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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001642-MR
AND
NO. 2012-CA-001701-MR

LISA MARIE BORBOA AND
TRAVELERS INSRUANCE
COMPANY — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 09-CI-00080

CASEY R. STARSIAK, D.O. AND
TWIN LAKES MEDICAL
FOUNDATION, INC. — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

JONES, JUDGE: Appellants Lisa Marie Borboa and Travelers Insurance Company[1] filed a medical malpractice negligence action against Appellees Casey

[1] Collectively referred to herein as Appellants.

Starsiak, D.O., and Twin Lakes Medical Foundation, Inc.,[2] in Ohio Circuit Court asserting that Dr. Starsiak injured Borboa's shoulder during surgery. Over Appellants' objection, the trial court allowed Appellees' medical expert, Dr. Frank O. Bonnarens, to testify that a cortisone shot administered by another physician prior to the surgery caused the shoulder injury. On August 30, 2012, the trial court entered a judgment upon a jury verdict in favor of Appellees and dismissing Appellants' claims.

On appeal, Appellants assert that the trial court abused its discretion by failing to conduct a preliminary *Daubert* hearing and proper *Daubert* analysis and then compounded the error by allowing Dr. Bonnaren's to testify before the jury about his unreliable "cortisone theory." For the reasons more fully explained below, we AFFIRM the Ohio Circuit Court's judgment.

I. Background

Borboa sought treatment for work-related left shoulder pain from her family physician, Ray Rowland, M.D., on March 4, 2008. Dr. Rowland ordered an MRI and a few days later he injected Borboa's left shoulder with depo-medrol, commonly known as cortisone. Borboa's pain continued and Dr. Rowland eventually referred Borboa to Dr. Starsiak.

Dr. Starsiak concluded that the cause of Borboa's shoulder pain was a bone spur under the acromion and clavicle with some evidence of impingement of

[2] Collectively referred to herein as Appellees.

the supraspinatus muscle. Dr. Starsiak recommended Borboa undergo shoulder surgery, which he performed on June 19, 2008.

Borboa's shoulder pain did not resolve after the surgery. In October 2008, Dr. Starsiak referred Borboa to Michael Moskal, M.D., a shoulder specialist. Dr. Moskal ordered a CT scan and a second MRI of Borboa's shoulder. The second MRI revealed a full thickness tear of Borboa's supraspinatus tendon that was not evident in the first MRI or pictures Dr. Starsiak took during surgery before he shaved the bone spur. Dr. Moskal diagnosed the tear as being beyond surgical repair. He opined that Dr. Starsiak caused the tear by cutting a hole through the muscle during surgery.

As a result, Borboa filed this medical malpractice negligence action against Dr. Starsiak.[3] The parties engaged in discovery and proceeded to trial. The central issue in the case became what caused the shoulder tear. Borboa maintained that Dr. Starsiak negligently caused the tear during the shoulder surgery to remove the bone spur. Relying on Dr. Bonnarens's expert medical opinion, Dr. Starsiak argued, among other things, that the cortisone shot Dr. Rowland administered in March 2008 caused the tear.

Dr. Bonnarens testified that he had performed over a thousand orthopaedic shoulder surgeries. He testified that very few of them involved patients that had received cortisone injections prior to surgery because he does not

[3] Travelers Insurance Company, Borboa's workers' compensation insurer, was added as an intervening Plaintiff and Twin Lakes Medical Foundation, Dr. Starsiak's employer, was added as an additional defendant.

use cortisone injections in his practice. He stated that based on his experience and research, he does not believe it is a beneficial treatment modality.[4] He further testified that the warning insert from the manufacturer of the product indicated that a possible adverse reaction or effect was tendon rupture. He also cited various animal studies on rats that showed some tendon weakness after cortisone injection. He admitted, however, that he was not aware of any such studies on humans.

Borboa filed a pretrial motion *in limine* to exclude Dr. Bonnarens' testimony on ground that it violated the rules on the admissibility of expert testimony established under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000), and *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997).

