RENDERED: SEPTEMBER 8, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000270-MR
&
NO. 2016-CA-000326-MR

JOHN RAAP APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 14-CI-002907

JAMELLE TAYLOR APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: John Raap brings Appeal No. 2016-CA-000270-MR and Jamelle Taylor brings Cross-Appeal No. 2016-CA-000326-MR from a February 5, 2016, Judgment of the Jefferson Circuit Court upon a jury verdict awarding

Jamelle Taylor $98,158.13 in compensatory damages for injuries he suffered as a result of his bicycle colliding with Raap's motor vehicle. We affirm.

On January 19, 2014, Raap was operating a motor vehicle on Bashford Avenue in Louisville, Kentucky. Raap attempted to turn right at the intersection of Shepherdsville Road and Bashford Avenue when his vehicle collided with a bicycle operated by Jamelle Taylor. Taylor was riding his bicycle on a sidewalk that ran parallel with Shepherdsville Road and was proceeding through an unmarked crosswalk at the intersection with Bashford Avenue when the accident occurred.

On June 2, 2014, Taylor filed a complaint in the Jefferson Circuit Court against, *inter alios*, Raap. In particular, Taylor claimed:

> That on or about the 19th day of January, 2014 Plaintiff Jamelle Taylor was riding his bicycle with the right[-]of[-]way in an attempt to cross Bashford Ave, in Louisville, Jefferson County, Kentucky[,] when Defendant John Raap, who was operating a 2007 Ford Edge, failed to yield the right[-]of[-]way to the Plaintiff and negligently caused a collision with the Plaintiff's person, thereby causing the Plaintiff to suffer serious bodily injuries.

Complaint at 2. Taylor sought damages for medical expenses, lost wages, and pain and suffering. Raap filed an answer and alleged that Taylor negligently and solely caused the accident.

A jury trial was held, and the jury found both Raap and Taylor negligent in causing the accident. The jury apportioned 55 percent of fault to Raap and 45 percent of fault to Taylor. The jury awarded Taylor $38,151.15 for past

medical expenses, $50,000 for future medical expenses, $8,500 for lost wages, $25,000 for future lost wages, $50,000 for past pain and suffering, and $25,000 for future pain and suffering. In accordance with the jury apportionment of fault, the circuit court awarded Taylor judgment in the total amount of $98,158.13.[1] These appeals follow.

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Raap initially contends that the circuit court erroneously failed to instruct the jury that Taylor possessed a statutory duty to yield the right-of-way to Raap at the intersection of Shepherdsville Road and Bashford Avenue. To support his contention, Raap cites to Kentucky Revised Statutes (KRS) 189.330(10). Raap believes that KRS 189.330(10) imposed a duty upon Taylor to yield to Raap's vehicle as Taylor was entering the roadway from the sidewalk. Raap argues that the circuit court erred by not so instructing the jury. Raap essentially sought a negligence *per se* jury instruction based upon KRS 189.330(10).

Under the law of this Commonwealth, the circuit court must instruct the jury upon every theory of the case supported by evidence. *Sargent v. Shaffer*, 467 S.W.3d 198 (Ky. 2015). And, "a trial court's decision on whether to instruct on a specific claim will be reviewed for abuse of discretion; the substantive content of the jury instructions will be reviewed *de novo*." *Sargent*, 467 S.W.3d at 204.

It is well recognized that a negligence *per se* claim is simply a negligence claim with a statutory standard of care replacing the common-law

[1] The circuit court also deducted $10,000 for payment of basic reparation benefits to Jamelle Taylor.

standard of care. *Wright v. House of Imports, Inc.*, 381 S.W.3d 209 (Ky. 2012). KRS 446.070 authorizes negligence *per se* claims and states that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation. . . ." To sustain a negligence *per se* claim, our Supreme court has set forth the following conditions:

> We said in *Straub* that "in accord with traditional legal principles related to the common law concept of negligence per se, [KRS 446.070] applies when . . . the plaintiff comes within the class of persons intended to be protected by the statute [alleged to have been violated]." *Id.* Our case law also recognizes two other conditions which must be satisfied for the application of KRS 446.070. First, "[t]he statute must have been specifically intended to prevent the type of occurrence that took place." *Hargis v. Baize,* 168 S.W.3d 36, 46 (Ky. 2005). Second, "the violation [of the statute] must have been a substantial factor in causing the result." *Id.*

In re: McCarty v. Covol Fuels No. 2, LLC, 476 S.W.3d 224, 227-28 (Ky. 2015).

> In this case, the statute at issue is KRS 189.330(10), and it reads:
>
> The operator of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway to be entered or crossed.

