

RENDERED: AUGUST 26, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000516-MR

RONALD MATTHEW JENNINGS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 10-CI-05260

DRAYER PHYSICAL THERAPY
OF KENTUCKY, PLLC;
DRAYER PHYSICAL THERAPY
INSTITUTE, LLC; and
JESSE NEIHEISEL

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND J. LAMBERT,
JUDGES.

KRAMER, CHIEF JUDGE: Ronald Jennings appeals a judgment entered in
Fayette Circuit Court dismissing a negligence action he filed against the above-
captioned appellees. For the reasons discussed herein, we affirm.

In June 2007, Jennings underwent surgery to repair a tear in the acromioclavicular (AC) joint in his right shoulder. Jennings's orthopedic surgeon, Dr. Ben Kibler, issued Jennings a post-operative prescription to undergo physical therapy to strengthen the shoulder joint, but only through exercises that would cause Jennings's shoulder to be elevated in a sixty-degree or less range of motion. On July 9, 2007, Jennings sought physical therapy services from the appellees in conformity with his prescription. The appellees provided him with a course of physical therapy that began on that date and lasted for the following twelve weeks.

On September 10, 2010, Jennings filed his negligence action against the appellees. He alleged that during his twelve weeks of physical therapy in 2007, the appellees had placed him on an exercise regimen that had exceeded the limitations prescribed by Dr. Kibler and had caused him to reinjure his shoulder. This matter proceeded to trial and the circuit court ultimately dismissed Jennings's action after the jury found Jennings had failed to demonstrate the course of physical therapy provided by the appellees violated any duty they owed him.

Jennings's arguments on appeal and the basis of his negligence action against the appellees focus upon a disagreement between expert witnesses over the meaning of the word "Blackburns," and whether Jennings did in fact perform certain kinds of exercises as a part of his physical therapy with the appellees.

"Blackburns" is a term used in the realm of physical therapy to describe a series of six shoulder exercises. "Blackburns" was noted in Drayer's records as a regular component of the exercises its physical therapist, Jesse Neiheisel, had used to treat

Jennings. Each of the experts who testified for either side in this matter agreed that, while “Blackburns” can be performed or modified to be performed within the limits of Dr. Kibler’s prescriptions, five of the six “Blackburns,” as “classically” defined, begin with the shoulder elevated in a ninety-degree position.

In other words, Jennings argued that the word “Blackburns,” as it appeared in his treatment records from Drayer, demonstrated Drayer’s course of treatment violated Dr. Kibler’s prescription; Drayer had therefore breached a duty owed to Jennings; and that the second element of his negligence action (*i.e.*, breach of duty) was therefore satisfied.¹

The appellees, on the other hand, argued the bare notation of “Blackburns” in their treatment records did not prove Jennings was provided physical therapy in excess of Dr. Kibler’s prescription. To that end, Neiheisel testified at trial that “Blackburns,” as he understands the term and as he understood it when writing it in Jennings’s treatment records in 2007, was a category of exercises that could be administered within the sixty-degree limitation prescribed by Dr. Kibler. Neiheisel noted the complete record of his treatment of Jennings included Dr. Kibler’s prescription; and he testified it was his recordkeeping practice to generally indicate the exercises he would administer and presume anyone reading his records would understand that the exercises administered were subject to any limitations prescribed by the patient’s physician. Neiheisel also

¹ A claim of negligence requires a showing of four elements: (1) duty; (2) breach; (3) causation; and (4) injury. *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 906 (Ky. 2013).

described and demonstrated for the jury how, during physical therapy, he had Jennings perform Blackburns subject to Dr. Kibler's prescribed limitation.

Three points bear emphasis before proceeding. First, as Jennings himself admits on page fifteen of his appellate brief, "there was no physical evidence to know whether [Neiheisel] modified the Blackburn exercises he charted in the medical records." Second, Neiheisel's testimony was the only first-hand account offered to the jury of how "Blackburns," as noted in those records, had actually been administered to Jennings during physical therapy sessions; Jennings offered no testimony in that regard. Third, the written account of Jennings's physical therapy, as it appeared in Drayer's records, was authored by Neiheisel; and the only evidence Jennings offered to dispute Neiheisel's testimonial account of how "Blackburns" had been performed during physical therapy was Neiheisel's use of the word "Blackburns" in his written account of Jennings's physical therapy.

