RENDERED: MARCH 15, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001822-MR

CLIFTON HALLEY and
KATHY HALLEY, his wife — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE GARLAND HOWARD, JUDGE
ACTION NO. 98-CI-01362

ALLSTATE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON AND HUDDLESTON, JUDGES.

EMBERTON, JUDGE: Clifton Halley was operating a motor vehicle when it was struck by a vehicle operated by Lance Spurlock. Halley, who was not wearing a seat belt, suffered facial lacerations, cuts, bruises, and a compression fracture of the twelfth thoracic vertebra. He settled with Spurlock's insurance carrier for the policy limits of $50,000, then filed the present action against Allstate Insurance Company, his own insurance carrier, to recover underinsured motorists benefits. The jury found Spurlock was sixty percent negligent in causing the accident and attributed the remaining forty percent of fault to

Halley. Since the total award to Halley, 60% of $50,347.08, or $30,208.25, did not exceed Spurlock's insurance coverage, Halley received nothing from the verdict. On appeal, he raises five points of error: (1) there should have been an instruction for an increased likelihood of future impairment; (2) the instructions should not have included Halley's duty to use a seat belt; (3) expert testimony regarding the failure to use a seat belt was inadmissible; (4) expert testimony regarding the speed of Halley's automobile should not have been admitted; and (5) the court erred in admitting evidence of collateral source payments received by Halley. We affirm.

The court's instructions permitted the jury to award Halley future medical expenses and damages for mental and physical pain and suffering including any he is reasonably certain to endure in the future. The court rejected Halley's tendered instruction requesting a separate damage item for "increased likelihood of future injury or complications." In Davis v. Graviss,[1] the court held that the jury may compensate a plaintiff for the increased likelihood of future complications. However, in Capital Holding Corporation v. Bailey,[2] concerned that the Davis opinion had been misconstrued, the court clearly rejected any notion that the increased likelihood of future complications is a separate element of tort recovery. As explained by the court:

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[1] Ky., 672 S.W.2d 928 (1984).

[2] Ky., 873 S.W.2d 187 (1994).

> The debate about how to apply Davis v. Graviss in awarding damages suggests the case has been misunderstood by some in two respects: (1) as sanctioning separate recovery for a new type of damages in addition to the traditional elements of tort recovery; and (2) as sanctioning recovery in the amount that would be appropriate if such future complications were already fully realized.
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> 1) A recovery for an increased risk of future harm, when such risk is established as a reasonable likelihood, is not a new element of damages but proof that the jury should consider in compensating for future physical pain and mental suffering, for future impairment or destruction of earning power, and, if there is evidence to support it, for future medical expenses.
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> 2) In awarding damages for the increased risk of future harm, the fact-finder should take into consideration the degree of the likelihood of future harm. Our law presently recognizes a jury is fully capable of apportioning fault. In like manner, a jury should apportion damages by degree for the increased likelihood of future harm. In this case, if there were now a present manifestation of harm caused by the plaintiffs' exposure to asbestos, in awarding damages for future harm the jury would need to assess how much greater now is the plaintiff's risk of developing cancer in the future than it was before the tort occurred.[3]

The trial court properly refused the separate instruction tendered by Halley.

The trial court admitted testimony from Kenneth Agent, an accident reconstructionist, whose qualifications include a Masters Degree in civil engineering from the University of Kentucky; work as a research engineer for the Kentucky Department of Transportation; and, work as a transportation engineer at the

[3] Id. at 195.

Kentucky Transportation Center at the University of Kentucky. While Halley admits Agent's qualifications as a reconstruction expert, he alleges that Agent could not testify as to the failure to use a seat belt as the cause of Halley's injuries because he was not competent to render a medical opinion.

Agent testified that based on his expertise, the medical and physical evidence, and the application of engineering principles, the use of a seat belt would have prevented Halley from being partially ejected through the driver's side window. Agent did not express a medical opinion. Well within his qualifications as a seat belt expert, he expressed his opinion as to the causative relation of Halley's failure to use a seat belt to his injuries. Such evidence is relevant and competent.[4] There was no error in the trial court's instruction to the jury that as a part of Halley's duty to exercise ordinary care for his own safety, he was required to use an available seat belt. As stated in Geyer v. Mankin:[5]

> In other words, if there is relevant and competent evidence that the plaintiff was contributorily at fault by failing to wear an available seatbelt and that such fault was a substantial factor in contributing to or enhancing the plaintiff's injuries, then the issue of the plaintiff's fault is submitted to the jury for determination. If the jury determines that the plaintiff has some degree of fault due to failure to wear a seatbelt, the liability of the parties is then determined by their respective degrees of fault.

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[4] Wemyss v. Coleman, Ky., 729 S.W.2d 174 (1987).

[5] Ky. App., 984 S.W.2d 104, 107 (1998).

