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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-001800-MR

JOHN AMSHOFF — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 16-CI-00095

NEVEL MEADE GOLF COURSE, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND GOODWINE, JUDGES.

CLAYTON, CHIEF JUDGE: John Amshoff appeals from a final judgment entered by the Oldham Circuit Court after a jury rendered a verdict in favor of Nevel Meade Golf Course, Inc., in a premises liability case. Amshoff, who was injured when he slipped on a footbridge at the golf course, argues that the trial court abused its discretion in refusing to exclude the testimony of a defense

expert on golf course practices and in not striking a juror for cause. Having reviewed the record and applicable law, we affirm.

Amshoff's injury occurred while he was participating in a charity golf scramble at Nevel Meade. The course conditions were wet that day as it had been raining the night before and intermittently throughout the morning. At the seventeenth hole, Amshoff had to walk across a wooden footbridge to retrieve his ball. Golfers are not permitted to ride carts across the bridge, which spans a creek bed and connects the cart path to the fairway. The bridge is approximately seven feet wide. A rubber anti-slip mat about three feet in width runs down the center of the entire length of the bridge. The mat does not, however, extend all the way to the edges of the bridge. This gap on the either side allows maintenance vehicles to cross the bridge without damaging the matting. Amshoff walked down the middle of the footbridge and just before reaching the end, cut across the corner and stepped off the matting and onto the wooden portion of the bridge. He slipped and fell, breaking his wrist. He required surgery and months of physical therapy to recover from the injury.

Amshoff filed a complaint in Oldham Circuit Court alleging Nevel Meade was negligent in failing to maintain the wooden footbridge and knew or had reason to know that an unreasonably dangerous condition existed on the walking surface of the bridge yet failed to warn of or remedy the condition,

including the lack of an anti-slip surface covering the entirety of the walking surface and the lack of handrails.

The jury returned a verdict of eleven to one in favor of Nevel Meade and the trial court entered a final judgment reflecting the verdict. This appeal by Amshoff followed.

Amshoff argues that the trial court abused its discretion in denying his motion *in limine* and overruling his trial objections to the testimony of defense expert witness Louis Miller. Miller was designated to testify regarding the design of the wooden footbridge on which Amshoff fell. Amshoff argued that he had not alleged any defects in the design of the bridge but rather was alleging the placement of the rubber matting on the bridge made it unreasonably dangerous. The trial court denied the motion because Amshoff had put the lack of handrails at issue as a design flaw in the footbridge.

The admissibility of expert testimony in Kentucky is governed by Kentucky Rules of Evidence (KRE) 702 and the principles set forth in in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *See Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995), *overruled on other grounds by Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999).

"When faced with a proffer of expert testimony under KRE 702, the trial judge's task is to determine 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." *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002) (internal citations and quotations marks omitted). "This calls upon the trial court to assess whether the proffered testimony is both relevant and reliable." *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 100 (Ky. 2008), *as modified on grant of rehearing* (Nov. 26, 2008).

"Overall, the function of the *Daubert* rule and the gatekeeping power it bestows upon trial courts is limited to the exclusion of unreliable or 'pseudoscientific' testimony which, among other things, cannot legitimately be challenged in a courtroom." *Epperson v. Commonwealth*, 437 S.W.3d 157, 165 (Ky. App. 2014).

We review a trial court's ruling on the admissibility of expert testimony for an abuse of discretion. The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Id*. at 163-64.

Nevel Meade's expert witness disclosure described Louis Miller of Golf Development Construction, Inc., as a Certified Builder sanctioned by the Golf Course Builders Association of America. Miller, who has a degree in

agronomy with a major in turfgrass from Penn State University, was described as possessing over forty years of experience in golf course design, construction and maintenance, including his experience with golf course cart and/or foot bridge construction/reconstruction at courses such as Valhalla Golf Club, Louisville Country Club, and Quail Chase Golf Course. His company was involved in the construction of numerous golf courses in Kentucky and was awarded a perfect score as top builder in the country in 2000. He served as the Golf Course Superintendent at the Louisville Country Club for thirty-three years, and twice past president of the Kentuckiana Golf Course Superintendents Association. Miller was expected to testify that there are no particular rules or standards in the golf course industry that require the inclusion of handrails or rubber matting as features in the construction of golf course bridges or cart bridges. He was further expected to testify that the physical features of the footbridge at issue were within recognized and accepted customs and practice for the construction of golf course bridges.

In his motion *in limine*, Amshoff argued that Miller's testimony would not assist the jury in resolving the primary factual issue at trial, which was whether Nevel Meade failed to use ordinary care in its maintenance of the wooden footbridge and failed to warn of a hazardous condition. He argued that resolving this issue did not require the application of a "standard of care" or any

scientific or specialized knowledge about customs and practices generally in the golf course industry. He contended that Miller's testimony would offer nothing that was not already within the common knowledge and experience of the jury and that Miller possessed no expertise in the area of golf course safety. Our review of this issue is limited because Amshoff has provided no reference to the record to show where his trial objections to Miller's testimony occurred as required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) nor does he describe the content of the testimony to which he objected.

