

RENDERED: SEPTEMBER 19, 2008; 10:00 A.M.  
 NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001733-MR

LISA MOT

APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT  
v. HONORABLE FRED A. STINE, V, JUDGE  
ACTION NO. 05-CI-01457

ERIC HAYS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; ACREE AND CAPERTON, JUDGES.

COMBS, CHIEF JUDGE: Lisa Mott appeals from the denial of two motions by the Campbell Circuit Court in a personal injury case arising from an automobile accident. She filed a motion for directed verdict at trial and a motion *in limine* prior to trial. She contends that the court erred to her prejudice in denying these motions and asks for a new trial. We disagree that a new trial is warranted. Therefore, we affirm.

Mott was involved in an automobile accident with Eric Hays, the appellee, on November 3, 2003. Both Mott and Hays were travelling eastbound on Interstate 275. The parties dispute the facts surrounding the accident. Mott claims that Hays was travelling behind her at a high rate of speed, that he lost control of his vehicle while changing lanes, and that he struck Mott's vehicle in the rear. He then careened off a bridge abutment and struck her vehicle in the rear a second time. Hays contends that the collision occurred when he changed from the left lane to the center lane at approximately the same time that Mott moved from the right lane to the center lane. Mott's complaint against Hays alleged significant injuries resulting from the accident.

Experts on both sides testified and agreed that Mott sustained medical expenses in excess of \$1000, the statutory predicate for a tort action based on a motor vehicle accident. Kentucky Motor Vehicle Reparations Act (MVRA). Kentucky Revised Statutes (KRS) 304.59-060(2)(b). Therefore, Mott contends that the court erred in giving *any instruction whatsoever* on the threshold amount of damages. While we agree that the instruction was unnecessary and superfluous under the circumstances, we cannot agree that it prejudiced her case.

In reviewing a motion for directed verdict, we are governed by the standard set forth in *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 25 (Ky. 2008):

The appropriate standard for review of denial of a motion for directed verdict is set forth in *Lewis v. Bledsoe Surface Mining Company*, 798 S.W.2d 459 (Ky. 1990). In determining whether the circuit court erred in failing to grant the motion, all evidence that favors the

prevailing party must be taken as true; and the reviewing court is not at liberty to assess the credibility of witnesses or determine what weight is to be given the evidence. *Id.* at 461. As the prevailing party, Adkins is entitled to all reasonable inferences that may be drawn from the evidence. *Id.* The appellate court is limited to determining whether the verdict is “palpably or flagrantly” against the evidence so as “to indicate that it was reached as a result of passion or prejudice.”

*Id.* (quoting *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1998)).

Mott contends that the instruction created a doubt as to the degree of seriousness of the accident, minimizing her claim by implication. It is true that the requirement of the threshold amount in the MVRA was intended to eliminate “the main brunt of small personal injury claims [.]” *Fann v. McGuffey*, 534 S.W.2d 770, 773 (Ky. 1976). Mott speculates upon the possible psychological effect of the instruction on the jury, musing that their award of less than \$3000 (when she was asking for \$40,000) was likely attributable to the alleged error of giving of the instruction.

Mott relies on *Bolin v. Grider*, 580 S.W.2d 490 (Ky. 1979), in support of her claim that the jury instruction warrants a new trial:

Once a plaintiff has introduced medical expense evidence to establish that the threshold had been met, it places upon a defendant the necessity of impeaching that proof in order to avoid a directed verdict on the threshold issue. When there is no evidence presented to the contrary, there is nothing for the jury to decide, and the threshold issue should not be submitted to the jury.

*Bolin*, however, is distinguishable because the defendant introduced medical history and testimony that created an issue as to whether the medical expenses

cited by the plaintiff had actually resulted from the collision. The *Bolin* jury was asked whether it believed that the medical expenses were a direct result of the collision, creating an innuendo that they could have been attributable to another occurrence or underlying condition. The jury answered “no,” that it did not believe that the medical expenses flowed from the collision. This Court reversed the case and granted a new trial, reasoning that:

the interrogatory presented to the jury the issue of the propriety of the size of the charges for “medical expense” when this factor was not in dispute and the effect of this submission on the negative answer could not be measured.

*Bolin*, 580 S.W.2d at 490-491.

In the case before us, the instruction did not cause the jury to question the propriety or the causation of the medical expenses. Both sides agreed that they exceeded the threshold amount. Thus, while the instruction was unnecessary, we cannot agree that it was prejudicial – much less prejudicial enough to warrant a new trial.

Mott’s second argument on appeal is that the court erred in denying her motion *in limine* prior to trial. She had sought to prevent Hays from presenting an argument that the lack of cosmetic damage to her vehicle tended to indicate that she could not have sustained injury. She contends that Hays’s use of enlarged photos of her car – without the supporting testimony of expert opinion – constituted a violation of Kentucky Rules of Evidence (KRE) 702 and that,

therefore, the photos should have been excluded from trial. KRE 702 provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

We are not persuaded that the photographs involved remotely rise to the level of scientific or technical knowledge encompassed by KRE 702. That issue was settled long ago in *Commonwealth, Department of Highways v. Arnett*, 390 S.W.2d 187 (Ky. 1965), in which the Court held that “the admission of photographs in evidence, so long as they may be said to fairly depict the matter sought to be portrayed, is too well established to admit of debate now.” In the present case, the trial court found that the photographs did “fairly depict the matter sought to be portrayed” and properly exercised its discretion as to whether to admit them. It is noteworthy that Mott herself introduced the photographs into evidence but objected to Hays’s argument based on her photographs. The court properly permitted Hays to extrapolate from Mott’s proffered evidence in order to imply that the injuries sustained were not grievous. The court properly refrained from interfering with counsel’s line of reasoning.

The latitude allowed counsel in addressing the jury is great, and must not be used as a license to inflame or

arouse passion and prejudice; but so long as the argument is pertinent to the law as given by the court in the instructions, and consistent with the facts proven and the reasonable deductions and inferences to be drawn therefrom, it does not transcend the limits of the law or warrant our interference.

*City of Providence v. Young*, 13 S.W.2d 1022 (Ky.App. 1929), *citing Johnson v. Commonwealth*, 9 S.W.2d 53.

In reviewing a motion *in limine*, our inquiry is whether the judge has abused his discretion. The test for abuse of discretion is whether the judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 999 S.W.2d at 945 (Ky. 1999), *citing Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996). We are satisfied that there was no abuse of discretion in this case.

We conclude that the trial court did not err in denying both of the motions that are the subject of this appeal. Accordingly, we affirm their denial by the Campbell Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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