

RENDERED: JULY 24, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000563-MR
AND
NO. 2008-CA-000666-MR

KENNETH R. BRANAM,
ADMINISTRATOR OF THE
ESTATE OF KEVIN BRANAM

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM ANDERSON CIRCUIT COURT
v. HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 07-CI-00149

ROSEANNE J. BURGER a/k/a
ROSEANNE J. LANZA; AND
JACK KAIN FORD, INC.

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: Kenneth R. Branam, Administrator of the Estate of Kevin
Branam (“the Estate”), appeals from a judgment of the Anderson Circuit Court

which confirmed a jury verdict in a motor-vehicle negligence action against Roseanne J. Burger and Jack Kain Ford, Inc. (collectively, “the appellees”). The Estate argues that the jury instructions omitted a significant duty, and that the trial court erred by allowing testimony by the appellees’ accident reconstruction and damages experts. We find that the instructions were substantially correct and that the trial court did not abuse its discretion by allowing the expert testimony. Since we are affirming in the direct appeal, we also conclude that the issues raised in the appellees’ protective cross-appeal are moot.

This action arises from a collision between vehicles driven by Kevin Branam and Roseanne Burger (“Burger”)¹ on May 15, 2006. At the time of the accident, Burger was an employee of Jack Kain Ford, Inc. (“Jack Kain”), and was acting within the scope of her employment. Burger was driving a 2004 Ford F-550 flat-bed truck, which had just been serviced by Jack Kain in Versailles, Kentucky. To test drive the vehicle, Burger traveled westbound on the Martha Lane Collins Bluegrass Parkway (“the Bluegrass Parkway”). She took the exit for U.S. Highway 127 (“US 127”), and then turned right at the end of the ramp onto northbound US 127.

At that point, US 127 is a 4-lane, limited-access highway. The road has two lanes in each direction, separated by a concrete median. Just north of the

¹ At the time of the accident, Burger’s name was Roseanne J. Lanza. In the interest of consistency we will refer to her as Burger.

intersection of US 127 and the Bluegrass Parkway, there is a left-turn lane adjacent to the left through-lane of northbound US 127.

Burger testified that she decided to turn around and return to the Bluegrass Parkway. She pulled the truck into the left-turn lane with the intent to either make a u-turn or to turn into a driveway on the opposite side of US 127. However, a portion of the rear of the truck remained in the left through-lane.

Kevin Branam was driving a 1995 Isuzu Trooper in the left lane of northbound US 127 some distance behind Burger's truck. Branam's vehicle sideswiped the truck, removing much of the left side of the body of the Isuzu. The Isuzu then crossed both lanes of northbound US 127, flipped over, and ejected Branam. Branam was unconscious at the scene and was later pronounced dead at the hospital.

There were two witnesses to the accident. April Wilhoite ("Wilhoite") was driving in the right lane of northbound US 127 approximately 2-3 car-lengths behind Branam's vehicle. At the scene, Wilhoite reported that she saw the flatbed truck move into the left-turn lane and come to a complete stop with a corner of the truck still in the left through-lane. In her later deposition and trial testimony, Wilhoite added that Burger appeared to change lanes suddenly and the accident occurred only a few seconds later.

Devonda Norton ("Norton") was traveling southbound on US 127. At the scene, Norton reported that she saw the flatbed truck move into the left-turn lane as if Burger intended to make a u-turn. In her deposition and trial testimony,

Norton added that she did not believe that Branam had sufficient time to avoid the collision after the truck stopped.

Thereafter, the estate brought this action against Jack Kain and Burger, seeking damages for negligence and wrongful death. At trial, the primary issue on liability concerned the amount of time that Burger was stopped in the left-turn lane. Burger testified that she had been stopped in the left-turn lane for at least thirty seconds before the collision. The appellees' expert, accident reconstructionist and Kentucky State Police Trooper Hunter Martin ("Trooper Martin"), was one of the police officers who arrived at the scene shortly after the accident. He interviewed Wilhoite, Norton and Burger at the scene. He also took photos at the scene and used a Sokkia Total Station Mapping System. Trooper Martin agreed that the truck bed was partially in the through-lane of northbound US 127. However, he listed no contributing factors for Burger. On the other hand, Trooper Martin noted that the conditions were clear and there were no obstructions to visibility. Consequently, Trooper Martin was of the opinion that there was no reason that Branam could not have seen the truck in the roadway and avoided the accident. As a result, he concluded that Branam's inattention was the primary cause of the accident. The appellees also offered the testimony of another accident reconstructionist, Vince Sayre ("Sayre"). Sayre's testimony was consistent with that of Trooper Martin.

