (The jury was permitted to award an amount not to exceed $500,000, the amount that Shaffer's attorney argued to the panel as fair.)
>
> (3) $21,000, for lost wages. (The instructions permitted an award not to exceed $60,000.) (Summary of the jury Verdict Form A.)

The instructions also authorized the jury to award Shaffer up to $152,760 for future medical expenses and $208,000 as future lost wages. However, the jury made no award for future medical expenses or for future lost wages. Shaffer was awarded $83,302.32 –- slightly less than 10% of the sum of $998,062.32 that she had originally asked the jury to grant her.

On November 25, 2003, the trial court awarded Shaffer a judgment of $62,306.97 against Rumpke and a judgment of $10,995.35 against Stewart. Since the jury's award did not exceed the limits of the insurance liability coverage of either Stewart or Rumpke, the court dismissed her claim against KFB.

Rumpke's motion for a judgment notwithstanding the verdict was denied, and this appeal and cross-appeal followed.

Shaffer first argues that the trial court erred in denying her motions to exclude certain portions of Dr. Olson's deposition testimony from evidence. Specifically, she cites portions of the doctor's opinions which had not been disclosed to her prior to his testimony as required by CR[2] 26.02(4)(a)(i). We find no error in the trial court's ruling.

Dr. Olson, a board certified neurologist, examined Shaffer in August 2002 pursuant to a court order that she be examined by an Independent Medical Examiner (IME). Following the exam, Dr. Olson prepared a report in which he concluded as follows:

> The patient has evidence of entrapment of the greater occipital nerve particularly on the right. Some of her complaints of fatigue and memory could be related to her medications. Her headache symptoms are certainly not typical for migraine although she does state that she complains of some vomiting and photophobia. Diagnosis: Auto Accident.

Stewart listed Dr. Olson on her witness list and stated that Dr. Olson's testimony would be "consistent with his report." No additional information about the substance of Dr. Olson's opinions was furnished to Shaffer.

[2] Kentucky Rules of Civil Procedure.

On March 31, 2003, Stewart took Dr. Olson's deposition, which was recorded on video tape. Dr. Olson testified that after he examined Shaffer and prepared his report, he reviewed the medical records compiled by her treating physicians. He disagreed with Dr. Oates's diagnosis of post-concussive syndrome. Rather, he totally agreed with the opinion of Dr. Harkess that such a diagnosis was rarely indicated absent a significant head injury or the patient's lapse into unconsciousness. He also believed that Shaffer was capable of being employed.

Dr. Olson's opinions, which were directly contrary to those of Shaffer's treating physicians, along with his conclusion as to her ability to work, had not been discussed in his report -- nor were they disclosed prior to the deposition. Consequently, Shaffer filed a motion *in limine* to exclude Dr. Olson's testimony to the extent that it exceeded the scope of his report and of Stewart's CR 26.02 disclosure representing that it would be consistent with his report. While the motion was pending, Dr. Olson died on July 5, 2003. The motion to exclude portions of his testimony was denied on July 14, 2003. Shaffer renewed her motion again -- both before and during the trial. However, the trial court did not alter its initial pre-trial ruling, and Dr. Olson's deposition was read into evidence in its entirety.

Shaffer contends that she was blindsided by Stewart's failure to comply with CR 26.02(4)(a)(i), resulting in an inability to cross-examine Dr. Olson effectively at the deposition. Because Dr. Olson died before trial, she argues that she was not able to re-depose the doctor or otherwise to cure the prejudice created by his surprise testimony. She claims that the trial court erred in failing to sanction Stewart for failing to comply with the disclosure provisions of CR 26.02(4)(a)(i). Because Dr. Olson was originally chosen as the IME, Stewart contends that she had no duty to supplement her answers to Shaffer's interrogatories or otherwise to disclose Dr. Olson's opinions that differed from the contents of his initial report.

Our standard of review of such an evidentiary ruling is limited to determining 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). See also, Naïve v. Jones, 353 S.W.2d 365 (Ky. 1961), reciting that "we must respect [the trial judge's]

exercise of sound judicial discretion" in the enforcement of the civil rules pertaining to discovery.

