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# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-000486-MR

LINDA TRENT — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 06-CI-00365

TECO COAL CORPORATION
AND RICHARD MARTIN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Linda Trent (Trent) appeals the Perry Circuit Court judgment, which was entered on November 27, 2007, and the February 12, 2008, order, which dismissed the motion for a new trial. The appellees are TECO Coal Corporation (TECO) and Richard Martin (Martin). We affirm.

This case transpires from a March 24, 2006, motor vehicle accident occurring on Kentucky State Route 15 at the Glowmar Bridge in Perry County. Trent claimed that TECO and Martin's negligence caused the accident and instituted an action in Perry Circuit Court to recover damages. At the conclusion of the trial, which began November 5, 2007, the jury apportioned fault between Trent and Martin, finding 50 percent liability for Trent and 50 percent liability for Martin. Further, the jury apportioned no liability to TECO and awarded zero damages. Trent moved for a new trial, which was denied by the circuit court, thus precipitating this appeal.

Trent contends that the trial court erred by improperly instructing the jury. Specifically, Trent disputes Jury Instruction Nos. Four and Five. Additionally, Trent believes that the circuit court should have instructed the jury that TECO'S conduct was negligence per se and that the jury should have awarded damages.

## FACTUAL AND PROCEDURAL BACKGROUND

On March 24, 2006, Trent was driving on Kentucky Highway 15 in Perry County, Kentucky, and was rear-ended by an unloaded school bus owned by the Perry County Board of Education and operated by Martin. Trent testified that she stopped at the Glowmar intersection, at a traffic light which had turned yellow. Immediately prior to the collision in drizzling rain, Trent stated that she had just passed a coal truck, rounded a curve, and entered a straight stretch when the traffic light turned yellow. Trent further stated that she had no difficulty stopping at the

white line. Martin admitted that he was at fault for failing to keep adequate stopping distance between his bus and Trent's car. Martin explained at the accident scene that he assumed Trent would go through the light, and he intended to go through the yellow light too. He contradicted Trent's testimony and claimed that she came to an abrupt stop at the yellow light. When Trent did stop, Martin was unable to control the bus and struck her vehicle in the back. After the collision, Trent declined Martin's request to call an ambulance for her, and the investigating police officer, Jackie Pickrell, marked "no injury" on the official accident report. After Trent and her husband left the accident scene, they did seek medical attention for her. According to her testimony, she continued for some time with ongoing medical treatment for neck and back pain.

On this section of the highway, TECO hauls material between its off-road mining facilities at Boone Ledge, Kentucky, and its coal washing/preparation plant at Buffalo Creek/Four Seam Road. Witnesses testified that dust and debris accumulate on this stretch of the road as a result of this hauling activity. On the date of the accident, Officer Pickrell noted that her narrative report made no mention of mud or debris on the highway. She also testified that numerous other coal trucks travel the road constantly. On her accident report she recorded the condition of the road as "wet" but did not check the category for "sand, oil, mud, dirt, debris." Her testimony was corroborated by the testimony of Kentucky State Police Officer Loren Holiday, who testified at the trial that no substance was on the road but that it was wet.

On June 29, 2006, Trent and her husband, Richard, filed this action against TECO and Martin. The trial began on November 5, 2007. In the judgment entered on November 27, 2007, the jury apportioned fault with 50 percent liability for Trent and 50 percent liability for Martin. The jury returned a zero damages award. Thereupon, Trent filed a motion for a new trial on December 7, 2007, which after several hearings and memorandums, was denied on February 12, 2008. This appeal follows.

ANALYSIS

1. Jury Instructions

Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review. *Reece v. Dixie Warehouse and Cartage Co*., 188 S.W.3d 440, 449 (Ky. App. 2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). Furthermore, the purpose of jury instructions is to guide the jury in its deliberation. If the statements in the jury instructions are substantially correct, they will not be overturned unless they are calculated to mislead.

> The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict. If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury.

