NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

NAIMAH BROOKS Appellee v. KALLIE SPELLER AND KHADIJAH BROOKS APPEAL OF: KALLIE SPELLER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 534 EDA 2012

Appeal from the Judgment Entered March 14, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 5447 NOVEMBER TERM, 2009

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY MUNDY, J.: Filed: January 24, 2013

Appellant, Kallie Speller, appeals from the March 14, 2012 judgment entered in favor of Appellees, Naimah and Khadijah Brooks, in this negligence action arising from an automobile accident. After careful review, we vacate the judgment and remand for proceedings consistent with this memorandum.

The relevant facts and procedural history, as gleaned from the certified record, are as follows. The parties were involved in a motor vehicle collision on June 21, 2008, at the intersection of City Avenue and Presidential Boulevard in Philadelphia, Pennsylvania. Appellee Khadijah Brooks was

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* Retired Senior Judge assigned to the Superior Court.

traveling westbound on City Avenue in a funeral procession along with her passenger, Appellee Naimah Brooks. As the procession made its way through the aforementioned intersection, Appellees' vehicle entered the intersection while facing a red traffic signal. Appellant's vehicle also entered the intersection, heading northbound on Presidential Boulevard, while facing a green traffic signal. The vehicles then collided in the intersection.

On December 3, 2009, Appellee Naimah Brooks filed a complaint against Appellant sounding in negligence.[1] Thereafter, the case proceeded to arbitration, and on November 15, 2010, Appellee Naimah Brooks was awarded $6,775.00 in damages.[2] On December 1, 2010, Appellee Naimah Brooks appealed the arbitration award and demanded a jury trial. A jury trial commenced on September 26, 2011. Thereafter, on September 28, 2011, the jury awarded Appellee Naimah Brooks $35,000.00 in damages and found Appellant liable for 100 percent of said damages. On October 7, 2011, Appellant filed a timely post-trial motion, which the trial court denied on January 13, 2012. This timely appeal followed on February 8, 2012.[3, 4]

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[1] The complaint also named Appellee Khadijah Brooks as a defendant.

[2] The arbitrator determined that Appellant was causally responsible for 25 percent of said damages, and that Appellee Khadijah Brooks was causally responsible for the remaining 75 percent.

[3] We note that, although Appellant purports to appeal from the January 12, 2012 order denying her post-trial motion, "an appeal from an order denying post-trial motions is interlocutory, ***see*** Pa.R.A.P. 301(a), (c), (d); where, as
(Footnote Continued Next Page)

On appeal, Appellant raises the following issues for our review.

> 1. Where a prima facie case of discriminatory practice has been made, may the trial court refuse to require opposing counsel to provide race-neutral reasons for use of their peremptory strikes to remove white persons from the venire, and subsequently deny a ***Batson/Edmonson***[5] motion for mistrial?
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> 2. May the trial court allow plaintiff's medical expert to testify outside the fair scope of his five-sentence EMG report that plaintiff sustained a serious impairment as a result of the accident?
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> 3. May the trial court refuse to instruct the jury as represented at the charging conference, on the applicable statutory provisions of the Motor Vehicle Code as to negligence per se, where negligence is a material issue as between two defendants?

Appellant's Brief at 2 (footnote added).

We review a trial court's denial of a ***Batson*** claim for clear error. ***Commonwealth v. Cook***, 952 A.2d 594, 603 (Pa. 2008) (stating that the trial court's decision on the ultimate question of discriminatory intent

(Footnote Continued) ––––––––––––––––––––

here, judgment is subsequently entered, the appeal is treated as filed after such entry and on the date thereof. Pa.R.A.P. 905(a)." ***K.H. v. J.R.***, 826 A.2d 863, 871-872 (Pa. 2003) (internal quotation and some citations omitted).

[4] Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

[5] ***Batson v. Kentucky***, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids a prosecutor to challenge potential jurors solely on account of their race); ***Edmondson v. Leesville Concrete Co., Inc.***, 500 U.S. 614 (1991) (applying ***Batson*** to civil cases).

represents a finding of fact that is accorded great deference on appeal and will not be overturned unless clearly erroneous).

