

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000555-MR

ARA ALENE LITTLE, ADMINISTRATRIX OF
THE ESTATE OF JOHNNY MICHAEL LITTLE
AND GUARDIAN OF JOHNNY MICHAEL LITTLE, JR.

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NOS. 05-CI-00830, 05-CI-01065,
AND 06-CI-01196

LEE E. STEWART;
STEWART TRUCKING, INC.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

KELLER, JUDGE: Following the presentation of proof by Ara Alene Little (Ara) in her capacities as Administratrix of the estate of Johnny Michael Little and as Guardian of Johnny Michael Little, Jr., the trial court granted the appellees' motion for a directed verdict. Ara appeals from the trial court's order, arguing that the evidence presented was sufficient to support submitting the question of the appellees' contributory negligence to the jury. For the reasons set forth below, we affirm.

FACTS

Johnny Michael Little (Little) suffered a fatal injury when the van (Little's van) he was driving collided with a coal truck being driven by James Polly (Polly). The parties agree that Little was driving from Phelps, Kentucky, toward Pikeville, Kentucky, on a three-lane section of Kentucky Route 632 (Route 632) when the accident occurred. We note that Route 632 is generally a two-lane road. However, as with many roads in Kentucky, Route 632 has sections where it expands to three lanes to permit faster moving vehicles to pass slower moving vehicles.

At the time of the accident, Little's van, a truck being driven by Lee Stewart (the Stewart truck), and a car being driven by Angela Lester (Lester) were traveling in the same direction. The Polly truck was traveling toward them from the opposite direction. The accident occurred when Little's van and the Polly truck collided at or near a curve in Route 632 where Route 632 merged from three lanes to two. Polly and Ara did not agree which of the two drivers was at fault. Furthermore, Ara and Stewart disagreed about what part Stewart may have played in the accident. Ara alleged that the accident was caused, in part, by actions or inactions by Stewart in the operation of his truck. She argued before the trial court and argues on appeal that she presented sufficient evidence of Stewart's negligence to submit the question to the jury. On the other hand, Stewart argued before the trial court, and argues before us, that the evidence presented by Ara could not support any finding of negligence on Stewart's part.

Because the resolution of the issue raised by Ara on appeal is fact intensive, we will summarize below the testimony of the witnesses related to any liability

by Stewart. Because Polly is not a party to this appeal, we will only address facts as to his actions as may be necessary to forward the narrative.

Wayne Kiser (Kiser) and Timothy McCoy (McCoy) were passengers in Little's van at the time of the accident. Kiser testified that Little's van was following the Stewart truck, which was spraying water and dirt onto the windshield. Because of the poor visibility and because the Stewart truck was going too slowly, Little decided to pass the Stewart truck. Little did so by pulling to the left of the Stewart truck into the third or middle lane. After Little's van had passed the Stewart truck, Kiser saw the Polly truck coming across the center line toward Little's van. The collision occurred almost immediately thereafter, causing Little's van to spin and pushing Little's van back into the Stewart truck. In addition to his testimony that Little's van had passed the Stewart truck before the collision, Kiser testified that the Stewart truck did not impede Little's ability to merge into the right lane had Little done so.

McCoy testified that he only remembers "bits and pieces" of the events leading up to and following the accident. However, he remembered that the Stewart truck was throwing water and mud onto the windshield of Little's van. McCoy also remembered that he looked in the side rear view mirror and that Little's van had passed the Stewart truck before the accident. McCoy was not sure how much distance there was between Little's van and the Stewart truck when the collision occurred; however, he testified that the Stewart truck was not in a position to impede Little's van from moving to the right. After Little's van had passed the Stewart truck, McCoy saw the Polly truck crossing the yellow line and coming into Little's lane. McCoy did not remember the

point of impact and did not remember whether the road had changed from three lanes to two lanes when the collision occurred.

Because he was not present at trial, Stewart's deposition was read into evidence. Stewart, the owner of Stewart Trucking, Inc., testified that he first noticed Little's van when it pulled beside him to pass. Stewart began to apply his brakes when he noticed Little's van and stated that Little's van was going fast enough to pass him. After Little's van had passed Stewart and was approximately a car length ahead of him, Little's van crossed the center line and collided with the Polly truck. Stewart testified that it appeared that the driver of Little's van lost control. Although Stewart could not estimate the speed of Little's van, he assumed that the driver lost control because he was going too fast as he headed into the curve in the road. After the collision with the Polly truck, Little's van spun in front of Stewart's truck and Little's van and the Stewart truck collided. At the time the Stewart truck hit Little's van, the Stewart truck had slowed to 20 to 25 miles per hour. Finally, Stewart testified that the road had not completely narrowed to two lanes when Little's van and Polly's truck collided.

Lester testified that, just prior to the accident, she was driving in the right lane of the three-lane section of road. Little's van was in front of her and the Stewart truck was in front of Little's van. Approximately three-fourths of the way through the three-lane section, Little's van pulled into the left lane to pass the Stewart truck. Lester was not certain if Little's van had completely passed the Stewart truck before crossing the center line and colliding with the Polly truck.

When questioned about statements in the police report, Lester testified that she told the state trooper that the accident was caused by Little's van crossing the

center line into the Polly truck's lane. She did not remember telling the trooper that the accident was caused by the inability of Little's van to get in front of the Stewart truck. When questioned about her deposition testimony, Lester testified that she recalled stating in her deposition that Little's van had not completely passed the Stewart truck at the time of the accident.

Kentucky State Trooper Chris Masters (Masters) investigated the accident. In pertinent part, Masters testified on direct examination about the statement he took from Lester the day of the accident. We cite that testimony below.

