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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000659-MR

KIMBERLEY J. MEYER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 04-CI-08023

DAVID P. COLLINGWOOD and
LOUISVILLE CARTAGE COMPANY, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: DIXON, STUMBO AND WINE, JUDGES.

DIXON, JUDGE: Appellant, Kimberley Meyer, appeals from a judgment of the Jefferson Circuit Court finding in favor of Appellees, David Collingwood and Louisville Cartage Company, Inc., and dismissing her personal injury action against them. Finding no error, we affirm.

On February 12, 2004, Appellant was traveling on the Watterson Expressway when her car collided with a tractor-trailer owned by Appellee, Louisville

Cartage Company, Inc., and operated by its employee, Appellee Collingwood. Appellant claimed that the accident was caused when Appellee merged into her lane. However, Appellee admitted that while he had activated his turn signal he had not yet merged into Appellant's lane of traffic. Further, Appellee alleged that both prior to and following the accident, he had observed Appellant talking on her cell phone. Although Appellant claimed she sustained serious cervical injuries as a result of the collision, the defense introduced photographs and expert testimony at trial establishing that it was an extremely low impact collision and that Appellant's car sustained virtually no damage.

During trial, Appellant's counsel attempted to cross-examine Appellee about his past driving history. Specifically, Appellee had represented on his 2001 employment application and during his deposition that he had not been involved in any prior accidents. However, a copy of Appellee's driving report obtained from the Kentucky Department of Transportation indicated that he had, in fact, been involved in two prior accidents. The trial court excluded the evidence on the grounds it was inadmissible under KRE¹ 608 and was more prejudicial than probative under KRE 403. The report and Appellee's cross-examination testimony were subsequently placed into the record by avowal.

At the close of evidence, the jury found in favor of Appellees and the trial court entered judgment accordingly. This appeal ensued.

¹ Kentucky Rules of Evidence

Appellant argues that the trial court erred in excluding evidence that Appellee lied on his employment application and during his deposition about his driving history. She contends that given the diametrically opposed versions of how the accident occurred, evidence as to Appellee's credibility was crucial. Appellant further argues that once Appellee placed his credibility in issue, she should have been permitted to impeach such during cross-examination.

“The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge. This broad rule applies to both criminal and civil cases” *Moore v. Commonwealth*, 771 S.W.2d 34, 38 (Ky. 1988). *See also Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004); KRE 611. In *Maddox v. Commonwealth*, 955 S.W.2d 718, 721 (Ky. 1997), our Supreme Court noted,

Witness credibility is always at issue and relevant evidence which affects credibility should not be excluded. *Parsley v. Commonwealth*, Ky., 306 S.W.2d 284 (1957). In R. Lawson, *The Kentucky Evidence Law Handbook*, § 4.15(II) (3rd ed. 1993), the relevancy requirement was described as including “any proof that tends to expose a motivation to slant testimony one way or another.... The range of possibilities is unlimited....” *Id.* at 183. However, it should also be noted that trial courts retain broad discretion to regulate cross-examination. “Defendants cannot run rough-shod, doing precisely as they please, simply because cross-examination is underway. So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries.” *U.S. v. Boylan*, 898 F.2d 230, 254 (1st Cir. 1990).

An appellate court should reverse a trial court's ruling under KRE 403 only if there has been an abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996).

The trial court herein entertained extensive arguments from the parties prior to excluding that the evidence in question on the grounds that it was more prejudicial than probative under KRE 403. We cannot conclude that it abused its discretion.

In determining whether evidence should be excluded as unduly prejudicial, the trial court must consider (1) the probative value of the evidence; (2) the probability that the evidence will cause undue prejudice; and (3) whether the harmful effects substantially outweigh the probative worth. *Barnett v. Commonwealth*, 979 S.W.2d 98 (Ky. 1998); *Kroger Co. v. Willgruber*, 920 S.W.2d 61 (Ky. 1996). Appellant maintains that the most probative evidence of Appellee's credibility is his driving history. However, although Appellee's driving record indicated that he had been in two prior collisions, the report contained no information as to the nature of the accidents, or even who was at fault. Furthermore, even during the avowal testimony, Appellant's counsel did not address the relevance of Appellee's driving history to the liability for the accident in question.

An evidentiary fact is relevant when it has a tendency to make a fact of consequence to the determination of an action more or less probable. KRE 401. Clearly this evidence did not do so. Further, it was within the discretion of the trial court to determine whether the probative value of the proffered evidence was substantially outweighed by undue prejudice. *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991). We find no abuse of that discretion.

Moreover, as amended in 2003, KRE 608 does not permit proof of specific instances of conduct by extrinsic evidence, but they may, “in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness” KRE 608(b) (as amended); *see also Purcell v. Commonwealth*, 149 S.W.3d (2004). However, the Commentary to the 2003 amendment clarifies that “the cross-examiner may not go beyond the answers he gets from such inquiry and later introduce extrinsic evidence to contradict the answers.” KRE 608(b), Evidence Rules Review Commission Notes (2003).

Appellee's testimony during avowal was that he did not recall any previous accidents before February 2004. Even when presented with his driving report, Appellee had no recollection of the prior accidents. Thus, even had the trial court permitted Appellant's counsel to cross-examine Appellee, the result would have been no different. Because of the KRE 608(b) prohibition of extrinsic evidence for the purposes of impeachment, Appellant would have been bound by Appellee's testimony on this issue. *See R. Lawson, Kentucky Evidence Law Handbook*, §4.20[5], p. 307 (4th ed. 2003).

The judgment of the Jefferson Circuit Court is affirmed.

WINE, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURS IN RESULT ONLY.

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