> To prove a [] Batson claim, the [movant] has to initially establish a *prima facie* showing that the circumstances give rise to an inference that the [opposing party] struck one or more prospective jurors on account of race. If the *prima facie* showing is made, the burden shifts to the [opposing party] to articulate a race-neutral explanation for striking the juror(s) at issue. The trial court ultimately makes a determination of whether the [movant] has carried [the] burden of proving purposeful discrimination.

Commonwealth v. Sanchez, 36 A.3d 24, 44 (Pa. 2011).

Furthermore, the requirements for a *prima facie* showing pursuant to ***Batson*** and its progeny are well settled.

> Generally, in order … to satisfy the first requirement of demonstrating a *prima facie* ***Batson*** claim, [the movant] must establish that [he or she] is a member of a cognizable racial group, that the [opposing party] exercised peremptory challenges to remove from the venire members of [his or her] race, and that other relevant circumstances combine to raise an inference that the [opposing party] removed the jurors for racial reasons. Whether the [movant] has carried this threshold burden of establishing a *prima facie* case should be determined in light of all the relevant circumstances.

Commonwealth v. Ligons, 971 A.2d 1125, 1142 (Pa. 2009). Additionally, a showing that a number of strikes were used against venirepersons of one race will not, without more, create the inference necessary to establish a *prima facie* ***Batson*** claim. ***See Commonwealth v. Spotz***, 896 A.2d 1191, 1212 (Pa. 2006) (stating, "[t]here is no particular number of peremptory

strikes that equates to a *prima facie* case[]"). Rather, the movant "must make a record specifically identifying the race of all the venirepersons removed by the [opposing party], the race of the jurors who served and the race of the jurors acceptable to the [opposing party] who were stricken by the [movant]." ***Commonwealth v. Washington***, 927 A.2d 586, 609 (Pa. 2007). "After such a record is established, the trial court must consider the totality of the circumstances to determine whether challenges were used to exclude venirepersons on account of their race." ***Id.***

In the instant matter, Appellant, who is white, objected and moved for mistrial after Appellees, who are African American, each used all of their peremptory challenges to exclude white persons from the jury. N.T., 9/26/11, at 3-4. The trial court denied Appellant's motion, concluding that Appellant failed to establish a *prima facie* showing that the circumstances gave rise to an inference of discriminatory intent. ***Id.*** at 4. The circumstances were such that, of 20 potential jurors, only seven were white, and counsel for Appellees used peremptory strikes to exclude six of the seven. The trial court did not articulate its reasons for concluding that Appellant failed to establish a *prima facie* ***Batson*** claim.

Our review of the record reveals that Appellee Naimah Brooks was given four peremptory challenges, Appellee Khadijah Brooks was given two peremptory challenges, and Appellant was given two peremptory challenges. Subsequently, Appellees each used their peremptory challenges exclusively

against white venirepersons, resulting in the exclusion of all but one white person from the jury. Given the limited number of white venirepersons coupled with counsel's exclusive use of peremptory challenges to exclude them, we are constrained to disagree with the trial court's conclusion that Appellant failed to establish a *prima facie* ***Batson*** claim. ***See Commonwealth v. Dinwiddie***, 601 A.2d 1216 (Pa. 1992) (stating that justification must be given whenever peremptory challenges are exercised disproportionately to exclude members of a particular race from a jury).

Once a party establishes a *prima facie* ***Batson*** claim, the burden shifts to opposing counsel to articulate race neutral reasons for striking the prospective jurors. ***Sanchez***, ***supra***. The record reflects that counsel for Appellees attempted to place said reasoning on the record; however, the trial court intervened, ruling that no *prima facie* showing had been made. N.T., 9/26/11, at 3-5. Accordingly, "the case must be remanded for a hearing before the trial court to enable [counsel] to present reasons for [their] challenges and a determination by the trial court whether the reasons given are racially neutral." ***Commonwealth v. Weaver***, 568 A.2d 1252, 1253 (Pa. Super. 1989), *appeal denied*, 590 A.2d 297 (1991).