Amshoff argues that Miller's testimony did not meet the *Daubert* standard because it was not based on scientific knowledge, principles or methodology. For example, when Miller was asked in his deposition and at trial whether he was offering any technical or scientific bases for his opinion, he replied, "No. Just common sense." But Miller's "common sense" was not the same as that of the average juror. Matters relating to golf course features are not within the common sense or everyday knowledge of most people. Miller's broad experience in the construction and maintenance of golf courses meant his testimony could be useful to jurors who were not familiar with industry customs relating to golf course bridges. Indeed, many members of the jury might not be familiar with the game of golf itself.

In *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000), the Kentucky Supreme Court adopted the principles of *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L.Ed.2d 238 (1999), in which the United States Supreme Court expanded a trial court's gatekeeping role to encompass not only scientific knowledge and testimony, but also "technical" and "other specialized" knowledge. *Epperson*, 437 S.W.3d at 164. Under the specific terms of KRE 702 itself, an expert witness need not provide solely "scientific" testimony but may qualify as an expert based on "knowledge, skill, experience, training or education[.]" Miller's qualifications fall squarely within this area of expertise.

Amshoff has failed to show that the trial court's admission of Miller as an expert witness was an abuse of discretion.

Next, Amshoff argues that the trial court abused its discretion in denying his motion to strike for cause prospective Juror 408, who during *voir dire* revealed she had recently worked as a paralegal at the law firm representing Nevel Meade. Amshoff provides no reference to the record to indicate when the motion to strike was made or its contents. A specific citation to the record showing when and how an issue was preserved for appeal is required under CR 76.12(4)(c)(v).

The record does contain the jury strike sheet on which Amshoff's counsel wrote the name of the juror he would have stricken had he not struck Juror 408. Although the sheet is sufficient to show a peremptory strike was used to remove Juror 408, we are not obligated to scour to the record to discover what arguments or objections Amshoff made before the trial court. *See Dennis v. Fulkerson*, 343 S.W.3d 633, 637 (Ky. App. 2011). We will review Amshoff's arguments to the extent we have been provided references to the video recording of the trial court's questioning of Juror 408.

> Generally speaking, the trial court enjoys broad discretion in deciding whether a juror should be stricken for cause. The central inquiry is whether a prospective juror can conform his or her views to the requirements of the law, and render a fair and impartial verdict based solely on the evidence[.] We will reverse only upon a showing that the trial court abused its discretion.

*Grubb v. Norton Hospitals, Inc.*, 401 S.W.3d 483, 485 (Ky. 2013), *as modified* (May 29, 2013) (internal citations and quotation marks omitted).

During *voir dire*, Juror 408 disclosed that she was previously employed as a paralegal by Krauser & Brown, the firm representing Nevel Meade. She estimated that she worked there for approximately one and one-half years, two years before. She worked directly for Brown, one of four attorneys at the firm, and only knew Krauser, who was present as defense counsel at the trial, on a "very superficial level." She explained that Krauser's office was at the other

end of the building and she "may have seen him a few times." In reply to the trial court's inquiry about the nature of her relationship with Krauser & Brown, she stated that she personally felt she could be impartial. She also replied in the negative when the trial court asked if she had close friends working at the firm and whether she had any knowledge about the present lawsuit.

Amshoff argues that Juror 408's responses did not adequately show an absence of potential bias. He contends that she possessed intimate knowledge of Krauser & Brown's internal practices, procedures and strategies which she would share with other members of the jury. As an example, he contends that Juror 408 could have revealed during the jury's deliberations that Krauser & Brown only tries cases that are a "slam dunk." Amshoff admits that the record is devoid of any evidence to support this hypothesis, but nonetheless argues that it is an illustration of Juror 408's potential implicit bias.

Amshoff's arguments are purely speculative and thus fall squarely within a scenario addressed by the Kentucky Supreme Court in *Grubb v. Norton Hospitals, Inc., supra*. In that case, the appellant, suing for medical malpractice, argued that a juror who was an attorney and had previously performed some legal work for the defendant hospital should have been stricken for cause. The Supreme Court disagreed because there was simply insufficient evidence regarding the nature of the juror's professional relationship with the hospital to

presume bias. The Court observed that the record was devoid of any additional evidence beyond the prior attorney-client relationship that would create a substantial doubt regarding the juror's ability to render a fair and impartial verdict. *Grubb*, 401 S.W.3d at 486–87 (Ky. 2013).

Similarly, Amshoff has not shown he made any effort to explore Juror 408's views on the defense firm's litigation strategies, and whether she would share these views, if any, with the other members of the jury. He "had ample opportunity to further explore this juror's possible bias or other unfitness to serve as a juror. His failure to do so is necessarily a waiver because the juror's bias, if any, could have reasonably been determined in voir dire." *Caraway v. Commonwealth of Kentucky*, 459 S.W.3d 849, 852 (Ky. 2015).

"It is elementary that the determination of whether to excuse a prospective juror rests within the sound discretion of the trial judge and ought not to be set aside by a reviewing court unless the error is manifest." *Gibson v. Kentucky Farm Bureau Mut. Ins. Co*., 328 S.W.3d 195, 200 (Ky. App. 2010), *as modified* (Dec. 3, 2010) (quoting *Peters v. Commonwealth*, 505 S.W.2d 764, 765 (Ky. 1974)). No such manifest error has been shown and consequently the trial court did not abuse its discretion in not striking Juror 408 for cause.

For the foregoing reasons, the final judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Tad Thomas
Lindsy Lopez
Louisville, Kentucky

BRIEF FOR APPELLEE:

J. Michael Wells
Louisville, Kentucky