*Ballback's Adm'r v. Boland-Maloney Lumber Co.*, 306 Ky. 647, 652-53, 208 S.W.2d 940, 943 (1948).

TECO and Martin argue that Trent did not preserve the objections to the jury instructions; however, we are not persuaded by this argument. Under Kentucky law, a party may "object to the language of the instruction or . . . submit an alternative instruction[.]" *Burke Enterprises, Inc. v. Mitchell*, 700 S.W.2d 789, 792 (Ky. 1985). First, regarding Jury Instruction No. 4, Trent did submit jury instructions. Second, the trial judge in the December 28, 2007, posttrial hearing overruled all objections about preservation of the jury instructions and found that they had been preserved. At the hearing, the trial judge noted that extensive discussion about all the jury instructions had occurred over the course of the litigation, and therefore, he was convinced that objections to the instructions were preserved. We will not substitute our opinion for that of the circuit court absent clear error and find no abuse of discretion in the trial judge so ruling.

Therefore, having determined the objections to the jury instructions were preserved, we review the Jury Instructions No. 4 and No. 5. Jury Instruction No. 4 reads as follows:

> It was the duty of the Defendant Teco (sic) Coal Corporation, in exercising direction and control over the safety of environmental affairs of Perry County Coal Corporation to exercise ordinary care for the safety of persons using the roadway, and this general duty of ordinary care includes, but is not limited to, the specific duty of the Defendant, Teco (sic) Coal Corporation, and its subsidiary, Perry County Coal Corporation, in the loading and hauling coal, to exercise ordinary care to

> prevent mud, dirt, coal, debris and other flyable materials from being tracked, thrown and spewed from its mine permitted boundary onto the traveled portions of Kentucky Highway 15, in the area where the accident occurred, so as to cause an unsafe condition for motorists to use the highway.
>
> Are you satisfied from the evidence that the defendant, TECO Coal Corporation or its subsidiary, Perry County Coal Corporation, failed to comply with such duty, and that such failure was the substantial factor in causing the collision? ___ Yes___ No

Trent complains this instruction is confusing and refers to a non-party to the action, Perry County Coal Corporation. First, we find the instruction to be clear in delineating the duty of care for TECO. Next, Trent's suggestion that the use of Perry County Coal Company as a non-party is disingenuous as Perry County Coal Company is a subsidiary of TECO. Furthermore, Trent's tendered instructions referred to Perry County Coal Company too. Lastly, with regard to Trent's objection to the use of "the" substantial factor rather than "a" substantial factor, we do not believe that the use of "the" rather than "a" implicates an "either or" choice between Martin and TECO. Trent cites *Daugherty v. Runner*, 581 S.W.2d 12, 20 (Ky. App. 1978):

> We note that the trial court's instruction mistakenly required the jury to find that Runner's breach of duty, if any, was "the" substantial factor in the plaintiff's failure to recover. The instruction should have read, "a" substantial factor.

Trent then rather deceptively says the Court did not decide the issue because it had not been preserved in that case. But the next sentence in the case says more than that:

> However, the trial court was not made aware of the error by objection, and it has not been raised on appeal, nor could it be, [Kentucky Rules of Civil Procedure] CR 51(3). For this reason we are not able to review the question. **In any event, it does not appear to be so substantial as to have caused the plaintiff any prejudice.** (Emphasis added).

Not only do we believe that, as in *Daugherty*, the phrasing error was not so substantial as to cause prejudice, but also that Trent provided no evidence demonstrating that the jury was prejudiced and would have decided this case differently.

Next, we turn to an analysis of Jury Instruction No. 5, which states:

> It was the duty of the plaintiff, Linda Trent, in the operation of her automobile to exercise ordinary care for her own safety and this general duty included the following specific duties:
>
> (a) To keep a lookout ahead and to the rear for other vehicles near enough to be affected by the intended movement of her automobile;
>
> (b) Not to stop her automobile on the main traveled portion of the highway or suddenly decrease the speed of her automobile unless it was reasonably necessary in order to avoid conflict with other traffic or pedestrians;
>
> (c) To exercise ordinary care generally to avoid collision with other persons and vehicles in the highway including the school bus operated by the defendant, Richard Martin.

