RENDERED: APRIL 22, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001953-MR

JIMMY ROGERS, DOTTIE ROGERS, GINGER ADKINS, SHAWN YATES, JAMIE YATES and JIMMY AUSTIN ADKINS, an unmarried minor — APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 00-CI-00327

COLUMBIA GAS TRANSMISSION CORPORATION, COLUMBIA ENERGY SERVICES CORPORATION, d/b/a COLUMBIA ENERGY, ASHLAND EXPLORATION, INC., COLUMBIA GAS OF KENTUCKY, INC., and UNKNOWN DEFENDANTS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, COMBS, AND VANMETER; JUDGES.

D. LAMBERT, JUDGE: This is an appeal from the November 5, 2014 order of the Floyd Circuit Court granting summary judgment in favor of the appellees

(collectively, "Columbia"). The trial court determined the appellants could not prove the requisite causation element of their toxic tort action based on the expert testimony offered. After review, we affirm.

I. BACKGROUND

In 2000, the appellants sued Columbia after discovering a measuring station on one of Columbia's natural gas transmission lines had released mercury onto their property. The appellants' alleged that they had been exposed to this mercury, and that this exposure caused them bodily injuries. After surviving multiple failure-to-prosecute notices, the appellants finally found Dr. Mark Geier to testify as an expert in support of their claims.

In 2012, Dr. Geier provided his opinion during a discovery deposition. The substance of his testimony was that he had conducted several tests on the appellants and discovered that their injuries were caused by mercury exposure. According to Dr. Geier, tests revealed high amounts of mercury in the appellants' bodies, and because the appellants carried two single nucleotide polymorphisms (SNPs) in their DNA, the high mercury-exposure levels explained the appellants' injuries.

Following the deposition, Columbia moved to exclude Dr. Geier's testimony. After pointing out that Dr. Geier's license to practice medicine in Kentucky had been revoked, Columbia argued (1) that Dr. Geier had never previously qualified as an expert with respect to metallic mercury exposure, (2)

that Dr. Geier's research linking organic mercury exposure during the vaccination process to future medical conditions had been rejected by other courts and the scientific community at-large, and (3) that Dr. Geier, by his own admission, offered his opinion without knowing any details as to when, how, or how long the appellants were exposed to any mercury from the measuring station—if at all. The trial court accepted these arguments and excluded Dr. Geier's testimony. The trial court then determined that the appellants' failure to produce a reliable expert rendered the case appropriate for summary judgment under CR[1] 56 and *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010). This appeal followed.

II. STANDARD OF REVIEW

The decision of a trial court to exclude expert witness testimony is reviewed for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). An abuse of discretion occurs when the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *KBA v. Unnamed Attorney*, 414 S.W.3d 412, 416 (Ky. 2014).

The decision of a trial court to award summary judgment is reviewed *de novo*. *Goldsmith v. Allied Building Components, Inc.,* 833 S.W.2d 378, 381 (Ky. 1992). This is because summary judgment is only appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." CR 56.03. Importantly, "the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, [and] all

[1] Kentucky Rules of Civil Procedure.

doubts are to be resolved against him." *Rowland v. Miller's Adm'r*, 307 S.W.2d 3, 6 (Ky. 1956). Furthermore, the respondent is not required to offer evidence that a genuine factual issue exists "unless and until the moving party has properly shouldered [its] initial burden." *Robert Simmons Const. Co. v. Powers Regulator Co.*, 390 S.W.2d 901, 905 (Ky. 1965); *Goff v. Justice*, 120 S.W.3d 716, 724 (Ky. App. 2002). If the moving party has carried its burden, summary judgment should still "only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor . . . .'" *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose,* Ky., 683 S.W.2d 255 (1985)).

III. DISCUSSION

1. **The trial court properly excluded Dr. Geier's testimony**

On appeal, the appellants first contend that the trial court abused its discretion by considering Dr. Geier's disqualification to practice medicine in Kentucky and in a number of other states. The appellants then argue that Dr. Geier's methodology was sound because he drew his conclusions from standard testing and evaluation procedures. Finally, the appellants take issue with the trial court's finding that Dr. Geier did not adequately support his opinion. For the following reasons, Dr. Geier was properly excluded.