In her second issue, Appellant avers that the trial court erred in allowing Appellee Naimah Brooks' expert witness, Dr. Bruce Grossinger, to testify to his opinion that Appellee Naimah Brooks sustained serious impairment of bodily function as a result of the accident. Appellant's Brief at

7. Specifically, Appellant argues that such testimony exceeded the fair scope of Dr. Grossinger's pretrial disclosures in violation of Pennsylvania Rule of Civil Procedure. 4003.5. ***Id.*** at 11.

Our standard of review regarding the admission of expert testimony is well settled. "[T]he admission of expert testimony is a matter within the sound discretion of the trial court, whose rulings thereon will not be disturbed absent a manifest abuse of discretion." ***Woodard v. Chatterjee***, 827 A.2d 433, 440-441 (Pa. Super. 2003) (quotations and citation omitted). "An [a]buse of discretion occurs if the trial court renders a judgment that is manifestly unreasonable, arbitrary or capricious; that fails to apply the law; or that is motivated by partiality, prejudice, bias or ill-will." ***Sabol v. Allied Glove Corp.***, 37 A.3d 1198, 1200-1201 (Pa. Super. 2011). Moreover, "[n]o hard and fast rule [exists] for determining when a particular expert's testimony exceeds the fair scope of his or her pre trial [sic] report, and we must examine the facts and circumstances of each case." ***Woodard***, ***supra*** at 441 (quotations and citations omitted).

Rule 4003.5 provides, in pertinent part, as follows.

> **Rule 4003.5. Discovery of Expert Testimony. Trial Preparation Material**
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> (a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:
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> (1) A party may through interrogatories require

> (a) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and
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> (b) the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.
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> ...
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> (c) To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to an interrogatory, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings.

Pa.R.C.P. 4003.5(a)(1), (c).

"The purpose of requiring a party to disclose, **at his adversary's request**, the substance of the facts and opinions to which the expert is expected to testify is to avoid unfair surprise by enabling the adversary to prepare a response to the expert testimony." ***Corrado v. Thomas Jefferson University Hosp.***, 790 A.2d 1022, 1029 (Pa. Super. 2001) (internal quotation and citation omitted) (emphasis added). Where there has been no request for such disclosure, and where no such disclosure has

been made, Rule 4003.5 does not operate to limit expert testimony. ***See*** Pa.R.C.P. 4003.5(c) (limiting expert testimony to the fair scope of any report developed pursuant to 4003.5(a)(1) or (2), but stating that an expert is free to testify to matters on which he or she has not been interrogated in the discovery proceedings).

Our review of the record reveals that Appellant did not serve Appellee Naimah Brooks with expert interrogatories and did not request disclosure of the facts known or opinions held by Dr. Grossinger pursuant to Pa.R.C.P. 4003.5. Thus, Appellant may not now seek to use Rule 4003.5 as a bar to limit the scope of Dr. Grossinger's opinion. Accordingly, Appellant's challenge to Dr. Grossinger's testimony on this ground fails.

Moreover, Appellant's claim would nevertheless fail as Dr. Grossinger's testimony did not exceed the fair scope of his pretrial report.

> [I]n deciding whether an expert's trial testimony is within the fair scope of his report, the accent is on the word "fair." The question to be answered is whether, under the particular facts and circumstances of the case, the discrepancy between the expert's pretrial report and his trial testimony is of a nature which would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the appropriate response.

Wilkes-Barre Iron and Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc., 502 A.2d 210, 212-213 (Pa. Super. 1985).

Herein, the report, a single-paragraph correspondence between Dr. Grossinger and another physician, states as follows.

