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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000535-MR

PEGGY MUDD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 14-CI-002843

COMMUNITY CAPITAL CORP.
d/b/a COMMUNITY CAPITAL;
CROSSLAND PROPERTIES, LLC
d/b/a COMMUNITY CAPITAL; and
ALBIN USED CARS I, LLC
d/b/a COMMUNITY CAPITAL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Peggy Mudd appeals from the Jefferson Circuit Court's February 2, 2017, order granting partial summary judgment in favor of Community Capital Corp. d/b/a Community Capital; Crossland Properties, LLC d/b/a

Community Capital; and Albin Used Cars I, LLC d/b/a Community Capital ("Community Capital") precluding damages for Mudd's cognitive deficits—including mild traumatic brain injury (mTBI), arterious venous malformation (AVM), memory loss, and headaches—due to her failure to prove they were causally related to the fall at issue. She also appeals the March 1, 2017, judgment entered following a jury trial. Following a careful review, we affirm.

Mudd went to Community Capital's facility with her husband to make a payment on a car loan owed by their daughter. Mudd claims this was the first time she visited the facility. She entered the building without difficulty. Although she exited the building by the same door, Mudd missed the one and only step and fell onto the exterior sidewalk. Mudd sought medical treatment for her injuries at a nearby emergency room (ER). At the ER, she complained of injuries to her left hip and left knee but denied injury to her head or loss of consciousness.

Within weeks of the fall, Mudd complained to her primary care provider, Dr. Karen Langness, of memory loss, headaches, and dizziness. Dr. Langness did not treat, test, or diagnose Mudd's complaints relating to these cognitive deficits but referred Mudd to neurologist Dr. Madhuri Vallabhuni who conducted an MRI and discovered an AVM, which Mudd likely had for decades, if not from birth. The AVM was subsequently surgically removed by neurosurgeon Dr. Jonathan Hodes.

Mudd later sued Community Capital alleging she "fell from a hazardous surface that was maintained in such a negligent, reckless, willful and/or

grossly negligent manner so as to cause her to fall, causing serious personal injury." Discovery was conducted, and the matter set for trial. Mudd neither filed expert disclosures nor identified expert witnesses despite the trial court's pretrial compliance order requiring her to do so. Community Capital identified and disclosed expert witness Dr. Timothy Allen, who performed a two-day exam of Mudd and concluded she "possibly" developed mTBI from her fall.

Community Capital moved for summary judgment. Less than a week before trial, the trial court granted partial summary judgment in favor of Community Capital precluding Mudd from presenting evidence of damages for her cognitive deficits due to her failure to prove they were causally related to the fall. The next day, Mudd deposed Dr. Langness to elicit testimony causally connecting Mudd's cognitive deficits to the fall. Mudd relied on Dr. Langness' deposition in her motion to reconsider the grant of partial summary judgment. A hearing was held on the motion to reconsider the day before trial, but was denied just prior to commencement of trial.

Trial lasted three days. Mudd presented testimony regarding her diminished quality of life after the fall. Community Capital cross-examined Mudd's husband regarding causes of changes in Mudd's lifestyle, including questions regarding her cognitive deficits. Mudd argued those questions opened the door, allowing her to present testimony those conditions were caused by the fall. The trial court noted a door cannot be opened to otherwise incompetent and inadmissible evidence. As such, testimony regarding causation of Mudd's

cognitive deficits was excluded. The jury returned a verdict in favor of Community Capital and judgment on the verdict was entered March 1, 2017. This appeal follows.

Mudd advances three arguments in seeking reversal. Her first argument is the trial court erred in excluding her treating physician's testimony on grounds it had to be disclosed in the same manner as expert witnesses under CR[1] 26.02(4). Second, she argues the trial court erred in granting summary judgment on her cognitive deficit damages, asserting sufficient evidence of causation existed for jurors to decide the issue. Finally, Mudd argues it was error to prevent her from presenting evidence the fall caused her cognitive deficits after Community Capital's questions during trial "opened the door." We discern no error.

