

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001553-MR

JOE ETTA BYRD

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 04-CI-00315

BILLY RAY HENRY; ESTATE OF
BILLY RAY HENRY; STATE FARM
AUTOMOBILE INSURANCE COMPANY;
ANTHEM HEALTH PLANS OF KENTUCKY,
INC.; AND KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,¹ SPECIAL
JUDGE.

¹ Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

ACREE, JUDGE: Jo Etta Byrd appeals the judgment of the Madison Circuit Court entered pursuant to a jury verdict rejecting her claim for personal injury damages suffered in a single vehicle accident with Billy Ray Henry.² We affirm.

In the late evening of January 27, 2004, Henry was driving his new pickup truck. Byrd was his passenger. Henry lost control of the vehicle and the subsequent collision injured Byrd. Byrd, who had a close personal relationship with Henry, nevertheless filed suit against him to recover damages.

Byrd and Henry gave consistent deposition testimony that the accident occurred because of black ice on the highway. However, Henry later sent a letter to Byrd's attorney³ purporting to amend his deposition testimony. While his deposition supported the defense that faulted bad weather and a sudden emergency, his letter admitted he was driving faster than advisable under the circumstances, was inattentive to his driving because he was eating a meal at the time and, after the vehicle lost traction, reacted by oversteering. Byrd also changed her version of the accident to place the blame more squarely upon Henry.

In July 2005, Henry was involved in a second automobile accident and died from his injuries. Again, Byrd was his passenger. Henry was taking her to a physical therapy session. Henry's daughter, Jennifer, was appointed administratrix and Henry's estate was substituted as a party defendant.

² Byrd originally instituted her action against Billy Ray Henry; however, Mr. Henry died before the case came to trial. His estate was subsequently substituted as a party defendant.

³ The letter was addressed to Henry's attorney and copied to Byrd's attorney. However, Henry's attorney only learned of the letter from Byrd's attorney.

Prior to trial, Byrd filed motions *in limine*. The purpose of the motions was to prevent any reference to: (1) the fact that Byrd was married but not to Henry; (2) the nature of the relationship between Byrd and Henry; and (3) the circumstances surrounding Henry's death, including the fact that Byrd was again Henry's passenger. The motions were denied.

At trial, Byrd testified that she and Henry were merely good friends. They played bingo together, went fishing, played card games together, and grilled out, but did not have a romantic or sexual relationship. She also testified she had never lived or slept with Henry. Byrd acknowledged she was married, that her husband had suffered a stroke and that he was a victim of Alzheimer's disease.

Attempting to challenge the veracity of Byrd's trial testimony (as well as to explain Henry's letter), Henry's estate called two witnesses who were allowed to testify over Byrd's objection. Henry's sister, Mary Mattox, testified that Henry and Byrd had lived together at her sister's home for at least six months and that they shared the main bedroom in that house. Henry's daughter Jennifer, the estate's administratrix, testified that her father had left her mother to be with Byrd and that Byrd and Henry had lived together. She testified that Henry had a tattoo of a heart with the inscription "Joe Etta Love", and that Henry and Byrd had exchanged rings to symbolize their relationship. She stated Henry wanted to marry Byrd, but he could not because she was already married.

The jury returned a unanimous verdict in favor of the Henry's estate, finding no liability. Byrd moved for a new trial and was denied. This appeal followed.

The only issue on appeal is whether the testimony of Mary Mattox and Jennifer Henry was offered as character evidence in violation of Kentucky Rule of Evidence (KRE) 608. We find it was not.

We review a trial court's ruling regarding the admission or exclusion of evidence for abuse of discretion. *See Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky.App. 2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (internal quotation marks omitted).

The credibility of a witness may always be questioned. KRE 607 provides: "The credibility of a witness may be attacked by any party, including the party calling the witness."

We have thoroughly reviewed the videotaped trial proceedings upon this issue and it is evident that the testimony of which Byrd complains was offered to impeach Byrd's own testimony that she had no romantic relationship with Henry. Byrd was the only surviving witness to the accident. Testing the veracity of her testimony was without question a proper subject of impeachment testimony such as presented in this case. We find no abuse of discretion.

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

ROSENBLUM, SPECIAL JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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