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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000147-MR

MOTORISTS MUTUAL INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 09-CI-01040

GYPSIE THACKER; AND
MANN, SUTTON & MCGEE, LTD. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, COMBS AND DIXON, JUDGES.

DIXON, JUDGE: Appellant, Motorists Mutual Insurance Company, appeals from a jury verdict awarding Appellee, Gypsie Thacker, over $1.9 million in underinsured motorist benefits for injuries she sustained in Florida. For the reasons set forth herein, we reverse the judgment of the trial court and remand the matter for a new trial in accordance with this opinion.

In the spring of 2009, Thacker, a resident of Pikeville, Kentucky, spent several weeks in Florida treating with a local rheumatologist. On the evening of March 16, Thacker had been riding her bicycle across the Flagler Memorial Bridge near Palm Beach, Florida, when she stopped to talk to a fisherman. As she placed her right foot on the bicycle pedal to begin moving again, her foot slipped off causing her bicycle to tilt into oncoming traffic. Thacker was struck by a jeep driven by Leon Higgins, a Florida resident, who was crossing the bridge in the opposite direction. Thacker suffered multiple injuries (factures to her hands, wrists, collarbone, and face) which allegedly resulted in the development of traumatic arthritis, carpal tunnel syndrome, headaches, traumatic brain injury, psychiatric impairment, and an exacerbation of her previously diagnosed depression.

Higgins' liability carrier paid its policy limits of $20,000 and Thacker thereafter filed an action in the Pike Circuit Court against Motorists Mutual, her own carrier, for underinsured benefits. Following an extensive trial in December 2012, a jury found both Higgins[1] and Thacker at fault, apportioning liability at 50/50. The jury returned a damage verdict of $3.9 million against Motorists Mutual. After offsets for PIP benefits and Higgins' liability coverage, Thacker was awarded $1.925 million. Motorists Mutual thereafter appealed to this Court. Additional facts are set forth as necessary.

[1] Higgins was not a party to any litigation.

On appeal, Motorists Mutual argues that the trial court erred by (1) refusing to give a sudden emergency instruction; (2) denying discovery of Thacker's psychotherapy records; (3) refusing to allow its expert to testify regarding the speed of Higgins' vehicle; (4) precluding its request for a Kentucky Rules of Civil Procedure (CR) 35 examination by a rheumatologist; (5) permitting Thacker to introduce Officer Medeiros's opinion that someone in Higgins' situation would apply maximum breaking and stop immediately; (6) excluding evidence of an alternative route; (7) permitting Thacker to introduce evidence that its reconstructionist did not have a Kentucky license; (8) precluding evidence from Thacker's divorce pleadings; and (9) not dismissing as a matter of law Thacker's claims for violation of the Consumer Protection Act, bad faith, and for punitive damages. After reviewing the record and applicable law, we conclude that Motorists Mutual was entitled to discover Thacker's psychotherapy records and that the denial of such warrants a new trial.

Motorists Mutual's first claim of error concerns the trial court's denial of access to Thacker's psychotherapy records. Specifically, Thacker had been treated both before and after the accident in question by Michael Spare, a psychotherapist. After the accident, Spare referred Thacker to Dr. Clayton Hall, a psychiatrist, for treatment. Dr. Hall started treating her for depression, posttraumatic stress disorder, and anxiety disorder allegedly related to the accident. As such, during the course of discovery, Motorists Mutual attempted to obtain Thacker's mental health records. However, her attorney filed a motion to quash the

subpoena of Spare's psychotherapy records and a motion for a protective order. The trial court subsequently conducted an *in camera* review of Spare's records and entered a protective order denying discovery on the basis that the records did not contain information relevant to Thacker's claims, nor would they lead to discovery of relevant evidence.

On appeal, Motorists Mutual contends that because Spare was the only psychotherapist who treated Thacker both before and after the accident, his treatment records were necessary to thoroughly assess her pre-injury and post-injury mental status. Motorists Mutual points out that Thacker's expert, Dr. Robert Granacher, testified that the accident aggravated her preexisting depression and caused a permanent psychiatric impairment that prevented her from working. Moreover, in support of her claim that the accident helped precipitate her divorce, Thacker introduced testimony from Dr. Brian Greenlee that Thacker had not planned on divorcing prior to the accident but that divorce rates increase for people suffering from traumatic brain injuries because such injuries cause personality changes. Accordingly, Motorists Mutual argues that discovery of Spare's records were essential for it to effectively rebut Thacker's expert testimony.

