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IN THE

Supreme Court of Virginia

RECORD NO. 181002

YASHANA SPRUILL,

Appellant,

v.

BRENDON GARCIA
and
ANGELA TYLER,

Appellees.

BRIEF OF APPELLEE ANGELA TYLER

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STATEMENT OF THE CASE

Appellee Angela Tyler, by counsel agrees and adopts Appellant's "Statement of the Case."

STATEMENT OF FACTS

Appellant, Yashana Spruill, claims that, as a result of an automobile accident that occurred on December 5, 2016, she sustained personal injuries. Spruill was a passenger in a vehicle driven by Appellee Angela Tyler. The vehicle, in which she was a passenger, came into contact with a vehicle driven by Appellee Brendon Garcia at the intersection of East Bayview Boulevard and Tidewater Drive in the City of Norfolk. Garcia was making a left turn from Tidewater Drive onto Bay View Boulevard as Tyler was traveling in the opposite direction on Tidewater Drive. Garcia claimed that he had a green arrow as he entered the intersection and Tyler claimed that she had a green ball as she approached and entered the intersection. In her complaint, Spruill alleged that Tyler and Garcia were jointly and severally negligent and prayed for $50,000.00 (Fifty-thousand dollars) with costs and interest, as a result thereof.

At trial, Spruill testified that she sustained soft-tissue injuries to her neck, back and shoulder. Also, in support of her claim, she had Dr. Berkowitz, chiropractor, appear at trial and present evidence of her claim. Through her direct testimony, it was revealed that Spruill started having problems with her back that

included numbness into her feet while she was in the military. (A 423) She also, on direct, testified that she underwent an MRI in 1998 and that she was prescribed physical therapy and that she received multiple epidural injection procedures for her back problem and related radiating symptoms. (A 424) She stated that upon her discharge from the military she was given a ten percent (10%) disability rating for her back (A 424). In addition to her testimony about her back pain with radiating symptoms, while in the military, she also, on direct, testified that she had been treating with Dr. Steven Choi since the year 2000 and that she would also receive treatment at the VA Medical Center, at least yearly, to confirm her disability rating. (A 426)

On direct, Spruill testified to "flare ups" of her back pain in 2011 and in 2013. (A 426) She described the "flare ups" as an increase in symptoms including "tingling down the backs of my [her] legs, and it's hard to walk." (A 427) Spruill testified that as a result of her flare up, in 2011, she presented to Dr. Choi and that there was no further treatment. She specifically denied having an MRI in 2011. (A 428) She did, however, on direct, recall that she had an MRI in 2013, due to her low back pain and radiating symptoms.

On cross-examination, Spruill again, repeated that she did not recall having an MRI in 2011. (A 454) Spruill also testified that she did not recall treating with a neurologist in 2011 for her back pain and radiating symptoms. She was

asked, "Do you remember seeing Dr. Ton [neurologist] back in 2011…" to which she responded, "No I don't" (A 455) Spruill was handed a record of her treatment and examination from Dr. Ton of Consultants in Pain Management from 2011 and was asked if it refreshed her recollection, that she had presented to Dr. Ton in 2011. Spruill denied that viewing the record of her treatment, refreshed her recollection, stating "No, it doesn't." (A 475) Spruill, several times repeated that she did not recall an MRI in 2011 and that she did not recall treating with Dr. Ton or being a patient of Consultants in Pain Management, despite reviewing the record of her treatment.

Following the accident with Garcia and Tyler, Spruill presented to Dr. Berkowitz, chiropractor. Spruill testified, on direct, that when she presented to the chiropractor's office, she completed an intake sheet and on that intake sheet, she self-reported herniated disc(s). Further, she stated that following a conversation with Dr. Berkowitz, she brought him a copy of the 2013 MRI report. (A 440) Spruill again testified, on re-direct that she had reported herniated disc(s) to the chiropractor's office on her first visit. (A 482) Dr. Berkowitz testified that on Spruill's intake sheet she checked the box identifying that she had herniated disc(s). (A 336) The chiropractor testified that Spruill presented, some prior medical records that included the 2013 MRI scan. The doctor was asked by counsel for Garcia (A 371):

Q; That's the report from the MRI scan. What year was that?

