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NOT TO BE PUBLISHED

NO. 95-CA-001419-MR

BETTY G. BREWER APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KENNETH F. CONLIFFE, JUDGE
ACTION NO. 91-CI-5168

EDDIE T. McAFEE APPELLEE

OPINION
AFFIRMING

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BEFORE: WILHOIT, Chief Judge; JOHNSON and MILLER, Judges.

JOHNSON, JUDGE: Betty G. Brewer (Brewer) has appealed from the judgment of the Jefferson Circuit Court entered on April 28, 1995, awarding her $2,000 pursuant to the verdict of the jury. We affirm.

On May 28, 1990, in Louisville, Kentucky, the vehicle driven by Brewer was hit in the rear by a car operated by the appellee, Eddie McAfee (McAfee). Brewer, an Indiana resident, sustained neck and back injuries and was transported to Norton Hospital for treatment. She commenced this action on August 12, 1991, and the matter was tried in April 1995. The jury found McAfee solely at fault for the accident and awarded Brewer $2,000

for pain and suffering, $1,490 of the $12,062.49 alleged to have been incurred for medical expenses, and $2,362.71 for lost wages. As Brewer's damages for medical expenses and lost wages did not exceed $10,000, that portion of the jury's award was eliminated from the final judgment by virtue of Kentucky Revised Statutes (KRS) 304.39-060(2). Unhappy with the amount of damages awarded, Brewer brought this appeal.

The sole issue raised in Brewer's appeal is whether the trial court erred in ruling that certain medical records pertaining to her and sought to be introduced by McAfee had been properly authenticated. During discovery, McAfee learned that Brewer had been involved in at least four other motor vehicle accidents in the ten years preceding the one he caused. None of those accidents was apparently the fault of Brewer. However, she received treatment after those accidents for injuries which were similar to the injuries she claimed to have suffered as a result of the 1990 accident.

In October 1993, McAfee subpoenaed Brewer's medical records from MetroHealth Care Clinic, an HMO based in Indianapolis, Indiana, where Brewer was treated following the previous accidents. The custodian of the records refused to release them without a court order, which McAfee obtained. The record reflects that Brewer was aware that McAfee had obtained her medical records from MetroHealth and that McAfee's counsel made them available to her counsel for inspection. On November 2, 1993, Brewer filed her first motion in limine in which she

challenged the relevance of any evidence pertaining to her prior automobile accidents. She did not then, nor at any time prior to the morning of trial a year and a half later, raise any issue concerning the authenticity of the MetroHealth medical records.

Because the injuries Brewer had previously sustained involved the same areas of her body that she alleged were injured in the 1990 accident, the trial court determined the evidence was relevant to the instant action and denied Brewer's motion in limine. She renewed her motion on the morning of trial, and again argued that the previous events had no relevance to the issues involved in the instant case. Again, the trial court ruled that the medical evidence concerning injuries suffered from her prior accidents was relevant and could be admitted. After the jury was seated, Brewer, for the first time, moved to exclude as evidence the records of medical treatment she had received for the previous injuries based on McAfee's alleged failure to comply with the requirements of KRS 422.305. The trial court reviewed the certification provided by the custodian of the MetroHealth records, found that it substantially complied with the information required by KRS 422.305(2),[1] and otherwise found no reason to suspect the records to be other than what McAfee purported them to be. The trial court also found that even if there were any question of the authenticity of the medical records, Brewer was estopped from raising it at that late date.

Brewer continues to insist that the records were not

[1]Inexplicably, this certification is not contained in the record on appeal.

properly authenticated as required by KRS 422.300 - 422.330. She specifically asserts that KRS 422.305(2)[2] was not complied with in that the records offered into evidence were not "contained in an inner wrapper in a sealed envelope." She also alleges the copied documents were untrustworthy as counsel for McAfee had opened the records and "arranged and tabbed the records as he saw fit."

