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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000307-MR

JULIA CALL

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 13-CI-00602

RENT-A-CENTER; NICKOLAS MESSER;  
AND BEAU CALL

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, JOHNSON,<sup>1</sup> AND J. LAMBERT, JUDGES.

JOHNSON, JUDGE: Julia Call appeals the jury verdict and judgment from an automobile accident in which the jury assessed 100% apportionment of fault to her husband, Beau Call, and awarded her no damages. After reviewing the record in

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<sup>1</sup> Judge Robert G. Johnson authored this opinion prior to the expiration of his term of office. Release of this opinion was delayed by administrative handling.

conjunction with the applicable legal authorities, we affirm the judgment of the Boyd Circuit Court.

## **BACKGROUND**

This appeal arises from a judgment following a jury trial which involved an automobile accident that occurred on July 2, 2011. Julia alleged that she sustained significant injuries and medical expenses as a result of that accident. Nickolas Messer, one of the drivers, and Thomas Fields, a co-worker, were making a delivery for Rent-A-Center (“RAC”) using a RAC box truck. Beau Call was driving a Ford F-250 truck, with Julia as his passenger. The accident occurred as the vehicles were passing each other on Straight Creek Road, a narrow street in Boyd County. As the vehicles approached each other their side mirrors made contact. Julia alleged that the impact of the opposing side mirrors caused her vehicle’s side mirror, or parts of it, to fly across the driver’s side and strike her in the head, causing multiple injuries including a traumatic brain injury. The parties agree on very little concerning the accident, liability, or damages claimed by Julia.

The police were called to the scene and Sergeant Carl Hall, a Boyd County Sheriff’s Deputy, investigated the accident. In his collision report, he noted that Julia was not present at the scene when he arrived. He wrote that she had complained of injury caused by “fragments of the side mirror” and had already been transported to the hospital by a private vehicle.

Julia filed a complaint on July 1, 2013, alleging negligence by Messer in the operation of his vehicle. Because Messer was operating the box truck as RAC's employee, Julia also sued RAC. Julia claimed permanent injury and disability, pain and suffering, medical expenses, and future medical expenses, all allegedly due to the accident.

Initially, Beau was a third-party defendant brought into the case by RAC and Messer for apportionment of liability only. The court held a four-day trial. At the close of Julia's evidence, the court granted her motion to amend her complaint to assert claims against Beau. Upon completion of the trial, the court tendered instructions to the jury, including the option to award Julia up to \$89,746.26 in past medical expenses, \$1,394,736 in past pain and suffering, \$1,172,575 in future pain and suffering, \$176,000 in past wage loss, and \$665,000 in future wage loss. After deliberating, the jury returned the following verdict, as reflected in the trial court's Judgment:

1. Defendant, Nickolas Messer, did not fail to comply with the exercise of ordinary care with regard to the subject incident and is not liable to [Julia] for the claims presented in the instant action.
2. Third-Party Defendant, Beau Call, did fail to comply with the exercise of ordinary care with regard to the subject incident.
3. Apportionment of Fault: Nickolas Messer – 0% ;  
Beau Call – 100%
4. Damages: \$0 in all categories

Following the jury's verdict, Julia filed a motion seeking a new trial alleging the jury verdict was inconsistent with the evidence, and that the jury's decision to deny her any emergency room medical expenses and impose all fault upon Beau went against the evidence presented at trial. She further alleged the jury's verdict was a result of passion and prejudice against her and Beau. Julia moved for a new trial pursuant to Kentucky Rules of Civil Procedure ("CR") 59, arguing that the verdict was "materially inconsistent and incongruous," and "[the] jury was influenced by unreliable and scientifically inaccurate opinions, along with inadmissible exhibits and testimony from Dr. Porta." The trial court denied her motion.

This appeal followed.

### **ANALYSIS**

On appeal, Julia argues that the trial court erred in refusing to grant a new trial based upon her argument that the jury's verdict was illogical and inconsistent with the weight of the evidence; that the court erred in allowing RAC and Messer's expert witness, Dr. Porta, to testify to matters outside the scope of his expertise; and that the trial court erred in allowing Dr. Porta to present an allegedly undisclosed exhibit to the jury. The standard of review when examining a trial court's decision to grant a new trial is as follows:

The granting of a new trial is within the discretion of the trial court. When a trial court denies a motion for a new trial, our standard of review is whether there has been an abuse of that discretion. The test for abuse of

discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. We presume the trial court to be correct and will reverse only upon clear error.