> Dear Dr. Shatzberg:
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> Thank you for referring Naimah Brooks for EMG consultation. She had an abnormal study, indicating bilateral L5 radiculopathy. This is expressed as active denervation in bilateral L5 myotomes and related paraspinous regions. These injuries were caused by the accident of 6/21/08. Thanks and best regards.
>
> Sincerely Yours,
>
> Bruce H. Grossinger, D.O.

Report of Doctor Bruce Grossinger, 2/9/09.

At trial, Dr. Grossinger testified that "bilateral radiculopathy" refers to nerve damage. N.T., 6/13/11, at 27. He further testified that "L5" refers to a region of the human spine containing nerves that control specific leg muscles. ***Id.*** at 23, 26. Dr. Grossinger then opined that nerve damage in the L5 region of the spine is consistent with difficulty walking and performing other physical activity as complained of by Appellee Naimah Brooks. ***Id.*** at 27-29. Finally, Dr. Grossinger asserted that he would consider bilateral L5 radiculopathy to be a serious impairment of bodily function. ***Id.*** at 35-36.

We cannot agree with Appellant's assertion that "nothing [in Dr. Grossinger's report] suggests impairment, let alone serious impairment." Appellant's Brief at 12. By its terms, Dr. Grossinger's report suggests that Appellee Naimah Brooks sustained nerve damage to a region of her spine wherein the nerves control bodily functions such as the ability to walk. Furthermore, the term "fair scope" contemplates a reasonable explanation

and even an enlargement of the expert's written words. ***Wilkes-Barre***, ***supra*** at 213. Given the nature of the injury described, Dr. Grossinger's report provided sufficient notice from which counsel could have reasonably anticipated subsequent testimony regarding serious impairment of bodily function. Such testimony would not be an unreasonable enlargement of his written words. Accordingly, the fact that Dr. Grossinger's report did not use the specific phrase "serious bodily impairment" is of no moment. ***See Butler v. Kiwi, S.A.***, 604 A.2d 270, 276 (Pa. Super. 1992) (concluding that Rule 4003.5 was not violated where trial counsel could reasonably anticipate the challenged testimony from the content of the expert's pretrial report), *appeal denied*, 613 A.2d 556 (Pa. 1992).

Appellant does not assert that she was unable to prepare a meaningful response to Dr. Grossinger's report or that the report misled her as to the nature of an appropriate response. To the contrary, Appellant presented her own expert witness, Dr. Jeffrey Malumed, who testified that his independent examination of Appellee Naimah Brooks did not reveal any serious impairment of bodily function. ***See*** N.T., 6/22/11, at 16-17, 23. Thus, even if Dr. Grossinger's testimony exceeded the scope of his pretrial report, we discern no reversible error, as said testimony did not result in any prejudice or unfair surprise to Appellant. ***See Sutherland v. Monongahela Valley Hosp.***, 856 A.2d 55, 59 (Pa. Super. 2004); ***Christiansen v. Silfies***, 667 A.2d 396, 477 (Pa. Super. 1995) (stating that "[t]he decision to admit

evidence outside the fair scope of an expert report is not reversible error absent prejudice or surprise to the opponent"), *appeal denied*, 686 A.2d 1307 (Pa. 1996). Accordingly, we discern no abuse of discretion on the part of the trial court in permitting Dr. Grossinger's testimony.

In her third issue, Appellant avers that the trial court erred in failing to instruct the jury on the applicable provisions of the motor vehicle code regarding negligence *per se*. Appellant's Brief at 2.

We are guided by the following standard of review in addressing an appellant's challenge to jury instructions.

> Our standard of review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error of law which controlled the outcome of the case.
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> Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error. In reviewing a trial court's charge to the jury we must look to the charge in its entirety.

Gorman v. Costello, 929 A.2d 1208, 1212 (Pa. Super. 2007), *citing* ***Quinby v. Plumsteadville Family Practice, Inc.***, 907 A.2d 1061, 1069-1070 (Pa. 2006). "[I]t must appear that the erroneous instruction may have affected the jury's verdict. Consequently, the trial court has great discretion in forming jury instructions." ***Meyer v. Union Railroad Company***, 865

A.2d 857, 862 (Pa. Super. 2004) (citations omitted).

