

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000242-MR

TANYA ROLOFF

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 16-CI-90101

WILLIAM E. SIMPSON

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Tanya Roloff appeals from a judgment of the Rowan Circuit Court entered following a jury verdict in favor of William E. Simpson. She argues that the trial court erred when it excluded from evidence the testimony of her treating chiropractor, Dr. Ryan Hanson, as well as her medical records from Hanson Chiropractic.

On July 27, 2014, Tanya was a passenger in a vehicle travelling on Kentucky Route 32 in Rowan County. At the same time, Simpson was operating a vehicle in the opposite direction on Kentucky Route 32. He attempted to make a left-hand turn across the eastbound lanes of Kentucky Route 32 without yielding for oncoming traffic and crashed into the vehicle in which Tanya was a passenger. Prior to trial, Simpson stipulated to liability so that it is not an issue on appeal.

After the accident, the occupants got out of their vehicles. Police and ambulance personnel came to the scene but neither Tanya nor Simpson required treatment. Two days after the accident, Tanya returned home to Oklahoma, where she sought treatment with Dr. Randall Dean Estep with McBride Clinic in Oklahoma City on July 30, 2014. She began treatment with Dr. Hanson, also in Oklahoma, on August 25, 2014.

Tanya filed a complaint alleging negligence against Simpson on May 10, 2016. Discovery commenced, and the depositions of Dr. Estep and Dr. Hanson were taken. Because both doctors were in Oklahoma, the parties went to Oklahoma for the purpose of taking their respective depositions for use at trial.

Dr. Estep testified that on July 30, 2014, Tanya came to the McBride Clinic where he worked in occupational medicine. He did not see Tanya but was the doctor who signed off on her visits to the clinic.

On her initial visit, Tanya complained of soreness in her neck, shoulder, and low back, which Dr. Estep attributed to strains to Tanya's cervical, lumbar, and thoracic area of her back. Dr. Estep testified that those strains were attributed to the accident, and the pain Tanya described at her first two visits to the McBride Clinic was more likely than not caused by the accident on July 27, 2014.

Although x-rays revealed some degenerative changes, he did not attribute those to the accident. Dr. Estep was asked: "And so there wasn't anything, a specific type of injury, that you saw that would be related to the accident a few days earlier?" He responded: "No."

Dr. Estep released Tanya to return to work on July 30, 2014. The last time Tanya was seen at the McBride Clinic was on August 22, 2014, at which time Tanya indicated she was going to see a chiropractor. He testified that at that point she was released and in his opinion, did not require further medical treatment.

The subject of this appeal is the exclusion of Dr. Hanson's testimony and Tanya's medical records. Simpson filed a motion *in limine* to exclude Dr. Hanson's testimony because Dr. Hanson did not identify an injury sustained by Tanya and did not testify that he was treating Tanya for an injury that was a result of her motor vehicle accident with Simpson. Tanya argued that Dr. Estep's testimony combined with the following excerpts from Dr. Hanson's testimony were sufficient to establish he treated Tanya for an injury caused by the accident.

Q. Okay. And did she relate to you how she was doing before the wreck?

A. I mean, I don't recall then, but I have asked her more recently, and she said she didn't have any problems.

Q. Okay. Did she talk to you about any significant chiropractic or other kinds of treatment before the wreck happened?

A. No.

Later, Dr. Hanson was asked about Tanya's condition before and after the accident.

Q. I guess that's just to keep her dialed in to the optimum health and try to get her back to where she was before the wreck? Is that a yes?

A. Yes. Sorry. Sorry.

Simpson also quoted Dr. Hanson's testimony noting that Dr. Hanson only testified that he was treating a "condition" based on a "thermal scan" machine and an x-ray. Importantly, Dr. Hanson testified that Tanya's condition could be natural, or it could be from the motor vehicle accident. Specifically, he testified that his findings "would not necessarily indicate an impact or damage on the right or left. We've seen it happen both ways." When asked if Tanya's condition is related to the accident, Dr. Hanson responded that he did not have any x-rays taken prior to the accident to compare with those taken after the accident.

The trial court granted the motion *in limine* ruling that Dr. Hanson's testimony did not provide the required causal connection between the accident,

injury, and treatment he provided. With the trial court having excluded Dr. Hanson's testimony, at trial Tanya sought to introduce authenticated medical records of Dr. Hanson through her testimony. The trial court permitted the introduction of the intake forms completed in Tanya's handwriting, but did not permit treatment notes, bills, diagnostic imaging, or any other parts of the certified records to be shown to the jury.

After being instructed by the trial court and closing arguments by counsel, the jury retired to deliberate. After forty-two minutes, the jury submitted the following question: "Does the plaintiff have any medical statements (medical info) from the chiropractor?" The trial court instructed the jury that they were only allowed to consider the evidence in the record and sent the jury back to deliberate. The jury unanimously found that Tanya had not incurred more than \$1,000 in reasonable and necessary medical expenses for treatment from the accident.¹ Consistent with the jury verdict, the trial court issued a final judgment in Simpson's favor.

Tanya filed a motion for judgment notwithstanding the verdict and for a new trial. Those motions were denied, and this appeal followed.

¹ Kentucky Revised Statutes (KRS) 304.39-060(2)(b) allows a plaintiff to recover damages caused by a motor vehicle accident "in the event that the benefits which are payable for such injury as 'medical expense' or which would be payable but for any exclusion or deductible authorized by this subtitle exceed one thousand dollars (\$1,000)[.]"

The errors alleged by Tanya present evidentiary issues. The abuse of discretion is the proper standard of review of a trial court's evidentiary rulings. *Goodyear Tire & 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 (citation omitted). Applying this standard, the trial court did not abuse its discretion in excluding Dr. Hanson's testimony.

To authorize damages for personal injuries there must be evidence to show not only that the defendant was guilty of some negligence but that such negligence was the proximate cause of the injury. *Myers v. Salyer*, 277 Ky. 696, 127 S.W.2d 158, 160 (1939). Except where "causation is so apparent that laymen with a general knowledge would have no difficulty in recognizing it[,] . . . 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) (citations omitted). "It is the quality and substance of a physician's testimony, not the use of particular 'magic words,' that determines whether it rises to the level of reasonable medical probability, i.e., to the level necessary to prove a particular medical fact." *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004) (citation omitted). While no magic words are required, to be admissible, a

physician's testimony must be based on more than speculation and conjecture. "[I]f a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision." *Combs v. Stortz*, 276 S.W.3d 282, 296 (Ky.App. 2009) (citation omitted).

It was not readily apparent that the treatment provided by Dr. Hanson was the result of any injury caused by the accident. To the contrary, Dr. Estep testified that the strains caused by the accident had been resolved when Tanya was released from the care of the McBride Clinic and that the degenerative changes on the x-rays were not caused by the accident. Dr. Hanson only testified that Tanya's condition as seen on the x-rays could be natural *or* from the accident. His testimony was insufficient to connect her condition and, therefore, his treatment to the accident.

Tanya argues that even if Dr. Hanson's testimony was properly excluded, the trial court improperly ruled that she could not introduce the medical records from Hanson chiropractic. She argues at length that the out-of-state medical records were properly authenticated pursuant to Kentucky Rules of Evidence (KRE) 902(11) (self-authentication of business records certified by the custodian). That argument misses the point of the trial court's ruling.

The problem with admissibility was not the authentication of the records. The reason the records were not admissible was because neither Dr.

Hanson nor any other physician related Dr. Hanson's treatment to any injury caused by the accident. Absent such relationship, the records were irrelevant and inadmissible.

For the reasons stated, the judgment of the Rowan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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