> Are you satisfied from the evidence that the plaintiff, Linda Trent, failed to perform one or more of these duties, and that such failure was a substantial factor in causing the collision? ___ Yes ___ No

Here, we are convinced, after reviewing the instruction as a whole, that the jury was appropriately instructed. The instructions were based somewhat on John S. Palmore, *Kentucky Instructions to Juries*, *Civil* § 16.29 (4th Ed. 1989), which is titled "Stopped or slow-moving vehicle struck from rear . . . ." Hence, as remarked by Trent, the instruction provided was primarily based on a template that does not quite fit wherein the *rear* vehicle stops on the road rather than an intersection controlled by a traffic light. The instruction used, however, did not mimic verbatim Palmore, and we believe its construction was sufficient to apprise the jury of Trent's possible liability. The fundamental function of jury instructions is to set forth "what the jury must believe from the evidence . . . in order to return a verdict in favor of the party who bears the burden of proof." *Webster v. Commonwealth*, 508 S.W.2d 33, 36 (Ky. 1974).

In the case at hand, the evidence is disputed as to the facts surrounding the collision. Trent testified she stopped without incident at the yellow light in the correct place. But a truck driver, Floyd Lewis, who was in another lane and behind her as she approached the intersection, went through that same yellow light. And Martin's claim that Trent stopped abruptly at the yellow light is bolstered to some extent by the fact Lewis went through the same yellow light. Martin, who was found 50 percent liable, acknowledges that the light was

yellow, admits that he failed to keep an adequate stopping distance, and that his bus rear-ended Trent's vehicle. Martin, however, maintains that Trent should not have stopped for the yellow light. Kentucky Revised Statutes (KRS) 189.338(2) instructs that a steady yellow signal warns vehicular traffic that "green movement is being terminated or that a red indication will be exhibited immediately thereafter when vehicular traffic shall not enter the intersection." Commonsense dictates that an individual may stop at a yellow light so as not to receive a citation for running a red light, if the light should turn red, before the individual clears the intersection. Yet, obviously, the larger purpose of the "yellow" signal is to eliminate collisions occurring at intersections needing traffic lights by regulating traffic. Thus, the larger purpose of all traffic regulation is to allow traffic flow without collisions. It goes without saying that stopping at a yellow light requires more than rote behavior.

So, according to the evidence, we have a situation where Trent stopped at a yellow light, perhaps suddenly, at a difficult intersection on a rainy day with a school bus immediately behind her and a coal truck to her right. The law of Kentucky requires drivers to operate their vehicles in "a careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway." KRS 189.290(1). Given this statutory requirement, the question then becomes whether Trent breached her duty in stopping at this specific yellow light under these specific circumstances in light of the statutory purpose of yellow lights. While the statute notes the purpose of a yellow light, it does not, as cited

above, necessitate that one immediately stop but only warns motorists that the "green movement is being terminated[.]" KRS 189.338(2)(a).

Significantly, a driver of an automobile who strikes another in the rear is not subject to strict liability, but rather must be proven to have violated the duty of ordinary care before he can be found to be at fault. *See Lucas v. Davis*, 409 S.W.2d 297, 299 (Ky. 1966). Thus, we believe that the jury was adequately guided by the jury instructions in its determination of the liability of the parties. Ultimately they found that Martin and Trent both violated one or more duties in operating their vehicles at the time of the accident. For example, as also explained in the instruction, Trent, in the operation of her automobile, had the general duty to exercise ordinary care for her own safety, and this general duty included the specific duty to avoid allowing for circumstances wherein collisions with other vehicles on the highway are possible.

