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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-001558-MR

ALISA AHMETOVIC AND
SUNITA BAHONJIC — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 08-CI-02197

MUHAREM TAHIROVIC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

KELLER, JUDGE: Alisa Ahmetovic (Alisa) and Sunita Bahonjic (Sunita) (collectively the Appellants) appeal from a judgment of the Warren Circuit Court based upon a jury verdict in favor of Muharem Tahirovic (Tahirovic). For the following reasons, we affirm.

## FACTS

This case arises from an automobile accident, which occurred on March 15, 2007, in Bowling Green, Kentucky. The Appellants were passengers in a vehicle owned and driven by Tahirovic. It is undisputed that immediately before the accident, an unknown driver traveling in the opposite direction swerved into Tahirovic's lane of traffic. Tahirovic then swerved off the road and hit a tree.

On December 4, 2008, the Appellants filed suit against Tahirovic in the Warren Circuit Court alleging that Tahirovic's negligent operation of his vehicle caused them to suffer injuries. Tahirovic's insurer, Allstate Insurance Company, retained counsel to represent Tahirovic in the matter. Through counsel, Tahirovic subsequently moved to have the unknown driver added as a party to the lawsuit, and the trial court granted that motion. Thereafter, the trial court held a two-day trial on July 20 and 21, 2010. Because the Appellants and Tahirovic are all immigrants from Bosnia, two interpreters were provided at trial by the Administrative Office of the Courts.

At trial, the Appellants' proof included testimony of both the Appellants, Tahirovic, and Dr. Mark Woodward, the chiropractor who treated the Appellants after the accident. We summarize the relevant testimony below.

Alisa testified that, on the day of the accident, Tahirovic agreed to drive her and Sunita to the grocery store. On the way to the store, she and Sunita told Tahirovic to slow down because he was driving too fast. Tahirovic told them that he was in a hurry. On the way home from the store, she and Sunita again

asked Tahirovic to slow down. However, Tahirovic responded by saying that it was his car. While driving home, an unknown driver barely crossed into their lane of traffic. Tahirovic then drove the car off the road and hit a tree. Alisa further testified that an ambulance came to the scene and they were all transported to the hospital. Alisa testified that, as a result of the accident, she sustained neck and back injuries, and that she is still having problems from those injuries.

During cross-examination, Alisa testified that she suffered neck and back injuries in a February 2005 motor vehicle accident when her boyfriend's car struck a tree after being forced off the road by a "phantom vehicle." She testified that she suffered additional injuries to her back and neck in September 2005 when her boyfriend's car was struck by another car.

Alisa also testified that, in July 2007, she allegedly suffered injuries, including a miscarriage, when she slipped and fell at a Kroger store. She also alleged that she suffered neck and back injuries when she slipped and fell at a Houchens grocery store in 2009.

In attacking Alisa's credibility, defense counsel presented her with a form whereby she consented to undergo a voluntary abortion the morning of the alleged Kroger store slip and fall. Alisa admitted signing the form but denied that she had the procedure. Counsel also confronted Alisa with her deposition testimony from the Kroger litigation wherein she stated that she had not suffered any injuries in the accident giving rise to this litigation. Finally, counsel confronted Alisa with her

deposition testimony from this case that she had not been involved in any accidents following the motor vehicle accident at issue herein.

At trial, Sunita testified to the following. On the day of the accident, she called Tahirovic and asked if he would drive her and Alisa to the grocery store. Tahirovic agreed, but stated that he was in a hurry that night. On the way home from the grocery store, she and Alisa told Tahirovic to slow down. Sunita then saw a car driven by an unknown driver cross into their lane, and she told Tahirovic to slow down. They then went off the road and hit a tree. Sunita testified that she suffered neck and back injuries and agreed with Alisa that they were transported to the hospital by ambulance.

On cross-examination, defense counsel asked Sunita if she had ever been convicted of a felony, and Sunita testified that she had not. When questioned further, Sunita admitted that she did plead guilty to Giving False Statements in Order to Obtain Government Benefits. When Sunita testified that she had missed work because of the accident, defense counsel confronted her with her deposition testimony that she had not.