The Ohio Circuit Court conducted a preliminary hearing on the *Daubert* motion and other pre-trial motions on July 25, 2012. Ultimately, the trial court overruled the motion. In so doing, the court stated "I'm going to have to let it in because it goes to its weight rather than its admissibility and you certainly have the right to cross examine the doctor and point out those items that you skillfully pointed out to the court." The trial court later issued a written order in conformity with its oral bench ruling. In relevant part, the written order states: "The Court has considered Plaintiff's Motion in limine to Exclude Dr. Frank O. Bonnarens' Opinions and Testimony that Cortisone (Depo-Medrol) Contributed to

[4] Dr. Bonnarens did not testify that using cortisone falls below the standard of care.

Plaintiff's Shoulder Injury. Upon the Court being sufficiently advised on this matter, IT IS HEREBY ORDERED that Plaintiff's Motion is OVERRULED."

The jury returned a verdict in favor of Appellees on August 15, 2012. This appeal followed. On appeal, Appellants contend that the trial court committed reversible error by procedurally failing to perform the requisite *Daubert* analysis and by abusing its discretion in allowing evidence of the so-called cortisone theory to be presented at trial.

Appellees also filed a protective cross-appeal in accordance with *Smith v. Wal-Mart*, 6 S.W.3d 829, 830 (Ky. 1999). In their cross-appeal, Appellees maintain that if we return this action to the trial court for a second time, we should correct certain errors the trial court committed by including an instruction that the court: 1) not allow into evidence Dr. Starsiak's licensure issues and the fact that he kept Borboa's chart in his desk; and 2) instruct the jury on comparative fault.

II. STANDARD OF REVIEW

On appeal, the standard of review for a trial court's ruling on the admissibility and relevance of expert testimony is abuse of discretion. *See Farmland Mut. Ins. Co. v. Johnson,* 36 SW3d 368, 378 (Ky. 2000). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear*, 11 S.W.3d at 581. Additionally, a trial court's findings of fact, if any, regarding the reliability of an expert's opinions should be disturbed only if they are clearly

erroneous. *See* Miller v. Eldridge, 146 S.W.3d 909, 914–15 (Ky.2004). *See also* Kentucky Rules of Civil Procedure (CR) 52.01.

III. ANALYSIS

A. Adequacy of Daubert Hearing

Appellants' first alleged error is that the trial court conducted a procedurally infirm *Daubert* hearing. They cite to the fact that: 1) the court heard twenty (20) other pre-trial motions during that same hearing; 2) took no testimony from medical experts; 3) heard only legal arguments from counsel; and 4) did not affirmatively state that it reviewed the written material submitted by the parties prior to issuing a bench ruling or in its subsequent written order.

Under *Daubert*, the trial court functions as a "gatekeeper" charged with keeping out unreliable expert evidence. *Miller*, 146 S.W.3d at 913–14. When determining the admissibility of an expert's testimony, factors that the trial court may consider are: "(1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community." *Goodyear*, 11 S.W.3d at 578–79.

A *Daubert* hearing is not required every time an expert's testimony is offered. *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654, 664-65 (Ky. App. 2009). If the record is complete enough to measure the proffered testimony against the standards of reliability and relevance, a hearing is not required. *Commonwealth v. Christie*, 98 S.W.3d 485, 489 (Ky. 2002). "Usually, the record upon which a trial court can make an admissibility decision without a hearing will consist of the proposed expert's reports, affidavits, deposition testimony, existing precedent, and the like." *Id.*

"When the record is adequate, the minimum a court must do to fulfill the requirements of *Daubert* and its progeny is to make an affirmative statement on the record that the court has 'reviewed the material submitted by the parties [relevant] to the testimony of the [expert witnesses] and [has] concluded that the testimony was reliable.'" *Lukjan v. Commonwealth*, 358 S.W.3d 33, 41 (Ky. App. 2012) (quoting *Hyman & Armstrong, PSC v. Gunderson*, 279 S.W.3d 93, 101 (Ky.2008)).

Certainly, the trial court did not perform an on-the-record, step-by-step *Daubert* analysis. This does not mean, however, that the trial court abandoned its role as gatekeeper. After a careful review, it is clear to us that the trial court had available and considered an adequate record. At the preliminary hearing, the trial court listened to the arguments of counsel. Afterwards, the trial court remarked that it was inclined to let the evidence come before the jury because it believed that

Appellants' arguments went more to the weight of the evidence than to its admissibility. Even so, the trial court allowed the parties to submit briefs after the preliminary hearing. Appellees' response to the motion *in limine* contained portions of Dr. Bonnarens's deposition testimony and his expert disclosures (professional qualifications, his opinions, and the basis of his opinions).

