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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001846-MR

McCREARY COUNTY HARDWOODS, INC.,
and FRANKLIN C. LYONS — APPELLANTS

APPEAL FROM McCREARY CIRCUIT COURT
V. HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 97-CI-00016

PAULA WILSON (NOW BRUCE); HUMANA
HEALTH CARE PLANS OF KENTUCKY, INC. — APPELLEES

AND NO. 2000-CA-001910-MR

PAULA J. WILSON — CROSS-APPELLANT

CROSS APPEAL FROM McCREARY CIRCUIT COURT
V. HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 97-CI-00016

FRANKLIN C. LYONS; McCREARY COUNTY
HARDWOODS, INC.; and HUMANA HEALTH
CARE PLANS OF KENTUCKY, INC. — CROSS-APPELLEES

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; JOHNSON and McANULTY, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal and cross appeal from a judgment entered by the McCreary Circuit Court after a jury trial

in a personal injury action stemming from a motor vehicle collision. For the reasons stated hereafter, we affirm.

Appellant/cross-appellee Franklin C. Lyons was employed as a truck driver by appellant/cross-appellee McCreary County Hardwoods, Inc. (collectively referred to as "appellants.") On September 9, 1996, as Lyons was driving a log trailer back to his employer's place of business, a collision occurred between the trailer and a car driven in the opposite direction by appellee/cross-appellant Paula J. Wilson. Wilson was seriously injured as a result of the collision.

The pertinent facts regarding the accident will be set out in detail in our opinion as needed. At the outset, however, it should be noted that the cause of the collision was disputed. Appellants adduced eyewitness testimony to show that Wilson's car slid on the wet road, crossed the center line, and went underneath the left rear wheels of the log trailer which then ran over the car. Wilson, by contrast, adduced eyewitness testimony and accident reconstruction evidence in support of her contention that it was the log trailer which crossed the center line as the truck and trailer rounded a curve.

The jury's verdict apportioned fifty percent fault to each party and awarded damages to Wilson. However, after the jurors responded affirmatively when the court inquired as to whether they had reduced their findings of damages by fifty percent, the court instructed the jury to reconsider its verdict in strict accordance with the written jury instructions. The jury thereafter awarded damages in the total amount of

$1,279,834.58, and the court entered a judgment consistent with that verdict. This appeal and cross appeal followed.

First, appellants contend that the trial court erred by failing to find that Wilson's attorney was disqualified from representing her due to a conflict of interest. We disagree.

The record indicates that at the time of trial, Wilson's attorney served as a part time assistant commonwealth's attorney for the judicial district in which this case was tried. Appellants assert that a conflict of interest existed because of testimony provided on Wilson's behalf by an alleged eyewitness, Gary Watters. More specifically, appellants allege that Watters lied under oath, but that Wilson's attorney was prohibited from prosecuting him for perjury because of the attorney's own involvement in the civil case.

First-degree perjury occurs when a person "makes a material false statement, which he does not believe, in any official proceeding under an oath required or authorized by law." KRS 523.020(1). Here, the parties clearly presented conflicting testimony regarding the circumstances of, and the eyewitnesses to, the collision. Although the jury members certainly could have believed that Watters' testimony was untruthful, they also could have believed that the other eyewitnesses were mistaken or simply did not remember details concerning Watters' presence at the scene immediately after the collision, or that Watters was misidentified as a person who was stuck in traffic some distance away from the collision scene. Thus, although the credibility of Watters' testimony was a legitimate issue for the jury's consideration, we cannot say that the evidence conclusively shows

that Watters gave sworn, material false statements which he did not believe, or that he could have been prosecuted for perjury. Further, there was no evidence that Wilson's attorney acted or intended in any way to use his official position in order to obtain an unfair advantage in this action. See Kentucky Bar Association v. Lovelace, Ky., 778 S.W.2d 651 (1989). Thus, we cannot say that the trial court erred by failing to find that Wilson's attorney was disqualified to represent her.

Next, appellants contend that the trial court abused its discretion by admitting the testimony of Wilson's accident reconstruction expert. We disagree.

KRE 702 provides that "[i]f 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." Moreover, a KRE 702 evidentiary ruling admitting expert testimony is only subject to appellate review pursuant to the traditional abuse of discretion standard. Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000).