The Estate's expert, accident reconstructionist Henry P. "Sonny" Cease, Jr. ("Cease"), relied more on the later deposition testimony of Wilhoite and

Norton. He also criticized Trooper Martin's use of the Sokkia Total Station system, and Trooper Martin's failure to conduct additional interviews with Wilhoite and Norton. Cease was of the opinion that Burger was negligent by attempting to make a left turn at that point and by stopping with a portion of the truck in the through-lane of northbound US 127. Cease further concluded that Branam could not have avoided the collision under the circumstances.

The other contested issue at trial concerned proof of damages. The Estate called William Baldwin, Ph.D. ("Dr. Baldwin") to testify about the destruction of Branam's power to earn money. Dr. Baldwin noted that Branam was relatively young (49 years old), and was self-employed as a mechanic. Dr. Baldwin also noted that Branam was the sole shareholder of an S-corporation, Kentucky Transmission, Inc., which continued to operate after Branam's death. Dr. Baldwin calculated Branam's loss of the power to earn money based mainly upon his personal tax returns and the tax returns of Kentucky Transmission. Accordingly, Dr. Baldwin found that the total value of Branam's earning capacity would be \$3,651,588.00

The Defendants' expert, Carolyn Conover ("Conover"), criticized this approach, stating that the corporate tax returns were not a true measure of an individual's earning capacity. She based Branam's earning capacity on his likely wages as a mechanic and branch manager, and upon the dividend income from Kentucky Transmission. Based on these factors, Conover offered various

calculations of Branam's lost earning capacity, ranging between \$387,000.00 and \$859,000.00, with the most likely amount being around \$642,000.00.

The matter was submitted to the jury on the issues of negligence and comparative fault. The jury apportioned 20% of the fault to Burger, and 80% to Branam. The jury also calculated total damages for the Estate before apportionment of \$673,931.00.² After apportionment, the trial court awarded a judgment for the estate in the amount of \$134,786.20. This appeal and cross-appeal followed. Additional facts will be set out as necessary in the opinion below.

The Estate first argues that the trial court's instructions were erroneous. Instruction No. 3 set out Burger's duties as follows:

It was the duty of the Defendant, Roseanne Burger, in operating the vehicle to be serviced by Jack Kain Ford to exercise ordinary care for her own safety and the safety of others using the highway, and this general duty included the following specific duties:

- a. To keep a lookout ahead and to the rear for other vehicles near enough to be affected by the intended movement of her automobile;
- b. Not to stop her automobile on the main traveled portion of the highway;
- c. Not to stop or suddenly decelerate the speed of the vehicle operating by her without first giving to the operator of any vehicle immediately following to the rear, if she had a reasonable opportunity to do so, a

² The jury's award was broken down as follows: \$6,042.00 for medical expenses; \$8,499.00 for funeral expenses; and \$666,432.00 for lost earning capacity, for a total of \$680,973.00. Pursuant to the provisions of the Motor Vehicle Reparations Act, Kentucky Revised Statute ("KRS") Chapter 304.39, the trial court reduced the medical expenses award by \$6,042.00 and the funeral expenses award by \$1,000.00, for amount of \$673,931.00.

- left turn signal lamp or mechanical signal device visible from the rear;
- d. To exercise ordinary care generally to avoid collision with other vehicles on the highway.

The Estate does not object to any portion of this instruction, but maintains that the trial court should have included an additional duty set out in KRS 189.330(8): “The operator of any vehicle shall not turn such vehicle so as to proceed in the opposite direction unless such movement can be made in safety without interfering with other traffic.” The appellees argue that the duty set in KRS 189.330(8) was not applicable because there was no evidence that the accident was caused by Burger’s attempt to make a left turn across oncoming lanes of traffic. Essentially, they argue that Burger owed that duty only to drivers in the southbound lanes of US 127, across which she was attempting to turn.

However, the literal language of the statute requires that the operator execute the turn “safely without interfering with other traffic”. The duty extends to all other vehicles which might be affected by the turn, whether in the same lane or the opposing lane. In this case, Burger’s attempted left turn or u-turn clearly interfered with vehicles using the left through-lane of northbound US 127. Thus, we disagree with the appellees that the duty set out in KRS 189.330(8) was not implicated under the facts of this case.

