RENDERED: AUGUST 20, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002147-MR

GERALDINE BENTLEY — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 02-CI-00847

LARRY KISER; AND
GARY D. KISER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; AND EMBERTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Geraldine Bentley has appealed from a judgment of the Floyd Circuit Court entered on September 4, 2003, which, following the jury's finding that she did not sustain any injuries as a result of the automobile accident in question, dismissed her complaint against Gary Kiser and his father, Larry Kiser, the appellees herein. Having concluded that all of

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Bentley's claims of error on appeal are without merit, we affirm.

On August 27, 2002, Bentley filed a complaint in the Floyd Circuit Court naming Gary and Larry Kiser as defendants.[2] Bentley alleged that on September 21, 2000, in Floyd County, Kentucky, an automobile driven by Gary Kiser "approached from the rear, fail[ed] to use reasonable caution and rear-ended the vehicle in which [Bentley] was a passenger."[3] In addition to asserting a negligence claim against Gary, Bentley alleged that Larry, as the owner of the car Gary was driving, "failed to reasonably maintain said vehicle and allowed said vehicle to be driven in an unsafe manner." Bentley alleged that she sustained physical injuries as a result of the accident, and sought damages for past, present and future pain and suffering, past and future medical expenses, lost earnings, and diminished earning capacity. In September 2002 Gary and Larry filed answers denying the material allegations in Bentley's complaint.

On August 25-26, 2003, after a significant amount of discovery had taken place, a jury trial was conducted in the Floyd Circuit Court. The parties stipulated that Gary was at

[2] Theresa McKinney, the driver of the vehicle in which Bentley was a passenger, was also named as a defendant in Bentley's complaint. On November 8, 2002, the circuit court entered an order dismissing all of Bentley's claims against McKinney with prejudice. McKinney is not a party to this appeal.

[3] At the time of the collision, the vehicle in which Bentley was a passenger had come to a complete stop at an intersection.

fault for the collision.[4] The issues to be litigated concerned the seriousness of Bentley's injuries, and the extent to which her injuries could be attributed to the accident.

After considering the evidence presented by both parties, the jury returned a verdict finding that Bentley "did not receive injuries as a result" of the accident. Consequently, on September 4, 2003, the circuit court entered judgment in favor of Gary and Larry, and dismissed all of Bentley's claims against them. On October 1, 2003, the circuit court entered an order denying Bentley's motion for a new trial. This appeal followed.

Bentley raises several arguments on appeal. She first claims that the circuit court erred by permitting counsel for Gary and Larry to elicit testimony from her in violation of the attorney/client privilege.[5] Specifically, Bentley points to a

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[4] Gary testified that he pulled up behind McKinney's vehicle (the car in which Bentley was a passenger) and came to a complete stop. However, after coming to a stop, Gary stated that his foot slipped off the brake, causing his car to roll into the rear of McKinney's vehicle.

[5] In Kentucky, the attorney/client privilege is codified under Kentucky Rules of Evidence (KRE) 503. KRE 503 provides in part as follows:

> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:
>
> > (1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

portion of her testimony during which, over her objection, counsel for Gary and Larry asked Bentley whether her former attorney, Glenn Hammond, had advised her to visit Dr. William Fannin:

> Counsel: Now, I believe you said earlier that whenever they asked you at school to try to get a paper so that you could get your disability that you went to Dr. [James] Campbell, didn't you?
>
> Bentley: Yeah.
>
> Counsel: And he wouldn't give you one, would he?
>
> Bentley: No, he said he was a company doctor.
>
> Counsel: And Glenn Hammond was your lawyer then, wasn't he?
>
> Bentley: Well, Glenn... Time was running out for me to apply for medical benefits.
>
> Counsel: But, now Glenn Hammond was your lawyer then, right?

> (2) Between the lawyer and a representative of the lawyer;
>
> (3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (4) Between representatives of the client or between the client and a representative of the client; or
>
> (5) Among lawyers and their representatives representing the same client.

Bentley: Yeah, he was.

Counsel: So, Glenn sent you to Dr. Fannin, didn't he?

Bentley: Yeah.