During direct examination by the Appellants' counsel, Tahirovic testified that he was in a hurry when he took the Appellants to the grocery store; that they told him to slow down; that the speed limit was 25 miles per hour (mph); and that he was speeding. Tahirovic further testified to the following:

> Appellants' Counsel: You had previously been on Double Springs Road before that night, correct?

Tahirovic: Yes.

Appellants' Counsel: Do you know what the speed limit was on that road?

Tahirovic: Yes, I knew what the speed limit was, but I was in a hurry. It is my fault, but it was storming that day and I was just in a hurry.

Appellants' Counsel: So it was your fault? Is this accident your fault?

Tahirovic: Yes.

Appellants' Counsel: So it's not true when [your counsel] tries to blame it on the other car, it's your fault isn't it sir?

Tahirovic: It's my fault but I had to turn somewhere. Yes, the other car was there. I had to turn somewhere, either him or somewhere else.

. . . .

Appellants' Counsel: Do you agree with me that this accident probably would not have happened had you been going slower?

Tahirovic: I think not. I think everything would have turned out ok.

Appellants' Counsel: Ok, I am not sure I understood that. Mr. Tahirovic, are you saying that had you been going slower, everything would have turned out ok - that this accident would not have happened?

Tahirovic: Yes, if I was driving in a normal way, the accident would not have happened.

. . . .

> Appellants' Counsel: But, nevertheless, you shared with us a minute ago that, had you been driving at a normal speed, this accident would not have happened.
>
> Tahirovic: I think not. I am not sure. You know. Who knows what can happen.

Additionally, Tahirovic testified that he was "100% sure" that both Sunita and Alisa were hurt as a result of the accident. He also stated that he did not know how fast he was going when he hit the tree; however, he hit the tree hard enough that he was injured and still has pain from the accident.

When questioned by his own counsel on cross-examination, Tahirovic testified to the following:

> Defense Counsel: Mr. Tahirovic, do you remember meeting with Mr. Walker and an interpreter in my office to respond to interrogatories that [the Appellants' counsel] sent us?
>
> Tahirovic: Yes, I remember.
>
> Defense Counsel: And is that your signature on that document.
>
> Tahirovic: Yes.
>
> Defense Counsel: And in a question [the Appellants' counsel] asks you about who else may have caused or contributed to this accident, and you said the unknown driver of the vehicle that ran you off the road is at fault for this accident, correct?
>
> Tahirovic: Yes that is what I stated but I am not sure if it was his fault or mine I just don't remember.
>
> Defense Counsel: But on that day you said it was his fault, correct?

Tahirovic: Yes, I had to escape his car.

Finally, on re-direct examination by the Appellant's counsel, Tahirovic testified as follows:

> Appellants' Counsel: Earlier today, you told me a few minutes ago that had you been driving a normal speed this accident wouldn't have happened, correct?
>
> Tahirovic: Maybe, but. [shrugs his shoulders]
>
> Appellants' Counsel: Now, the only way this unknown driver was responsible [was] because you were going so fast and made it so, correct?
>
> Tahirovic: I think yes.

At the close of their case, the Appellants moved for a directed verdict on liability arguing that Tahirovic admitted that the accident was his fault. The trial court denied the Appellants' motion. The Appellants then made a motion to prohibit defense counsel from calling Roman Kickarillo (Kickarillo) as an expert witness arguing, that his testimony would improperly impeach Tahirovic's testimony. The trial court also denied that motion.

The defense's proof consisted solely of the expert testimony of Kickarillo, an engineer and accident reconstructionist. Kickarillo testified that, based on the minimal damage to the vehicle, Tahirovic was driving 5 mph or less when the car hit the tree. Kickarillo further testified that the car was traveling 20 mph or less when it left the roadway. Although the parties agreed that Kickarillo could not offer any opinion regarding the injuries of the parties because he was not a medical expert, the Appellants' counsel asked Kickarillo if he had any reason to

doubt Tahirovic's claimed injuries. In response, Kickarillo testified that he did have reason to doubt Tahirovic's claimed injuries.

After the Appellants' counsel concluded his cross-examination of Kickarillo, defense counsel approached the bench and asked the trial court for permission to question Kickarillo on re-direct examination about his opinion on the likelihood that Tahirovic could have suffered injuries from the accident. The trial court concluded that, because the Appellants' counsel opened the door by asking Kickarillo if he had any reason to doubt Tahirovic's claimed injuries, defense counsel could ask that question. Ultimately, Kickarillo testified that, in accidents, such as the one in question, where the vehicle is traveling at a speed of 5 mph or less, there is only a very remote chance that the occupants will sustain bodily injuries.