However, the trial court concluded that subsection (c) of Instruction No. 3 adequately set out Burger’s duties under in KRS 189.330(8). Thus, the question on appeal is whether the omission of the precise language of the statute

failed to substantially and accurately set out the entire law. The Estate first notes that an instruction based on a statute should encompass the wording of the statute so far as possible. *Sorg v. Purvis*, 487 S.W.2d 943, 945 (Ky. 1972). The Estate also points to the long-standing rule that erroneous instructions to the jury are presumed to be prejudicial, and that an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error.

McKinney v. Heisel, 947 S.W.2d 32, 35 (Ky. 1997), citing *Barrett v. Stephany*, 510 S.W.2d 524 (Ky. 1974); and *Trevillian v. Boswell*, 241 Ky. 237, 43 S.W.2d 715 (1931). Consequently, the Estate argues that the omission of the statutory language of KRS 189.330(8) should be considered presumptively prejudicial.

But when examining jury instructions for error, it is also well-established that the instructions must be read as a whole. *Bills v. Commonwealth*, 851 S.W.2d 466, 471 (Ky. 1993). See also *Carmical v. Bullock*, 251 S.W.3d 324, 328 (Ky. App. 2007). In this case, Instruction No. 3 accurately set out Burger's duties. While the instruction did not specifically include the turning duties set out in KRS 189.330(8), that duty was necessarily encompassed under the instruction given. The court advised the jury that Burger had a duty to keep a lookout ahead and to the rear, not to stop her vehicle in the traveled portion of the highway, not to stop or suddenly decrease the speed of her vehicle without a proper signal, and to exercise ordinary care to avoid a collision with other vehicles. Although an instruction setting out the precise language of KRS 189.330(8) would have set out Burger's duties in more detail, we cannot say that the omission of the instruction

significantly misstated the law to the jury. Therefore, we conclude that the error was harmless and does not compel reversal in this case.

The Estate next argues that the trial court erred by allowing Trooper Martin to testify without first subjecting his testimony to a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Prior to trial, the Estate moved to exclude the testimony, arguing that Trooper Martin's methodology was not scientifically reliable. The Estate requested a hearing to assess the admissibility of Trooper Martin's testimony. The trial court denied the motion, finding that Trooper Martin was qualified to offer an expert opinion in the field of accident reconstruction.

In *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), *overruled on other grounds by Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), the Kentucky Supreme Court adopted the analysis of *Daubert*, in which the United States Supreme Court set out key considerations for admitting expert testimony under the Federal Rules of Evidence.

When a party proffers expert testimony, the trial court must determine in a preliminary hearing pursuant to KRE 104, 'whether the expert is proposing to testify to (1) scientific [, technical, or other specialized] knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.' The nonexclusive, flexible factors to be considered in determining the admissibility of the proffered expert testimony as set forth in *Daubert* and adopted in *Mitchell* are: (1) whether the theory or technique can be or has been tested; (2) whether it has been subjected to peer review or publication; (3) whether there is a known or potential rate of error; and (4) whether the theory or technique has general acceptance

within its particular scientific, technical, or other specialized community.

Florence v. Commonwealth, 120 S.W.3d 699, 702 (Ky. 2003), *citing Goodyear Tire and Rubber Company v. Thompson*, 11 S.W.3d 575, 578 (Ky. 2000), *quoting Daubert*, 509 U.S. at 592-93, 113 S.Ct. at 2796-97.

The *Daubert* test is designed to keep out unreliable or “pseudoscientific” expert scientific testimony that would confuse or mislead the jury, or that cannot legitimately be challenged in a courtroom. *Daubert*, 509 U.S. at 592-93, 113 S.Ct. at 2796. The “gatekeeping” function of the trial court is restricted to keeping out unreliable expert testimony, not to assessing the weight of the testimony. This latter role is assigned to the jury. Kentucky courts have stressed this distinction in roles, noting with approval that a trial court “was aware of the difference between its role as gatekeeper and the jury's role in determining the weight evidence should have.” *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 489-90 (Ky. 2002), *vacated on other grounds by Ford Motor Co. v. Smith*, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056. *See also Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 40-41 (Ky. 2004).

In this case, the Estate concedes that the field of accident reconstruction has been previously accepted as scientifically reliable given proper expert qualifications. *See Ryan v. Payne*, 446 S.W.2d 273, 277 (Ky. 1969). The Estate also agrees that Trooper Martin was qualified to testify as an expert in the field of accident reconstruction. Rather, the Estate argues that Trooper Martin’s

application of the methodology for accident reconstruction was so flawed as to render his conclusions inherently unreliable.