Indeed, all of the expert witnesses who testified at trial agreed that, aside from what Neiheisel represented in his trial testimony and his use of the word "Blackburns" in his treatment records, no evidence indicated whether Jennings's physical therapy had or had not violated Dr. Kibler's sixty-degree limitation.

This, in turn, leads to the specifics of Jennings's argument on appeal.²

The appellees' physical therapist expert witness, Terry Malone, opined at trial that the physical therapy Neiheisel administered to Jennings did not exceed Dr.

² The appellees have devoted substantial portions of their brief urging that all or some of Jennings's brief should be stricken for failing to comply with Kentucky Rules of Civil Procedure (CR) 76.12 in various ways. Having reviewed Jennings's brief, we are unconvinced that it is defective in any way that would warrant those types of sanctions.

Kibler's prescription. As to why, Malone acknowledged "Blackburns" were "classically" defined as a series of six exercises, five of which could not be performed without elevating a shoulder in a ninety-degree range of motion. But, he further testified the term was open to interpretation because, in his experience, many physical therapists regularly modified the battery of Blackburn exercises and over the years the term had been used in a general sense to describe variations of the Blackburn exercises with a range of sixty degrees or less; this practice was an acceptable method of physical therapy; and, from his understanding of Neiheisel's deposition and treatment records, this is what had occurred.

Prior to trial, Jennings filed a motion in limine to exclude Malone's opinion testimony because, as he argued, it was demonstrated during a deposition that Malone based his opinion (*i.e.*, that Neiheisel did not administer Blackburn exercises to Jennings in excess of Dr. Kibler's sixty-degree limitation) entirely upon an impermissible assessment of Neiheisel's credibility as a witness. In particular, Jennings directs our attention to the following exchange between his counsel and Malone during cross-examination:

Counsel: Did I ask you and did you answer these questions and answers? [Reading from Malone's pre-trial deposition] Okay, so my question was do they exceed Kibler's limitations in this case? Answer, not as applied, they were applied in a pattern lower in range of motion than the classic description. Question, how, how do we know that? Answer, that is the description in the materials provided. Question, yeah, but who specifically represented that? Answer, the physical therapist for Drayer, that'd be Mr. Neiheisel. Question, and you believe Mr. Neiheisel, correct? Answer, yes sir. And

then on page 79 I said okay, in other words when you look at everything and kind of weigh the testimony, you find the physical therapist Mr. Neiheisel more credible than Mr. Jennings?]³ Answer, yes sir. Did you, did you give those answers to those questions?

Malone: Yes, sir.

Counsel: So you, so you would agree that at your deposition you were already taking sides about Mr. Neiheisel's version of modifications?

Malone: I was stating the facts as I saw them, sir.

Counsel: Well, but one of the facts, what you're calling a fact was his version which was disputed about, about the fact that he modified the Blackburns, correct?

Malone: I stated the facts as I saw them, sir.

Counsel: But I, I know you said that but my question is *the facts as you saw it, the fact that you're seeing, is that Mr. Neiheisel, you're claiming represented that he modified the Blackburns. That's, that's the fact that you're pointing to, to form your opinion, correct?*

Malone: Yes, sir.

(Emphasis added.)

In light of the above, Jennings argues the circuit court committed reversible error by allowing Malone to offer his expert opinion at trial.

We disagree.

It is well settled that a witness cannot directly or indirectly vouch for the truthfulness of another witness. *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997); *Bell v. Commonwealth*, 245 S.W.3d 738, 745 (Ky. 2008),

³ Despite the implication of Jennings's counsel's question, nothing at trial and nothing Jennings cites in the record indicates Jennings gave contrary testimony that the Blackburn exercises administered by Neiheisel exceeded Dr. Kibler's prescription.

overruled on other grounds by Harp v. Commonwealth, 266 S.W.3d 813 (Ky. 2008). Such testimony “remove[s] the jury from its historic function of assessing credibility.” *Newkirk v. Commonwealth*, 937 S.W.2d 690, 696 (Ky. 1996).