Herein, the record reflects that the trial court instructed the jury pursuant to Pennsylvania Motor Vehicle Code Section 3321. N.T., 9/28/11, at 18. Section 3321 advises that the vehicle approaching from the right shall have the right-of-way when two vehicles reach an intersection simultaneously. ***See*** 75 Pa.C.S.A. § 3321. Counsel for Appellant objected on the ground that section 3321 "really applies to stop sign cases, which this isn't." N.T., 9/27/11, at 130. Thus, counsel avers that the trial court should have charged the jury regarding section 3112.[6] Appellant's Brief at 13. Section 3112 reads, in pertinent part, as follows.

> **§ 3112. Traffic-control signals**
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> **(a) General rule.--** Whenever traffic is controlled by traffic-control signals exhibiting different colored lights, or colored lighted arrows, successively one at a time or in combination, only the colors green, red and yellow shall be used, except for special pedestrian signals carrying a word legend, and the lights shall indicate and apply to drivers of vehicles and pedestrians as follows:
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> ...
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> (3) **Steady red indication.--**

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[6] We note that Appellant has properly preserved this issue pursuant to Pennsylvania Rule of Civil Procedure 226 by presenting the charge to the trial court in proposed jury instructions and making the charge a part of the record prior to filing a motion for post-trial relief. ***See*** Pa.R.C.P. 226.

> (i) Vehicular traffic facing a steady red signal alone shall stop at a clearly marked stop line, or if none, before entering the crosswalk on the near side of the intersection, or if none, then before entering the intersection and shall remain standing until an indication to proceed is shown except as provided in subparagraph (ii).

75 Pa.C.S.A. § 3112(a)(3)(i).

Although section 3112 may have been more appropriate in the instant case, we cannot agree with Appellant's conclusion that the trial court's instructions misled or confused the jury. Specifically, the trial court also charged the jury pursuant to section 3107 governing funeral processions as follows.

> [Court]: The general rule is that the driver of a vehicle which is being [] driven in a funeral procession may … proceed past a red signal indication [] or stop sign if the lead vehicle in the procession started through the intersection while the signal indicator was green or, in the case of a stop sign, the lead vehicle first came to a complete stop before proceeding through the intersection.

N.T., 9/28/11, at 20. The jury charge regarding right-of-way, while perhaps irrelevant, was neither misleading nor confusing in light of the additional instruction that a vehicle may not enter an intersection when facing a red signal unless the vehicle is part of a funeral procession. Viewed as a whole, the trial court's charge was adequate to aid the jury in determining whether Appellee Khadijah Brooks was negligent *per se* when she entered the

intersection while facing a red signal. Accordingly, Appellant's claim is without merit.

Appellant further opines that the trial court erred by omitting subsection (c) of section 3107. Subsection (c) provides as follows.

> **(c) Right-of-way to emergency vehicles.--**This section does not relieve the driver of a vehicle which is being driven in a funeral procession from yielding the right-of-way to an emergency vehicle making use of audible and visual signals, nor from the duty to drive with due regard for the safety of all persons.

75 Pa.C.S.A. § 3107(c). By omitting subsection (c), the trial court sought to avoid confusion among the jurors. N.T., 9/28/11, at 28-29. Specifically, the subsection refers to a duty to yield to emergency vehicles, which was not at issue in this case. After careful review, we conclude that the trial court acted within its discretion to avoid confusion. Accordingly, this claim is without merit.

Based on the forgoing, we vacate the March 14, 2012 judgment entered in favor of Appellees, and remand this case for a hearing during which counsel may present reasons for striking the jurors at issue. ***See Weaver***, ***supra*** at 1257. If the trial court finds that counsel did not have a neutral explanation for the strikes, a new trial shall be ordered. However, if the trial court finds that counsel has presented racially neutral reasons for striking said jurors, the judgment shall be reimposed.

Order vacated. Case remanded. Jurisdiction relinquished.