[Cite as *Hyden v. Kroger Co.*, 2006-Ohio-6430.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Scott A. Hyden,	:	
Plaintiff-Appellee,	:	
		No. 06AP-446
v.	:	(C.P.C. No. 03CVD-12-13173)
The Kroger Company et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

O P I N I O N

Rendered on December 7, 2006

Malek & Malek, James Malek and *Brian L. Summers,* for appellee.

Porter, Wright, Morris & Arthur, LLP, Karl J. Sutter and *Ryan P. Sherman,* for appellant The Kroger Company.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, The Kroger Company ("Kroger"), appeals from a judgment of the Franklin County Court of Common Pleas adopting a magistrate's report and jury verdict in favor of plaintiff-appellee, Scott A. Hyden, that allowed Hyden to participate in the workers' compensation fund for injuries sustained in the course of his employment with Kroger. Because the trial court did not err in the challenged evidentiary issues, we affirm.

{¶2} In July 1999, Kroger hired Hyden as an Order Selector. Hyden's job entailed lifting and sorting between 200 and 225 boxes an hour, most weighing 80 to 97 pounds. In May 2003, Hyden visited his family practitioner, Dr. Joseph Lutz, after he began experiencing pain in his lower back. Dr. Lutz diagnosed Hyden with a lumbar strain and herniated disc L5-S1. Believing he injured his back in the course of his employment at Kroger, Hyden filed a workers' compensation claim.

{¶3} On August 18, 2003, Hyden brought his claim before a district hearing officer at the Bureau of Workers' Compensation; the officer denied Hyden's claim because he failed to establish his employment was the proximate cause of his injury. A staff hearing officer affirmed the denial of Hyden's claim, and the Industrial Commission of Ohio refused Hyden's appeal from the staff hearing officer's order.

{¶4} On December 1, 2003, Hyden filed a complaint against Kroger in the Franklin County Court of Common Pleas seeking to participate in the benefits of the Ohio Workers' Compensation Fund. Pursuant to Civ.R. 53 and Loc.R. 99 of the Franklin County Court of Common Pleas, a magistrate conducted a jury trial. The jury returned a verdict in favor of Hyden, finding him entitled to participate in the workers' compensation fund. After the magistrate filed his report and the jury verdict, Kroger filed objections to the report and a motion for judgment notwithstanding the verdict and/or for a new trial. The trial court adopted the magistrate's report in its entirety and subsequently denied Kroger's motions.

{¶5} Kroger appeals, assigning six errors:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT THE KROGER COMPANY ("KROGER") BY DENYING KROGER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF KROGER BY OVERRULING KROGER'S OBJECTIONS AND SUPPLEMENTAL OBJECTIONS TO THE MAGISTRATE'S REPORT AND ADOPTING THE MAGISTRATE'S DECISION.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF KROGER IN FINDING THAT THE PLAINTIFF-APPELLEE'S MEDICAL EXPERT, JOSEPH LUTZ, TESTIFIED WITHIN REASONABLE MEDICAL PROBABILITY IN SUPPORT OF A PROXIMATE CAUSAL RELATIONSHIP BETWEEN PLAINTIFF-APPELLEE'S CLAIMED INJURIES AND HIS WORK DUTIES WITH KROGER.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF KROGER IN ADMITTING THE EXPERT OPINION OF PLAINTIFF-APPELLEE'S MEDICAL EXPERT, JOSEPH LUTZ, WHEN THE OPINION WAS BASED ON FACTS NOT IN EVIDENCE.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF KROGER IN ADMITTING SPECULATIVE HEARSAY TESTIMONY FROM THE MEDICAL REPORT OF A PHYSICIAN WHO WAS NOT CALLED TO TESTIFY AT TRIAL.

SIXTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF KROGER IN ALLOWING PLAINTIFF-APPELLEE'S COUNSEL TO MAKE INFLAMMATORY AND PREJUDICIAL COMMENTS IN HIS CLOSING ARGUMENT.

