[Cite as *Kelm v. Conkel*, 2017-Ohio-8545.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Russell A. Kelm,	:	
Plaintiff-Appellant,	:	No. 16AP-494 (M.C. No. 2015 CVE 015171)
v.	:	(REGULAR CALENDAR)
Rene Conkel,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on November 2, 2017

On brief: *Law Offices of Russell A. Kelm*, *Russell A. Kelm*, and *Colleen M. Koehler*, for appellant. **Argued:** *Russell A. Kelm*.

On brief: *Hollern & Associates*, and *Edwin J. Hollern*, for appellee. **Argued:** *Edwin J. Hollern*.

APPEAL from the Franklin County Municipal Court

BROWN, J.

{¶ 1} Russell A. Kelm, plaintiff-appellant, appeals from the judgment of the Franklin County Municipal Court, in which the court entered a final judgment, pursuant to a jury verdict, in favor of appellant and against Rene Conkel, defendant-appellee.

{¶ 2} On November 16, 2014, appellant and appellee were involved in a motor vehicle accident. Appellee's insurer, Allstate Insurance Company ("Allstate"), made payment to appellant for, at least some of, his car repairs. The vehicle was in the repair shop for approximately four months.

{¶ 3} On May 8, 2015, appellant filed an action against appellee for damages to his vehicle. Appellant claimed damages for replacement of a damaged tire and wheel,

supplemental body shop repairs, a dent in the door, battery replacement, cost of a replacement rental car, lost use of the vehicle, diminution in value of the vehicle for being in an accident, and interest on the unpaid damages.

{¶ 4} On October 5, 2015, appellant filed a motion for summary judgment as to both liability and damages. Appellee filed a memorandum contra motion for summary judgment, to which was attached the affidavit of James Petrucz, the diminution in value coordinator for Allstate.

{¶ 5} On October 22, 2015, appellant filed a motion in limine to exclude the affidavit testimony of Petrucz, as well as his testimony at trial. On December 1, 2015, the trial court denied appellant's motion in limine, granted appellant's motion for summary judgment as to liability, and denied appellant's motion for summary judgment as to damages. The trial court indicated that the order did not constitute a final appealable order pursuant to Civ.R. 54(A).

{¶ 6} Commencing on June 21, 2016, the matter was tried before a jury on the issue of damages. Appellant sought a total of $11,939.75 in damages, while appellee asked for the jury to award appellant $1,153.06, based on the supplemental parts list, average car rental cost for 24 days, and filing fee. The jury returned a verdict in favor of appellant for $1,153.06. On June 27, 2016, the trial court issued a judgment, journalizing the jury's verdict. Appellant appeals the judgment of the trial court, asserting the following three assignments of error:

> I. THE TRIAL COURT ERRED IN PERMITTING AN ALLSTATE INSURANCE ADJUSTOR TO TESTIFY AS AN EXPERT WITNESS IN A DAMAGES ONLY AUTO ACCIDENT TRIAL.
>
> II. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION IN LIMINE AND MOTION FOR SUMMARY JUDGMENT.
>
> III. AN INSURANCE ADJUSTOR TESTIFYING AT TRIAL IS NOT IMMUNE FROM QUESTIONS DIRECTED AT HIS BIAS.

{¶ 7} We will address appellant's third assignment of error first, as it is dispositive of this appeal. In his third assignment of error, appellant argues the trial court erred when it prohibited him from asking Petrucz questions directed at his bias based on his

employment with Allstate. Evid.R. 403(A) provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." " '[T]he trial court is vested with broad discretion and an appellate court should not interfere absent a clear abuse of that discretion.' " *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 40, quoting *State v. Allen*, 73 Ohio St.3d 626, 633 (1995). An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). An appellate court may not substitute its judgment for that of the trial court when applying the abuse of discretion standard. *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990).

{¶ 8} Evid.R. 611(B) permits cross-examination on all matters that are relevant and that affect credibility. Further, "[b]ias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence." Evid.R. 616(A). "Thus, Evid.R. 611 and 616, by specifically mentioning credibility, bias, and prejudice as appropriate subjects of cross-examination, are a testament to the inherent probative value of such evidence. Evid.R. 403 seeks to eliminate the potential for prejudice of certain evidence by prohibiting its use in certain circumstances." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 171 (2001).

{¶ 9} In reaching a decision involving admissibility under Evid.R. 403(A), a trial court must engage in a balancing test to ascertain whether the probative value of the offered evidence outweighs its prejudicial effect. *State v. Hymore*, 9 Ohio St.2d 122 (1967), paragraph seven of the syllabus. In order for the evidence to be deemed inadmissible, its probative value must be minimal and its prejudicial effect great. *State v. Morales*, 32 Ohio St.3d 252, 258 (1987). Furthermore, relevant evidence which is challenged as having probative value that is substantially outweighed by its prejudicial effects "should be viewed in a light most favorable to the proponent of the evidence, maximizing its probative value and minimizing any prejudicial effect" to the party opposing its admission. *State v. Maurer*, 15 Ohio St.3d 239, 265 (1984).