Mudd's first argument regards admissibility of her treating physician's testimony concerns evidentiary issues. Our standard of review is whether there was an abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994).

Mudd's argument is primarily a recitation of tortured legal theories with very little application to the facts of the case before us. The sole case cited, *Caldwell v. Chauvin*, 464 S.W.3d 139 (Ky. 2015), differs from this case both factually and in its legal application. *Caldwell* concerns denial of a writ seeking to

[1] Kentucky Rules of Civil Procedure.

prohibit informal *ex parte* interviews of plaintiff's medical treatment providers. Mudd lifted the choice phrase "treating physician[s] . . . are like any other fact witness in the eyes of the law" and uses it out of context to support her otherwise unsupported position. *Id*. at 158.

However, in the more relevant case of *Charash v. Johnson*, 43 S.W.3d 274 (Ky. App. 2000), the Court held:

> CR 26.02(4) provides that a party may, through interrogatories, require another party to identify the experts it expects to call at trial. The physicians did not list themselves as experts in response to [. . .] CR 26.02(4) interrogatories. Consequently, the circuit court limited the defendant physicians' testimony to the facts they had learned and the opinions they had formed based on first-hand knowledge and observation. [. . .]
>
> The United States Court of Appeals for the Sixth Circuit addressed the propriety of excluding a defendant's expert testimony in *Pedigo v. UNUM Life Insurance Co. of America*[, 145 F.3d 804 (6th Cir. 1998).] Pedigo, a physician and medical examiner, sought disability insurance benefits after the police shot him following an altercation. Pedigo argued his injuries were accidental. The district court prevented Pedigo from offering his expert opinion regarding the bullet wounds because Pedigo did not identify himself as an expert. The Sixth Circuit determined that the district court properly excluded Pedigo's expert testimony "because the witness would not be testifying from first-hand knowledge but, like other experts, only from information observed, gathered, and preserved by others." Similarly, the circuit court in this case properly excluded the physicians' opinion evidence gleaned from information acquired well after Johnson died as they "would not be testifying from first-hand knowledge."
>
> According to CR 26.02(4), a party must disclose, if asked through interrogatories, the identity of "each person

> whom the . . . party expects to call as an expert witness at trial. . . .” The physicians are “person[s]” within the meaning of CR 26.02(4) and are thus subject to the rule’s disclosure requirement when testifying about events beyond those they personally observed. Because the physicians did not list themselves as experts, the circuit court did not err in excluding portions of the physicians’ expert testimony.

Id. at 280-81 (internal footnotes omitted).

Here, Mudd argues it was error for the trial court to exclude the testimony of her treating physician, Dr. Langness. However, Dr. Langness did not treat, test, or diagnose Mudd’s cognitive deficits; she referred Mudd to neurologist Dr. Vallabhuni and testified she would defer to Mudd’s treating specialists’ findings and opinions.[2] The trial court held physicians’ opinions on matters outside their personal observations, medical records, and treatment must be disclosed under CR 26.02(4). Therefore, for the reasons set forth in *Charash*, it was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles for the trial court to exclude Dr. Langness’ testimony regarding the causation of Mudd’s cognitive deficits as undisclosed expert testimony. As such, we hold the trial court did not abuse its discretion in excluding this testimony.

Mudd’s second argument alleges the trial court committed reversible error in granting partial summary judgment on her claim for damages relating to her cognitive deficits. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file,

[2] No specialist, including Dr. Vallabhuni, Dr. Hodes, or Dr. Allen, causally linked Mudd’s cognitive deficits to the fall.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in finding no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698 (Ky. App. 2000)).

The only evidence Mudd proffers in support of her claim she had sufficient evidence to present to a jury she suffered cognitive deficits because of her fall is from Dr. Langness. However, Dr. Langness' opinions regarding causation are not contained in Mudd's medical records but rather come from Dr. Langness' deposition taken the day after entry of the motion for summary judgment. As previously discussed, those opinions had to be disclosed under CR 26.02(4). Furthermore, because Dr. Langness was not deposed until after partial summary judgment was granted, her testimony was not before the trial court for consideration in ruling on the motion for summary judgment. Mudd had ample opportunity to make Dr. Langness' deposition available prior to the court's ruling. Therefore, it was improper to introduce it in a motion to reconsider.

