Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-099

NOVEMBER TERM, 2004

Mary Lynn Lobello	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
Estate of Roy Nicholson	}	
	}	DOCKET NO. 586-11-01 Wncv
		Trial Judge: Alan W. Cook

In the above-entitled cause, the Clerk will enter:

Prior to his death in October 2003, Roy F. Nicholson was involved in an automobile accident with plaintiff Mary Lynn Lobello, resulting in this negligence action.[1] A trial was held and the jury returned a verdict in favor of plaintiff. Defendant, Nicholson's estate, appeals from the judgment, contending the trial court committed reversible error by: (1) admitting, over objection, evidence that Nicholson had been involved in another motor vehicle accident five months after the accident with plaintiff and had subsequently surrendered his license; (2) instructing the jury on future lost income damages absent evidence that plaintiff was likely to lose income in the future; (3) providing a confusing and distorted jury instruction on the effect of a violation of a public safety statute and on the collateral source rule; (4) ruling on plaintiff's post-judgment motion to amend while the case was on appeal; and (5) awarding plaintiff costs and pre-judgment interest. We agree with the first contention, and therefore reverse and remand.

The accident in question occurred at about 9:00 p.m. on February 21, 2000. Plaintiff testified that she was traveling east on Route 302 in the City of Montpelier when a tractor-trailer truck immediately in front of her flashed a turn signal, braked, and slowed down to turn into the driveway of Twin City Equipment Company. Plaintiff testified that she gradually slowed but did not come to a complete stop when she was suddenly struck from behind by decedent. She testified and introduced evidence showing that, as a result of the accident, she suffered an acute whiplash injury, missed several weeks of work, and received medical treatment costing over $7000.

---

[1] Nicholson died after the complaint was filed, and his estate was substituted as defendant.

Nicholson, who was seventy-four years old at the time of the accident, was deposed in June 2002. In his deposition testimony, he acknowledged striking plaintiff's car, but claimed that plaintiff was partly responsible because she had stopped very suddenly behind the truck. Nicholson died before trial, and his estate moved to admit his deposition testimony with three limited exceptions. The estate sought to exclude as irrelevant (1) an answer in which Nicholson acknowledged that his son had power of attorney over him, (2) several additional questions and answers in which Nicholson acknowledged that he had been involved in a similar accident five months after the accident with plaintiff, and (3) several responses in which he acknowledged that he had voluntarily relinquished his driver's license after the second accident.[2]

---

[2] The colloquy involving the second accident and Nicholson's driver's license was as follows:

Q. My understanding is you were also involved in another accident after this one, in July of that year. Do you have a recollection of that, Mr. Nicholson, with a Norman Blodgett?

A. Yes. That was a similar situation.

Q. Did your vehicle strike the rear of Mr. Blodgett's vehicle?

A. Yes.

Q. Did Mr. Blodgett make any sort of a claim against you?

A. If it was, it's against the insurance company and I don't recall—there were none made against me.

Q. Okay. Do you currently have your license, Mr. Nicholson?

A. No.

Q. Okay. Did you voluntarily relinquish your license?

A. Yes.

Q. When did you do that?

A. It was very shortly after—I think it was very shortly after the Blodgett vehicle.

Q. Okay. You voluntarily relinquished your license sometime after this situation with Mr. Blodgett?

A. I agreed not to drive and have done so.

Plaintiff's counsel sought to exclude the deposition in its entirety, noting that she had attempted unsuccessfully to obtain Nicholson's medical records and to videotape his testimony to demonstrate that his memory was impaired, and arguing that a bare reading of the deposition would not adequately demonstrate his incapacity. The trial court ruled that the entire deposition would be admitted, and overruled the estate's request to exclude the portions at issue. The court found that the power-of-attorney exercised by Nicholson's son was relevant to Nicholson's testimonial competence and credibility at the deposition, that the second automobile accident was "highly relevant on the issue of his competence" at the deposition, as was his voluntary relinquishment of his driver's license, and that "[a]ll of these items will be admitted because in my judgment the probative value of these on the issue of competency far outweighs any prejudice that may be involved." For similar reasons, the court ruled that plaintiff was entitled to subpoena and introduce Nicholson's medical records, explaining that Nicholson's "medical condition is fair game given the fact that he may have been demented at the time of the deposition." The deposition was read in its entirety at trial. In addition, the court admitted Nicholson's death certificate, which indicated that Nicholson was suffering from a form of dementia at the time of his death.

The jury returned a verdict in favor of plaintiff, awarding damages of $40,572. Plaintiff later filed a motion to amend the judgment to include interest from the date of filing and costs. The court granted the motion, awarded costs of $2460.64 and interest of $2513.42, and issued an amended judgment of $45,546.06. This appeal followed.