A: 2013

Q: That report actually references an earlier MRI from 2011, doesn't it?

A: Yes

Q: Now - -

A: It's compared to 2011

Further, Dr. Burkowitz was asked, on cross-examination about Spruill's presentation to and/or treatment with Consultants in Pain Management. The examination was as follows (A 382):

Q: Let me get the doctor's name. Dr. Martin Ton. He's a physiatrist?

A: I know Dr. Ton

Q: You know Dr. Ton?

A: Yes

Q: Where you aware that she sought treatment with Dr. Ton in – on September 8th 2011, at which point she described that she was there for complaints of back pain and bilateral lumbar radicular pain? Patient states she has had this for over a decade. She believes it is related to heavy lifting when she was in the military. She does not recall any specific injury or trauma. She describes tingling, cramping, sensation down both legs, down to the feet with sharp shooting pain and pins and needles type paresthesia. She has had epidural steroid injections five

years ago. It did help. She does not recall why she never followed up with her additional treatment. She has had physical therapy. It did not help her and chiropractic manipulation is somewhat helpful. She does it on an intermittent basis. (Read to the witness)

Then, on re-direct Dr. Burkowitz was asked by counsel for Spruill about her presentation and/or treatment with Neurology Associates. The record used by counsel in examining his witness was dated July 19, 2011.

After Spruill closed her case, counsel for Garcia advised the trial court that he intended to introduce several records of Spruill's treatment from 2011. Counsel, arguing to the court and summarizing *Neeley v Johnson, 215 VA 565 (1975)*, "that in a case where a plaintiff takes the position or that she doesn't remember treatment or denies some treatment in the past, that the records themselves become admissible." (A 385) Counsel stated his intention to offer the records, properly redacted, to just the factual information, as evidence in the case pursuant to statute, "which allows the custodians to submit an affidavit in lieu of actually appearing in person." (A 498) Counsel for Garcia identified that intake sheet of Consultants in Pain Management, signed by Spruill, that references the 2011 MRI and epidural injections in 2011 to treat her symptoms. The records were redacted to exclude the opinions and the court allowed, pursuant 8.01-391 (D) the introduction of the redacted record, (A 510) with the presentation of the

appropriate certificate. (A 400) (With the trial court citing that "Such identification and authentication may be made through witness testimony or a certificate by affidavit or by declaration pursuant to 8.01-4.3… or a combination of witness testimony and a certificate.") (A 513). As redacted, with the appropriate certificate, the records were properly allowed into evidence.

ASSIGNMENT OF ERROR BY APPELLANT

Appellant Spruill alleges that the trial court erred by allowing the admission of Spruill's statements contained in certain medical records and that the trial court erred by allowing the introduction of certain medical records over objection by her counsel.

STANDARD OF REVIEW

Generally, this Court will review a trial court's decision to admit or exclude evidence using an abuse of discretion standard and, on appeal, will not disturb the trial court's decision to admit evidence absent a finding of abuse of that discretion. *John Crane, Inc. v Jones, 274 Va 581 (2007); Riverside Hosp. v Hall, 272 Va 518, 529 (2006).*

ARGUMENT

I. The trial court did not err in admitting the plaintiff's statements and medical records into evidence by way of affidavit.

Under the Virginia Rules of Evidence, hearsay is not admissible except as otherwise provided by Virginia rules or laws. Va. Sup. Ct. R. 2:802. Rule 2:803 outlines hearsay exceptions that are applicable regardless of the availability of the declarant. These exceptions include statements for purposes of medical treatment and records of a regularly conducted activity. R. 2:803. Section 8.01-391 of the Code of Virginia extends this exception to copies of records:

> If any business or member of a profession or calling in the regular course of business or activity has made any record or received or transmitted any document, and again in the regular course of business has caused any or all of such record or document to be copied, the copy shall be as admissible in evidence as the original, whether the original exists or not, provided that such copy is satisfactorily identified and authenticated as a true copy by a custodian of such record or by the person to whom said custodian reports, if they be different, and is accompanied by a certificate that said person does in fact have the custody.

Va. Code § 8.01-391(D) (2014). The code further states that "[s]uch identification and authentication may be made through witness testimony or *a certificate by affidavit* or by declaration pursuant to § 8.01-4.3, or a combination of witness testimony and a certificate." Id. (emphasis added).