CR 26.02(4)(a)(i), requires a party -- if asked -- to disclose "the subject matter" to which his expert is going to testify and:

> to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

As noted by the Supreme Court of Kentucky in Primm v. Isaac, 127 S.W.3d 630, 634 (Ky. 2004), citing Wrobleski v. de Lara, 353 Md. 509, 727 A.2d 930, 933 (1999), "Expert opinion testimony can be powerful evidence . . . and can have a compelling effect with a jury." Because of their potential to affect the outcome of a trial, the disclosures pertaining to experts required by the civil rules are designed "to facilitate effective cross-examination and rebuttal" of their testimony. Jefferson v. Davis, 131 F.R.D. 522, 525 (N.D.Ill. 1990).

We agree that Stewart did not comply with either the letter or the spirit of this discovery rule. Stewart contends that the doctor's status as an IME absolved her of any duty to disclose portions of the expert's opinions that were unknown to the other parties. We disagree. Stewart listed Dr. Olson on her witness list; Dr. Olson testified that he had discussed the case extensively with her attorney. Thus, regardless of the

doctor's initial status as an IME, we believe that Stewart had some obligation to make a disclosure of his opinions that were favorable to her and known only to her. See, CR 35.02; and, Metropolitan Property and Casualty Insurance Co. v. Overstreet, 103 S.W.3d 31 (Ky. 2003).

Nonetheless, we do not conclude that the court's failure to sanction Stewart by excluding portions of Dr. Olson's testimony resulted in an unfair proceeding or that it constituted an abuse of discretion. In analyzing this issue, the trial court noted that Dr. Olson's opinions were not belated in the sense of remaining undisclosed until just before trial or until shortly after the trial had begun. After learning of Dr. Olson's opinions by deposition, Shaffer had six months in which to rebut them with other expert testimony. Although Shaffer's ability to cure any prejudice by re-deposing Dr. Olson was prevented by his untimely death, she did have adequate time to attack or to mitigate the impact of his opinions with the testimony of other expert witnesses.

Shaffer also claims that she was not adequately prepared to cross-examine Dr. Olson at his deposition. However, she was on notice from his earlier report that he did not believe that she suffered a permanent brain injury. Thus, she was aware that he disagreed with the diagnosis reached by her own doctors. Shaffer had previously cross-examined appellee's

other expert, Dr. Harkess, whose opinions on the etiology of post-concussive syndrome were shared by Dr. Olson. Thus, she should have been prepared to cross-examine Dr. Olson effectively on the substance of those opinions. Under these circumstances and in deference to the broad discretion afforded to the trial court, we cannot conclude that the prejudice –- if any –- resulting to Shaffer due to the allegedly incomplete CR 26.02 disclosures requires a reversal of the judgment.

Shaffer next argues that the court erred in refusing to allow her to introduce evidence gathered by Investigations Unlimited, a surveillance firm that Stewart hired to record Shaffer's activities. The trial court allowed Shaffer to discover this information from Stewart (including a videotape and a report) but reserved its ruling on its admissibility. Before trial, Stewart filed a motion *in limine* to exclude the introduction of this evidence at trial. The motion was granted on the basis that it was "intended to inflame the jury." In order to preserve the issue for review, Shaffer submitted the investigator's report by avowal. As with the previous issue, our function is to determine whether the trial court abused its discretion in excluding this evidence.

Relying on Transit Authority of River City v. Vinson, 703 S.W.2d 482 (Ky.App. 1985), Shaffer contends that the trial court erred in excluding the evidence of Stewart's surveillance

activities. She argues that the evidence was relevant to the issue of the extent of her injuries as follows:

> By conducting surveillance, Defendant Stewart's agent created a written record of [Shaffer's] life over a set period of time following her injury. The photographs, video tape and report were "relevant unstaged evidence" of [Shaffer's] condition at the time of surveillance. The fact that Investigations Unlimited was not able to assemble more than thirty (30) seconds of videotape of [Shaffer] over nearly eighteen (18) hours of surveillance is evidence that [Shaffer] was not functioning normally at the time the surveillance was conducted.

(Appellant's brief, p. 14.)

