RENDERED: DECEMBER 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000064-MR

BARBARA FERGUSON APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 09-CI-00508

UNDERTOW TRUCKING, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND WINE, JUDGES.

CLAYTON, JUDGE: Barbara Ferguson appeals from a judgment entered by the Johnson Circuit Court in a commercial motor vehicle accident. The judgment was based on a unanimous jury verdict in favor of Undertow Trucking, Inc. Ferguson maintains that the trial court erred when it failed to grant her motion for directed verdict on the issue of liability and denied her motion for a judgment

notwithstanding the verdict. Furthermore, she argues that the trial court provided the jury with erroneous damage instructions. For the following reasons, we affirm.

BACKGROUND

On September 18, 2008, Barbara Ferguson and Jason Blair were involved in a motor vehicle accident in Johnson County, Kentucky. While no contact occurred between Ferguson's car and Blair's truck, Ferguson was injured when she swerved into the guardrail ostensibly to avoid Blair's truck. Blair was driving a truck for Undertow Trucking, Inc. (hereinafter "Undertow Trucking"). Apparently, the truck crossed the centerline while negotiating a curve on Kentucky Route 172. Kentucky Route 172 is a two-lane highway with a double-yellow line divider. A guardrail is on the side of the highway adjacent to a drop that ends in a ravine and creek.

Ferguson filed a complaint on October 22, 2009, alleging that because the Undertow Trucking vehicle was across the centerline of the highway when the accident occurred, it was the cause of her injuries. In the complaint, she alleged negligence; negligence per se; respondeat superior liability; and negligent hiring, entrustment, and retention. According to Ferguson's doctors, she suffered a torn right rotator cuff as well as injuries to her neck and back because of the accident.

Trial was held on October 28, 2010. The following people testified at trial: Blair, who is the sole owner and driver for Undertow Trucking; Ferguson's spouse, Corlis; and Ferguson. Additionally, the video depositions of Drs. Ronald Mann and Keith Hall, Ferguson's treating physicians, were played for the jury.

Blair testified that he was hauling coal from Twin Energy Mine in Morgan County and had been doing so for several weeks. Typically, he made the trip three times per day. He also stated that Kentucky Route 172 is a tight squeeze for a coal truck and has many sharp curves. Blair was making his third trip of the day when he entered the curve in question. He observed that his vision was obscured because of the leaves on the trees.

Regarding the events of that day, Blair stated that he was well into the curve before he saw Ferguson's vehicle and that as he entered the curve, his tractor and trailer were completely in the proper lane. But, as he came through the curve, the truck crossed the centerline. While Blair said that it is possible to keep a tractor-trailer on its side of the yellow line at this particular curve, in this case, he explained that the truck was on the wrong side of the yellow line because of off-tracking. Off-tracking, he explained, is when the trailer is not following the same line as the tractor due to its length.

Additionally, Blair conceded that the tractor-trailer was extremely heavy and, therefore, he needed to be extremely careful navigating a road like Kentucky Route 172. Furthermore, Blair acknowledged that Ferguson was on her side of the yellow line and not driving too fast or erratically.

Next, Ferguson's spouse, Corlis testified. He is also a truck driver. In his statements, he claimed that it is possible to drive within the curves of Kentucky Route 172, which he also travels.

Dr. Mann and Dr. Hall testified in the video depositions. Dr. Mann stated that he believed that the accident caused Ferguson's injuries, that she suffered physical pain and mental anguish as a result of the injuries, and that she will continue to have pain in the future. Moreover, Dr. Mann opined that Ferguson had an increased risk of future complications from her injuries. In Dr. Hall's testimony, he opined that that Ferguson suffered pain as a result of the accident.

Finally, Ferguson testified. She stated that she was completely in her lane going into the curve and that the tractor-trailer was more than a tire and a tire and a half in her lane. She claimed that if she had had enough room, her vehicle would not have hit the guardrail. And Ferguson said that she was not on a cell phone or distracted by her grandchild or ever outside the yellow line.