Assuming for purposes of argument that the provisions of KRS 422.300 -- 422.330 are applicable to the medical records of an out-of-state clinic[3], we can find no breach of the statutory requirements established for self-authentication of those medical records. The statute does not require that the

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[2]KRS 422.305(2) provides:

> The certification shall be signed before a notary public by the employee of the hospital charged with the responsibility of being custodian of the records and shall include the full name of the patient, the patient's medical record number, the number of pages in the medical record, and a legend substantially to the following effect: "The copies of records for which this certification is made are true and complete reproductions of the original or microfilmed medical records which are housed in (name of hospital). The original records were made in the regular course of business, and it was the regular course of (name of hospital) to make such records at or near the time of the matter recorded. This certification is given pursuant to KRS . . . by the custodian of the records in lieu of his or her personal appearance." Such copies shall be separately enclosed and sealed in an inner envelope or wrapper bearing the legend "Copies of Medical Records," and the title and number of the action or proceeding, the date of the subpoena, the name of the hospital, the full name of the patient, the patient's medical record number and the name and business telephone number of the employee making the certification, and the sealed envelope or wrapper, together with the certification, shall then be enclosed and sealed in an outer envelope or wrapper, and delivered to the requesting party.

[3]KRS 422.300 allows a litigant to use as evidence photocopies of medical records or charts of "any hospital licensed under KRS 216B.105."

records remain in the sealed envelope--only that they be delivered to the requesting party in that condition. Clearly, it is contemplated that the records might be removed from the envelope, reviewed, re-arranged and used selectively during a trial. KRS 422.300 provides a safeguard to prevent tampering with or alteration of photocopies of records by its requirement that the hospital "hold [the original records] available during the pendency of the action or proceeding for inspection and comparison by the court, tribunal or hearing officer and by the parties and their attorneys of record."

MetroHealth is not a hospital, nor is it licensed pursuant to KRS 216B.105. See n.3. Thus, although Brewer premised her argument below on the requirements of KRS 422.305, and while the trial court based its resolution of the issue of authenticity on that statute, we agree with McAfee that any issue relating to the authenticity of the MetroHealth records is better examined in light of the Kentucky Rules of Evidence (KRE). The applicable rule, we believe, is KRE 902(11), the rule providing for self-authentication of business records. Brewer does not dispute that McAfee complied with the requirements of KRE 902(11). She insists this rule has no application to medical records in the first instance. We disagree. KRE 902(11) allows for self-authentication of records of "regularly conducted activity within the scope of KRE 803(6) or KRE 803(7)." KRE 803(6), which concerns hearsay exceptions, specifically includes "opinions, or diagnoses, made at or near the time" of the event

recorded. Further, KRE 803(6) defines "business" to include any "profession, occupation, and calling of every kind." Indeed, medical records have long been considered to fall within the category of business records. See Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122, 123 (1991); and Buckler v. Commonwealth, Ky., 541 S.W.2d 935, 937-939 (1976).
Having reviewed the record, we can find nothing to support Brewer's argument that the trial court erred in finding the records at issue to be authentic. See Hackworth v. Hackworth, Ky. App., 896 S.w.2d 914, 916 (1995).

Lastly, Brewer has not cited any authority to support her claim that the trial court erred in its determination that the evidence concerning her prior accidents and the treatment she received following those accidents was relevant. Nevertheless, she has included in her brief several references to the relevancy issue. We find no abuse of discretion in the trial court's denial of Brewer's requests to exclude this evidence. "Evidence of other injuries, whether received in an automobile accident or in a bullfight, would be competent if such evidence had any bearing on the pain or disability claimed as a result of the subject injury." Burnett v. Ahlers, Ky., 483 S.W.2d 153, 158 (1972). See also Ford Motor Company v. Zipper,Ky., 502 S.W.2d 74 (1973) and Barker v. Sanders, Ky., 347 S.W.2d 529, 532 (1961).

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. James W. Bryant
Louisville, KY

BRIEF FOR APPELLEE:

Hon. Wm. Clifton Travis
RICKETTS & TRAVIS
Louisville, KY