At the close of Tahirovic's case, the Appellants renewed their motion for a directed verdict on the issue of liability. The trial court again denied that motion. The jury unanimously returned a verdict in favor of Tahirovic finding that the unknown driver was 100% at fault for the accident and awarded no damages to either Appellant. The trial court subsequently entered its judgment adopting the jury's verdict. This appeal followed.

## STANDARDS OF REVIEW

The issues raised by the Appellants have differing standards of review. Therefore, we set forth the appropriate standard of review as we address each issue.

## ANALYSIS

### 1. Impeachment of Own Client

On appeal, the Appellants first contend that the trial court erred by allowing defense counsel to call Kickarillo as a witness. Specifically, the Appellants argue that, by calling Kickarillo as a witness, defense counsel improperly impeached the testimony of his own client. We review the admission of evidence for an abuse of discretion. *See Commonwealth v. King*, 950 S.W.2d 807, 809 (Ky. 1997) ("It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion."). An abuse of discretion arises when the court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994).

At the outset, we note that the Appellants have failed to designate where in the record Kickarillo's testimony has impeached Tahirovic. *See* Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v). It is not the burden of the Court to search the record to find proof of the Appellants' claims. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). Under such circumstances, we are authorized to strike the brief entirely, refuse to consider those claims that do not comply with the rule, or review the non-compliant allegations of error for manifest injustice rather than considering them on the merits. *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006); *Elwell v. Stone*, 799 S.W.2d 46, 47-48 (Ky. 1990). In this case, we choose not to do so.

Having carefully reviewed the record, we do not believe that defense counsel impeached Tahirovic by calling Kickarillo as a witness. Impeachment is an action taken at trial to attack the credibility of a witness. *See* Kentucky Rule of Evidence (KRE) 607. In Kentucky, a "witness may be impeached by the use of *any evidence relevant to testimonial credibility.*" R. Lawson, *Kentucky Evidence Law Handbook,* § 4.00(A) (2d. ed.1984) (emphasis added). For example, a witness may be impeached by introducing evidence of bias, interest, or hostility, prior inconsistent statements, character evidence, and criminal convictions. Lawson, §§ 4.10, 4.15[2], 4.20, 4.25 (4th ed. 2003); *see also* KRE 608; KRE 609; KRE 613. Unlike evidence showing a witness' bias, hostility, inconsistent statements, character, or prior convictions, an inconsistency between one witness' testimony of the events and that of another is not impeachment. Such evidence is not being offered to contest testimonial credibility.

Although the Appellants do not cite the record, we believe that there are only two instances when Kickarillo could have potentially impeached Tahirovic. The first instance occurred when Kickarillo testified as to the speed the car was traveling when it hit the tree. As noted above, Tahirovic testified that he hit the tree hard, but he did not know how fast he was driving when his car hit the tree. Kickarillo testified that, at most, Tahirovic was traveling 5 mph. Kickarillo's testimony was not impeachment testimony because it was not relevant to Tahirovic's testimonial credibility. In fact, it did not even contradict Tahirovic's

testimony, because Tahirovic only stated that he did not know how fast the car was traveling when it hit the tree.

The second potential instance of impeachment arose when Kickarillo testified as to whether it was likely anyone could suffer bodily injury from the accident in question. Tahirovic testified that he suffered injuries from the accident and that he was 100% sure that the Appellants suffered injuries as well. Ultimately, Kickarillo testified that in accidents such as the one in question, where the vehicle is traveling at a speed of 5 mph or less, there is only a very remote chance that the occupants could sustain bodily injuries.

We note that, despite the fact that the trial court ruled in Appellants' favor and prevented Kickarillo from testifying as to the parties' injuries, the Appellants' counsel opened the door to this line of questioning. As stated in *Commonwealth v. Stone*, 291 S.W.3d 696, 701-02 (Ky. 2009), "'opening the door' to otherwise inadmissible evidence is a form of waiver that happens when one party's use of inadmissible evidence justifies the opposing party's rebuttal of that evidence with equally inadmissible proof." Because the Appellants' counsel asked Kickarillo if he had any reason to doubt Tahirovic's claimed injuries, defense counsel could ask that same question. Therefore, the Appellants are precluded from complaining about that testimony now. Accordingly, we conclude that Kickarillo's testimony did not impeach Tahirovic.