Thacker, on the other hand, claims that the records in question centered on the treatment of her son's substance abuse, not her mental health. Further, Thacker argues that her psychotherapy records are privileged under Kentucky Rules of Evidence (KRE) 507 and that any information contained in the records is "so inextricably intertwined with the privileged communications of her

family members that her personal information could not be divulged without infringing upon the privilege relating to the communications of other family members . . . ."

KRE 507, which governs the psychotherapist-patient privilege, provides, in relevant part:

> A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

KRE 507(b). Significantly, however, KRE 507(c)(3) provides that there is no privilege under the rule for any relevant communications "[i]f the patient is asserting that patient's mental condition as an element of a claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense."

In *Dudley v. Stephens*, 338 S.W.3d 774 (Ky. 2011), our Supreme Court held that a defendant has the right to discovery of mental health records, if relevant, when a plaintiff has made a claim for mental distress:

> Appellant's claim for mental pain caused by the alleged negligence, put into question her mental state at the time the medical treatment occurred. It would be fundamentally unfair to permit Appellant to allege and prove mental anguish caused by the negligence while denying the Real Parties in Interest from reviewing her

> mental health records for the possibility of pre-existing mental conditions.

Id. at 776. The *Dudley* Court noted that psychotherapy records may be discoverable even when a plaintiff is seeking damages for "garden variety' emotional distress." *Id.*

Although the trial court herein made no mention of privilege under KRE 507, this is precisely the type of evidence that would be discoverable under *Dudley*. Further, we have carefully reviewed Spare's records and must conclude that, contrary to the trial court's ruling, the records are directly relevant to Thacker's claims and Motorists Mutual was entitled to discovery of such. Accordingly, the trial court's denial of discovery was an abuse of discretion and warrants a new trial. Because we are remanding for a new trial, we will also address those issues that are likely to recur.

Motorists Mutual's next assignment of error concerns the trial court's refusal to instruct the jury on the sudden emergency doctrine. Motorists Mutual contends that regardless of whether the jury believed Higgins was traveling in excess of the posted speed limit, he had no reason to anticipate that Thacker would fall off her bike into the path of his vehicle. Because the jury was not given a sudden emergency instruction, Motorists Mutual argues that it was not informed that a qualifying event "altered" Higgins' duties, and was therefore prevented from basing its finding of fault on whether it believed Higgins' conduct was a reasonable response to an emergency situation. We disagree.

The sudden emergency doctrine is generally defined as:

> [W]hen an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor is not negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency.

57A Am.Jur.2d, *Negligence* § 198 (2004). "The rationale for the rule arises from the perception of human nature that 'a prudent person, when brought face to face with an unexpected danger, may fail to use the best judgment, may omit some precaution that otherwise might have been taken, and may not choose the best available method of meeting the dangers of the situation.'" *Henson v. Klein*, 319 S.W.3d 413, 418 (Ky. 2010) (Quoting 57A Am.Jur.2d, *Negligence* § 200 (2004)).

In *Harris v. Thompson*, 497 S.W.2d 422, 428 (Ky. 1973), Kentucky's then-highest court held:

> [W]hether the instruction on a motorist's duties should be qualified by a proviso such as the sudden emergency theory does not depend upon whether the particular circumstance might be characterized in common parlance as a 'sudden emergency,' but whether it changes or modifies the duties that would have been incumbent upon him in the absence of that circumstance. In this case the qualification was made necessary because by not remaining on the right side of the road Sechrest violated a specific duty unless the exceptional circumstance of the ice on the road had the effect of relieving him from it. Had the accident taken place in his own lane of travel, or on the right side of the highway, it would not have been necessary, because then the unexpected presence of the ice would have amounted to no more than a condition bearing upon the question of whether the accident

> resulted from a failure on his part to comply with the more generalized duties of ordinary care. The proper criterion is whether any of the specific duties set forth in the instruction would be subject to exception by reason of the claimed emergency.