Masters: She [meaning Lester] stated that she observed a white van traveling at a pretty good speed. The van apparently attempted to pass an 18 wheeler [the Stewart truck] and waited until the "S" curve. She stated that the van attempted to get in front of the 18 wheeler . . . causing the collision. She stated that the 10 wheeler [the Polly truck] was on his side of the roadway.

Q: . . . She stated that the van then attempted to get over in front of the 18 wheeler causing the collision?

Masters: Yes Ma'am.

Q: That's exactly what she told you?

Masters: That's what I've got here.

Q: I assume that if she had told you that the van crossed the yellow line and that that's what caused the collision that would be in your notes, right?

Masters: . . . I guess so.

Ara presented testimony from Polly's video deposition. In pertinent part, Polly testified as follows:

Q: Alright, from the time that you first saw the truck [the Stewart truck] how long was it until you saw the van coming around?

Polly: How long it was?

Q: How much time, if you are going one, two, three, four?

Polly: I know I saw - I saw - when I come [sic] out of the curve, I saw the truck, then I saw the van - what are you talking about the truck I saw or the van I saw?

Q: You said you saw the truck first, didn't you?

Polly: I saw the truck first.

Q: Did you see the van at the same time or . . .

Polly: I saw the truck first. Then I saw the van coming around.

Q: Okay.

Polly: Then when I saw the van it was coming toward me.

Q: Was it all simultaneous at the same time, or was there some lapse of time before you saw the van after you saw the truck?

Polly: When I was going toward the curve, I was going up towards the curve, I glanced up, I saw a truck coming in the distance. So I didn't pay no [sic] mind. Here comes a truck. So I just went around the curve. When I was going around the curve there's the truck, (inaudible) comes around the van, there goes the van.

Q: There's the van.

Polly: It wasn't probably more than a second, I saw the van, I just looked down and there's the van and pow like that there.

Q: Okay. You saw the truck, then you saw the van. And then, by seconds, counting off, how long did it take before you and the van collided. Counting one, two, three, four, five.

Polly: Probably just a second. Not even that long.

Q: Just like that.

Polly: Just like that. I just glanced, pow.

Q: You saw the van and pow, it hit you.

Polly: Uh-huh.

Finally, Luke Hatfield (Hatfield), an engineer, testified that, based on his review of the expert reports and his view of the accident scene, Lester could not have seen whether Little's van crossed the yellow line before the collision. Hatfield also identified a photograph of a sign from the scene that stated that traffic should merge to the left.

Following the presentation of Ara's proof, Stewart made a motion for a directed verdict. In support of his motion, Stewart argued, as he does here, that Ara did not present any proof that Stewart's actions caused or contributed to the accident. Ara argued before the trial court, as she does here, that Stewart had a duty to merge to the left and to yield to Little's van, which had the right-of-way, and that Stewart's failure to do so contributed to the accident. Ara cites to testimony from Polly, Stewart, Lester, and Masters to support her position.

After hearing lengthy argument from counsel, the trial court granted Stewart's motion for directed verdict. In doing so, the court found that

the Plaintiffs failed to meet their burden of proof in that there was no evidence presented by the Plaintiffs to establish any negligent conduct on the part of Lee E. Stewart or Stewart Trucking, Inc. Further there was no evidence of a causal relationship between the conduct of Lee E. Stewart and Stewart Trucking, Inc. and the automobile accident in question which resulted in the death of Johnny Michael Little. No witness testified of any activity by Lee E. Stewart or

Stewart Trucking, Inc. that could have caused the accident in question.

The court then entered a judgment consistent with the preceding finding and order. It is from the trial court's order and judgment that Ara appeals.

STANDARD OF REVIEW

On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, Ky., 840 S.W.2d 814 (1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984).

Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998).

ANALYSIS

With the above standard in mind, and having reviewed the record, we discern no error in the trial court's directed verdict in favor of Stewart. Ara argued before the trial court and argues before us that Stewart's failure to either slow or merge contributed to the accident. However, the evidence does not support that position. Both Kiser and McCoy testified that Little's van had completely passed the Stewart truck before the accident. Stewart testified that he first noticed Little's van when it was beside him and that he began to slow. Furthermore, Stewart testified that Little's van had completely passed him and was a car length ahead at the time of the accident. Lester testified that the collision occurred when Little's van crossed into Polly's lane. She also testified that she had stated in her deposition that Little's van had not completely passed

the Stewart truck at the time of the collision. Trooper Masters testified that Lester initially stated that the collision was caused by Little's attempt to "get in front of the 18 wheeler," not that Little's van crossed the center line. The above testimony, taken in the light most favorable to Ara, does not evidence any negligence on Stewart's part. Even the testimony from Trooper Masters that Lester said that the accident was caused by Little's attempt to get in front of the Stewart truck, speaks only to Little's actions, not to Stewart's.

Finally, we note that Ara states that Polly testified that Little's van and the Stewart truck were next to each other when Polly came around the curve. We have reviewed Polly's testimony and cannot find any place where Polly clearly states that. Polly did state that he saw the Stewart truck before he saw Little's van, but he stated that he saw the Stewart truck "coming in the distance." When he started going around the curve he saw the Stewart truck and then the van. Polly did not state that Little's van and the Stewart truck were next to each other.

Faced with this evidence, we cannot say that the trial court was erroneous, clearly or otherwise, when it granted Stewart's motion for directed verdict. Therefore, we affirm the judgment of the Pike Circuit Court.

ALL CONCUR.

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ORAL ARGUMENT FOR APPELLANT:

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