*Kaminski v. Bremner*, 281 S.W.3d 298, 304 (Ky. App. 2009) (citations and quotation marks omitted).

Julia's first issue on appeal argues that the jury's verdict was incongruous and inconsistent with the evidence presented and could only be the result of passion and prejudice on the part of the jury. An analysis of the evidence presented at trial controverts those claims.

The parties disagree about what happened concerning the accident. Thomas Fields, Messer's passenger, testified at trial via video deposition that the RAC truck was going approximately ten to fifteen mph when the accident occurred. Fields stated that Beau's driver-side window was intact after the accident, slightly rolled down, and the driver was smoking. He further alleged that he witnessed Julia exit her vehicle, walk around the truck, but did not notice any visible signs of injury. Fields testified that both trucks' mirror housings were still intact and extended after the collision but that he did observe pieces of glass and plastic on the roadway. (To be clear, Fields was indicating that the only portion of Beau's side mirror that suffered clear damage in his view was the mirror itself contained within the casing.).

Messer, the driver of the RAC box truck, testified at trial that he was heading toward the four-way stop when he observed Beau's truck coming from the four-way stop. As the vehicles approached, both slowed down and he noticed the driver side window of Beau's truck was slightly rolled down. He testified that he was traveling between five to fifteen mph when the collision occurred. Messer stated that after the two mirrors hit, he and Beau pulled over to the side of the road, and exited their vehicles. At that point, Messer said he saw Beau's mirror lying on the ground near the middle of the road and stated that Beau then picked up the mirror and placed it in his truck. Messer then witnessed Julia exit the vehicle, walk around to the front of the vehicle, and return, getting back inside Beau's truck. He also testified that the casing and arm of Beau's mirror was intact and extended (aside from the mirror itself), and the side mirror of the RAC truck was not damaged.

At trial, Beau testified that upon approaching the RAC truck he pulled over into the grass on the right-hand side and stopped. Beau acknowledged being a smoker, but denied that he was smoking during or after the accident. He testified that his side mirror collapsed and that he believed the RAC truck was going at least forty-five mph. He denied that his mirror was lying in the middle of the road or that he picked up his side mirror from the middle of the road and placed it in his truck. Upon cross-examination, Beau admitted that he saw the RAC truck

approaching while he was stopped at the four-way-stop but that he continued on Straight Creek Road even though he could have waited there for the RAC truck to pass.

Sergeant Hall, who was called to the scene to investigate the accident, testified at trial that he had been involved in hundreds of accident investigations over the years. He referenced his report generated at the accident scene and stated that he had a vague recollection of the accident in question. Sergeant Hall testified:

Both of the drivers said that the—that the road was narrow in that location. . . . And he—and both of them just pretty much said, yeah, you know nobody was really on anybody else's side. It was just narrow, you know, met at the wrong place at the wrong time.

When asked if he would have documented it on his report if Beau had told him at the scene that the RAC truck was going 45 mph, as alleged by Beau, or that the RAC truck had crossed over into his lane of travel, he answered yes.

Each party presented expert witnesses at trial. Julia's expert, Dr. William Smock, testified how the impact could have resulted in the mirror's striking Julia's head. Conversely, Dr. David Porta, testifying on behalf of RAC and Messer, stated that in his opinion it would have been impossible for the mirror to move in the upward trajectory necessary for the mirror to strike Julia's head.

The parties presented starkly different testimony concerning the lead-up to the accident, the accident itself, the damage to the vehicles, the position of the mirror-casing (extended vs. folded), and whether it was physically possible due to the laws of gravity for the accident to result in the harm Julia claimed to have incurred.

The parties' proffered testimony **directly** contradicted each other's on nearly every aspect of this matter. These were all questions of fact for the jury to decide. Julia claims passion and prejudice on the part of the jury, based at least in part on her courtroom behavior, but points to no evidence indicating any specific juror negatively reacted to her so as to give rise to such a claim beyond the fact that she found their ultimate decision unconscionable. It is the role of the jury to consider the testimony of the parties and decide what effect the witnesses' interest may have on that testimony. *Com. Dep't of Highways v. Book*, 358 S.W.2d 506 (Ky. App. 1962). Assessing the credibility of fact witnesses and determining the weight to assign their testimony are the "unique province" of the jury. *McDaniel v. Commonwealth*, 415 S.W.3d 643, 654 (Ky. 2013). The jury's decision of 100% liability on the part of Beau and awarding no damages to Julia was supported by evidence in the record. Simply the fact that Julia is not happy with the jury's decision is not a basis to overturn its verdict. We hold that the trial judge's



decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Julia's second issue on appeal is her contention that the trial court permitted RAC's and Messer's expert witness, Dr. Porta, to testify outside the scope of his expertise.