Defendant contends the court committed reversible error in admitting that portion of Nicholson's deposition testimony relating to his subsequent driving history. We agree. The uniform rule in this and other states is that a party's pre- or post-accident driving record is irrelevant and inadmissible to prove the party's negligence in connection with the accident in question. See Melford v. S.V. Rossi Constr. Co., 130 Vt. 148, 150 (1972) ("Generally, evidence of a driver's previous accident is inadmissible in a civil action arising out of a motor vehicle accident, since such evidence is considered immaterial in the determination of the driver's negligence on the occasion in question. . . . Likewise, evidence of speeding on other occasions has been held improper."); accord Ferreira v. General Motors Corp., 657 P.2d 1066, 1069 (Haw. Ct. App. 1983) ("[E]vidence of whether a party had ever been involved in an automobile accident previous to the date of the accident involved is inadmissible on the negligence issue."); Bixby v. Gallagher, 204 N.W.2d 295, 300 (Mich. Ct. App. 1973) ("There is no question that evidence of prior accidents is not admissible on the basic issue of negligence in a subsequent case."); DeMatteo v. Simon, 812 P.2d 361, 363 (N.M. Ct. App. 1991) (defendant's "post-accident driving record" inadmissible to prove negligence); Sass v. Thomas, 370 S.E.2d 73, 74 (N.C. Ct. App. 1988) (evidence of driver's previous accidents immaterial to determination of driver's negligence on the occasion in question); see generally Annotation, Admissibility, in Civil Motor Vehicle Accident Case, of Evidence that Driver Was or Was Not Involved in Previous Accidents, 20 A.L.R.2d 1210 (1951), & A.L.R.2d Later Case Service, vols. 19-20, at 402-404 (1996).

Evidence of a party's other motor vehicle accidents may, of course, be admissible for purposes other than proving negligence. See, e.g., Khatib v. McDonald, 410 N.E.2d 266, 274 (Ill. App. Ct.

1980) (determining that evidence of prior accident involving similar injuries was admissible on question of extent of injuries and damages in connection with accident in question). Here, the court ruled that Nicholson's subsequent accident and relinquishment of his driver's license were relevant to his testimonial competence at his deposition, and therefore admissible. The second accident, however, occurred in July 2000, and the relinquishment of the driver's license occurred shortly thereafter. The deposition was taken in June 2002, nearly two years later. Nothing in the record or the court's ruling demonstrates how these two events had any bearing whatsoever on Nicholson's competence at the subsequent deposition. See Bixby, 204 N.W.2d at 301-302 (rejecting claim that defendant's prior accident was admissible to show a mental defect).

Absent this connection, the only logical purpose the evidence could have served was to impermissibly suggest to the jury that because Nicholson had been involved in a similar rear-end collision five months later, and then decided to relinquish his license, he must have been to blame for the accident with plaintiff. This was a relatively simple negligence case that turned essentially on a credibility contest between the parties, and it is impossible to conclude that such highly prejudicial evidence did not affect the outcome. Indeed, plaintiff's counsel closed her rebuttal argument to the jury by observing: "If you don't believe [plaintiff], give her zero. That's not what happened. Mr. Nicholson's not a bad person. He wasn't a bad person. But he rear-ended her. He hit her, he drove away, he was confused. There's no question on liability. In fact, four months later he rear-ended somebody else. You have to believe somebody. If you think [plaintiff] is lying, and she's not, then don't find for her. She's not lying." (Emphasis added).

Contrary to counsel's argument, Nicholson's second accident was not relevant to the question of his liability for the accident with plaintiff, and it's admission may well have prejudiced the jury. See Melford, 130 Vt. at 152-53 (admission of unrelated traffic accident may have prejudiced jury and therefore required reversal of judgment); Bixby, 204 N.W.2d at 302 (prejudice caused by erroneous admission of prior accident required new trial); Sass, 370 S.E.2d at 74 (erroneous admission of evidence of plaintiff's prior motorcycle accident was prejudicial and entitled plaintiff to new trial); see also Ronan v. J.G. Trumbull Co., 99 Vt. 280, 291 (1926) (question propounded by counsel regarding defendant's alleged negligent driving on an unrelated occasion so "irreparably prejudiced" defendant's case that reversal was required), overruled in part on other grounds by Cappello v. Aero Mayflower Transit Co., 116 Vt. 64 (1949).

Nevertheless, plaintiff argues here, as she did at trial, that it was only fair to admit the entire deposition transcript because Nicholson resisted her later efforts to capture his testimony on videotape before he died, and the entire transcript was necessary to challenge his capacity to accurately recall the events surrounding the accident. Nicholson acknowledged at the deposition, however, that his memory was vague, that he had difficulty recalling details of the accident, that he was on some medication, and that his son had power of attorney. All of this arguably reflected on his capacity to accurately recall and recount the events surrounding the accident. Omitting Nicholson's testimony concerning his subsequent driving history would not in any way have prejudiced plaintiff.

Nor can plaintiff argue that defendant was required to request a limiting instruction directing the jury to consider the evidence only as it related to Nicholson's competence at the deposition. See V.R.E. 105 (when evidence is admissible for one purpose but not admissible for another, court, upon request, shall restrict evidence to its proper scope and instruct jury accordingly). This sort of instruction is proper only when the evidence is admissible for one purpose. Here, as noted, Nicholson's subsequent driving history was not relevant to Nicholson's competence at the deposition, and a limiting instruction would only have drawn more attention to the improper evidence. See Keus v. Brooks Drug, Inc., 163 Vt. 1, 8 (1993) ("A limiting instruction, while appropriate for properly admitted basis evidence, can only draw attention to improperly admitted evidence and will not cure the error.").

Accordingly, we conclude that the admission of Nicholson's subsequent driving history was prejudicial error, and requires reversal of the judgment. Our holding renders it unnecessary to address defendant's remaining claims.

Reversed and remanded.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned