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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001619-MR

LAURA BAILEY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CI-02758

MCM BUSINESS SERVICES, INC., D/B/A
MCM SIGNS; FRANK PATTON; AND
KENT MAYS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; GRAVES,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Laura Bailey appeals from a jury verdict entered in favor of MCM Signs, Frank Patton, and Kent Mays, finding that Patton was not liable based on the doctrine of sudden emergency. After careful review, we affirm.

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On April 11, 2005, Patton was driving a boom truck northbound on U.S. 25 in Lexington, Kentucky, for his employer, MCM Signs. He looked away from the road, and when he looked back he saw a FedEx truck and a small blue car completely stopped in front of him. He applied the brake, but he alleged that the brakes did not work properly so that he was forced to swerve to the left and cross the center lane of traffic, thereby hitting the vehicle driven by Bailey head-on.

Immediately after the accident, Patton told the police officer investigating the scene, Officer William Federspiel, that his brakes did not work properly. Kent Mays, Patton's employer who was following behind Patton the day of the accident in a separate boom truck, testified that he did not see Patton skid nor did he see any skid marks after the accident. Patton testified that had the brakes been working properly that he would have been able to avoid the collision. However, neither Mays nor Patton assert that they have any evidence to support the claim of brake failure.

Bailey hired two experts to inspect the braking system on the boom truck,Van Douglas Kirk, an Advanced Master certified auto technician, and William Cloyd, III, a mechanical engineer and accident reconstructionist. Both experts performed an inspection on the brakes on September 8, 2005, five months after the accident. Following the inspection, both experts concluded that there was no physical or mechanical evidence to support Patton's claim that the primary

service brake did not work properly. There was also no evidence that the secondary emergency brake system had been activated due to loss of air pressure.

At trial, over Bailey's objection, the jury was given a "sudden emergency" instruction due to the alleged brake failure. This instruction defined the standard of care of a driver faced with a brake failure sudden emergency. After some deliberation, the jury sent out a written question asking "if we don't have enough evidence to prove/disprove breaks [sic] working, then do we have to answer the Page 4 question "No." We cannot determine that [breaks [sic] working] based on evidence given." The trial court subsequently modified the instruction and allowed counsel to reargue the new instruction to the jury. The new instruction stated that:

> if immediately before the collision the brakes on Frank Patton's truck suddenly and without previous warning failed, and thereby confronted him with an emergency in which it appeared to him in the exercise of reasonable judgment that he was in imminent danger of collision with stopped traffic, and if such emergency was not caused or brought on by any failure of Frank Patton to perform his duties as above set forth, he was not thereafter required to adopt the best course possible in order to avoid the apparent danger, but was required to exercise only such care as the jury would expect an ordinarily prudent person to exercise under the same conditions and circumstance.

The jury then returned a defense verdict based upon the sudden emergency/brake failure instruction. Bailey filed a motion for a judgment notwithstanding the verdict, which was subsequently denied. This appeal followed.

Bailey first argues that the court erred in submitting the sudden emergency instruction to the jury as there was no evidence offered at trial to support brake failure. Patton responds to the merits of all claims but also argues that the claims of error related to the sufficiency of the evidence were not properly preserved for appellate review because there was no motion *by Bailey* for a directed verdict at the close of all the evidence; instead, the court by its own accord noted a renewal of Bailey's motion for directed verdict. Bailey can only prevail on an insufficiency of the evidence claim if preserved through a motion for a JNOV, which in turn must be predicated on a directed verdict motion at the close of all the proof. A mid-trial directed verdict motion alone is insufficient to preserve an insufficiency of the evidence claim. *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998) ("A defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence, in order to be preserved for our review.").

Ultimately, we find that the intent of the holding in *Baker*, to allow a court the opportunity to pass on the issue in light of all the evidence, was honored by the trial court's renewal of Bailey's motion for directed verdict at the close of all the evidence, and Bailey did make a motion for JNOV following the jury's verdict. Therefore, we will address Bailey's claim on the merits.

Bailey first argues that the court committed reversible error in instructing the jury on the sudden emergency defense. She specifically contends that there was no evidence to support the instruction. Errors alleged regarding jury

instructions are considered questions of law and are to be reviewed on appeal under a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky.App. 2006).

"Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it." *Farrington Motors, Inc. v. Fidelity & Cas. Co. of N.Y.*, 303 S.W.2d 319, 321 (Ky. 1957). The doctrine of sudden emergency defined in *Regenstreif v. Phelps*, 142 S.W.3d 1, 4 (Ky. 2004), establishes that:

> [W]hen a defendant is confronted with a condition he has had no reason to anticipate and has not brought on by his own fault, *but which alters the duties he would otherwise have been bound to observe, then the effect of that circumstance upon these duties* ***must*** *be covered by the instructions*.

Regenstreif, 142 S.W.3d at 4, *quoting Harris v. Thompson*, 497 S.W.2d 422 (Ky. 1973) (emphasis added).

In the instant case, Patton testified that his brakes did not work properly. Officer Federspiel testified that, immediately after the accident, Patton told him that he tried to brake, tried to slow down, but his brakes had not worked properly. Kent Mays also testified that there were no skid marks on the roadway to indicate the brakes had been activated. Moreover, Patton swerved into oncoming traffic when he realized his brakes were not working. In *Robinson v. Lansford*, 222 S.W.3d 242 (Ky.App. 2007), this Court noted that swerving into another lane of traffic is action indicative of encountering a sudden emergency. Therefore, we

find that there was sufficient evidence to sustain an instruction on sudden emergency, and we find no error.

Bailey also argues that it was an error for the court to exclude the report of Dr. James Harkess. Dr. Harkess examined Bailey for the defense on October 25, 2006. Unfortunately, Dr. Harkess was killed in a tragic accident only six days later. A report was finally received by Patton several weeks after Dr. Harkess's death, but the signature was stamped on the bottom. We have examined the objection and the grounds stated. We agree with the lower court that the report constitutes hearsay and that it was thus inadmissible.

KRE 801(c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. The report, prepared in anticipation of litigation by an expert retained for the trial, constitutes out-of-court statements utilized to prove the truth of the matter asserted. KRE 801(a) defines a statement as "[a]n oral or written assertion[.]" The report contained written assertions of Dr. Harkess in order to prove the truth of the matter asserted. Moreover, a jury is not permitted to take even a sworn deposition to the jury room because jurors might give undue weight to the testimony contained in such a document and not give adequate consideration to controverting testimony received from live witnesses. *See Berrier v. Bizer*, 57 S.W.3d 271 (Ky. 2001).

Dr. Harkess is obviously not available to authenticate the report, and neither party had the opportunity to examine Dr. Harkess under oath. It is

impossible to determine whether the report is a rough draft or the final report Dr. Harkess intended to provide. Despite Bailey's contention, there is no hearsay exception applicable to Dr. Harkess's report. As such, we find no error in the court's decision to exclude Dr. Harkess's report.

For the foregoing reasons, the judgment and verdict of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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