At the conclusion of testimony, Ferguson moved for a directed verdict on the issue of liability since Blair admitted that he was on Ferguson's side of the yellow line. The trial court denied the directed verdict motion. The jury deliberated and entered a unanimous verdict for Undertow Trucking. Subsequently, Ferguson made a motion for a judgment notwithstanding the verdict, which the trial court denied on December 14, 2010. This appeal follows.

ISSUES

On appeal, Ferguson argues three main issues. She maintains that the trial court should have granted the motion for directed verdict on the issue of Undertow Trucking's liability; that the trial court should have tendered separate instructions for past pain and suffering as well as future pain and suffering; and,

finally, that Ferguson is entitled to jury instruction including the words - "inconvenience," "increased likelihood of future complications," and "loss of enjoyment of life."

Undertow Trucking counters these arguments by noting that the trial court properly refused to direct a verdict of liability against the company; that the jury instructions appropriately instructed the jury regarding past and future pain and suffering; and, lastly, that the failure to include a jury instruction on damages for inconvenience, increased likelihood of future complications, and loss of enjoyment of life is harmless error.

STANDARD OF REVIEW

The standard of review for reviewing a motion for a directed verdict is set forth in *Lewis v. Bledsoe Surface Mining Company*, 798 S.W.2d 459, 461–62 (Ky. 1990), as follows:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky., 743, 184 S.W.2d 111 (1944), and *Cochran v. Downing*, Ky., 247 S.W.2d 228 (1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or

> prejudice.'" *NCAA v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.

Thus, as the reviewing court, we do not address issues of credibility or the weight of the evidence. Our responsibility is to treat all evidence in favor of the prevailing party as true and make all reasonable inferences that may be drawn from the evidence in favor of the prevailing party. Under such circumstances the judgment of the trial court will only be reversed when a verdict is so palpably or flagrantly against the evidence as to indicate that it was reached as a result of passion or prejudice. In the instant case, the prevailing party is Undertow Trucking. Similarly, the same standard that is used for a directed verdict is also used for a judgment notwithstanding the verdict. *Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky. 1991).

With regard to the review of jury instructions, any errors in jury instructions are considered as questions of law and are reviewed by this Court de novo. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). With these standards in mind, we now turn to the issues in the instant case.

ANALYSIS

1. Directed Verdict

Ferguson relies on Kentucky Revised Statute(s) (KRS) 446.070 to argue that the unexcused violation of a statute is negligence per se. She cites

several statutes, which she maintains Blair violated. These statutes are KRS 189.290, KRS 189.300, KRS 189.310, KRS 189.345, and KRS 189.670. In sum, these statutes are safety statutes that require heavy motor trucks, like the one in this case, to drive safely on the highways and travel on the correct side of the highway. We observe that KRS 189.310 and KRS 189.345 appear to be particularly relevant. KRS 189.310(1) and (2) state:

> (1) Two (2) vehicles passing or about to pass each other in opposite directions shall have the right-of-way, and no other vehicle to the rear of those two (2) vehicles shall pass or attempt to pass either of those vehicles.
>
> (2) Vehicles proceeding from opposite directions shall pass each other from the right, each giving to the other one-half (1/2) of the highway as nearly as possible.

And KRS 189.345(1)(a) provides:

> (1) No vehicle shall be driven on the left side of the roadway under the following conditions:
>
> (a) When approaching or upon the crest of a grade or a curve in the highway where the operator's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction;

At the outset, we note that violation of a statute or regulation does not necessarily result in a viable claim of negligence per se. As stated in *Alderman v. Bradley*, 957 S.W.2d 264, 267 (Ky. App. 1997):

> In order for a violation to become negligence *per se*, the plaintiff must be a member of the class of persons

> intended to be protected by the regulation, and the injury suffered must be an event which the regulation was designed to prevent. Only when both requirements are affirmatively demonstrated is negligence *per se* established with the applicable regulation or statute defining the relevant standard of care.

