IN THE COURT OF APPEALS

DANITA D. and RODNEY YOUNGBLOOD, Plaintiffs-Appellees	)	HAMILTON CIRCUIT C.A. NO. 03A01-9601-CV-00037
vs.	)	HON. ROBERT M. SUMMITT JUDGE
KITTY REBECCA QUILLIAMS SOLOMON, Defendant-Appellant	)	AFFIRMED IN PART, REVERSED IN PART AND REMANDED

PAUL CAMPBELL, III, Campbell and Campbell, Chattanooga, for Appellant.

HOYT O. SAMPLES, Samples, Jennings & Pineda, Chattanooga, for Appellees.

OPINION

McMurray, J.

This action arises from a typical intersection-traffic- light automobile accident. The case was tried before a jury. The jury rendered a verdict finding the defendant-appellant to be 100 percent at fault and established damages at $4,000 for the plaintiff, Rodney Youngblood and $11,500.00 for the plaintiff, Danita D. Youngblood. A counterclaim was dismissed. Judgment was entered on the jury verdict and this appeal resulted. We affirm in part and reverse in part.

The appellant presents numerous issues for our consideration. The main thrust of the first three issues challenges the trial court's action in admitting into evidence the front page of a copy of a police officer's report concerning the accident. Appellant challenges the introduction of the document on three grounds: (1) that the accident report was introduced into evidence contrary to T.C.A. § 55-10-114; (2) that the report had been altered and was not properly authenticated; and (3) that the report contained information concerning the defendant's liability insurance carrier.

Obviously, each of the three complaints relating to the accident report have merit. The introduction of the police report is proscribed by T.C.A. § 55-10-114(b) which provides in pertinent part as follows:

> (b) No reports or information in this section shall be used as evidence in any trial, civil or criminal,

> arising out of an accident, except that the department shall furnish upon demand of any party to such trial, or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department in compliance with law.

There are no exceptions in the statute for introduction of a report as evidence in any manner and we are not inclined to create one.[1] It has been held that an officer's report may used for the purpose of refreshing the officer's memory. See Lee v. Shipp, (Tenn. App. opinion filed September 11, 1985). See also Tennessee Rules of Evidence, Rule 803(5), relating to refreshment of a witness' recollection. It would appear that Rule 803(5) would make the police report admissible absent the statutory prohibition. We are of the opinion, however, that the statutory prohibition against admission must prevail. See Rule 101, Tennessee Rules of Evidence and McBee v. Williams, 405 S.W.2d 668 (Tenn. App. 1966). McBee expressly holds that the question of admissibility of such [accident] reports is controlled by T.C.A. § 59-1014 [now T.C.A. § 55-10-114]. We agree with McBee and hold that police reports prepared and filed pursuant to T.C.A. § 55-10-114 are inadmissible as evidence and the admission of the of the report in this case was error.

It is elementary that authentication of evidence is a condition precedent to its admissibility. See Rules 901 and 902,

[1]A timely objection was made by the defendant to the admission of the report.

Tennessee Rules of Evidence. A police report of an accident does not fall within the classification of documents which are self-authenticating. In the case under consideration, the report was introduced without authentication. The officer who prepared the report was called as a witness by the plaintiffs. No attempt was made to authenticate the report by the officer, rather, the report was introduced simply at the request of plaintiffs' counsel.[2]

The record reflects that three copies of the police report were received by the court. The first, (exhibit 21), which was admitted into evidence, appeared to be altered from its original form in that it reflected the name of a person other than the defendant as the driver's name. It also contained in the box for Ms. Youngblood's address the notation "State Farm."

The second copy tendered to the court was marked exhibit 22 I.D., and contained the same information as exhibit 21 plus additional information written on the top of the document relating to the defendant's insurance company and claims representative. The third copy, marked as exhibit 23 I.D., appears to be an unaltered copy of the original report.