"The trustworthiness or reliability of the records is guaranteed by the regularity of their preparation and the fact that the records are relied upon in the

transaction of business by the person or entities for which they are kept." *"Automatic" Sprinkler Corp. v. Coley & Petersen, Inc., 219 Va. 781, 793, 250 S.E.2d 765, 773 (1979)*. As such, the admission of such evidence is conditioned upon proof that the record "comes from the proper custodian and that it is a record kept in the ordinary course of business made contemporaneously with the event by persons having the duty to keep a true record." *Id.* In addition, the records must include documents that are relied upon by the preparer of the record or for whom the document is prepared. *Id.*

The modern Shopbook Rule, which has been adopted in Virginia, allows for verified regular entries to be admitted into evidence without requiring proof from record keepers or original observers. *Id. at 792*. Although this rule generally limits use of the records "to facts or events within the personal knowledge of the recorder to which he could testify if called as a witness. . . . [it] does not necessarily exclude all entries made by persons not having personal knowledge of the facts entered." *Id.* "In many cases . . . practical necessity requires the admission of written factual evidence based on considerations other than personal knowledge of the recorder, provided there is a circumstantial guarantee of trustworthiness." *Id.*

The Court applied the Shopbook Rule in *Neeley v. Johnson*, holding that a trial court should have admitted medical records as a business record qualifying as an exception to the hearsay rule. *215 Va. 565, 571-72, 211 S.E.2d 100, 106 (1975)*.

Of note, the Court clarified that the trial court should redact any opinions or conclusions made by the recorder before admitting the records. *Id.*

In the case at hand, the trial court addressed the line of analysis in Neeley and the statutes referenced herein. The trial court admitted Spruill's medical records as an exception to the hearsay rule. The court required that all opinions and conclusions be redacted before admitting the records into evidence.

Appellee Garcia's counsel first attempted to authenticate the records by questioning Spruill about the content. Plaintiff Spruill claimed that she could not recall any information about her prior medical history, in spite of extensive documentation of preexisting complaints and treatment contained in the record. In addition, counsel for Appellant stated in his opening remarks that Spruill "hadn't had any problems with her back since she got out of the military in 1988." (A 178-9) Counsel for Garcia advised the Court that the custodians of the records were under subpoena. To enter the records more efficiently, counsel for Garcia authenticated the records by way of affidavit, a method specifically contemplated by Rule 2:902 of the Rules of the Supreme Court of Virginia and section 8.01-391(D) of the Code of Virginia. See Va. Code § 8.01-391(D) (2014) ("[I]dentification and authentication may be made though . . . a certificate by affidavit . . . ."); Va. Sup. Ct. R. 2:902(6)(a) ("In any proceeding where a business record is material and otherwise admissible, authentication of the record and the

foundation required by subdivision (6) of Rule 2:803 may be laid by . . . a certification of the authenticity of and foundation for the record made by the custodian of such record or other qualified witness . . . by affidavit . . . ."); see also Va. Sup. Ct. R. 2:1005 (derived from Va. Code § 8.01-391).

Counsel for Appellant also argues, for the first time, that he was not given fifteen (15) day notice in advance of trial in accordance with Virginia Code § 8.01-390.3 (See Argument "a.") This was not a basis of Appellant's objection at the time. Rule 5:25 requires an objection to be stated with reasonable certainty at the time of the ruling. As counsel did to not state any such objection to the trial court, it is waived on appeal.

II. If the trial court erred in allowing the evidence, the error was harmless.

Va. Code § 8.01-678 prohibits reversal of a case where the complaining party has received a fair trial and substantial justice has been reached.

When it plainly appears from the record and evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed… *Harman v Honeywell Int'l, Inc.,* 288 Va. 84.

This Court has held that nonconstitutional error is harmless if the reviewing court can be sure that the error did not influence the jury and only had a slight effect. *Lawrence v Commonwealth, 279 Va. 490 (2010).*

A review of the disputed pages reveals that any information contained in the documents was information supplied by the Appellant; further that the unredacted information was testified to either by the Appellant and/or by other witnesses, mainly Dr. Berkowitz and without objection.