{¶6} Because Kroger's assignments of error raise related and overlapping issues, we address the issues in disposing of the assigned errors.

I. Whether Dr. Lutz expressed his opinion with the requisite degree of certainty

{¶7} Kroger contends it is entitled to judgment as a matter of law because Hyden's medical expert, Dr. Lutz, failed to state within a reasonable degree of medical certainty that Hyden's employment with Kroger proximately caused his injuries. When determining whether Kroger is entitled to judgment as a matter of law, we must construe the evidence most strongly in favor of Hyden, the prevailing party. *Hartford Cas. Ins. Co. v. Easley* (1993), 90 Ohio App.3d 525, 530.

{¶8} "It is well-settled that the establishment of proximate cause through medical expert testimony must be by probability. At a minimum, the trier of fact must be provided with evidence that the injury was more likely than not caused by defendant's negligence." *Shumaker v. Oliver B. Cannon and Sons, Inc.* (1986), 28 Ohio St.3d 367, 369, abrogated on other grounds by *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185. Probability means more than 50 percent likely. *Stinson v. England* (1994), 69 Ohio St.3d 451. "Evidence which only shows that a condition could have been the result of an injury is 'insufficient proof to warrant submission of the cause to the jury.' " *Shumaker,* at 369, fn. 3, citing *Drew v. Indus. Comm.* (1940), 136 Ohio St. 499, 501.

{¶9} Here, Kroger cites to three instances where Dr. Lutz testified Hyden's job duties "could have," "within reason to believe," and "very well could have" caused Hyden's back injuries. While these three equivocations fall short of the reasonable certainty standard, Dr. Lutz went on to testify "it's very likely and it's my opinion that [Hyden's employment duties] caused the problem he is having with his back." This medical expert testimony, stated in a likelihood greater than 50 percent, satisfies the reasonable certainty standard and therefore provides sufficient evidence that Hyden's employment with Kroger proximately caused his back injuries. Moreover, Dr. Lutz's three equivocal answers do not render his fourth and proper opinion insufficient as a matter of law, but rather go to the weight the jury, in its discretion, ascribed to Dr. Lutz's opinion regarding causation. Accordingly, the record does not support Kroger's contention that Dr. Lutz failed to opine with the requisite degree of medical certainty.

II. Whether Dr. Lutz's opinion was premised on facts not in evidence

{¶10} Kroger next contends it is entitled to judgment as a matter of law because Dr. Lutz's medical opinion on the proximate cause of Hyden's injuries assumed that Hyden's job required him to lift approximately 2,000 parcels a day, evidence neither admitted into evidence nor provided in a hypothetical question.

{¶11} Evid.R. 703 provides that "[t]he facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted into evidence at the hearing." To comply with Evid.R. 703, the facts must be either within the personal knowledge of the expert or based upon facts shown by other evidence. *Steffy v. Blevins*, Franklin App. No. 02AP-1278, 2003-Ohio-6443, at ¶18.

{¶12} Here, Dr. Lutz testified that "the lifting that [Hyden] did repeated over and over over four years, you know, almost 2,000 packages every eight hours, you know, did cause some – you know, the strain to his back, that it's very likely and it's my opinion that that caused the problem he is having with his back." (Tr. Vol. I, 145.) Although the evidence fails to precisely describe that Hyden's job required him to lift 2,000 packages every eight hours, Hyden testified that he lifted and sorted between 200 and 225 boxes, weighing 80 to 97 pounds, an hour. Because this testimony, calculated over an eight-hour day, was admitted into evidence, Dr. Lutz's opinion was properly admitted under Evid.R. 703.