Given that the applicable statutes herein are intended to protect motorists from injury on the highway, and Ferguson is a motorist, we move to the next step in the analysis.

Ferguson maintains that because Blair failed to stay on his side of the highway, as required by statute, he is negligent per se. Under KRS 189.310(2), she argues that Blair did not give her "one-half (1/2) of the highway as nearly as possible." Further, Ferguson claims that under KRS 189.345(1)(a), Blair did not stay on "the left side of the roadway," as required by the conditions herein. She, then, appears to be suggesting that proof of a statutory violation and an admission of negligence create strict liability.

According to *Hargis v. Baize*, 168 S.W.3d 36, 46 (Ky. 2005), a "violation of a statute does not necessarily create liability." The statute must not only "intend to prevent the type of occurrence that took place, [it also] must have been a substantial factor in causing the result." *Id*. (citation omitted). Hence, even though under KRS 189.290(1) Kentucky law 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[,]" and other motor vehicle statutes are even more particular as to Blair's driving actions, Ferguson must still

demonstrate that Blair's negligence was the cause of the injury before liability attaches. *See Greathouse v. Mitchell*, 249 S.W.2d 738, 740 (Ky. 1952).

In fact, a violation of a statute does not automatically lead to liability. In order for liability to attach, even with a violation of a statute, the negligence must be the cause of the injury before liability attaches. *Id*. Although there are no specific cases with facts exactly like this case, other Kentucky cases have noted the lack of strict liability for violations of traffic statutes. For instance, in a case where an automobile driver struck another automobile in the rear, it was held that the driver was not subject to strict liability. Rather, the Court held that it must also be shown that prior to a finding of fault, it must be established that the driver at fault violated the duty of ordinary care. *USAA Casualty Insurance Company v. Kramer*, 987 S.W.2d 779, 782 (Ky. 1999).

Ferguson cites several cases to support her proposition that because Blair has admitted he was over the yellow line, and thus violated a statute, it was negligence per se. These cases do not alter our reasoning that Ferguson still must establish that Blair's actions were the proximate cause of her injuries. The first, *Hargis v. Baize,* which we noted above for other purposes, involved a case concerning Kentucky's Occupational Safety and Health Act, not motor vehicle statutes. Later in that case, the Court stated:

> The violation of a statute does not necessarily create liability. The statute must have been specifically intended to prevent the type of occurrence that took place, and the violation must have been a substantial

> factor in causing the result. *Isaacs v. Smith*, 5 S.W.3d 500, 502 (Ky. 1999).

Hargis, 168 S.W.3d at 46. While *Jewell v. Dell*, 284 S.W.2d 92 (Ky. 1955), does state that violation of the terms of traffic statutes is negligence per se, it also very clearly says that proximate cause must also be shown. Lastly, in *Previs v. Dailey*, 180 S.W.3d 435 (Ky. 2005), although the Court there held that the violation of an ordinance was negligence per se, in that case the driver of the truck clearly admitted that his actions caused the injuries.

Therefore, Ferguson's view that she is entitled to a directed verdict on liability because Blair was over the yellow line is overly simplistic. Ferguson must not only establish negligence, she must also show proximate causation. Legal causation is established by demonstrating that an actor's negligent conduct was a substantial factor in bringing about the harm. "Substantial factor" is explained in Restatement (Second) of Torts § 431 cmt. a (1965):

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent . . . . [T]his is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Causation is a mixed question of law and fact. *See Deutsch v. Shein*, 597 S.W.2d 141, 145 (Ky. 1980). Typically, mixed questions of law and fact are reviewed de novo. At times, however, causation becomes an issue of fact for the jury. In this situation, the proximate causation was an issue for the jury. In *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 92 (Ky. 2003), citing Restatement (Second) of Torts § 434 (1965), the Court addressed "when legal causation is a question of law for the court and when it is a question of fact for the jury."