Under KRE[2] 702,

[2] Kentucky Rules of Evidence.

> 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.

With respect to this type of evidence, "[t]he trial court functions as a 'gate keeper' charged with keeping out unreliable, pseudoscientific evidence." *Brosnan v. Brosnan*, 359 S.W.3d 480, 484 (Ky. App. 2012). Moreover, as explained in *Stringer v. Commonwealth,* 956 S.W.2d 883, 891 (Ky. 1997):

> Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

The *Daubert* requirements mentioned above refer to the following factors a trial court may apply when assessing the reliability of an expert's proffered testimony:

> (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 Tire and Rubber Co., 11 S.W.3d at 578-79 (citing *Daubert*, 509 U.S. at 592–94, 113 S.Ct. at 2796–97, 125 L.Ed.2d at 482–83). Notably, these requirements are not exhaustive since their purpose is to allow the trial court to separate science from pseudo-science, e.g., astronomy from astrology. *Miller v. Eldridge*, 146 S.W.3d 909, 919 (Ky. 2004). Furthermore, a trial court must avoid applying the *Daubert* factors rigidly to novel methods just because they are novel —as this would figuratively "lock the gate to innovative or unique scientific techniques that have been newly developed in response to the unusual facts of a particular case." *Id.*

Here, there is no evidence that the trial court improperly considered Dr. Geier's reputation in the medical community as the basis for its decision. Instead, after stating in its order granting summary judgment that "[t]he loss of [Dr. Geier's] medical license is not dispositive to the Court but is one factor reflecting on his credentials[,]" the trial court applied Dr. Geier's methods to the legal authorities previously cited and properly found them unreliable pursuant to its gate-keeper function. Though Dr. Geier employed traditional methods for testing mercury exposure and compared them to family medical histories and data produced from physical examinations, his methods were not generally accepted in the scientific community nor were they particularly helpful in resolving the causation question at issue. On the contrary, several other courts and the scientific

community rejected Dr. Geier's previous attempts to link mercury exposure to subsequent injuries, and the metallic mercury used in Columbia's measuring stations was not the same type of mercury Dr. Geier studied—a fact Dr. Geier confirmed when he testified that he did not have any experience researching metallic mercury. Additionally, Dr. Geier's testimony did not provide any evidence connecting the mercury released on the appellants' property to the mercury in the appellants' bodies. Dr. Geier even admitted that he did not have any knowledge of the appellants' exposure to mercury from the measuring station, if any, other than what he learned from the appellants. Dr. Geier's testimony was thus deficient, and the trial court reasonably excluded it.

2. The trial court appropriately granted summary judgment

The appellants' final argument on appeal challenges the trial court's decision to award summary judgment based on *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010), which held that defendants are entitled to summary judgment "[i]n a medical malpractice action, where a sufficient amount of time has expired and the plaintiff has still failed to introduce evidence sufficient to establish the respective applicable standard of care." According to the appellants, the facts of *Blankenship* are distinguishable from this case because they produced an expert, who they maintain was a credible witness. For the following reasons, we agree with the trial court's decision to grant summary judgment based on the standard set forth in CR 56 and *Steelvest*, *supra*.

After observing that causation presents mixed questions of law and fact that are best left for juries, this Court in *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 479 (Ky. App. 2012), also recognized that a trial court may not, as a general rule, grant summary judgment against a plaintiff simply because he was unable to establish, through expert testimony, a causal relationship between his injury and the act or omission of the defendant. *Id.* at 479-80. The two exceptions to this general rule occur in medical malpractice cases, like in *Blankenship*, and in cases where it appears practically impossible for the party responding to a summary judgment motion to produce evidence at trial warranting judgment in his favor. *Id.* at 80 (citing *Steelvest*, 807 S.W.2d at 480).

Here, even though Dr. Geier was properly excluded as an expert, the first exception does not apply because this is not a medical malpractice action. The second exception does apply, however, because the appellants have not presented any credible evidence in the last 15 years tending to show that the mercury released from Columbia's measuring station caused their injuries. Accordingly, a jury is unnecessary and summary judgment is proper. The order of the Floyd Circuit Court is hereby affirmed.

VANMETER, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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