Although Vinson would support a ruling admitting the evidence, it does not require such a result in light of the overriding discretion of a court to exclude such evidence in the appropriate circumstances. Additionally, there are significant factual differences between Vinson and this case. In Vinson, the surveillance evidence was compiled over a period of six months, and the issue of the plaintiff's post-accident activities was "hotly contested." Id. at 485. In this case, Stewart's investigators conducted a three-day stake-out at Shaffer's residence. A record of her activity (or inactivity) for three days of the eighteen hundred days intervening between the accident and the trial would provide statistically minimal information bearing on the issues before the jury.

Unlike Vinson, there was no factual dispute concerning Shaffer's disability. No witness suggested that Shaffer was malingering or attempting to fake her condition. The sole issue for the jury was to determine whether her debilitating symptoms were causally related to the accident or whether they were caused by the numerous elements of psychological stress in her life and/or the multiple medications that she was taking -- factors unrelated to the automobile accident.

In excluding the evidence, the trial court expressed its belief that the jury would be inflamed at hearing evidence that Stewart had spied on Shaffer in anticipation of the trial. The court properly exercised its discretion in weighing the prejudice against the probative value of the evidence, finding the probative value to be only slight. KRE[3] 403. We fail to perceive any abuse of the court's discretion in this evidentiary ruling.

Shaffer last argues that the trial court erred in failing to fashion the instructions to require the jury to vote separately on each of the five categories of alleged damages. She objected to the court's inclusion of all elements of damages within one instruction -- albeit on separate lines. However, Shaffer failed to cite any authority to the court requiring a separate instruction. Because the form of the instructions is a

[3] Kentucky Rules of Evidence.

matter committed to the discretion of the trial court (CR 49.02), we find no basis to disturb the judgment because of the jury's treatment of separate elements within a single instruction.

In its cross-appeal, Rumpke argues that the trial court erred in failing to grant its motions for a directed verdict or, in the alternative, to grant its motion for a judgment notwithstanding the verdict (JNOV). Rumpke contends that it was entitled to such relief because "there was a complete absence of proof with which to hold [it] responsible for the accident on the proximate cause issue at trial." (Rumpke's brief, p. 12.)

Our standard of review on this issue is set forth in Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461 (Ky. 1990):

> All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"

Rumpke acknowledged that its driver violated safety statutes by stopping his vehicle on the road. It also admits that its employee violated the company's own internal policy by failing to secure the garbage so as to prevent the very thing that happened –- its loss onto the roadway. However, Rumpke urges that the chain of events which its driver negligently set in motion:

> was irretrievably broken when Appellee Stewart, faced with clearly visible, stopped traffic in her lane of the road, absolutely failed to take any evasive action or even attempt to stop her vehicle.

(Appellee Rumpke's brief, p. 10.) Thus, Rumpke seeks to be relieved from responsibility for its employee's negligence due to the independent, superseding negligence of Stewart in failing to keep her car at a safe distance from Shaffer.

We disagree that Stewart's negligence constituted a superseding cause of the accident as a matter of law.

> "[I]f the resultant injury is reasonably foreseeable from the view of the original actor, then the other factors causing to bring about the injury are not a superseding cause." *NKC Hosps., Inc. v. Anthony,* Ky.App., 849 S.W.2d 564, 568 (1993)(citing William L. Prosser, *Law of Torts 272* (4th ed.1978) and *Deutsch v. Shein*, Ky., 597 S.W.2d 141, 144 (1980)). The basic premise of a superseding cause is that it is "extraordinary and unforeseeable." *House v. Kellerman*, Ky., 519 S.W.2d 380, 383 (1974); *see also Britton v. Wooten*, Ky., 817 S.W.2d 443, 451 (1991).

Williams v. Kentucky Department of Education, 113 S.W.3d 145, 151 (Ky. 2003). After coming to a complete stop in the passing lane of a busy, four-lane highway in a 45 mile-per-hour speed zone, Rumpke's employee should have comprehended the likelihood of the danger and should have anticipated that a vehicle might come upon the scene and be unable to stop in time to avoid a collision. The jury was entitled to believe that the combined actions of both Rumpke's employee and of Stewart caused the accident.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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