Here, the record clearly shows that the witness, based on his education, training and experience, was properly qualified as an expert in accident reconstruction. While it is true that the witness did not first visit the scene until some fourteen months after the collision, he testified that he relied upon his visits to the scene, his examination of the vehicles, and his examination of numerous photographs which were taken while

emergency vehicles were still at the scene. The witness declined to speculate as to the circumstances leading to the collision and, unlike the witness in Kennedy v. Hageman, Ky. App., 704 S.W.2d 656 (1985), he stated no opinion concerning fault or negligence of the drivers. Although he testified as to his opinion concerning the area of impact of the vehicles, he specifically declined to use the term "point of impact." Instead, he responded during cross-examination as follows:

> Q Alright, you're [sic] assumption in talking about point of impact--
>
> A Area, I use the term, area of impact.
>
> Q Okay. Is where the two vehicles touched the very first time?
>
> A No, actually, the area that you're--is--where the marks are being made is at the point we call maximum engagement. That's where the maximum dynamic force has been applied to both vehicles and the vehicles crush down against the pavement and leave these marks. Now, it will be, this happened so quickly, it--some people call it the point of impact. I hesitate a little bit because it's the area of impact.

Contrary to appellants' argument, we believe that the expert's testimony was properly admitted. Although appellants refer to Wells v. Conley, Ky., 384 S.W.2d 496 (1964), in asserting that the trial court erroneously permitted the expert to testify concerning the vehicles' point of impact, the testimony here materially differed from that in Wells, as the expert herein specifically declined to identify a point of initial impact, or to give an opinion as to which part of the car created the gouge in the road. Instead, he simply referred to an

area of impact which represented the point at which the "maximum dynamic force" was applied to both vehicles.

Further, we are not persuaded by appellants' assertion that Mulberry v. Howard, Ky., 457 S.W.2d 827 (1970), and Sellers v. Cayce Mill Supply Co., Ky., 349 S.W.2d 677 (1961), preclude admission of the expert's testimony based on his failure to examine the scene immediately after the collision. Although both Mulberry and Sellers noted that accident reconstruction experts examined the collision scenes shortly after the accidents occurred, neither case in any way prohibited the admission of such expert testimony based on later examinations. Instead, alleged shortcomings in an expert's testimony, relating to matters such as the timeliness of the examination of the scene or the failure to examine a vehicle's underside, go to the weight and credibility to be awarded the expert's testimony by the jury, rather than to the issue of the admissibility of the evidence. It is then up to the jury to weigh the credibility of the evidence. It follows, therefore, that the court did not abuse its discretion by admitting the expert's testimony.

Next, appellants contend that the trial court erred by permitting Wilson's family physician, Dr. Patton, "to give incompetent testimony as to the nature and extent of her injuries." We disagree.

Appellants' objections to the statements in question were not adequately preserved for review. Reviewing those statements point by point, we note that appellants failed to object to Dr. Patton's initial testimony that at the time of trial, Wilson's left leg was five-eighths inch shorter than her

right leg. Although appellants' counsel later objected to Dr. Patton's spontaneous remark that the leg length difference had been measured by an orthopedic surgeon, the court did not rule on the objection, appellants did not seek an admonition to the jury, and Wilson's attorney immediately proceeded to a different topic. Next, although Dr. Patton referred to the measurement of Wilson's legs by a physical therapy assistant, as confirmed by an orthopedic surgeon, we note that such statements were directly solicited by appellants' counsel during cross-examination.

Appellants now complain that neither the nontestifying orthopedic surgeon nor the nontestifying physical therapy assistant was identified as an expert medical witness "in the Rule 26 disclosures, or in answer to defense interrogatories." However, we have found and appellants have cited to nothing in the record to show that an objection in this vein was timely made. Moreover, appellants also failed to adequately preserve any objection based on the assertion that Dr. Patton's testimony about Wilson's anticipated future medical expenses "amounted to surmise and estimation." Although appellants timely objected to the request by Wilson's counsel that Dr. Patton provide "a reasonable estimate" of future medical expenses, they did not object when the question was rephrased to ask the physician to describe Wilson's anticipated future medical expenses "within a reasonable degree of probability." Hence, they are in no position to raise this issue on appeal.