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. [T]he decision as to the qualifications of an expert rests in the sound discretion of the trial court and [we] will not disturb such [a] ruling absent an abuse of discretion.

*Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 578 (Ky. 2000)

(citations and parentheses omitted). Further, as stated in the Kentucky Rules of Evidence ("KRE") 702:

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.

KRE 702. This issue was properly preserved by Julia when she filed a motion in limine prior to trial to exclude RAC's and Messer's expert, Dr. Porta. Julia

claimed that Dr. Porta lacked qualifications to testify as an expert on injury causation, and that he was not a qualified accident reconstructionist. RAC and Messer responded to this motion. In his thirty-page curriculum vitae, Dr. Porta established his credentials as an expert witness. Dr. Porta has consulted in over 600 legal matters relating to “trauma biomechanics, anatomical injury analysis, and injury reconstruction.” He has testified in court sixty-three times, holds numerous academic and professional appointments related to anatomy and injury biomechanics, holds numerous certifications and continuing education training such as “Crash Investigation I” from Northwestern University, has been given numerous honors and awards, holds numerous professional memberships, been published multiple times in the areas of human anatomy, injury, and fractures, written chapters in medical texts such as “Biomechanics of Impact Injury,” and given dozens of lectures on human anatomy. The trial court overruled Julia’s motion and permitted Dr. Porta to testify.

At trial, Dr. Porta testified about his work involving accident reenactments. His fifteen-page report on the accident included voluminous photos and his attempt to analyze the physical evidence of the accident against the testimony of the parties. In his report he stated his methodology as follows:

I have performed research in the area of trauma biomechanics and injury causation since 1990. . . . In performing this case analysis, I have relied upon my knowledge of vehicle dynamics and occupant kinematics

during collisions as well as my research experience in human anatomy, basic physics, and the biomechanics of traumatic injuries combined with my experience in forensic consulting on over 600 cases (mostly related to motor vehicle accidents) since 1992.

As a forensic science, Injury Reconstruction is based on the principles of Inductive Scientific Reasoning described in the late 1500's by Sir Francis Bacon. Seeking objective scientific facts and comparing these to previous observations allows one to draw useful generalizations and make predictions. . . . Briefly, one must a) define vehicle kinematics during the crash, b) define the injuries and the appropriate kinematics that typically result in said injuries, and c) determine if they are consistent with each other. Attention is then turned to the subject vehicle for potential evidence documenting injurious contacts.

. . . .

There are insufficient scientific facts to determine causation in this minor motor vehicle accident. But if the plaintiffs' testimony about the accident are considered factual, impact to Ms. Call's head and neck by the mirror insert is inconsistent with the basic laws of physics.

In light of the standard set forth in *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), as adopted by Kentucky in *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004), the trial court's decision to allow Dr. Porta to testify was neither arbitrary, unreasonable, unfair, nor unsupported by sound legal principles.

For her third issue on appeal, Julia claims that the trial court erred when it allowed Dr. Porta to bring a similar truck side-mirror to court to use as an

example in his testimony without disclosing that he would use the exhibit as part of his testimony. The same abuse of discretion standard of review described in *Goodyear* applies to this claim, as it is an evidentiary matter. *Goodyear*, 11 S.W.3d at 578. Julia’s claim of surprise is refuted by an examination of the deposition of Dr. Porta at page twelve, which states:

Q: Okay. When we go to trial in this case, what do you intend to—how do you intend to offer this mirror?

A: I don’t. I just wanted to have something to show you today. No. I would use the real mirror, and then I would get an exemplar of the real trailer style mirror.

Our court has previously ruled that if an expert witness fails to disclose with specificity his planned testimony, it necessitates the exclusion of the testimony. *Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 392-94 (Ky. App. 2004). In this case, Dr. Porta indicated in his deposition that he would use a replica of the side mirror in question for demonstration to the jury. Based on the expert witness’ deposition, Julia had notice that the expert witness planned to use such an exemplar of the real mirror in his testimony to the jury as an example. There was no error nor abuse of discretion by the trial court in permitting him to so testify.

### **CONCLUSION**

Based upon the foregoing, we affirm the Boyd Circuit Court’s judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sam Aguiar  
David Cowley  
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ORAL ARGUMENT FOR  
APPELLANT:

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BRIEF AND ORAL ARGUMENT  
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