{¶13} Moreover, Dr. Lutz properly based his opinion on personal knowledge acquired as Hyden's personal physician in the course of treatment. Dr. Lutz testified that he talked to Hyden about "what may have caused, you know, the problems that he had [in his back]." (Tr. Vol. I, 117.) "It was then that he first brought up that there was never an incident at work that caused this, but he talked to me a little bit about the work situation, that fact that it may have added to this or brought this on." Id. Later, Dr. Lutz testified that he talked to Hyden about "the conditions of his job and that type of thing, he mentioned that, you know, there was no one incident that caused the back pain but because of his job of lifting, you know, that he felt that had something to do with this." (Tr. Vol. I, 124.) Although Dr. Lutz did not disclose the details of these conversations before providing his opinion on proximate cause, the conversations reveal that Dr. Lutz acquired personal knowledge of the facts supporting his opinion. Because Dr. Lutz based his opinion on personal knowledge, his opinion was properly admitted under Evid.R. 703.

{¶14} Kroger nonetheless maintains that because Sharon Heckathorn, a Human Resources Administrator for Kroger, testified that Hyden worked less than two years as a material handler, as opposed to four years as Dr. Lutz assumed, Dr. Lutz's opinion was based on inaccurate facts. Kroger thus contends it is entitled to judgment notwithstanding the verdict or, alternatively, a new trial.

{¶15} "Weaknesses in the factual bases of an expert's testimony go to the weight and credibility of the expert's testimony, not to its admissibility." *Blevins,* at ¶18. Because the trial court properly admitted Dr. Lutz's opinion, and because Heckathorn's competing testimony does not affect the admissibility of Dr. Lutz's opinion, Kroger is neither entitled to judgment notwithstanding the verdict nor a new trial. Accordingly, Kroger's contention is unpersuasive.

III. Whether Dr. Lutz improperly testified from the report of a non-testifying doctor

{¶16} Kroger also asserts the trial court erred by failing to exclude inadmissible hearsay testimony from Dr. Lutz. The testimony at issue occurred on redirect examination when Dr. Lutz recited from Dr. Bradford Mullin's report: "Dr. Mullin said that [Hyden] did have significant pain into his posterior thigh but that's better since he's not been lifting and twisting at work. In Dr. Mullin's treatment options and plan he also stated we talked about his job, and I told him that no matter what we do I don't think his back will hold up if he's required to lift 1,800 parcels a day and so I believe that Dr. Mullin shares my opinion that, you know, his work was affecting his back." (Tr. Vol. I, 144-145.)

{¶17} Although Dr. Lutz's testimony regarding Dr. Mullin's report is hearsay that ordinarily would be inadmissible, the trial court did not err in this instance by allowing the testimony. Dr. Lutz did not testify from Dr. Mullin's report on direct examination. On

cross-examination, Kroger induced Dr. Lutz to testify from Dr. Mullin's report to demonstrate the contradicting histories of Hyden's pain set forth in the reports of Dr. Mullin and Dr. Lutz, apparently to further Kroger's trial strategy that focused, in part, on the discrepancies in an attempt to prove Hyden's employment with Kroger did not cause his back injuries. On redirect examination, Dr. Lutz provided the hearsay testimony at issue in response to plaintiff's inquiring whether any report, including Dr. Mullin's, contradicted Dr. Lutz's opinion.

{¶18} The trial chronology thus reveals Kroger invited Dr. Lutz's hearsay testimony on cross-examination. Having introduced the hearsay from Dr. Mullin's report into evidence, Kroger cannot invoke the hearsay prohibition in an effort to keep out additional hearsay from the same report that is not as favorable to Kroger's trial strategy. See *State v. McCombs*, Summit App. No. 22837, 2006-Ohio-3289, at ¶13; *State v. Croom* (Jan. 18, 1986), Cuyahoga App. No. 67135; *State v. Miller* (1988), 56 Ohio App.3d 130; *State v. Bey* (1999), 85 Ohio St.3d 487, 493 (noting that a party will not be permitted to take advantage of an error it invited or induced the trial court to make).