We must determine whether the General Assembly specifically intended KRS 189.330(10) "to prevent the type of occurrence that took place." *In re McCarty*, 476 S.W.3d at 227. Upon review of its plain language, we do not believe that KRS 189.330(10) was specifically intended to prevent automobile and bicycle accidents at a pedestrian crosswalk.[2] Thus, Taylor breached no duty to Raap that would

[2] It is a cardinal rule of statutory interpretation that the intent of the legislature is gleaned from the words used in the "statute rather than surmising what may have been intended but was not

constitute negligence *per se*. Such a view of KRS 189.330(10) would impermissibly enlarge its intended scope beyond what we believe was intended by the legislature. The circuit court submitted the case to the jury based upon comparative negligence as applicable to the facts established at trial. The jury concluded that Taylor was less negligent than Raap in causing the accident, though both were found to be negligent. Accordingly, we cannot conclude that the circuit court erroneously failed to instruct the jury that Taylor possessed a statutory duty under KRS 189.330(10) to yield to Raap.

Raap next asserts that the circuit court erroneously failed to instruct the jury that Taylor possessed a duty under Louisville Metro Ordinance Section 74.01 not to ride his bicycle on the sidewalk.[3] For the following reasons, we disagree.

Similar to a statute, a municipal ordinance may also "create a duty subject to liability as negligence per se." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 438 (Ky. App. 2001). However, as with a statute, a party must come within the class of persons intended to be protected by the ordinance to assert a negligence *per se* defense. *See In re: McCarty*, 476 S.W.3d 224.

Louisville Metro Ordinance Section 74.01 provides, in relevant part:

> No person 11 years of age or older shall operate a bicycle on the sidewalks located within the geographical boundary limits of Louisville/Jefferson County Metro Government ("Louisville Metro").

expressed." *Flying J Travel Plaza v. Com. Transp. Cabinet*, 928 S.W.2d 344, 347 (Ky. 1996).

[3] John Raap's tendered Instruction No. 4 would find that Taylor breached his duty of ordinary care as a matter of law by riding his bicycle on the sidewalk.

The above ordinance was obviously intended to protect pedestrians walking on a sidewalk from bicycle traffic and accidents caused therefrom, not persons operating a motor vehicle on public roadways. Consequently, we do not believe that Raap is within the class of persons intended to be protected by the ordinance. Additionally, there is no evidence in the record that riding the bicycle on the sidewalk was a substantial factor in causing the accident in the roadway. *Lewis*, 56 S.W.3d 432. We thus conclude that the circuit court did not err by failing to instruct the jury that Taylor has breached his duty of ordinary care by riding his bicycle on the sidewalk.

Raap also argues that the circuit court committed reversible error by admitting into evidence the medical records of Dr. Mark Puckett, who was a treating physician of Taylor. It must be emphasized that Raap concedes that the medical records were properly authenticated but contends the records were inadmissible because:

> First, since the records were received less than a month before trial, Raap had no opportunity to depose Puckett, or to effectively dispute his conclusions as to the cause and severity of Taylor's arthritis. Since Taylor did not begin treating with Puckett until after [Dr.] Richardson and [Dr.] Bonnarens were deposed, neither doctor had an opportunity to review Puckett's records, or to evaluate his conclusions. No other medical experts testified at trial. Raap's only recourse at trial was to demonstrate that Puckett was not an orthopedic surgeon, and that Taylor never provided Puckett with pre-[a]ccident medical records, and never disclosed to Puckett his pre-[a]ccident medical history, which might have changed

> Puckett's opinions about the causes of Taylor's post-[a]ccident arthritis.
>
> Second, it was improper for the Court to admit Puckett's records in the absence of testimony explaining the records to the jury.

Raap's Brief at 23-24.

As to Raap's first contention, the appellate record indicates that Raap received the medical records on November 9, 2015, and the first day of trial commenced December 9, 2015. We reject Raap's argument that his only recourse was to challenge the credentials of Puckett and the weight afforded the medical records. It is uncontroverted that Raap did not attempt to depose Puckett before trial and did not seek leave to supplement his own experts' opinions to impugn the contents of the medical records. Raap did file a motion *in limine* to exclude introduction of the medical records, but the circuit court denied the motion by order entered December 4, 2015. Thus, there was no undue prejudice.

As to Raap's second contention, the law is well settled that the circuit court's decision to admit or to exclude authenticated medical records is purely discretionary. *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503 (Ky. 1989). Medical records may be admitted into evidence without accompanying expert testimony if relevant and probative. *Id.* The circuit court may exclude the medical records if the prejudicial effect outweighs its probative value. *Id.* Particularly, our Supreme Court has held that a trial court would not abuse its discretion by

excluding voluminous medical records where "there is a probability that distortion, confusion, or misunderstanding" by the jury would have resulted. *Id.* at 508.