> Section 434 of the Restatement (Second) of Torts addresses the issues of when legal causation is a question of law for the court and when it is a question of fact for the jury. The court has the duty to determine "whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff." Section 431(1)(a).

Here, the dispute is factual and, hence, a jury question. It revolves around Ferguson and Blair's factual dispute as to the location of his tires across the centerline and whether his actions were the substantial cause of Ferguson's injuries. Ferguson says that she had nowhere to go but the guardrail because Blair was in her lane coming straight toward her. Whereas Blair admitted that he was across the yellow line because of off-tracking but only to the extent of a tire or a tire and half. Therefore, he maintains that Ferguson had ample room to pass without hitting the guardrail. The jury believed Blair's version of the events, that is, Ferguson had room to pass. Therefore, the jury determined that Blair's actions

were not the proximate cause of Ferguson's injuries. Apparently, the jury believed that it was Ferguson's reaction to the situation that caused her to hit the guardrail.

In this calculus, it is the trial judge who decides whether to grant a motion for directed verdict. In *Bierman v. Klapheke,* 967 S.W.2d 16, 18–9 (Ky. 1998), the Kentucky Supreme Court noted:

> In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented. Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ.

Since the prevailing party was Blair, he was entitled to all reasonable inferences that the trial court could give the facts and evidence. Here, we concur with the trial judge's assessment that disputed issues of fact existed upon which reasonable minds could differ. The evidence heard by the jury was that Blair's truck made no contact with Ferguson's vehicle and no airbags deployed. Blair said he was unaware that Ferguson's vehicle had made impact with the guardrail.

The verdict rendered was not palpably or flagrantly against the evidence to suggest it was made as a result of passion or prejudice. *Lewis*, 798 S.W.2d at 461–462. Since it was disputed as to whether Blair was the proximate cause of Ferguson's injuries, the trial judge was constrained from granting a directed verdict on the issue of liability.

Therefore, after careful review of the proceedings of the trial court, we are convinced that based upon the evidence adduced at trial, a jury could reasonably have made the inferences herein. Although a different conclusion might have been reached, we are unable to conclude that, following the denial of the motion for a directed verdict, that the jury verdict is so palpably or flagrantly against the evidence as to indicate that it was reached as a result of passion or prejudice. Consequently, consistent with *Lewis*, we hold that the court did not err when it denied Ferguson's motion for a directed verdict.

2. Jury Instructions

Regarding jury instructions, Ferguson initially claims that the court erred when it failed to provide separate instructions regarding past **and** future pain and suffering. She also maintains that the trial court erred by not including the words "inconvenience," "increased likelihood of future complications," and "loss of enjoyment of life."

Regarding her first assertion of error, Ferguson relies exclusively on *McVey v. Berman*, 836 S.W.2d 445 (Ky. App. 1992), for this proposition. In *McVey*, the Court said "[o]f course, it may be appropriate in many cases to give an additional separate instruction on future pain and suffering." *Id*. at 450. The language therein is permissive not mandatory. Since Ferguson provides no other Kentucky law mandating separate instructions for past and future pain and suffering and has shown no prejudice resulting from this action by the trial judge, there is no error on the part of the trial judge.

Next, Ferguson argues that the jury instructions should have had the words "inconvenience," "increased likelihood of future complications," and "loss of enjoyment of life" in them. Given that we have held that the trial court did not err in failing to grant a motion for directed verdict or a motion for a judgment notwithstanding a jury verdict, clearly any error resulting would be harmless. The jury never deliberated as to damages and, therefore, it is unnecessary for us to go further in our examination of this issue.

The judgment of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kyle R. Salyer
Paintsville, Kentucky

BRIEF FOR APPELLEE:

C. Tom Anderson
Pikeville, Kentucky