Next, appellants contend that the court erred by instructing the jury that Lyons had a duty to "abstain from having any measurable marijuana in his body while driving a

tractor trailer rig for McCreary County Hardwoods, Inc." We disagree.

KRS Chapter 281A pertains to commercial driver's licenses. Appellants urge us to find that the chapter's provisions were inapplicable to Lyons on the day of the collision because his trip fell within the exclusion set out in KRS 281A.050(3)(c), which excepts from the chapter's application "[d]rivers of vehicles that are . . .[u]sed within one hundred fifty (150) highway miles of the point of origin." Although it is undisputed that at the time of the collision Lyons was engaged in a trip of less than 150 miles, it is also undisputed that the truck was used on other occasions for trips of more than 150 miles. As the statute plainly refers to whether particular "vehicles" are used for trips of more than 150 miles, rather than to whether particular "trips" exceed 150 miles, we are not persuaded by appellants' argument that even if KRS Chapter 281A was applicable to other trips for which the truck was used, it was not applicable to Lyons' trip on the day of the collision.

For purposes of KRS Chapter 281A, the term "controlled substances" includes marijuana since that substance is one of those "defined or listed in KRS Chapter 218A." See KRS 281A.010(9). KRS 281A.190(1) disqualifies any person from driving a commercial vehicle for one year if that person is convicted of driving such a vehicle while under the influence of a controlled substance, or while having a blood, urine or breath alcohol concentration of 0.04 or more. KRS 281A.210 goes one step further by providing in pertinent part:

> (1) Notwithstanding any other provision of this chapter, a person shall not drive a commercial motor vehicle within this state while having any measurable or detectable amount of alcohol or other controlled substances in his system.
>
> (2) A person who drives a commercial motor vehicle within this state while having any detectable amount of alcohol or controlled substance in his system . . . shall be placed out of service for twenty-four hours. (Emphasis added.)

Appellants asserted at trial and on appeal that because there was no evidence to show that Lyons was under the influence of marijuana at the time of the collision, there was no evidence to support an instruction under KRS 281A.210. However, this argument ignores the fact that while KRS 281A.190 pertains to driving commercial vehicles while under the influence of alcohol or controlled substances, KRS 281A.210 plainly goes further to apply to a person who, although not impaired by the use of such substances, drives a commercial vehicle while having "any measurable or detectable amount of alcohol or other controlled substances" in his or her system. Because evidence was adduced to show that Lyons indeed did have a measurable or detectable amount of marijuana in his system at the time of the collision, it follows that regardless of whether he was under the influence of the drug, the court was justified in giving an instruction under the statute.

Next, appellants contend that the trial court erred by permitting the jury to reconsider its verdict. We disagree.

The following exchange occurred after the jury returned its initial verdict:

THE COURT: One question to the--to the jury, in this percentage of fault, where you say 50 percent and 50 percent, did you consider that in assessing damages? Did you say the damages were, say, $100, but we'll make it $50?

FOREPERSON: Yes.

THE COURT: That is not what you're supposed to do.

JUROR: On one item we didn't. On one item.

THE COURT: Did you do it on all of them or just part of them?

FOREPERSON: The majority, part.

THE COURT: Well, you need to follow that Instruction without regard to how you divide it up. You assess the damages based on what you think the actual damages are and not take half of it, okay.

FOREPERSON: So we go back?

THE COURT: Yes.

MR. ORWIN: Let's find out which one they didn't do it on, because it's--There's one that's alright, Judge. Apparently, they didn't--

THE COURT: Well, they'll know which ones that they did. She said they didn't do it on all of them. I didn't ask them that. That's their prerogative, I guess, to decide that.

(Jury returned to jury room)

. . . .

THE COURT: I will read it one more time, in the record, with everybody present.

(Jury returned to courtroom)

THE COURT: This question that you sent out, for your benefit, the procedure is, I get the people that's--attorneys, really, involved and show them the question. The rule is, is if a jury has a question the only

> time that we can answer it is in open court with everybody present. "Will the figure that we give be divided by percentage?" The answer is, yes. That's the question you asked and that's the answer. So, now, you can go back and finish.