{¶ 10} Although evidence may be damaging or harmful to the defendant, that does not necessarily mean that the evidence is prejudicial under the rules of evidence. Only when the evidence induces the jury to decide the case on an improper basis, i.e., an

emotional one, does the defendant suffer material prejudice. *State v. Bernatowicz*, 62 Ohio App.3d 132, 138 (6th Dist.1989). Thus:

> "Exclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the word 'unfair.' Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect."

Oberlin at 172, quoting Weissenberger, *Ohio Evidence*, Section 403.3, at 85-87 (2000).

{¶ 11} In the present case, appellant attempted to question Petrucz as to his bias in the case based on his employment with Allstate. Appellant asked Petrucz directly whether he was biased and whether there was any advantage to him in maximizing the diminution of value number in his testimony. The trial court sustained the objections of appellee's counsel to appellant's inquiries. Appellant argues that because Petrucz was an employee of Allstate, which had a direct interest in the outcome of the case, the jury had a right to know this relationship and Allstate cannot hide behind the protection of insurance disclosure by calling its own employee to testify as an expert.

{¶ 12} Appellant relies largely on two decisions: the Supreme Court of Ohio's decision in *Ede v. Atrium S. OB-GYN*, 71 Ohio St.3d 124, 129 (1994); and *Edwards v. Louy*, 6th Dist. No. L-01-1367, 2002-Ohio-3818. In *Ede*, the estate of a patient who died during surgery filed a medical negligence action against the doctor who performed the surgery. Prior to trial, the doctor filed a motion in limine to exclude any reference to the existence of insurance coverage. The estate countered that the doctor and his expert were members of the same mutual insurance company and because each insured in a mutual insurance company is both part owner and part insurer, the expert had a direct, personal pecuniary interest and bias in the outcome of the case. The trial court granted the motion in limine, and, at trial, sustained the doctor's objection to the estate's preliminary questions in this regard.

{¶ 13} On appeal, the court of appeals affirmed. On further appeal to the Supreme Court, the court reversed. The court found that Evid.R. 411 does not require the exclusion of evidence of insurance in a personal injury action when offered for another purpose, such as proof of witness bias or prejudice. The court further held the trial court failed to properly consider Evid.R. 403. The court explained that the trial court did not appreciate the probative value of establishing that the defendant doctor and the expert were both insured by the same mutual insurance company. The trial court focused its inquiry on only one thing—whether a doctor's premiums could be raised by the mutual insurance company if the doctor refused to testify on behalf of another doctor insured by the same insurance company. The trial court failed to consider the expert's possible personal bias resulting from his insurance relationship, such as the prospect that the expert's own premiums might fluctuate due to the result of the case. The trial court also grossly overestimated to what extent testimony that the doctor was insured would prejudice the jury. The court noted that the second sentence of Evid.R. 411 exists for a reason—it recognizes that testimony regarding insurance is not always prejudicial. The court explained that, too often courts have a Pavlovian response to insurance testimony—immediately assuming prejudice. The court thought it was naive to believe that today's jurors, bombarded for years with information about healthcare insurance, do not already assume in a medical negligence case that the defendant doctor is covered by insurance. The court explained that the legal charade protecting juries from information they already know keeps hidden from them relevant information that could assist them in making their determinations. The court then found the following:

> Therefore, we hold that in a medical malpractice action, evidence of a commonality of insurance interests between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause. Thus, in the present case, the trial court acted unreasonably in excluding evidence regarding the commonality of insurance interests of [the defendant-doctor] and [the expert doctor]. The judgment of the court of appeals is reversed and the cause is remanded to the trial court for a new trial.

Ede at 128.

{¶ 14} In *Edwards*, the plaintiff was injured in car accident with the defendant. The defendant admitted liability, and the case was tried on damages. The jury awarded the plaintiff various damages. On appeal, the defendant argued, in pertinent part, that the trial court erred when it allowed the plaintiff to elicit testimony from the defendant's expert that the defendant's insurance company hired the expert before suit was filed to review the plaintiff's medical records. The court of appeals found that it is proper, under Evid.R. 411, to allow a party to impeach a defense witness by asking the witness to disclose the fact he worked for the insurance company that insured the defendant. The court found there was a mistaken notion that if anyone during the course of a trial mentions the word "insurance," an insured defendant is entitled to a mistrial. The court found this is not and has never been the rule.