With that said, whether at trial or during his deposition, Malone only commented on Neiheisel’s credibility when Jennings’s counsel *told* him to do so. To the extent that Malone’s comments qualified as vouching for Neiheisel’s credibility, they cannot serve as a basis for reversal because they were the result of invited error.⁴ *See Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011) (“Generally, a party is estopped from asserting an invited error on appeal.”)

Setting those statements aside, it is also evident that the remainder of Malone’s testimony was admissible because it was clearly based upon an assumption. *See, e.g., Hoff v. Commonwealth*, 394 S.W.3d 368, 377 (Ky. 2011) (explaining an expert witness may make a conditional statement that if he accepts another witness’s statements as true, those statements, in conjunction with other evidence, would lead to a certain conclusion). To be sure, Malone—like every other expert who testified at trial in this matter—gave an opinion regarding whether the Blackburns administered by Neiheisel did or did not exceed Dr. Kibler’s sixty-degree limitation. But Malone—like every other expert on both

⁴ This is exactly what the court told Jennings’s counsel at trial immediately after Jennings’s counsel read this portion of Malone’s deposition into evidence, questioned Malone about it, and then once again moved to exclude Malone’s testimony from the jury’s consideration.

sides of this dispute⁵—also qualified his opinion for the jury by testifying he had no evidentiary basis for knowing whether Blackburn exercises had been administered above or below Dr. Kibler’s sixty-degree limitation.

Stated differently, Malone made it abundantly clear that his opinion was based upon his *assumption* that Neiheisel correctly described how Blackburn exercises had been administered to Jennings; and his assessment of whether, based upon that description, Neiheisel’s physical therapy breached a duty owed to Jennings. This was also how the circuit court understood Malone’s testimony; during oral arguments regarding Jennings’s motion for judgment notwithstanding the verdict or a new trial based upon this issue, the court explained:

I understand what you’ve said and I really, I don’t believe that’s what [Malone] was talking about, the credibility of [Neiheisel]. I mean I really think any time an expert is reviewing matters they’re taking those things that are presented to them as correct and they’re basing their decision on the records as presented to them.

⁵ For example, Jennings’s physical therapist expert witness, Chad Thompson, testified it was more probable than not that the physical therapy Neiheisel administered to Jennings exceeded Dr. Kibler’s prescription. As to why, Thompson explained that *he* would have used the term “Blackburns” as shorthand for charting a series of six exercises, five of which could not be performed without elevating a shoulder in a ninety-degree range of motion, because that was what *he* generally understood the term “Blackburns” to mean.

Moreover, Thompson maintained his opinion that Neiheisel had violated the applicable standard of care despite (1) being told by Jennings’s counsel on direct examination that Neiheisel had testified, to the contrary, that Neiheisel had intended a different meaning and had actually administered Blackburn exercises to Jennings within the sixty-degree limitation prescribed by Dr. Kibler; (2) acknowledging on cross-examination that Blackburn exercises could be performed with the sixty-degree limitation; and (3) admitting that, while he would have noted Blackburn exercises subject to a sixty-degree limitation as “modified” Blackburn exercises, different physical therapists take different kinds of notes, and he had no knowledge of how Neiheisel had actually administered the exercises.

Clearly, I mean, they have to believe the records are true and that's entirely what happened, but I thought in cross-ex and everything you all made it abundantly clear that it would have been a totally different situation if, if things had been different. I mean if the facts had been different the opinion would have been different. I really don't think that's a reason for judgment notwithstanding the verdict or for a new trial.

Our standard for reviewing a trial court's ruling admitting or excluding evidence 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)). In light of the above and the deference we must accord to a trial court's evidentiary rulings under the abuse of discretion standard, *see Miller v. Eldridge*, 146 S.W.3d 909, 917 (Ky. 2004), we cannot find that the circuit court's decision to permit this evidence presents any ground for reversible error.

Accordingly, we AFFIRM.

All CONCUR.

BRIEF FOR APPELLANT:

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