Considering the facts here under the standards set forth above, we believe that Trent failed to demonstrate that the instructions were erroneous. In summary, we find that Jury Instruction No. 4 and Jury Instruction No. 5 correctly stated the law. Supporting our reasoning is the fact that the jury did not indicate any difficulty with the instructions or experience any confusion or irregularity with the deliberation process. Finally, the jury verdicts were unanimous and consistent. Consequently, Trent has not shown that the jury was confused or misled by the instructions.

2. TECO's Liability

Trent argues that the actions of TECO require instruction on negligence per se. Negligence per se "is merely a negligence claim with a statutory standard of care substituted for the common law standard of care." *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 926-27 (Ky. 1994), *quoting Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Company*, 115 Wash.2d 506, 799 P.2d 250 (1990). Further, negligence per se "applies only if the alleged offender has violated a statute and the plaintiff was in the class of persons which that statute was intended to protect." *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 99-100 (Ky. 2000).

The administrative regulation referenced by Trent is 405 Kentucky Administrative Regulations (KAR) 3:020. The basis of the argument is that, because a violation of a safety regulation is negligence per se, and allegedly TECO violated this administrative regulation, there is negligence per se. Interestingly, Trent does not cite the entire section of the administrative regulation. Trent quotes 405 KAR 3:020 Section 5(b) as follows:

> A person or operator engaged in surface operations of underground coal mining <u>shall not</u> . . . permit the throwing, piling, dumping or otherwise placing of any . . . particles of coal, earth, soil, dirt, debris . . . or any other materials or substances of any kind or nature beyond or outside of the area of land which is under permit . . . . (Emphasis added).

The entire section states:

> A person or operator engaged in surface operations of underground coal mining shall not throw, pile, dump or permit the throwing, piling, dumping or otherwise

> placing of any overburden, stones, rocks, coal, particles of coal, earth, soil, dirt, debris, trees, wood, logs, or any other materials or substances of any kind or nature beyond or outside of the area of land which is under permit and for which bond has been posted pursuant to KRS 350.151, nor place such materials herein described in such a way that normal erosion or slides brought about by natural physical changes will permit such materials to go beyond or outside of the area of land which is under permit and for which bond has been posted pursuant to KRS 350.151.

The situation herein discussed a stretch of highway where many different companies' trucks haul many different types of freight. The case is not about land under permit. Obviously, the roadway in question is for transport not dumping or placing of materials. Therefore, given the necessity of a statutory breach in order to have negligence per se and the uncertainty as to whether this administrative regulation is even relevant, we are not persuaded as to the necessity for a negligence per se standard. "Such violations of administrative regulations, like statutory violations, constitute negligence, per se, and the basis for liability if found to be a substantial factor in causing the result." *Britton v. Wooten*, 817 S.W.2d 443, 447 (Ky. 1991). Here, credible testimony exists for the fact-finder that no debris was even on the roadway at the time of the accident, and thus, debris was not a substantial factor in the accident.

Given that TECO had operations in the area through its subsidiary, Perry County Coal Corporation, TECO was involved in the safety and environmental affairs of its subsidiary. David Blankenship, (Blankenship), the director of safety and environmental affairs for TECO, stated at trial that the

company took measures to deal with the issues of fugitive dust and tracking materials off-permit. Blankenship testified that Perry County Coal did not track materials onto Kentucky Highway 15 because of these measures. First, the trucks never leave the blacktop, which minimizes the material falling off. Second, Perry County Coal built a bridge and added a merge lane to the highway at its mining site to minimize the tracking issue. Finally, Perry County Coal operates a sweeper/vacuum truck on almost a daily basis. The company went to great lengths to not track material onto the public highway.

