

RENDERED: February 21, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 95-CA-000806-MR

GLADYS BRIGHT, as Executrix of
the Estate of ROBERT BRIGHT

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 92-CI-00519

STACIE LYNN CARNES; RAYMOND BROWN;
and STATE FARM MUTUAL AUTOMOBILE
INSURANCE

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: WILHOIT, Chief Judge; EMBERTON and GUDGEL, Judges.
EMBERTON, JUDGE. Gladys Bright, Executrix of the Estate of
Robert Bright, appeals from a judgment of the Knox Circuit Court
entered following a jury verdict which found the appellee, Stacie
Lynn Carnes, not responsible for the death of Robert Bright,
appellant's husband. Appellant alleges that the trial court
erroneously permitted the appellees to question appellant

regarding income received from survivor's income benefits from her husband's railroad retirement pension. She further objects to the admission of testimony given by the investigating officer, Trooper Martin.

On October 21, 1992, Mr. Bright, as a pedestrian, was struck by an automobile operated by Stacie Carnes and owned by her father, Raymond Brown. William Baise, Mr. Bright's son-in-law, was with Mr. Bright at the time of the accident. Mr. Baise testified the two had been viewing an old farm house and were preparing to cross the road when he heard an oncoming car. His recollection is that both stopped, and that Mr. Bright's feet were partially on the paved roadway and partially on the driveway. Although he did not see the car prior to impact, he did see a dog cross the road and felt the air of the car brush past him. Mr. Bright was struck, thrown into the air, flipped five times, and fell head-first on the highway. Mr. Baise testified that the vehicle did not leave the roadway.

Kentucky State Trooper James Pace testified that he found no evidence that Ms. Carnes left the roadway.

Ms. Carnes testified that Mr. Bright was in the road approximately two to three feet from the center line. She recalled that she came around a curve and saw Mr. Bright walking toward her vehicle, she attempted to swerve, but struck Mr. Bright.

Trooper Gary Martin, who investigated the scene, testified that he had worked as an officer for four years with local police officers and had been a state trooper since 1982. During that time he had investigated over 1,000 accidents. Mr. Baise informed him at the accident scene that he and Mr. Bright were standing on the side of the road. Trooper Martin observed that the grass and the weeds next to the road were not disturbed indicating that Ms. Carnes's vehicle did not leave the roadway. He also testified that measurements of the damage to Ms. Carnes vehicle indicated that Mr. Bright was in the road at the time of impact.

Because of appellees' failure to qualify Trooper Martin as an expert, he was not permitted to express opinions on direct examination. On cross-examination, however, appellant solicited opinion testimony which, the trial court held, opened the door for the appellee to solicit opinions. Trooper Martin testified that, in his opinion, Mr. Bright was at least one-foot six-inches in the roadway when struck.

Ms. Carnes's parents testified that when they arrived at the scene Mr. Baise told them that Mr. Bright had stepped into the path of Ms. Carnes's vehicle.

The jury returned a unanimous verdict finding that Ms. Carnes did not fail to comply with any duties and the issue of damages was not reached.

There was no error in permitting the appellees to solicit opinion testimony from Trooper Martin.

In short, the appellants, having opened the book on the subject, were not in a position to complain when their adversaries sought to read other verses from the same chapter and page.

Harris v. Thompson, Ky., 497 S.W.2d 422, 430 (1973).

Appellant further attacks Trooper Martin's testimony on the basis that it was premised on assumptions. The record reveals that Trooper Martin's testimony was based on his experience, witness statements, and physical evidence. An investigating officer's opinion based on facts, expert training, and the application of his training and experience to those facts, is admissible. An opinion, based on mere assumption, however, is not admissible. Wells v. Conley, Ky., 384 S.W.2d 496 (1964). The record reveals that Trooper Martin's opinion that Mr. Bright was in the roadway was supported by statements from witnesses indicating Mr. Bright was in the roadway and by physical evidence surrounding the site confirming such statements. Additionally, the point of impact on the vehicle, blood marks on the pavement, and other measurements formed the basis for Trooper Martin's opinions.

We have reviewed the testimony of Trooper Martin and find nothing in the record which would constitute an abuse of discretion by the trial court. Perry v. Commonwealth, Ky., 839 S.W.2d 268 (1992).

Finally, appellant complains that she was questioned concerning payments received from insurance companies and the railroad retirement pension, citing O'Bryan v. Hedgespeth, Ky., 892 S.W.2d 571 (1995), which held the collateral source provision of Ky. Rev. Stat. (KRS) 411.188 unconstitutional. The jury in this case found that Ms. Carnes was not negligent in the operation of her vehicle and the issue of damages was not reached. The jury's knowledge of collateral source payments, if prejudicial to a party, affects the jury's award of damages and not the liability of a party. Any error in the admission of the payments received by appellant was harmless. Vittitow v. Carpenter, Ky., 291 S.W.2d 34 (1956).

Although there was some question as to the location of Mr. Bright at the time of the accident and Ms. Carnes' inability to avoid a collision, there was more than substantial evidence to support the jury's verdict. Ohio Valley Terminix Corp. v. Rudolph, Ky., 444 S.W.2d 114 (1969). The judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William D. Stark, Jr.
Barbourville, Kentucky

BRIEF FOR APPELLEES STACIE
LYNN CARNES and RAYMOND BROWN:

Darrell L. Saunders
Corbin, Kentucky

BRIEF FOR APPELLEE STATE FARM
MUTUAL AUTOMOBILE INSURANCE
COMPANY:

Bridget L. Dunaway
William C. Stambaugh
London, Kentucky