We agree with the Estate that any consideration of reliability entails an assessment into the validity of the reasoning and the methodology upon which the expert testimony is based. *Goodyear Tire, supra* at 578-79. However, the Estate does not challenge the validity of any particular theory of accident reconstruction or the techniques used in the field. It only challenges Trooper Martin's application of those theories and techniques in this case.

Where the evidence consists of the routine application of a test or a technique the reliability of which has been widely recognized, the trial court need not conduct a pre-trial hearing to screen it unless the opponent comes forward with proof that the proffered evidence is unreliable. *Florence, supra* at 703.

Furthermore, criticisms of an expert's application of an accepted technique generally go to the weight and credibility of the testimony, rather than its admissibility. Therefore, we conclude that the trial court did not err by allowing his testimony without a formal *Daubert* hearing.

Finally, the Estate argues that the trial court should have excluded Conover's testimony regarding Branam's earning capacity because the appellees did not disclose that she would be testifying on that matter. The trial court's pre-trial order required both parties to submit disclosures of their expert witnesses by January 11, 2008. Pursuant to the trial court's pre-trial court, both sides disclosed their expert witnesses in a timely manner. In their disclosure, the appellees

identified Conover as their expert witness regarding the Estate's damages. The disclosure set out Conover's qualifications and outlined the substance of her testimony. In particular, the appellees stated that Conover intended to criticize Dr. Baldwin's use of the tax returns of Kentucky Transmission as a basis for calculating Branam's lost earning capacity. The disclosure did not state that Conover would provide specific calculations concerning Branam's earning capacity, but noted "[t]hat according to online salary research, ... similar auto mechanics and managers would earn approximately \$30,000.00 to \$63,000.00 annually."

Due to an illness, the parties did not depose Conover until February 4, 2008. At that deposition, Conover submitted charts and spreadsheets detailing various calculations of Branam's likely income. The Estate moved to preclude Conover from testifying about these matters, arguing that it was outside of the scope of the appellees' pre-trial disclosure. The trial court denied the motion. Conover testified at trial from these calculations, and the jury's findings regarding Branam's lost earning capacity are within the range of amounts which Conover calculated.

On appeal, the Estate argues that the Kentucky Rules of Civil Procedure ("CR") 26 disclosure did not state that she would identify about these matters and the disclosure that she would testify on these matters, nine days before trial, was not timely. The appellees respond that the Estate was not unfairly

prejudiced because Conover merely provided specific calculations for the general statements which she made in her pre-trial disclosure.

CR 26.02(4) requires parties to disclose, upon request before trial, “facts known and opinions held by experts,” including, “the subject matter on which the expert is expected to testify, and ...the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.” CR 26.02(4)(a)(i). The purpose of the rule is to allow the opposing party to adequately prepare for the substance of the expert’s trial testimony. We review the trial court decision to admit or to exclude evidence for abuse of discretion. *Goodyear Tire, supra* at 577. The trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* at 581.

In this case, the appellees disclosed that Conover intended not only to criticize Dr. Baldwin’s calculations of Branam’s earning capacity, but to offer her own opinions regarding his likely earning capacity. While that disclosure was not detailed, we conclude it was sufficient to apprise the Estate of the substance of Conover’s testimony. Furthermore, the Estate had an opportunity to depose Conover prior to trial about her testimony on the subject. Under the circumstances, we cannot find that the trial court abused its discretion by allowing the testimony.

In their cross-appeal, the appellees challenge: (1) the admission of opinion testimony by Norton and Wilhoite that Branam could not have avoided the accident: (2) the admission of Cease’s expert testimony regarding the cause of the

accident; (3) the admission of a video made by Cease which re-enacted the movement of the truck; and (4) the admission of evidence regarding the income of Kentucky Transmission after Branam's death. However, the appellees did not ask the trial court for a new trial on these issues, and on appeal they do not contend that these issues would warrant a new trial on their own. Rather, they simply seek to preserve these issues for review in the event that this Court granted a new trial on the issues raised in the Estate's direct appeal. Since we have found that the Estate is not entitled to a new trial, we conclude that the issues raised in the appellees' cross-appeal are now moot.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joe C. Savage
Escum L. Moore, III
Lexington, Kentucky

BRIEF FOR APPELLEES:

Katherine J. Hornback
R. Craig Reinhardt
Lexington, Kentucky