Continuing with the legal requirement that in order for negligence per se to be implicated, it must be shown that the action was a substantial factor in the negligence. Ample evidence exists that Trent did not prove that TECO violated any regulation. Besides the above-cited measure, the site of the accident was almost a mile from where the company trucks pull out onto the highway. And numerous other trucks owned or operated by other companies haul coal or logs or gravel on Kentucky Highway 15. Trent introduced no evidence by any party or witness demonstrating that any regulation or statute had been violated. Clearly, it is the province of the jury to listen to evidence and determine liability. Under the negligence standard used at trial, the jury found that TECO and its subsidiary did not violate any duty.

3. Damages

Pursuant to CR 59.01(d), a new trial may be granted on all or part of the issues if "[e]xcessive or inadequate damages, [appeared] to have been given

under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." The Kentucky Supreme Court explained the test for a trial court to follow when reviewing an award of actual damages for excessiveness or inadequacy:

> When presented with a motion for new trial on grounds of excessive damages, the trial court is charged with the responsibility of deciding whether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.

*Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984)(*overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493-95 (Ky. 2002)). The Court went on to explicate the appropriate standard for an appellate court to follow when reviewing a trial court's ruling on the issue of excessive or inadequate damages:

> Upon reviewing the action of a trial judge in (granting or denying a new trial for excessiveness), the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge . . . to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous.

*Davis* at 932 (quoting *Prater v. Arnett*, 648 S.W.2d 82, 86 (Ky. App. 1983)). *See also Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. App. 2001). Moreover, even an award of zero damages is not inadequate when the evidence allows one to conclude

that the one party did not cause the damage to the other party. *Thomas v. Greenview Hosp., Inc.*, 127 S.W.3d 663 (Ky. App. 2004) (*overruled on other grounds by Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005)). The determination of the amount of damages is properly under the purview of a jury. *Commonwealth, Dept. of Highways v. Priest*, 387 S.W.2d 302, 305 (Ky. 1964).

Following a thorough review of the record, we cannot say that the trial court abused its discretion in denying the motion for a new trial with respect to the issue of damages. At the trial, Trent's contention that uncontroverted evidence was presented as to her injuries is inaccurate. A variety of evidence was presented: some showing she had no injuries; some showing she had questionable injuries; and some showing she had injuries. In sum, the jury was presented with sufficient, ample testimony and evidence about Trent's possible injuries, and the conflicted evidence. For example, Trent stated at the accident scene to both the officer and the appellee, Martin, that she was not hurt. Additionally, the medical evidence provided at the trial contained differing information as to whether Trent suffered an injury or whether the injury was the result of this accident or whether the injury was a preexisting condition. Without exception, it is the sole responsibility of the jury to weigh the evidence and judge the credibility of all the witnesses, and jurors are not bound to accept the testimony of any witness as true. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-65 (1941).

Numerous cases exist in Kentucky in which the jury failed to award damages despite a finding of liability. Even though the jury made a finding of

liability on the part of Martin, it does not necessarily mean Trent is entitled to damages. If the jury believed she was not injured, or, if so, she was injured as a result of some other cause, it does not have to award damages. *Carlson v. McElroy*, 584 S.W.2d 754, 756 (Ky. App. 1979). And an award of zero damages is not inadequate when the evidence allows one to conclude that Martin did not cause Trent's injury. *Thomas,* 127 S.W.3d 663. Also, the jury is not required to accept as absolute truth the testimony of either Trent or her doctors relating to her injuries. They had the opportunity to observe Trent at trial and hear firsthand the other evidence before arriving at the verdict. Indeed, the jury could have believed Trent grossly exaggerated the extent of her injuries. *Davidson v. Vogler*, 507 S.W.2d 160 (Ky. 1974).

In conclusion, the determination of the amount of damages is primarily the province of the jury, and this jury concluded from the evidence that Trent did not sustain a compensable injury. Moreover, the trial court's decision is not clearly erroneous if the underlying verdict is supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1965). We agree with the trial judge that there was sufficient evidence to support the jury's verdict and that he, in denying the motion for a new trial, did not abuse his discretion.

The judgment of the Perry Circuit Court is affirmed in all respects.

ALL CONCUR.

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