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[2]The introduction of this report was made during the testimony of Russell King, formerly the attorney for the plaintiffs in this action. He testified that he had called Ms. Solomon to clear up confusion about her name. He further testified that during the ensuing conversation Ms. Solomon represented to him that she did not know the color of the traffic lights at the time of the accident. He further testified that when he learned that Ms. Solomon had changed her story, he realized that he was a potential material witness in the case and ceased his representation of the plaintiffs. The police report was proffered to explain why Mr. King had contacted Ms. Solomon.

Since exhibits 22 and 23 were marked, apparently for identification only, it would be reasonable to believe that they were not made available for the jury's inspection. The record, however, does not demonstrate clearly which copy, if any, was submitted to the jury. There was a long colloquy between the attorneys and the trial judge in chambers. The colloquy sheds little light on the question of which, if either, of the reports the jury was allowed to view, but to the contrary adds to the confusion regarding the question. It would appear from remarks of the trial judge that at the time of the conference in chambers, the jury had not yet been allowed to see either of the reports. Further, it appears that the offending information alleged to have been written in the top margin of the police report was excised. In any event, the information that appears in the top margin of exhibit 22 does not appear in the top margin of exhibit 21. Since exhibit 21 was admitted into evidence and exhibits 22 and 23 were marked for I.D., we will presume that exhibit 21 was made available to the jury.

As noted above, the introduction of the police report was error. Our next inquiry is whether the error was harmless or reversible error. Rule 36, Tennessee Rules of Appellate Procedure, provides as follows:

> (b) effect of error. — A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not

affected the judgment or would result in prejudice to the judicial process.

It appears that the introduction of the first page of the police report, standing alone, would neither have affected the judgment or result in prejudice to the judicial process. The effect of introducing a police report with information identifying the liability insurance companies of the parties is another matter.

There is a general rule in this state that evidence relating to the existence or non-existence of liability insurance is not admissible. Woods v. Meacham, 46 Tenn. App. 711, 333 S.W.2d 567 (1960). Deliberate injection of the matter into the trial is ground for a reversal. Id. However, where such evidence comes out inadvertently in the examination of a witness on other subjects, the tendency is to allow the verdict to stand unless the record shows that the evidence had some effect on the jury. See Finks v. Gillum, 38 Tenn. App. 304, 273 S.W.2d 722 (1954); Seals v. Sharp, 31 Tenn. App. 75, 212 S.W.2d 620 (1948).

In this case, we are unable to determine from the record before us whether the jury had before it evidence of the existence or non-existence of liability insurance. If we were able to determine to a satisfactory degree that such proof was before the jury coupled with the erroneous admission of the police report into evidence, we would not hesitate to hold the errors to be revers-

ible. In this instance, however, we are left to speculate and this we are unable to do. We, therefore, find that the appellant has failed to establish to the requisite degree of probability that the issue relating to the erroneous introduction of the police report is reversible error.

We will next turn our attention to the issue which we consider to be dispositive of this appeal as between the appellant and the appellee, Ms. Youngblood. The appellant insists that there is an insufficient nexus between the injuries complained of by Ms. Youngblood and the accident in question. Dr. Steven Tipps, whose qualifications as an oral maxillofacial surgeon were stipulated, testified by deposition on behalf of the plaintiff. He testified that he initially saw Ms. Youngblood on February 25, 1992. At that time he found that "she had bilateral temporomandibular joint pain at that time which was three years duration." He performed surgery on her on March 10th, 1992, which he considered successful. His last contact with Ms. Youngblood prior to the accident was in August, 1992. Dr. Tipps testified that in August 1992, he and Ms. Youngblood discussed redoing the surgery on the left side of Ms. Youngblood's jaw. He further testified that he first saw Ms. Youngblood, post accident, on October 20, 1992, which was six days after the accident in question. He noted a history that she had been in a motor vehicle accident in which she struck her left jaw,

and that she had an increase in her problems associated with her left temporomandibular joint at that time.