Here, the admitted medical records of Puckett consisted of a mere eight pages. There is no doubt that the medical records were relevant. Kentucky Rules of Evidence (KRE) 401 and KRE 402. The medical records summarized Puckett's examinations of Taylor, contained a history of Taylor's injury incurred as a result of the accident, and contained a summary of Puckett's treatment. Also, Puckett's view that Taylor's preexisting arthritis and degeneration of his knee had "a large post-traumatic component" was contained in the medical records. We simply cannot conclude that the circuit court abused its discretion by concluding that the probative value of the medical records was greater than any prejudicial effect therefrom. *See Young*, 781 S.W.3d 503. Hence, we are of the opinion that the circuit court did not commit reversible error by admitting Puckett's medical records into evidence.

Finally, Raap argues that the circuit court erroneously permitted Robert Miller to testify at trial. Raap points out that Miller testified as an expert in accident reconstruction for Taylor. In particular, Raap claims that Taylor failed to adequately disclose the grounds for Miller's opinions before trial:

> Taylor's liability argument turned on his claim that, immediately prior to the [a]ccident, Raap was not stopped at the edge of Shepherdsville Road, but was accelerating from the stop bar on Bashford Avenue, about 25 feet away. Taylor and Hazelwood's testimony to this effect was substantially impeached. However, Miller provided critical support for this claim by

> testifying that Raap was going between 10-14 MPH at the time of the [a]ccident, which could only have happened if Raap had been rapidly accelerating between the stop bar and the sidewalk. While Miller's 10-14 MPH estimate had been previously disclosed, Taylor never disclosed that, subsequent to producing his expert report and sitting for deposition, Miller had examined photographs, components parts, and a repair estimate for Raap's vehicle, and would substantially base his trial testimony on this evidence. Nor did Taylor disclose that Miller read the statements and deposition of various witnesses to the aftermath of the [a]ccident, and would reference this evidence at trial to bolster the accuracy of Taylor's account.

Raap's Brief at 19-20 (citations omitted). Raap thus alleges that the circuit court committed reversible error in this respect.

The legal requirement to disclose the facts and grounds underlying an expert's opinion is found in Kentucky Rules of Civil Procedure (CR) 26.02. It provides in relevant part:

> **(4) Trial preparation: experts.**
>
> Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph
>
> (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (a) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) After a party has identified an expert witness in accordance with paragraph (4)(a)(i) of this rule or otherwise, any other party may obtain further discovery of the expert witness by

> deposition upon oral examination or written questions pursuant to Rules 30 and 31. The court may order that the deposition be taken, subject to such restrictions as to scope and such provisions, pursuant to paragraph (4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

It is recognized that "[t]he purpose of the rule [CR 26.02] is to allow the opposing party to adequately prepare for the substance of the expert's trial testimony." *Pauly v. Chang*, 498 S.W.3d 394, 412 (Ky. 2015). We review the circuit court's decision as to "application of the Rules of Civil Procedure and admissibility of evidence . . . for an abuse of discretion." *Hashmi v. Kelly*, 379 S.W.3d 108, 111 (Ky. 2012).

Taylor filed the following expert disclosure pursuant to CR 26.02 concerning Miller:

> Based upon his education, training, and experience, and his inspection(s) and review(s) of the scene, vehicle and bicycle involved in the subject collision, Mr. Miller is expected to testify as to how the subject collision occurred, including, but not limited to, timing, the speed of both the car and bicycle, visibility, braking, and point of impact. [Taylor's] counsel intends to supplement a copy of the final report, data and animations prior to trial.

Taylor's CR 26 Expert Witness Disclosure at 2. Raap particularly alleges that the CR 26.02 disclosure failed to specifically identify the following grounds utilized by Miller in forming his expert opinion: (1) photographs of Raap's vehicle after the accident, (2) certain parts of Raap's vehicle, (3) a repair estimate for Raap's damaged vehicle, and (4) witnessess' statements and depositional testimony.

As to the first two items, Taylor's CR 26.02 disclosure that Miller would base his opinion upon inspection of the vehicle would logically include a review of photographs of Raap's vehicle and any parts thereof. On the other hand, the repair estimate of Raap's vehicle and witnessess' statements/depositional testimony were not within the CR 26.02 disclosure made by Taylor. Nonetheless, considering the whole of Miller's testimony at trial and the CR 26.02 disclosure filed by Taylor, we cannot conclude that any error by the circuit court in admission of items not listed in Taylor's disclosures resulted in an unfair trial or was prejudicial to Raap. *See Clephas v. Garlock, Inc.*, 168 S.W.3d 389 (Ky. App. 2004). To the extent any error occurred, it was harmless. CR 61.01.

CROSS-APPEAL NO. 2016-CA-000326-MR

Raap has filed a protective cross-appeal in this case. As we affirm the direct appeal, all issues raised in the cross-appeal are rendered moot.

For the foregoing reasons, the Judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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