Finally, we note that the Appellants cite to cases from other jurisdictions in support of their argument that attorneys cannot impeach their own clients. Because

we do not believe that defense counsel impeached Tahirovic, we do not need to address whether or not an attorney can impeach his own client.

2. Directed Verdict

Next, we address the Appellants' argument that they were entitled to a directed verdict on the issue of liability. As noted in *Mountain Water Dist. v. Smith*, 314 S.W.3d 312, 314 (Ky. App. 2010):

> Upon consideration of a motion for a directed verdict, "the trial court must 'draw all fair and rational inferences from the evidence in favor of the party opposing the motion, and a verdict should not be directed unless the evidence is insufficient to sustain the verdict.' " *Kroger Co. v. Willgruber,* 920 S.W.2d 61, 64 (Ky. 1996) (quoting *Spivey v. Sheeler,* 514 S.W.2d 667, 673 (Ky. 1974)). Upon review by an appellate court, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt [or liability], only then the defendant is entitled to a directed verdict[.]" *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991) . . . .

The Appellants contend that the trial court erred in denying their motions for directed verdict because Tahirovic admitted that he was liable for the accident. In support of their argument, the Appellants point to Tahirovic's testimony at trial wherein he stated that, had he been traveling at a normal speed, the accident would not have happened.

Having carefully reviewed the record, we do not believe that Tahirovic's testimony constituted a judicial admission of liability. As set forth in *Witten v. Pack*, 237 S.W.3d 133, 136 (Ky. 2007):

> "A judicial admission . . . is a formal act of a party (committed during the course of a judicial proceeding) that has the effect of removing a fact or issue from the field of dispute; it is conclusive against the party and may be the underlying basis for a summary judgment, directed verdict, or judgment notwithstanding the verdict." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.15[4], at 590 (4th ed. LexisNexis 2003) (emphasis omitted). Testimony of a party may constitute a judicial admission if "deliberate and unequivocal and unexplained or uncontradicted." *Bell v. Harmon*, 284 S.W.2d 812, 815 (Ky. 1955).

In this case, Tahirovic's testimony regarding who was at fault for the accident was not clear and unequivocal. Although Tahirovic at one point stated that the accident was his fault, he also stated that he had no choice but to turn somewhere - either toward the unknown driver or somewhere else. Additionally, Tahirovic testified that had he been driving in a normal way, the accident would not have happened. However, when asked again whether he thought the accident would have happened had he been driving at a normal speed, Tahirovic stated, "I think not. I am not sure. You know. Who knows what can happen."

When questioned by his own counsel on cross-examination, Tahirovic acknowledged that, in his answer to the Appellants' interrogatories, he stated that the unknown driver of the vehicle ran him off the road and was at fault for the accident. Tahirovic then stated that he was not sure if the accident was his fault or the unknown driver's fault. Finally, on re-direct examination, the Appellants' counsel asked Tahirovic the following:

> Appellants' Counsel: Now, the only way this unknown driver was responsible [was] because you were going so fast and made it so, correct?
>
> Tahirovic: I *think* yes.

(Emphasis added).

Based on the preceding, we cannot say that Tahirovic clearly and unequivocally admitted that he was liable for the accident. Thus, the statements made by Tahirovic were not judicial admissions.

Having concluded that Tahirovic's statements did not constitute judicial admissions of liability, we address whether the trial court erred in failing to grant a directed verdict on that issue. As noted above, both of the Appellants and Tahirovic testified that an unknown driver crossed into their lane of traffic. Tahirovic also testified that the unknown driver caused him to swerve off the road. Finally, Kickarillo testified that, when the car left the road, it was traveling 20 mph or less, and that it was traveling 5 mph or less when it hit the tree. Therefore, drawing all rational inferences in favor of Tahirovic, we conclude that there was an issue of fact for the jury to decide whether Tahirovic was at fault. Accordingly, the trial court did not err in denying the Appellants' motions for directed verdict on the issue of liability.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the Warren Circuit Court.

ALL CONCUR.

ORAL ARGUMENT AND
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