Herein, the evidence established that Higgins took no action in response to seeing Thacker's foot slip off the pedal and her bike tilt into traffic, but rather continued in his lane until he collided with her. He did not change the course of his vehicle and did not brake until after he hit Thacker. Had Higgins swerved to avoid Thacker or suddenly applied his brakes causing some other occurrence, then arguably his response to Thacker's conduct may have been excused by the sudden emergency doctrine. However, we are of the opinion that Thacker's presence in Higgins' lane of traffic was "no more than a condition bearing upon the question of whether the accident resulted from a failure on his part to comply with the more generalized duties of ordinary care." *Harris*, 497 S.W.2d at 428. Accordingly, a sudden emergency instruction was not warranted.

Next, Motorists Mutual argues that the trial court erred in permitting the testimony of Robert Miller, Thacker's accident reconstruction expert, who testified that at the time of the accident, Higgins was driving in excess of 51 miles per hour in a posted 30-miles-per-hour zone. Motorists Mutual points out that Higgins, in fact, offered the only eyewitness testimony about speed when he stated that he was traveling thirty miles per hour, with the flow of traffic. Motorists Mutual contends that Miller's opinion to the contrary was based on the assumption

that Higgins used heavy and continuous breaking after the impact, which it argues is unsupported by the evidence due to the lack of any skid marks at the scene.

KRE 702 provides, in relevant part,

> 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.

When faced with a proffer of expert testimony, the trial court must determine pursuant to KRE 104, "whether the expert is proposing to testify to (1) scientific [, technical, or other specialized] knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993). *See also Ragland v. Commonwealth*, 191 S.W.3d 569, 576 (Ky. 2006). "[T]he word 'knowledge' connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.'" *Daubert*, 509 U.S. at 590, 113 S.Ct. at 2795.

In order to meet the above standard, proffered expert testimony must be both relevant and reliable. *Id.* at 589, 113 S.Ct. at 2795. The factors set forth in *Daubert* and subsequently adopted by our Supreme Court in *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), *overruled on other grounds in*

Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999), that a trial court may apply in determining the admissibility of an expert's proffered testimony include, but are not limited to: (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community. *Daubert*, 509 U.S. at 592–94, 113 S.Ct. at 2796–97. A trial court's ruling on the admission of expert testimony is reviewed under the same standard as a trial court's ruling on any other evidentiary matter. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 583 (Ky. 2000). *See also Fugate*, 993 S.W.2d at 935.

It was Miller's opinion that Higgins was driving in excess of 51 miles per hour at the time he collided with Thacker. Miller testified that his opinion was based upon his experience, training, scene measurements, photographs, distance calculation of the jeep that traveled 156 feet after impact, the coefficient of friction of the roadway, Higgins' statements, and published tables for friction calculation. Miller specifically pointed out that skid marks were unnecessary for the speed calculation. In addition, Thacker provided three affidavits from other experts in the field of accident reconstruction validating the methodology and basis for Miller's opinions.[2]

[2] In its brief, Motorists Mutual claims that the affidavits, which were attached to Thacker's brief, were not part of the record in the trial court and should be stricken from the appellate record. In

We find Motorists Mutual's reliance on *West v. KKI, LLC*, 300 S.W.3d 184 (Ky. App. 2008), misplaced. Therein, an expert was called to testify about the danger caused by riding a particular roller coaster. However, during his testimony the witness

> admitted that he ha[d] never formally analyzed, documented, and researched roller coaster rides; but, rather, he premise[d] his opinion . . . merely upon having ridden them on numerous occasions. With respect to this particular ride, [the witness] was unable to state the acceleration rate, speed, or g-forces generated during the ride. Nor did he do any calculations or produce any other documentation in support of his conclusion that Kentucky Kingdom's warning was inadequate. And, as noted by the trial court, he admitted that his opinion was substantially based upon an "I–know–it–when–I–see–it" analysis.

Id. at 196. Unlike the expert in *West*, Miller's opinion herein was based upon thirty years of education and experience, physical evidence and accepted scientific formulas.

Clearly, Thacker established that the methodology employed by Miller in reaching his conclusions is consistent with that used in his field of expertise. Nevertheless, Motorists Mutual was not prohibited from challenging Miller's opinion due to the lack of information as to the extent and duration of Higgins' application of his brakes. As noted by the Court in *Daubert*:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Additionally, in the

fact, the affidavits were made part of the record below on December 10, 2012, and were specifically referenced during the hearing on Motorists Mutual's motion *in limine*.