. . . .

Counsel: Who sent you to Dr. Fannin?

Bentley: Glenn Martin Hammond.

Counsel: Who was your lawyer then, right?

Bentley: Just over the telephone; yeah, I called him.

. . . .

Counsel: And I believe you had an MRI too, didn't you?

Bentley: Yeah.

Counsel: And Mr. Hammond told you to get that too, didn't he?

. . . .

Bentley: Yeah. He told me.

Bentley argues that this line of questioning violated the attorney/client privilege and constitutes reversible error. We disagree.

Assuming, arguendo, that Hammond's advising Bentley to visit Dr. Fannin is the kind of communication which could fall under the attorney/client privilege, Bentley waived her right to assert the privilege at trial. "[C]ommunications that occur in

confidence lose their confidentiality (and the protection of the [attorney/client] privilege) if the client voluntarily discloses them to third persons."[6] In the case sub judice, it is not disputed that Bentley disclosed to another physician, Dr. Russell Travis, that Glenn Hammond had advised her to visit Dr. Fannin. In his deposition testimony, Dr. Travis stated that during his examination of Bentley, she informed him that "she saw Mr. Glenn Hammond, who told her to ask Dr. Campbell for a cut-off slip, but when he wouldn't give her one, Mr. Hammond then sent her to Dr. Fannin in Pikeville." Therefore, assuming that Hammond's advising Bentley to visit Dr. Fannin was the kind of communication which could fall under the attorney/client privilege, Bentley waived her right to assert that privilege by disclosing the content of her communications with Hammond to Dr. Travis.

Bentley attempts to avoid the effects of this waiver by claiming that her disclosure to Dr. Travis was "not voluntary." However, Bentley has failed to point to any evidence indicating that her disclosure was coerced, or that it was anything less than voluntary. Accordingly, Bentley's claim

[6] Lexington Public Library v. Clark, Ky., 90 S.W.3d 53, 61 (2002)(quoting Robert G. Lawson, The Kentucky Evidence Law Handbook, §5.10, at 236 (3d ed. 1993)). See also KRE 509 (providing in part that "[a] person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privilege matter").

that a portion of her testimony was elicited in violation of the attorney/client privilege is without merit.

Bentley next argues that, in the line of questioning quoted above, the identification of Hammond as the individual who had referred her to Dr. Fannin was irrelevant,[7] or in the alternative, that its probative value was substantially outweighed by the danger of undue prejudice.[8] We reject both contentions.

Questions of relevancy and whether the probative value of the evidence is outweighed by the danger of undue prejudice are matters that are within the sound discretion of the circuit court.[9] Absent a showing that the circuit court abused its discretion, this Court will not disturb the circuit court's determination on appeal.[10] In Miller, ex rel. Monticello Banking Co. v. Marymount Medical Center,[11] our Supreme Court discussed

[7] See generally KRE 402 (providing that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible").

[8] See generally KRE 403 (providing that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence").

[9] See Green River Electric Corp. v. Nantz, Ky.App., 894 S.W.2d 643, 645 (1995).

[10] Id.

[11] Ky., 125 S.W.3d 274, 281-82 (2004).

the admissibility of evidence which is intended to show bias on the part of a particular witness:

> Admissibility of evidence tending to prove the bias of a witness is a matter of relevancy. "Any proof that tends to expose a motivation to slant testimony one way or another satisfies the requirement of relevancy. The range of possibilities is unlimited . . . ." The interest of a witness, either friendly or unfriendly, in the prosecution or in a party is not collateral and may always be proved to enable the jury to estimate credibility. It may be proved by the witness' own testimony upon cross-examination or by independent evidence [citations omitted].

In the case at bar, Dr. Fannin's videotaped deposition was offered into evidence as part of Bentley's case-in-chief. Hence, the fact that Bentley had been referred to Dr. Fannin by her then-attorney was certainly relevant evidence for the jury to consider in assessing Dr. Fannin's credibility. Accordingly, the circuit court did not abuse its discretion by determining that the evidence was relevant, or that its probative value was not substantially outweighed by the danger of undue prejudice.