We are not persuaded by appellants' contention that the foregoing colloquy establishes that the trial court told the jury how to decide contested issues during its reconsideration of the case. In fact, the court declined to inquire as to which awards of damages had or had not been reduced by the jury. Given the fact that the jurors had not been discharged, the verdict as a whole was still in their hands. Therefore, they were free to review the case in its entirety and to reach the verdict which they found appropriate during redeliberation. See 75B Am.Jur.2d Trials §1894 (1992). It follows that the court did not err by failing to direct the jury to adhere to any portion of its initial verdict.

Next, appellants contend that the court erred by failing to grant them a directed verdict or a judgment n.o.v. We disagree.

Appellants again assert that they are entitled to relief based on the allegedly erroneous admission of the testimony of Watters and the accident reconstruction expert. However, as noted above, there was no error in the admission of that evidence. Moreover, there is also no merit to appellants' contention that the court erred by striking the expert witness's estimate of the total fees which appellants would pay him, especially since the witness was permitted to testify as to his hourly fee.

This court's role in reviewing the denial of a directed verdict is limited to reviewing the evidence and ascribing thereto "all reasonable inferences and deductions which support the claim of the prevailing party," and then determining "whether the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18-19 (1998). This court may not substitute its judgment for that of the trial court unless it was clearly erroneous. Id. at 18.

Here, a great deal of conflicting evidence was adduced regarding the circumstances of the collision. However, because the trial court did not err by admitting the testimony of Watters and the expert witness, it follows that we cannot agree with the contention that the admissible evidence favored appellants, or that "the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." Bierman, 967 S.W.2d at 19. Thus, the denial of the motion for a directed verdict was proper. Further, for the same reasons noted above, it is equally clear that appellants were not entitled to a judgment n.o.v.

Finally, on cross appeal Wilson contends that the trial court erred by failing to instruct the jury as to punitive damages. We disagree.

KRS 411.184 provides in pertinent part:

> (1) As used in this section and KRS 411.186, unless the context requires otherwise:
>
> (a) "Oppression" means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.

> (b) "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.
>
> (c) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.
>
> . . . .
>
> (2) A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.
>
> (3) In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question.

However, this statute must be viewed in light of Williams v. Wilson, Ky., 972 S.W.2d 260 (1998), which held KRS 411.184(1)(c) unconstitutional insofar as it departs from common law standards regarding the recovery of punitive damages. The court impliedly endorsed a return to the preexisting common law standard of gross negligence, which requires a showing that there was a "'wanton or reckless indifference to the rights of others.'" 972 S.W.2d at 262, (quoting Horton v. Union Light, Heat & Power Co., Ky., 690 S.W.2d 382, 388 (1985)). Such conduct lacks "intent or actual knowledge of the result." 972 S.W.2d at 264.

Here, despite the evidence of marijuana residue in Lyons' body, there was absolutely no evidence to suggest that he

was under the influence of marijuana at the time of the collision. Moreover, although Wilson seems to suggest that Lyons acted recklessly by taking the truck on a "narrow, winding, wet mountain road" immediately prior to the collision, there was nothing to indicate that the mere use of the vehicle in such a manner was negligent, or that it violated any statutes or regulations. In short, and contrary to Wilson's contention, there was simply no evidence to support a finding that Lyons' actions included a "wanton or reckless indifference to the rights of others," or that his actions otherwise were oppressive, fraudulent or malicious. Absent such evidence, it follows that Lyons' employer was not liable for punitive damages because it failed to anticipate his conduct. Hence, we hold that the court did not err by failing to give the jury a punitive damages instruction.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR McCREARY COUNTY HARDWOODS, INC.; and FRANKLIN C. LYONS:

William A. Watson
Middlesboro, KY

BRIEF FOR PAULA J. WILSON (NOW BRUCE):

Charles E. King
Pine Knot, KY

Howard O. Mann
Corbin, KY

ORAL ARGUMENT FOR PAULA J. WILSON (NOW BRUCE):

Howard O. Mann
Corbin, KY

BRIEF FOR HUMANA HEALTH CARE PLANS OF KENTUCKY:

Mary Ann Smyth Rush
J. Warren Keller
London, KY