The first record and intake sheet from Consultants in Pain Management signed by the plaintiff does not contain any information that could be deemed anything other than factual information. (A539)

Similarly, the second, third and fourth pages (A 540, 541 542) contain factual information provided by Spruill.

Counsel for Appellant has stated that the fifth page (A 543) contains "opinions" that the plaintiff reported back pain and leg pain that would radiate into her legs. That testimony is not opinion testimony and further, it is cumulative as it had been testified to, without objection, by the plaintiff and by Dr. Berkowitz.

The sixth page (A 544) was read to Dr. Berkowitz, again without objection and the note merely records Spruill's admissions/statements. It does not contain anything that could be described as opinions by any health care provider.

The next record (A 545) is the report of the 2011 MRI. The findings of the 2011 MRI are the same as the 2013 MRI study, whose interpretation was read in by Dr. Berkowitz. The doctor testified that he reviewed the report from the radiologist from the 2013 MRI study and that there was a comparison noted to the

2011 MRI. He continued that the 2013 MRI revealed disc bulges, that she had injections to her facets prior to the accident and the plaintiff reported a chronic back condition that pre-dated the accident.

The following records (A546, 547, 548) document the 2011 injection testified to by Berkowitz, without objection and identified medications that the plaintiff admitted that she had prior to the accident.

Prior to the introduction of the records, counsel was careful to redact opinions and/or other information that could not now be argued as harmless, if admitted.

In this matter the plaintiff admitted to chronic back pain with radiating symptoms going back as far as 1998. It is undisputed that she had an MRI in 2013 and that the 2013 MRI report was compared to a 2011 MRI. Dr. Berkowitz testified that he reviewed the 2013 report from the radiologist and that the Appellant had two separate disc bulges in 2013 and that the 2013 reading was compared to the 2011 study. Assuming, for purposes of this argument that the admission of that record was error, it was harmless as Spruill's expert testified to the same finding from a subsequent (2013) MRI.

If the admission of any of the aforementioned records from 2011 were error, they were made harmless by Spruill's own testimony and by that of Dr. Berkowitz as it was then cumulative; further there was testimony of 2013 treatment for the

same symptoms, and testimony of similar complaints shortly before the accident that was the subject of Spruill's Complaint.

In addition to the proven pre-existing condition and symptoms, there was ample evidence for the jury to conclude that Spruill failed to meet her burden of proof on damages. For example, Sprull told Tyler that her lawyer was sending her to a chiropractor. (A 298); that Spruill and Tyler went to church together the Sunday after the accident, Spruill was able to raise her hands, go to her knees and bend her back while worshiping, without incident. (A 303); that Spruill was able to perform all of her work activities following the accident; (A 324) that Spruill went to the emergency room at the suggestion of Tyler (A 326); that there were no reported complaints of injury at the scene of the accident (A205); that her expert witness never requested or reviewed prior medical records of Spruill including the emergency room record (A 355); that Spruill's expert witness was unaware of her activities for the twelve (12) days before her initial presentation to him (A 362). That the Chiropractor testified that he is relating Spruill's symptoms to the accident based upon what Spruill has told him. (A 370); that Dr. Berkowitz receives referrals from lawyers and gives referrals to lawyers (A389) that the plaintiff's expert witness receives 50% back from the fee charged by the therapists to whom his patients are referred. (A 291)

The harm, if any, caused by the introduction of the statements of Spruill and records from 2011, did not influence the jury and could have only have had a slight effect, if any.

CONCLUSION

For the afore stated reasons, Appellee Tyler argues that the trial court did not commit error by allowing the introduction of Spruill's statements and redacted medical records. However, should this Court find that the trial court did err by allowing Spruill's statements and redacted medical records, Appellee Tyler argues that the error did not influence the jury and only had a slight effect, if any.

As such, this Court should deny Appellant's request for a new trial and should Affirm the jury's verdict.

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CERTIFICATE OF SERVICE

I hereby certify compliance with Rule 5:26 and Rule 5:26(e), including that three copies of the foregoing Brief of Appellee Tyler have been hand-filed with the Clerk of the Virginia Supreme Court and electronic copies of the same have been filed, via VACES. On this same day, an electronic copy of the Brief of the Appellee has been served, via email to counsel for Appellant on this 16th day of May 2019 at the following address:

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