Bentley also contends that her testimony that Hammond had referred her to Dr. Fannin contained inadmissible hearsay. Once again, we disagree. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

matter asserted."[12] Simply stated, Bentley testifying that Hammond had referred her to Dr. Fannin or that Hammond had advised Bentley to get an MRI did not involve the introduction of a "statement" "offered in evidence to prove the truth of the matter asserted" within that statement. Accordingly, Bentley's hearsay argument is without merit.

Finally, Bentley argues that the circuit court erred in the submission of jury instructions.[13] Specifically, Bentley claims that the circuit court erred by submitting, sua sponte, Instruction No. 3, which provided in full as follows:

> In order to award any amounts hereinafter to [Bentley], you must first find that she received injuries as a direct result of this automobile accident.
>
> We, the Jury, find that [Bentley] did ____ or did not ____ receive injuries as a result of this accident. (CHECK ONE)
>
> If you have found that [Bentley] did not receive injuries as a result of this automobile accident, you shall proceed no further and return to the courtroom with your verdict.

Bentley proffers three arguments in support of her position that the above instruction was erroneously submitted.

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[12] KRE 801(c). "Statement" is further defined under KRE 801(a) as:

> (1) An oral or written assertion; or
>
> (2) Nonverbal conduct of a person, if it is intended by the person as an assertion.

[13] Curiously, neither the parties' proposed instructions, nor the complete set of instructions as submitted to the jury have been included in the record on appeal.

She first contends that this instruction placed "undue emphasis" on the possibility that she may not have sustained injuries as a result of the accident in question. Bentley argues that Instruction No. 2 sufficiently instructed the jury on the issue of causation. This instruction provided as follows:

> If you find that [Bentley] is entitled to recover damages for her injuries your award shall only include damages for pre-existing injuries to the extent that such conditions were aroused by the accident but not to the extent that they are unrelated to the accident.

We reject Bentley's argument and hold that Instruction No. 3 did not place "undue emphasis" on the element of causation.

Although it is true that "instructions should not give undue prominence to certain facts or issues,"[14] in the case at bar, Instruction No. 2 and Instruction No. 3 addressed separate issues. Instruction No. 2 required the jury to find that the accident caused the worsening of a pre-existing condition before the jurors would be entitled to award damages for such an injury. Instruction No. 3 required the jury to find that any other injuries must have been caused by the accident before damages could be awarded. Therefore, Instruction No. 3 did not place any "undue emphasis" on the issue of causation.[15]

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[14] Kavanaugh v. Daniels, Ky.App., 549 S.W.2d 526, 528 (1977).

[15] See Spencer v. Matthews, Ky., 247 S.W.2d 515, 516-17 (1952)(rejecting an argument that a general causation instruction and a causation instruction

Second, Bentley claims that Instruction No. 3 was improperly submitted on grounds that "the evidence demonstrated that [Bentley] was injured from the automobile accident." In essence, Bentley appears to argue that she was entitled to a directed verdict on the issues of causation and/or the existence of an accident-related injury. We disagree. Dr. Travis testified that, in his opinion, Bentley sustained no residual injuries as a result of the accident in question.[16] In addition, Dr. David Jenkinson testified that he "didn't find any specific abnormality that [he] could relate to an injury." Thus, whether Bentley sustained an injury as a result of the accident in question was a contested issue at trial. Accordingly, the circuit court did not err by submitting Instruction No. 3.

Bentley's final claim of error is that the term "direct result" should have been specifically defined in the jury instructions. However, Bentley never raised this argument before the circuit court, and we decline to address it for the first time on appeal.[17]

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addressing a pre-existing condition placed undue emphasis on the pre-existing injury).

[16] Dr. Travis testified that Bentley "may have suffered a lumbar strain and maybe a cervical strain," but that those problems should have been resolved in four-to-six weeks.

[17] See Kentucky Rules of Civil Procedure 51(3)(providing that "[n]o party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds

Based on the foregoing, the judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Earl Martin McGuire
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

John V. Porter
John N. Billings
Paintsville, Kentucky

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of his objection" [emphasis added]).