

RENDERED: July 15, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000736-MR

RONGGUI LI

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 01-CI-01247

FLOYD GOODPASTER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

TACKETT, JUDGE: Ronggui Li appeals from the judgment of the Fayette Circuit Court entered on a jury verdict in favor of defendant Floyd Goodpaster, Jr. finding that Goodpaster was not liable for an accident between Goodpaster's automobile and Li's

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

bicycle. Li argues on appeal that the court erred by excluding evidence of an independent medical evaluation performed by a doctor hired by Goodpaster, that he was entitled to an adverse inference instruction based on Goodpaster's failure to call that physician as a witness, and that the court erroneously excluded evidence of a "yield to pedestrians" sign at the edge of the crosswalk where the accident took place. We hold that any error pertaining to the independent medical evaluation was harmless, and that the court properly excluded evidence about the sign, and affirm.

The accident occurred at approximately 8:40 p.m. on April 3, 2000, near the intersection of Alumni Drive and University Drive in Lexington, Kentucky. Witnesses testified that it was dark and rainy at the time of the accident. Goodpaster had just driven through the intersection when Li's bicycle went in front of him, and Goodpaster's car struck the bicycle, sending Li over the car's hood and onto the road. Li suffered injuries, including an alleged brain injury, as a result of the accident.

Witness Leslie Wells testified Li did not check for clear before entering the crosswalk. She described him as wearing dark, non-reflective clothing, and having his head down and pedaling across the road. She said that he crossed the road

in front of Goodpaster without warning and that there was no way the accident could have been avoided.

The evidence regarding the nature and extent of Li's injuries was contested by the defense. The defense sought to portray Li's witnesses as "hired guns", and attacked their credibility as well as Li's with respect to the extent of his injuries. The defense had hired an expert for an independent medical evaluation, Dr. Douglas Ruth, who opined that Li did have a brain injury. A little less than a month before the trial, the defense submitted its witness list, leaving Dr. Ruth off, and notified the court and the plaintiff that it would not be calling Dr. Ruth. Li did not take Dr. Ruth's deposition or seek to obtain his testimony for trial, but instead sought an adverse inference instruction based on the defense's failure to call the witness. The court denied the instruction. The court also ruled in limine that the plaintiff could not make reference to Dr. Ruth's evaluation since Ruth would not be called as a witness.

The jury returned a verdict that Goodpaster was not liable for the accident. The court denied Li's motion for new trial, in which he raised the grounds presented in this appeal. This appeal followed.

Turning first to the evidence of Dr. Ruth's evaluation, we hold that any error was harmless. Goodpaster

contends that Li could have taken Dr. Ruth's deposition himself once he was given notice that Goodpaster did not intend to call Ruth as a witness. Li argues that he should at least have been given the opportunity to introduce evidence that he had undergone an evaluation by a doctor hired by the defense and that the defense chose not to call the doctor as a witness.

The substance of Dr. Ruth's report was that Li had sustained a neuropsychiatric impairment of 1 to 14% as a result of the accident, substantiating Li's claim that he had suffered a brain injury. Goodpaster had identified Dr. Ruth as a witness in answers to interrogatories, but left him off the final witness list submitted before trial. Li cites Commonwealth Power Ry. & Light Co. v. Vaught, 191 Ky. 641, 231 S.W. 247 (1921), and Mackey v. Greenview Hospital, Inc., 587 S.W.2d 249 (Ky. App. 1979), in support of his argument that he should have been allowed to testify that he had been evaluated by Dr. Ruth at the defense's request, to comment on the failure of the defense to call an expert witness it hired, or that he should have been given an adverse inference instruction, allowing the jury to conclude that the testimony of Dr. Ruth would have been adverse to Goodpaster's case that Li did not suffer a brain injury. Even accepting the Appellant's contention as correct, for the sake of argument, we must nevertheless conclude that any error was harmless.

Li argues that because the defense strategy was to attack his credibility with respect to the damages issue, that it also damaged his credibility with respect to the liability issue. Even if that were true, the jury could have reached the same conclusion based on the testimony of Leslie Wells, a disinterested witness, alone. Based on Wells' testimony, the jury could conclude that Goodpaster had no liability for the accident, even if it believed Li to be completely truthful about the nature and extent of his injuries. The jury's verdict is supported by evidence that does not depend on the credibility of either party, and therefore any error in excluding the evidence of Dr. Ruth's evaluation or in failing to give the requested instruction is harmless, since the jury need never have reached the question of damages.

Next, we hold that the court did not err by excluding the evidence of the yield to pedestrians sign. Essentially, Li argues that the yield to pedestrians sign should be treated as a regular yield sign, and cites KRS 189.330(5), the statute that establishes the duties of a motorist approaching a yield sign. For the sake of argument, we will accept that statute's language as encompassing Goodpaster's duties to a pedestrian in the crosswalk. Even accepting that argument, however, we cannot ignore that Li was not a pedestrian, and that the duties did not apply to him; he was instead operating a vehicle, and was

required to operate it in the same manner as a motor vehicle.  
601 KAR 14:020 §9. Since he was not a pedestrian, it was not  
error to exclude evidence of the "yield to pedestrians" sign as  
possibly confusing to the jury.

For the foregoing reasons, the judgment of the Fayette  
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward L. Cooley  
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BRIEF FOR APPELLEE:

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