RENDERED: October 31, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002552-MR

ESTATE OF JEFFREY LEE CLAYWELL, BY AND
THROUGH ITS ADMINISTRATOR, GEORGE CLAYWELL;
GEORGE CLAYWELL, INDIVIDUALLY; AND
LORETTA CLAYWELL, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 00-CI-00175

TOMMY GRIDER AND MARSHA GRIDER — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BAKER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: On October 22, 1999, Minta Blankenship was driving herself and five friends to school southbound along Kentucky Highway 61 in Adair County when the right side of her vehicle strayed from the paved surface onto a dirt and grass slope. Apparently the vehicle straddled the fog line at the

edge of the pavement for about twenty yards then collided with and uprooted a heavily anchored mailbox. The vehicle rolled completely over, struck a fence at the bottom of the slope, and came to rest facing north. Blankenship and four of her passengers survived the accident with only minor injuries, but one of the passengers, Jeffery Claywell, suffered a massive head injury and died. Claywell's parents and estate brought suit against Blankenship and against Tommy and Marsha Grider, the owners of the mailbox. Prior to trial, Blankenship settled. In September 2002, the Adair Circuit Court tried the case against the Griders. After three days of testimony, the jury returned a defense verdict. It found that the Griders were not liable for Claywell's death and that Blankenship bore one-hundred percent of the fault. The trial court entered judgment in accordance with this verdict on September 18, 2002. Appealing from that judgment, the Claywells contend that several errors by the trial court rendered the trial unfair. We agree at least that the testimony of their expert witness should not have been excluded.

In addition to the box itself, the mailbox consisted of a steel pole about five inches in diameter that was anchored in nearly half a ton of subsurface concrete. The Claywells' theory at trial was that a violent collision with this mailbox apparatus had caused the vehicle to roll over and thus had turned what would likely have been a merely frightening mishap

into a tragedy. The Griders sought to show that the vehicle had overturned as a result of going down the slope and not as a result of colliding with the mailbox.

The Claywells contend on appeal that the trial court should have directed a verdict on the issue of liability against the Griders. The Griders breached KRS 179.240, they maintain, a safety statute that requires owners of land "situated along a public road" to remove obstacles from the right-of-way along their property. That breach, they contend, constitutes negligence per se and entitled them to a directed verdict.

We are not persuaded that KRS 179.240 applies in this case. That statute appears in a chapter primarily concerned with the maintenance of county roads. The roadway involved in this case is a state highway. KRS 177.106 governs encroachments along state highways and requires anyone causing or maintaining such an encroachment to obtain a permit for it from the Department of Highways. It is this latter statute, we believe, and not KRS 179.240, that applies to the Griders' mailbox. The Claywells have not alleged that the Griders breached KRS 177.106.

Even if there was such a statutory breach, moreover, or even if we were to assume that the Griders were negligent for having created an unreasonable risk of foreseeable harm to motorists unfortunate enough to collide with their steel and

concrete behemoth,[1] negligence, whether per se or otherwise, does not give rise to liability unless it is the proximate cause of a compensable injury.[2] A factual dispute over the proximate cause of an injury, then, will preclude a directed verdict even if there is no dispute about the defendant's negligence.

Here, there was a factual dispute about the causative role of the mailbox. The Griders presented expert testimony by an accident reconstructionist to the effect that the mailbox essentially gave way to the vehicle by coming entirely out of the ground. According to this expert, the vehicle ran over the mailbox and onto the steep slope, which caused it to roll. The vehicle would have rolled over, he opined, even had the mailbox not been there. Claywell's injuries were likely suffered during the rollover. In light of this testimony, the jury's verdict exonerating the Griders from liability was not palpably or flagrantly against the evidence. The trial court did not err,

[1] *Cf.* Rogers v. Daigle, 643 So. 2d 758 (La.App. 1994) (characterizing such overly rigid and heavy mailboxes as "lethal roadside hazards.")

[2] Wood v. Wyeth-Ayerst Laboritories, Ky., 82 S.W.3d 849 (2002); Estate of Wheeler v. Veal Realtors & Auctioneers, Ky. App., 997 S.W.2d 497 (1999); Laughlin v. Lamkin, Ky. App., 979 S.W.2d 121 (1998).

therefore, by denying the motion for directed verdict and submitting the question of the Griders' liability to the jury.[3]

The Claywells next contend that the trial court erred when it struck the testimony of their reconstructionist, a state trooper with training and experience in the field, who opined that the collision with the mailbox probably did cause the vehicle to overturn. Among the evidence he had observed was a tire track through the grass from a point where the vehicle was likely to have left the road on a line a few feet off the pavement to the place where the mailbox had stood. The trooper testified that the track probably showed the path of the Blankenship vehicle.

On cross-examination the trooper admitted that he did not examine the scene until the day following the accident and by that time, he acknowledged, other vehicles had driven through it. In response to counsel's leading question, the trooper agreed that he had assumed the track through the grass had not been made by one of these other vehicles. At that point counsel moved to strike the trooper's testimony in its entirety on the ground that an expert opinion offered by a police officer "may not be based on any assumption."[4] The trial court agreed that

[3] Lewis v. Bledsoe Surface Mining Company, Ky., 798 S.W.2d 459 (1990).

[4] Alexander v. Swearer, Ky., 642 S.W.2d 896, 897 (1982).

this rule applied in these circumstances and admonished the jury to disregard everything the trooper had said.

Experts may not testify as to their opinions unless it appears that the opinions are both reliable and relevant.[5] A reliable opinion is one based upon both an accurate determination of sufficient facts and inferences from those facts that logic, testing, peer review, and other specialized experiences have shown to be cogent.[6] The rule against expert assumptions serves this reliability requirement by helping to ensure that the expert's opinion is not merely speculative but has an adequate factual underpinning.[7]

We are persuaded that the trooper's purported assumption in this case did not indicate that he was merely speculating and thus that it did not require the striking of his testimony. There was ample evidence in addition to the tire track to support the trooper's opinion that the vehicle had followed a path partly on and partly off the pavement until it struck the mailbox. The surviving passengers testified that

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[5] Goodyear Tire and Rubber Company v. Thompson, Ky., 11 S.W.3d 575 (2000).

[6] *Id.*

[7] *See* Alexander v. Swearer, *supra* (Officer's inference that debris pattern at accident site indicated a particular point of contact was no more likely than other inferences and thus amounted to inadmissible speculation.)

that is what happened, and the damage to the vehicle showed plainly that the vehicle had collided more-or-less head on with the mailbox slightly to the passenger side of the vehicle's center line. Indeed, the Griders' own expert thought that such a path was likely. In these circumstances, we believe that the possibility that another vehicle made the tire track went to the weight of the trooper's testimony rather than to its admissibility. The trial court erred by ruling otherwise. The error, furthermore, cannot be deemed harmless. As noted above, whether the collision with the mailbox was a substantial cause of Claywell's death was the key issue in the case. The trooper's testimony pertaining to that issue could have led to a different verdict.

Because we have determined that the Claywells are entitled to a new trial, their other allegations of error are moot. We shall comment briefly, however, on issues apt to arise on remand. The trial court's jury instructions did not misstate the Griders' duty, which, in the absence of a valid statutory claim, was the general duty to exercise reasonable care for the safety of those using the highway. Nor did the court misstate Blankenship's duties, which included the duty to keep a lookout for obstacles on or near her line of travel.

We agree with the Claywells, however, that interrogatory number five, which asked the jury to determine the

Griders' liability, should have read "Do you find from the evidence that Defendants Tommy Grider and Marsha Grider violated their duties set forth in these instructions and that such violation was a substantial factor in causing the death of Jeffery Claywell." The original version, which asked if the violation "was a substantial factor in causing the accident and death of Jeffery Claywell" could be interpreted as exonerating the Griders unless the mailbox caused Blankenship to drive off the road.

The trial court did not abuse its discretion by permitting the Griders' reconstructionist to testify about the difference a seatbelt would have made in restraining Claywell's movement during the rollover. He was not qualified, however, to offer medical opinions concerning the nature of Claywell's injuries.

Finally, we agree with the trial court that the Claywells' were not entitled to seek pain-and-suffering damages. The overwhelming evidence was that in the brief period before he died Jeffery did not regain consciousness. If the proof at retrial is substantially the same, these damages should again be excluded.

In sum, because the testimony of the Claywells' expert witness was improperly excluded and because the error cannot be deemed harmless, the Claywells are entitled to a new trial.

Accordingly, we reverse the September 18, 2002, judgment of the Adair Circuit Court and remand for additional proceedings consistent with this opinion.

TACKETT, JUDGE, CONCURS.

BAKER, JUDGE, DISSENTS and files separate opinion.

BAKER, JUDGE, DISSENTING: I concur with the entirety of the majority opinion, with the exception of the determination to send this matter back to the circuit court to be retried. The majority has held that this case is to be remanded for a new trial based upon the exclusion of this testimony, to which I dissent.

Mailboxes along the roadside are commonplace in both a rural and urban setting. The record in this case does not indicate that there are any statutes, codes or other recognized standards for the construction of such a mailbox, and we all have seen examples of such which range from common to unusual and unique. Some are constructed of wood or other simple building materials; others are elaborate works of stone, steel or other materials.

There is no indication in this record that the mailbox in issue was anything other than open and obvious to all concerned. Scifres v. Kraft, Ky. App., 916 S.W.2d 779 (1996). Whether or not its post was sunk in a substantial amount of concrete or none at all, in my judgment, does not constitute

negligence. Its presence along the side of the road was clearly proper – if not mandatory – in order for the appellees to receive their mail, and I would be unwilling to afford a remedy in this unfortunate case, given the open and obvious nature of this structure. Id. To reach any other conclusion would be necessarily to conclude that all mailboxes must be constructed to certain standards, none of which are presently recognized or required under the law.

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