{¶19} Even if the trial court erred in allowing the testimony, Kroger fails to demonstrate the requisite prejudice. Although Kroger contends the testimony at issue corroborated Dr. Lutz's opinion on causation, Dr. Lutz testified only that "Dr. Mullin shares my opinion that, you know, [Hyden's] work was affecting his back." The testimony incorporating Dr. Mullin's statement does not prove causation; rather, Dr. Mullin's opinion equivocally suggests Hyden's work was affecting Hyden's back injuries, but falls short of ascribing Hyden's work as the cause of his injuries. Indeed, Dr. Lutz's recitation of Dr. Mullin's testimony is equally consistent with Hyden's having sustained the injury outside

work, but suffering some irritation of the injury due to the nature of his work. Because Dr. Mullin's opinion does not corroborate Dr. Lutz's opinion on causation, Dr. Lutz's testimony did not prejudice Kroger. Accordingly, Kroger's argument regarding Dr. Mullin's report is unconvincing.

IV. Whether plaintiff exceeded the bounds of permissible closing argument

{¶20} Kroger lastly contends the trial court erred in allowing Hyden's counsel to disparage Kroger's expert witness, Dr. Steiman, during closing argument. Hyden's counsel noted how much money Dr. Steiman earned as a result of testifying, how often he testified, and how often he testified for defendants. Hyden's counsel also twice referred to Dr. Steiman as a "hired gun" and questioned whether Dr. Steiman was an "independent" physician. Kroger did not object to the statements.

{¶21} Counsel is afforded broad latitude in closing arguments. *Pang v. Minch* (1990), 53 Ohio St.3d 186, paragraph two of the syllabus. Reasonable inferences and deductions may be drawn from evidence adduced at trial, *Barnett v. Thornton*, Franklin App. No. 01AP-951, 2002-Ohio-3332, at ¶27, and an expert's bias and pecuniary interest are fair subjects for a closing argument. *Clark v. Doe* (1997), 119 Ohio App.3d 296, 306, citing *Calderon v. Sharkey* (1982), 70 Ohio St.2d 218. An argument crosses the bounds of fairness when not supported by the evidence and presents a substantial likelihood the jury will be misled. *Thornton,* at ¶29.

{¶22} Here, because Dr. Steiman testified he earned $600 an hour for his time at deposition and trial, he performs about 40 depositions per year, and 90 percent of his examinations are for defense attorneys, plaintiff was permitted to refer to those facts in closing arguments. Similarly, questioning Dr. Steiman's bias or "independence" was a

permissible inference or deduction drawn from those facts. Moreover, even if the term "hired gun" transcends the bounds of fairness in closing argument, an issue we need not resolve, plain error is not demonstrated.

{¶23} Ordinarily, a judgment will not be reversed due to misconduct of counsel during closing argument to a jury in the absence of a proper and timely objection that allows the court to take proper action. *City of Columbus v. Figge* (July 11, 2000), Franklin App. No. 99AP-940, citing *Snyder v. Stanford* (1968), 15 Ohio St.2d 31, paragraph one of the syllabus. Having failed to object, Kroger waived all but plain error. Id. "Notice of plain error * * * is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Although the plain-error doctrine is applied almost exclusively in criminal cases, it has been applied to civil cases if the error "would have a material adverse affect [sic] on the character and public confidence in judicial proceedings." *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210. Here, Hyden's counsel's reference in closing argument to Dr. Steiman as a "hired gun" cannot meet the test of *Long*, much less *Schade*, especially in view of the other evidence adduced at trial.

{¶24} Acknowledging that it failed to object, Kroger nonetheless contends the trial court was required to intervene sua sponte and to take curative action to nullify the effects of the statement. Such a duty, however, arises only when counsel's gross and persistent conduct or statements have a prejudicial affect. *Figge,* supra. Plaintiff's reference to Dr. Steiman as a "hired gun," even if improper, was neither so gross nor abusive as to require the trial court to sua sponte intervene. The challenged conduct consisted on two

comments, and because they were infrequent and in themselves were not egregious, the trial court was not required to intervene. Accordingly, Kroger's contention is unpersuasive.

{¶25} Having found the issues contained in Kroger's six assignments of error do not demonstrate reversible error, we overrule all of Kroger's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and McGRATH, JJ., concur.

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