

NEW PROSPECT DRILLING CO.,
Appellant,
v.

FIRST COMMERCIAL TRUST, N.A. as
Administrator of the Estate of Jolene
Marie
Jones, Deceased Appellee.

No. 97-615.
Supreme Court of Arkansas.
April 9, 1998.

NEWBERN, Justice.

This is a negligence case resulting from an automobile-truck accident in which Jolene Marie Jones died. Ms. Jones was driving a Mercury Topaz that collided with a Ford Ranger pickup truck driven by Carl Lewallen and owned by Mr. Lewallen's employer,

Appellant New Prospect Drilling Co. ("New Prospect"). As the result of a jury's verdict, appellee First Commercial Trust, N.A. ("First Commercial"), administrator of Ms. Jones's estate, recovered \$3 million in damages against New Prospect. New Prospect argues for reversal on account of jury misconduct and misconduct by First Commercial's attorney during the trial. It also contends that the Trial Court erred by allowing a deputy sheriff to give expert testimony and that the damages awarded were not supported by substantial evidence. We affirm the judgment as modified to reduce the damages by \$100,000.

The action was originally brought against Mr. Lewallen and New Prospect. A nonsuit was taken with respect to Mr. Lewallen. A trial began in June 1996. A mistrial occurred, and the retrial resulting in the verdict favoring First Commercial was held in January 1997.

The accident occurred on two-lane Pope County Road 81 north of London. Ms. Jones was westbound, and Mr. Lewallen was eastbound. The issue of fault depended upon whether (me or both of the vehicles crossed the center line. Mr. Lewallen testified he had dropped his watch inside his truck and had pulled off on the shoulder to retrieve it. Having done so, he pulled back onto the road, and the wreck occurred shortly thereafter. He remembered nothing about how it happened, and there were no other eyewitnesses to the crash.

In the first trial, First Commercial presented the testimony of Pope County Deputy Sheriff Danny Sorey who investigated the accident. In response to questions about how the accident happened, Deputy Sorey said that the Ford pickup was found straddling the centerline and that a skid mark, shown in photographs to have been in the westbound lane, came from the right front wheel of the

pickup. Objections to that testimony were sustained on the basis that Deputy Sorey had not been qualified as an expert.

At the second trial. New Prospect sought a ruling that Deputy Sorey not be allowed to offer expert opinion testimony. In response, counsel for First Commercial stated he would "qualify" the witness by presenting evidence of his education and experience in accident investigation. New Prospect asked the Trial Court to review the record of the previous trial and to assure that the rulings on the questions would be the same. The Trial Court responded that he would hope to follow the same "line" but that he would have to hear the questions asked this time before ruling.

On direct examination. First Commercial's counsel, Richard Peel, asked Deputy Sorey a number of questions about his accident-investigation **236training at the law-enforcement academy. Deputy Sorey recalled having studied various aspects of accident *471 investigation and added that he had been investigating accidents for six years at the time this one occurred. He said he had benefitted from the experience of others, including state police officers, with whom he had worked accidents. ~J

Mr. Peel asked Deputy Sorey if, "based on [his] education and experience in [his] investigation of this accident," he had an opinion as to which tire on the Ford pickup was skidding. As the skid mark in question went into the westbound lane of traffic, an answer that it was the right front tire of the truck would place the truck squarely in the oncoming lane of traffic in which Ms. Jones had the right of way. Counsel for NewProspect objected on the ground that "[t]he proper foundation has not been laid ... nor is he qualified to render that opinion...." The Trial Court overruled the objection. Deputy Sorey testified that it was the truck's right front tire and further opined, over further objection, that the wreck occurred in the westbound lane.

On cross-examination. New Prospect questioned the deputy's credibility. Deputy Sorey acknowledged and reiterated his deposition testimony in which he had said he was not an expert. He admitted that his drawings of the scene in front of the jury were different from his field-note drawings, which apparently suggested the wreck occurred in Lewallen's eastbound lane. He initially had the Topaz in the eastbound lane, but that was error, he said, and he made a second drawing to correct that mistake. He conceded that most of the truck was in the eastbound lane after the accident and that he had not noted in his field notes whether there were any gouge marks at the scene on the day of the accident. The marks had been covered, he explained, and did not become visible until later. The deputy conceded that he "never got underneath the Ford Ranger" and attempted to follow the skid marks to either tire.