Additionally, as discussed in *Charash*, Dr. Langness' testimony was properly limited to her treatment and observations. Dr. Langness did not treat

Mudd for the cognitive deficits but referred her to another provider. In her deposition, Dr. Langness testified she would defer to specialists concerning Mudd's cognitive deficits, including their causation. Even so, when questioned about the possibility Mudd suffered mTBI because of the fall Dr. Langness responded, "That is one possibility."

> Kentucky law concerning proof of causation is well-established.
>
> There may, of course, be situations in which causation is so apparent that laymen with a general knowledge would have no difficulty in recognizing it. [. . .] But excepting those situations we have adhered to the rule that the causal connection between an accident and an injury must be shown by medical testimony and the testimony must be that the causation is probable and not merely possible.

Jarboe v. Harting, 397 S.W.2d 775, 778 (Ky. 1965) (internal citations omitted). The trial court correctly found, given the nature of Mudd's claimed injuries, expert medical testimony was required to establish causation between her cognitive deficits and her fall. Mudd offered too little evidence too late. No physician or medical expert concluded within the standard of medical probability the fall caused Mudd's cognitive deficits; therefore, Mudd failed to meet her burden of proof on the causation element and those claims failed as a matter of law. The trial court did not err in granting partial summary judgment on those claims.

Mudd's final argument—again an evidentiary issue—concerns admissibility of evidence her cognitive deficits were caused by the fall after Community Capital "opened the door" by questioning her limitations relative to

her cognitive deficits. During cross-examination of Mudd's husband, William, Community Capital asked about Mudd's other injuries, specifically her cognitive deficits, which affected her ability and frequency to perform and enjoy her previously normal activities of daily life. Community Capital acknowledged they referenced Mudd's cognitive deficits intentionally to undermine her pain and suffering claim because until William's cross-examination the jury was under the false impression Mudd's limitations were caused by her knee and hip injuries. Mudd argued Community Capital was "free to correct the story for the jury as to what was really the primary cause of [Mudd's] pain and suffering, but in so doing, they opened the door to the brain injury claims."

Again, Mudd only cites one distinguishable case in support of her argument, *Hamilton Mut. Ins. Co. of Cincinnati v. Buttery*, 220 S.W.3d 287, 296 (Ky. App. 2007), for the proposition an opposing party is entitled to comment on evidence generally inadmissible against a litigant, if the litigant "opens the door" by first presenting the inadmissible evidence. Here, the trial court stated:

> [b]y opening the door to something, the door still has to open to otherwise relevant and admissible evidence. And, in this case, the Court has ruled that there is no sufficient admissible evidence that Mrs. Mudd's neurological issues are related to the fall. And I prohibited testimony that the fall caused these, because of that. Now, if this were a circumstance was [sic] there was that kind of causation evidence, but I had excluded it because it wasn't timely or for some reason other than it was not relevant, then we've got an argument. "Okay, Judge, this otherwise admissible evidence and relevant evidence which you have excluded they have now opened the door to." And if that's the case, then I would

> say, "Yes, you have. Put it on." But in this case, what you're asking to put on is evidence that I have excluded because it doesn't meet the causation.

We have previously discussed the reasons the trial court did not err in excluding the testimony of Dr. Langness on causation as neither properly disclosed nor competent. Mudd's unsupported argument that Community Capital's cross-examination of William regarding the reasons for Mudd's sedentary lifestyle "opened the door" to allow Mudd to introduce inadmissible testimony attempting to causally link Mudd's cognitive deficits to the fall defies logic and the rules of evidence. For these reasons, we hold it was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles for the trial court to exclude testimony regarding the causation of Mudd's cognitive deficits. There was no abuse of discretion.

For the foregoing reasons, the orders of the Jefferson Circuit Court are AFFIRMED.

ALL CONCUR.

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