Appellants read our opinion in *Lukjan* too broadly to the extent that they rely on it to require a trial court to recite a specific script on the record. *Lukjan* simply stands for the proposition that a trial court satisfies *Daubert* and its progeny, if it indicates affirmatively on the record that it has considered the record. No precise language is required. It is enough, if the appellate court can ascertain from the record that the trial court reviewed the available record before issuing its final ruling on the matter.

Here, the trial court stated it "considered Borboa's motion *in limine* and was sufficiently advised on this matter." Logic and common sense dictate that consideration of a motion adequate to render one sufficiently advised necessarily includes a review of any response. The trial court's statements at the hearing as well as its subsequent written order are sufficient to allow us to conclude that the trial court satisfied its obligations by considering all the relevant material in the record before issuing its final written order.

B. Reliability of Opinion

We now turn to the issue of whether the trial court abused its discretion by allowing Dr. Bonnarens' cortisone causation theory to come before the jury. Kentucky Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case.

Appellants argue that the trial court should not have allowed the cortisone theory to come before the jury because it was untested, unpublished, and not subject to peer review. In evaluating whether an expert is qualified, "Kentucky's case law clearly indicates that the decision required of the trial judge is to determine if an expert has 'adequate' rather than 'outstanding' qualifications." Lawson, *The Kentucky Evidence Law Handbook*, § 6.15 (3d ed.).

Likewise, "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." *Commonwealth v. Martin*, 290 S.W.3d 59, 68 (Ky. App. 2008). "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." *Id.*

"Disputes as to the strength of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony." *Id.* (quoting *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir.1995)). For example, in *Rehm v. Ford Motor Co.*, 365 S.W.3d 570 (Ky. App. 2011), a testifying expert submitted an alternative theory as to the cause of mesothelioma based primarily on literature review. The trial court remarked that the alternative theory "flew in the face of 90% of the evidence," yet allowed the theory to come before the jury. *Id* at 576. On appeal, we concluded that the theory was not "junk" such that it should have been kept from the jury. Additionally, we noted that the cross-examination was thorough and exposed the potential weaknesses of theory. As such, we affirmed the trial court's decision to allow the testimony.

Having carefully reviewed the record, we cannot conclude that the trial court abused its discretion in allowing Dr. Bonnarens to testify that the cortisone injection could have caused the tear. Dr. Bonnarens testified that he has performed upwards of one thousand shoulder surgeries and is familiar with the anatomy of the shoulder. He further testified that he ceased using cortisone injections in his own practice because of his concerns about their effectiveness and possible side effects, including tendon rupture. Dr. Bonnarens further explained that the manufacturer's literature accompanying the injections indicates that tendon rupture is a possible side effect. Furthermore, Dr. Bonnarens explained that he relied on the results of a

survey indicating that approximately 39% of other physicians surveyed had experienced tendon rupture in their patients after cortisone injection and on some animal studies suggesting a casual connection between cortisone injections and weakened tendons.

We do not believe that Dr. Bonnarens' opinion was based on the kind of junk science *Daubert* was designed to keep from the jury. His opinion was based on his medical degree, personal experience treating patients, his review of the product warnings, surveys showing the experience of other physicians, and clinical animal studies. We believe the jury was fully capable of understanding and evaluating his testimony. Moreover, his testimony could be (and was) subjected to vigorous cross-examination.

We find no abuse of discretion and affirm the trial court's rulings denying Borboa's motion *in limine* and permitting Dr. Bonnarens's expert opinion on the cortisone theory.

C. Protective Cross-Appeal

In light of our decision to affirm the trial court on Appellants' points of error, Appellees' protective cross-appeal is moot. As such, we will not address the points of error raised by the cross-appeal.

IV. CONCLUSION

For the reasons set forth above, we AFFIRM the Ohio Circuit Court.

ACREE CONCURS.

VANMETER CONCURS IN RESULT ONLY.

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