Although the cross-examination was effective and perhaps raised some questions about the deputy's thoroughness in investigating the scene, the abstract does not show any motion from New Prospect to strike his testimony on the ground that his expert qualifications had been somehow disproved in view of what had come out on cross-examination.

*472 Each side presented an expert accident reconstructionist to testify about who was responsible for the accident. Deputy Sorey was a second expert witness for First Commercial on

the issue of who had caused the collision.

New Prospect frames the issue as whether Sorey was properly declared an expert. Arkansas R. Evid. 702 provides: "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." We have held that, "[whether a witness may give expert testimony rests largely within the sound discretion of the trial court, and that determination will not be reversed absent an abuse of discretion. On appeal, the appellant must demonstrate that the trial court has abused its discretion." *Wade v. Grace*, 321 Ark. 482, 486, 902 S.W.2d785, 788 (1995) (citations omitted).

In *Smith v. Davis*, 281 Ark. 122, 663 S.W.2d165 (1983), we acknowledged that our prior cases had precluded police officers from giving opinions as to the causes of accidents. We recognized, however, that other jurisdictions held to the contrary. The holding of the case appeared as follows:

We need not expand our decision beyond the facts of this case: Where an officer investigates a vehicle accident, observes sufficient relevant evidence such as skid marks, debris from the vehicles, position of the vehicles, or makes other observations, and where he can rationally form an opinion about the point of impact, he should be allowed to testify as to that opinion. It is for the trial court to determine whether proper foundation has been laid for the testimony. 866 *Gruzen v. State*, 276 Ark.149, 634 S.W.2d 92 (1982); *Dixon **237 v.State*, 268 Ark. 471, 597 S.W.2d 77 (1980).Id. at 125, 663 S.W.2d 165, 663 S.W.2d at166.

We have continued to hold in favor of allowing such opinions. In *Sledge v. Meyers*,

304 Ark. 301, 303-04, 801 S.W.2d 650, 651(1991), we held that the Trial Court had erroneously prohibited the trooper from stating "her opinion about the location of *473the vehicles at the moment of impact." We noted in the *Sledge* case that, in *Ferrell v. Southern Farm Bureau Cas. Ins. Co.*, 291 Ark.322, 724 S.W.2d 465 (1987), "we expressly said a qualified trooper could state 'who crossed over a center line.' " *Sledge v. Meyers*, 304Ark. at 303, 801 S.W.2d at 651. ;

Deputy Sorey testified about the kinds of things that appear to be permissible under the cases mentioned above. His testimony dealt with the point of impact: in what lane did the collision occur, and what tire on Lewallen' struck caussly said a qualified trooper could state 'who crossed described his investigation at the scene that led him to reach his conclusions. We have been cited to no authority holding that a law officer's modest refusal to declare himself an expert disqualifies the officer. ;

0](New Prospect makes much of the fact that the judge in the first trial sustained objections to Sorey's testimony. First Commercial's response is that Mr. Peel spent more effort in qualifying Deputy Sorey in the second trial than in the first and that there was more of a basis for determination. Again, we are cited to no authority suggesting that a judge in such a circumstance

is prohibited from changing his ruling.

New Prospect also asserts that, even if Deputy Sorey was entitled to give an opinion on the basis of his credentials, his testimony still should have been stricken for lack of foundation. New Prospect points to the concessions made by Deputy Sorey during cross-examination regarding what he did and did not do during his processing of the accident scene. Based on the information elicited on cross-examination, New Prospect says there was no foundation for his conclusions. But New Prospect did not use the information elicited on cross-examination to make a "lack of foundation"-type motion to strike. ,

'There was a foundation-based objection raised during direct examination. Prior to that time, however, Deputy Sorey had established that he had processed the scene; taken measurements; determined the vehicles' positions in the road; detected the skid marks; and searched for gouge marks, finding some then and others later. "The foundation objection was properly denied at that *474 time. If New Prospect then wished to strike the testimony in light of its cross-examination, it should have said so then. As it stands, much of New Prospect's argument that Deputy Sorey's opinions lacked foundation are being raised for the first time on appeal. We do not reverse on the basis of arguments not raised in the trial court.)