> event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, and likewise to grant summary judgment.

509 U.S. at 596, 113 S.Ct. at 2798 (citations omitted). We conclude that the trial court did not abuse its discretion in allowing Miller's expert testimony.

Motorists Mutual also argues that the trial court erred in denying its pretrial motion for a CR 35 examination by its rheumatologist, Dr. David Knap, for the purpose of assessing Thacker's rheumatoid arthritis. Motorists Mutual points out that it had agreed to reimburse Thacker's travel costs to Nashville and offered her the option of traveling by car or by air.

When the mental or physical condition of a party, or of a person in the custody or under the legal control of a party, is in controversy, CR 35.01 vests in the trial court the discretion to "order [a] party to submit to a physical or mental examination by a physician, dentist or appropriate health care expert." The purpose of the rule is to "provide a level playing field between the parties. Defendants have no say in determining what physician plaintiff chooses as his or her expert witness." *Sexton v. Bates*, 41 S.W.3d 452, 457 (Ky. App. 2001) (quotation omitted). A defendant may choose the examining doctor and that choice is entitled to respect but for a plaintiff's "valid and substantiated objection." *Id.*

The record establishes that Motorists Mutual selected physicians to perform mental and physical examinations without any objection by Thacker. Dr. David Shraberg, a neuropsychiatrist, and Dr. Henry Tutt, a neurosurgeon, both examined and offered opinions relative to Thacker. Further, Thacker did not retain any rheumatologists to testify at trial. We believe that the discretion afforded the trial court in CR 35.01 is designed to prevent a litigant from obtaining as many examinations as it desires without demonstrating that such are necessary and appropriate under the circumstances.

Both Dr. Shraberg and Dr. Tutt had complete access to Thacker's medical records from both before and after the accident. Motorists Mutual did not demonstrate that it was necessary for Thacker to undergo an additional examination by Dr. Knap. As Thacker did not call a rheumatologist at trial, we conclude that the trial court did not abuse its discretion in denying Motorists Mutual's CR 35.01 motion.

Motorists Mutual next argues that the trial court erred in permitting the testimony of Detective Keith Medeiros of the Palm Beach Police Department. Detective Medeiros, who was one of the investigating officers on the scene of the accident, testified that based upon his experience and training, someone in Higgins' situation would typically apply maximum breaking and stop the vehicle immediately. Motorists Mutual contends that Detective Medeiros's opinion was improper because it was based on nothing more than speculation and subjective belief.

A police officer can qualify as an expert provided he has sufficient training and experience. *Southwood v. Harrison*, 638 S.W.2d 706 (Ky. App. 1982). Detective Medeiros was a qualified accident reconstructionist with approximately ten years of experience. In addition, he had received specific training regarding accidents involving bicycles. Clearly, Detective Medeiros possessed the prerequisites to qualify as an expert.

Despite Detective Medeiros's qualifications, Motorists Mutual objects to his opinion that, based upon his training and experience, a person would typically apply the brakes immediately upon hitting something in the roadway. We cannot conclude that it was improper for Detective Medeiros to express a commonly accepted principle in the field of reconstruction and what, we are of the opinion, would be a commonly accepted principle among lay people as well. Detective Medeiros did not testify as to what Higgins did or did not do, nor did he opine as to Higgins' speed at the time of impact. We find nothing improper about the testimony and the trial court did not err in allowing such.

We likewise find no merit in Motorists Mutual's argument that it suffered irreparable prejudice from the trial court's pretrial ruling excluding evidence that an alternative route was available to Thacker. By way of avowal at trial, Motorists Mutual introduced evidence that a series of bridges span the Intercoastal Waterway, connecting West Palm Beach to Palm Beach. Motorists Mutual asserted that had Thacker chosen the nearby Royal Park Bridge on the day in question, the accident could have been avoided.

It is undisputed that Flagler Memorial Bridge was open to both motorized and non-motorized vehicles and that it was legal for Thacker to ride her bike across such bridge. Higgins acknowledged that it was common for joggers, bicyclists and walkers to use the bridge and even admitted that he had done so on occasion. Motorists Mutual fails to cite to any authority in support of its position that Thacker, presented with differing routes of travel, had a duty to consider a route deemed by Motorists Mutual to be the safest choice. Contrary to Motorists Mutual's argument, this is not an assumption of risk case. *See Carlisle v. Reeves*, 294 S.W.2d 74 (Ky. 1956) (individual knew that it was dangerous to stand in dark street with back to oncoming traffic). Nor is this a duty to warn case. *See Peak v. Barlow Homes, Inc.*, 765 S.W.2d 577 (Ky. App. 1988).

We must agree with Thacker that to accept Motorists Mutual's argument would lead to absurd results. Simply because there were other bridges, or even other forms of transportation that Thacker could have chosen on the day in question, simply does not equate to a finding that she voluntarily placed herself in a more dangerous position. We cannot conclude that Motorists Mutual suffered irreparable prejudice by the exclusion of its proffered evidence.

Next, Motorists Mutual argues that the trial court erred in permitting Thacker to introduce evidence that its accident reconstructionist, Walter Kennedy, did not have a Kentucky private investigator's license. Specifically, after having been qualified as an expert and permitted to testify as to his opinions, Kennedy acknowledged on cross-examination that he did not hold a Kentucky private

investigator's license.[3] Thacker thereafter sought to inquire of Walters about the penalties for performing services that require such license. Upon Motorists Mutual's objection, however, Thacker was prohibited from continuing the line of questioning. Nevertheless, on appeal, Motorists Mutual argues that Thacker misstated the law and was allowed to impeach Kennedy on a collateral issue, resulting in undue prejudice. We disagree.

In *Lukjan v. Commonwealth*, 358 S.W.3d 33, 39 (Ky. App. 2012), a panel of this Court clarified that the absence of a private investigator's license does not preclude an otherwise qualified expert witness from testifying. The panel noted, however, that licensure may be a factor to be considered. *Id.* We believe that although the trial court herein properly qualified Kennedy as an expert under KRE 702 based upon his experience, training and credentials, the fact that he did not hold a Kentucky license was relevant to the weight to be afforded his testimony. As such, we do not find any prejudice occurred.

Motorists Mutual next asserts that the trial court erred in precluding an affidavit from Thacker's divorce proceeding wherein she sought, *inter alia*, $1,800 per month in maintenance for entertainment and travel expenses. Motorists Mutual

[3] KRS 329A.015 prohibits an individual from "hold[ing] himself or herself out to the public as a private investigator, or [to] use any terms, titles, or abbreviations that express, infer, or imply that the person is licensed as a private investigator unless the person at the time holds a license to practice private investigating issued and validly existing under the laws of this Commonwealth as provided in this chapter."

claims that the evidence had a direct bearing on Thacker's level of activity and rebutted her claims of pain and suffering. We disagree.

There was nothing within Thacker's affidavit that indicated her level of activity with regard to her entertainment and travel, and indeed KRS 403.200(2) has no such requirement for maintenance. Thacker testified that although the accident diminished her quality of life, she did continue to travel in and around her home county as well as to Florida. Motorists Mutual was free to cross-examine her about the nature and extent of her activities. However, we find nothing in the affidavit that in any manner shows that her activity level was greater than what she testified to. The evidence was not relevant to any issues before the jury and, as such, the trial court properly excluded it.

Finally, Motorists Mutual argues that the trial court erred as a matter of law in not dismissing Thacker's claims for violation of the Consumer Protection Act, bad faith, and punitive damages for failure to pay PIP benefits. However, as those claims were bifurcated, there has been no ruling on the merits. As such, the court's denial of Motorists Mutual's motion to dismiss is not subject to review at this point.

For the foregoing reasons, the judgment of the Pike Circuit Court is reversed and this matter is remanded for a new trial in accordance with this opinion.

COMBS, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: I would affirm. While our Court attempts to substitute its judgment for that of the trial court, I must trust the trial court's review of the records at issue in chambers was meaningful, purposeful and thorough during the course of the trial. Furthermore, while we might be tempted to second-guess the trial court's judgment based on recordings and documents of record, we should not because the trial court heard the arguments, evaluated the issues and entered its learned judgment. As it was in the best position to judge the credibility of the evidence in its entirety, I would affirm the judgment which the trial court rendered.

BRIEFS FOR APPELLANT:

David C. Jones
Lexington, Kentucky

BRIEF FOR APPELLEE GYPSIE THACKER:

Jim G. Vanover
Allison J. Ball
Pikeville, Kentucky