Agent also testified that Halley could have avoided the accident if he had been traveling at 55 miles per hour, remained in his original lane of travel and braked hard. Halley admits that he was traveling approximately 10 miles per hour over the speed limit at the time of the accident but contends that Spurlock had a duty to yield to traffic on the superior highway, and therefore, his speed was irrelevant.

KRS 189.330 provides that motorists entering a highway yield to motorists on the superior highway that are so close as to constitute an immediate hazard.[6] However, KRS 189.330 does not, as a matter of law, preclude a finding of negligence on the motorist traveling on the superior highway. The speed of the motorist on the superior highway can be relevant if there is evidence that his speed was a proximate cause.

Prior to Killman v. Taylor,[7] there was confusion as to whether a motorist on a superior highway could be negligent and constitute a proximate cause of the collision so as to render him liable or bar his claim for damages.[8] In Killman, the court categorized the cases dealing with the subject into two groups:

> In one group of cases, which we shall call "Group A," this court held that the negligence of the driver who entered upon the through highway was as a matter of law the sole cause of the collision. In that group are Vaughn v. Jones, 257 S.W.2d 583;

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[6] See Daulton v. Reed, Ky., 538 S.W.2d 306 (1976).

[7] Ky., 453 S.W.2d 574 (1970).

[8] This case was decided prior to the adoption of comparative fault.

> Chambliss v. Lewis, Ky., 382 S.W.2d 207; Riggs v. Miller, Ky., 396 S.W.2d 69; Davidson v. Davidson, Ky., 412 S.W.2d 221; and Tooke v. Adkins, Ky., 418 S.W.2d 220.
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> In a second group of cases, "Group B," we held that there was a jury issue as to whether the driver of the vehicle on the through highway was guilty of negligence constituting a proximate cause of the collision. In that group are Metcalfe v. Hopper, Ky., 400 S.W.2d 531; Tilford v. Garth, Ky., 405 S.W.2d 6; Browning v. Callison, Ky., 437 S.W.2d 941, Indianapolis & Southeastern Trailways, Inc. v. Blankenship, Ky., 444 S.W.2d 267; and Ellison v. Begley, Ky., 448 S.W.2d 371.[9]

The court expressed serious doubt as to the validity of the lead case in "Group A," Chambliss , supra:

> We believe also that there may have been some unsoundness in the statement in Chambliss that "where the approaching car on the arterial highway was in view for an unlimited distance, the speed of the approaching car cannot be considered to be a causative factor." Upon further reflection it is our opinion that if, at the time it became apparent that the motorist on the inferior highway was not going to yield, the motorist on the favored highway was at a distance from which, if he had been traveling not in excess of the lawful speed, he would have had reasonable time and opportunity to avoid the collision, but he was in fact traveling in excess of the lawful speed, by reason of which he did not have reasonable time or opportunity to avoid the accident, his excessive speed may be considered a proximate cause. We observe that the statement in Davidson, that under the circumstances of that case speed was not a proximate cause, was correct, because the circumstances were that the favored car was only two or three car lengths from the intersection when the other car entered it.[10]

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[9] Id. at 577.

[10] Id. at 578.

It is clear that the motorist on the superior highway does not have an absolute right-of-way. His speed just prior to the accident may be relevant if it was a factor in the assessment of the ability of the motorist on the inferior way to judge the approach time of the oncoming motorist or in avoiding the collision. In this case there was expert testimony that Halley's excessive speed was a contributing factor to the accident. Under the circumstances, the issue was properly submitted to the jury.

Halley's final point of error is the admission of evidence that he was paid by his employer while off work for twelve weeks following the accident.[11] Except for limited circumstances which are not at issue in this case, evidence of employer paid sick days has been considered a collateral source and is inadmissible.[12] However, even if we were to hold the evidence inadmissible, we do not find that it was prejudicial. Since we find no other reversible errors, we would be bound to remand this case for retrial on the issue of lost wages only.[13] The maximum in lost wages claimed by Halley is $22,359.45 which, when added to the remainder of the jury's verdict, is insufficient to recover under the under insured provision of Halley's policy.[14] For this reason, we affirm.

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[11] O'Bryan v. Hedgespeth, Ky., 892 S.W.2d 571 (1995).

[12] Davidson v. Vogler, Ky., 507 S.W.2d 160, 164 (1974).

[13] Id.

[14] The jury awarded $17,918.94 for past medical expenses; $2,500 for future medicals; $4,928.14 for lost wages; and $25,000 for mental and physical suffering, for a total award of $50,347.08. Adding $17,431.31 ($22,359.45 minus $4,928.14) the

(continued...)

The judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Russ Wilkey
Owensboro, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Max S. Hartz
Owensboro, Kentucky

[14](...continued)
maximum award would be $67,778.39, 60% of which would be $40,667.03.