The following questions were asked of Dr. Tipps and the following answers given:[3]

> Q. When Ms. Youngblood came back on August 20, 1992 to see you, what did you do with her at that time."[4]
>
> A. Well, other than the exam or following the exam, we discussed redoing the arthroscopic surgery on the left side once again.
>
> Q. Was that surgery eventually done?
>
> A. That surgery was scheduled and done in November 1992.
>
> * * * *
>
> Q. Dr. Tipps, assuming the history of Mrs. Youngblood as has been presented to you, I would like you to further assume this fact, that Mrs. Youngblood was involved in a motor vehicle accident on October 14, 1992, during which she struck her head.
>
> Do you have an opinion as to a reasonable degree of medical certainty as to whether such a motor vehicle accident more probably than not aggravated the condition in her left TMJ joint?
>
> A. I would say so yes.
>
> * * * *
>
> Q. With the same assumptions and the same factors, do you have an opinion as to a reasonable degree of medical certainty of whether the second TMJ surgery

[3]Objections, rulings thereon and statements of counsel have been omitted.

[4]It is significant to note that this date is prior to the accident in question.

> on November 17, 1992 was more probably than not caused by this motor vehicle accident?
>
> * * * *
>
> A. Well in view of the fact that we had previously discussed redoing arthroscopic surgery on that side, it may have been going to be done whether she had the accident or not. But certainly, the accident did not improve the situation.

While we recognize that the "reasonable degree of medical certainty" test may now have given way to the "more probable than not" test, we are of the opinion that the above testimony meets neither. See Reel v. Crawford, an unreported opinion from this court with a concurring opinion by Judge Susano, filed August 1, 1994.[5]

> Our courts have consistently required a reasonable degree of medical certainty from experts before their opinions are admissible as evidence. For example, in Aetna Casualty and Surety Co. v. Long, 569 S.W.2d 444, 446 (Tenn. 1987), testimony that the injury "could have been caused" was insufficiently certain. Similarly in Knoxville Poultry and Egg Company v. Robinson, 477 S.W.2d 515, 517 (Tenn. 1972), testimony that there was a "possible" causal connection was also insufficiently certain.

We are of the opinion that substituting "more probable than not" for "reasonable degree of medical certainty" in the above quoted rule would not alter its application in this case. Dr.

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[5]We agree with Judge Susano that the phrase "reasonable medical certainty" is not a magic phrase which is required in the testimony of a medical expert. It is sufficient if the evidence establishes, if accredited by the trier of fact, that the accident in question or other conduct of the defendant was a proximate cause of the injury for which damages are sought.

Tipp's testimony that "it [the operation] may have been going to be done whether she had the accident or not. But certainly, the accident did not improve the situation" is too speculative and uncertain to substantially assist the jury in determining whether the accident necessitated the additional surgery. We are of the opinion that the court's action in allowing the reception of evidence relating to the subsequent surgery and the costs associated therewith constitutes reversible error as between the defendant and Ms. Youngblood.

The appellant further charges the trial court with error in refusing to give certain requested jury charges relating to a party's duty at an intersection and judging the credibility of a witness. We have examined the court's charge to the jury and are satisfied that the jury was adequately charged and that the appellant's requested charges were sufficiently covered. We find no merit in these issues.

Considering the record as a whole and all issues presented for review by the appellant, we are of the opinion that the judgment as to Ms. Youngblood must be reversed and remanded for a new trial. As to the judgment in favor of Mr. Youngblood, we find no reversible error and that part of the judgment is affirmed.

In our discretion, we assess the costs of this appeal equally between the appellant and the appellee, Ms. Youngblood. This case is remanded to the trial court for such other and further action that is required consistent with this opinion.

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Don T. McMurray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

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William H. Inman, Sr. Judge

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ORDER

This appeal came on to be heard upon the record from the Circuit Court of Hamilton County, briefs and argument of counsel.

Considering the record as a whole and all issues presented for review by the appellant, we are of the opinion that the judgment as to Ms. Youngblood must be reversed and remanded for a new trial. As to the judgment in favor of Mr. Youngblood, we find no reversible error and that part of the judgment is affirmed.

In our discretion, we assess the costs of this appeal equally between the appellant and the appellee, Ms. Youngblood. This case

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PER CURIAM