{¶ 15} In the current case, Allstate acknowledges the holding in *Ede* but claims that it is limited to medical negligence actions, and that case does not hold that an insurance adjuster is biased because he works for the same insurance company that insures the at-fault party. Allstate claims there is no probative value in telling the jury that the adjuster works for the defendant's insurer. Allstate asserts it makes no difference that the witness is employed by the insurer for the defendant because the jury probably assumes that the witness is employed by the defendant's insurer, and it is not proper "to beat the witness up" on the connection without some other evidence of bias. Allstate seems to concede that if a party can lay a proper foundation—such as a direct pecuniary interest—to establish purported bias of an insurance adjuster because the adjuster is employed by the defendant's insurance company, the party should be allowed to cross-examine the adjuster as to such bias.

{¶ 16} We find the trial court erred here when it prohibited appellant from questioning appellee's expert insurance adjuster regarding bias. Although we agree *Ede* involved a medical negligence action and the financial and personal relationships between the expert and insurer in *Ede* were different than those in the present case, the court's rationale and analysis in *Ede* ring just as true in the current automobile accident case as they did in the medical negligence case in *Ede*. In both situations, there is a possibility of bias based on the economic ties between the defendant's expert witness and the defendant's insurance carrier. *See Piontkowski v. Scott*, 65 Ohio App.3d 4, 9 (8th

Dist.1989) (Patton, J., dissenting opinion), citing 23 Wright & Graham, *Federal Practice and Procedure*, Section 5367 at 459 (1980) (" 'When a witness testifies on behalf of an insured party, the opponent on cross-examination is entitled to ask about any economic ties between the witness and the insurance company that might be expected to color his testimony. * * * The paradigm case for use of evidence of insurance to show bias is in the cross-examination of a claims adjuster or insurance company doctor.' "). Appellant attempted to explore bias by asking Petrucz whether his interests were aligned with one of the parties in the case and whether there was any advantage to him in maximizing the diminution of value number that he presented. Appellant attempted to establish there was an economic or other reason for Petrucz to give favorable testimony for appellee but was prevented from doing so from the outset. Despite appellee's insistence to the contrary, there does exist a potential for bias in that Petrucz potentially faced economic loss by way of termination or demotion if he presented testimony unfavorable to Allstate. Petrucz also faced potential castigation from Allstate if it did not approve of his testimony. It is far from unbelievable that Petrucz might feel pressure to present testimony financially favorable to the entity that employs him and pays his daily wages. The trial court here did not appreciate the probative value of establishing Petrucz's potential for bias, and such was error. The jury should have been able to know about Petrucz's relationship to appellee's insurer in order to fully and fairly adjudge Petrucz's demeanor and tone of voice and make an informed judgment on any bias. The error here was also clearly prejudicial because Petrucz was appellee's only witness on the pertinent issues. For these reasons, we sustain appellant's third assignment of error. Therefore, the cause must be remanded to the trial court for a new trial.

{¶ 17} We do not reach appellant's first and second assignments of error due to our disposition of appellant's third assignment of error. App.R. 12(A). Our decision to reverse this cause and remand it for a new trial renders the trial court's December 1, 2015 decision denying appellant's motion in limine and motion for summary judgment an interlocutory, non-final appealable order, as the trial court originally indicated in that order. Appellant is not entitled to an appeal of the trial court's interlocutory denial of his motion in limine and motion for summary judgment until another trial is held and a final appealable order is rendered on damages. If at the close of the proceedings on remand, the trier of fact

grants appellant all he prays for, the issues raised in the first and second assignments of error will be moot. If the trier of fact makes determinations unfavorable to appellant, he may again appeal the issues raised in the first and second assignments of error. *See generally Carlotta v. Tesseris*, 1st Dist. No. C-870033 (Dec. 23, 1987) (finding no final, appealable order was issued; remanding matter to the trial court for further proceedings; finding the order granting motion for summary judgment was now an interlocutory order; and explaining issues raised on appeal may become moot at the close of proceedings after remand). *See also generally State v. Grubb*, 28 Ohio St.3d 199, 201 (1986) (the granting or denial of a motion in limine is a tentative, interlocutory, precautionary ruling reflecting the trial court's anticipatory treatment of an evidentiary issue which the trial court may change at trial when the disputed evidence appears in context); *Balson v. Dodds*, 62 Ohio St.2d 287 (1980) (ordinarily, the denial of a motion for summary judgment does not constitute a final appealable order).

{¶ 18} Accordingly, appellant's third assignment of error is sustained, his first and second assignments of error are rendered moot, the judgment of the Franklin County Municipal Court is reversed, and this matter is remanded to that court for further proceedings in accordance with law, consistent with this decision.

Judgment reversed and cause remanded.

TYACK, P.J., and LUPER SCHUSTER, J., concur.
