RENDERED: APRIL 19, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001870-MR

PEGGY BERRY, as Administratrix of the Estates Of KENDRA NICOLE JOHNSON, SEVIN ZYRIN JOHNSON, MYA ULA-JEAN LOU JOHNSON, and MCKINZYE JOHNSON; and MEGAN NICOLE GREEN, b/n/f PEGGY BERRY, legal guardian — APPELLANTS

APPEAL FROM GALLATIN CIRCUIT COURT
v. HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 08-CI-00280

CSX TRANSPORTATION, INC. — APPELLEE

AND NO. 2011-CA-001921-MR

MARILYN ROBBINS, as Administratrix of the Estate of GLEN[1] JOHNSON, JR. — APPELLANT

APPEAL FROM GALLATIN CIRCUIT COURT
v. HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 09-CI-00003

CSX TRANSPORTATION, INC. — APPELLEE

[1] In the notice of appeal in this matter, the appellant describes herself as "Marilyn Robbins, Administratrix for the Estate of Glen Johnson, Jr." With that exception, every other pleading, brief, and order herein describes the appellant as "Marilyn Robbins, Administratrix for the Estate of *Glenn* Johnson, Jr." The latter spelling appears to be the correct one. Accordingly, we have captioned this opinion according to the notice of appeal, but will nevertheless refer to the estate in question as that of "Glenn Johnson, Jr."

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KELLER[2] AND MOORE, JUDGES.

MOORE, JUDGE: This matter concerns two consolidated appeals of a defense verdict in favor of CSX Transportation, Inc. (CSX), relating to claims of negligence and wrongful death arising from a car accident. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Sometime between December 27, 2007, and January 15, 2008, Kendra and Glenn Johnson, Jr., and their three minor children, Sevin, Mya, and McKinzye, tragically died. They were traveling in their 2002 Ford Taurus along KY 467 in Gallatin County in an area where the road runs alongside and underneath CSX's railroad tracks. Their vehicle left the road and landed on its top just below a culvert in Lost Branch Creek. Their submerged vehicle was not discovered in Lost Branch Creek until January 15, 2008.

Thereafter, Peggy Berry filed a negligence and wrongful death action against CSX in her capacity as administratrix of Kendra's, Sevin's, Mya's, and McKinzye's estates, and also as legal guardian of Megan Nicole Green, Kendra's

[2] Judge Michelle M. Keller concurred in result in this opinion prior to her appointment to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

sole remaining child.[3] (We will refer to this group of appellants collectively as "Kendra's estate.") Marilyn Robbins, in her capacity as administratrix of Glenn's estate, also filed a negligence and wrongful death action against CSX. In each action, it was alleged that CSX had either obstructed or created a condition on KY 467 which caused the Johnsons' vehicle to leave the road and resulted in the Johnsons' deaths.

Following trial, the jury found in favor of CSX. In conformity with the jury's verdict, the trial court dismissed the balance of the appellants' claims. This appeal followed.

ANALYSIS

Before we delve into the arguments offered by the appellants respecting CSX's alleged negligence, an examination of the relevant part of the jury instructions and the particulars of jury's findings will put perspective on this case. It is a fundamental rule of tort liability that for negligence to be established there must have been (1) a duty owed by a defendant to the plaintiff, (2) a breach of that duty which (3) was the proximate cause of the injuries which resulted in (4) damages. Negligence must be proven; it will never be presumed. *Helton v. Montgomery*, 595 S.W.2d 257, 258 (Ky. App. 1980). The only question that the jury answered related to one instruction out of the total of seven instructions given. In its entirety, that instruction (entitled "Instruction No. 3") provided:

> CSX Transportation, Inc. had a duty to exercise ordinary care in the use of its right of way and in conducting work

[3] Megan was Glenn's step-child, and was not with the Johnsons at the time of the accident.

adjacent to KY Highway 467 so as to avoid creating an artificial condition in or adjacent to KY Highway 467 that causes an unreasonable risk of harm to persons using KY Highway 467. In exercising its general duties, CSX Transportation, Inc., had the following specific duties:

a) To exercise ordinary care to keep from filling up a drainage ditch along a public road so as to interfere with the purposes for which it was made, and

b) To exercise ordinary care to keep from placing obstructions in a road.

You will find for Plaintiffs if you are satisfied from the evidence that

1. CSX Transportation, Inc., failed to exercise ordinary care in the use of its right of way and/or in conducting work adjacent to KY Highway 467 so as to avoid creating an artificial condition in Highway 467 that caused an unreasonable risk of harm to persons using KY Highway 467.

AND

2. That the failure(s) of CSX Transportation, Inc. were a substantial factor in causing the injuries and deaths to Plaintiffs.

Otherwise, you will find for CSX Transportation, Inc.

Even if you might otherwise find for Plaintiffs under this Instruction, you will nevertheless find for CSX Transportation, Inc. if you are further satisfied from the evidence that:

1. Such artificial condition had not existed for a sufficient length of time before the accident happened that in the exercise of ordinary care CSX Transportation, Inc. should have discovered and remedied it;

AND

> 2. In the exercise of ordinary care CSX Transportation, Inc. should not have been expected to have anticipated and prevented such condition.

The question that immediately followed this instruction then asked the jury: "Do you find for Plaintiffs and against CSX Transportation, Inc. under Instruction No. 3? _____ Yes _____No."

In sum, the above instruction listed several duties that CSX owed the appellants in the context of this case, but asked the jury to determine whether CSX breached any of them by failing to "exercise ordinary care" (*e.g.*, the second element of negligence). If so, the instruction further asked the jury to determine whether any such breach was a substantial factor in causing the appellants' injuries (*e.g.*, the third element of negligence). When the jury answered this instruction with a unanimous "no," it effectively concluded the jury's consideration of this case.

This instruction did not give the jury the option of explaining whether they based their answer upon the second element of negligence or the third. Significantly, *the appellants raised no argument of error with regard to this instruction*. We are left, then, to presume that the jury's verdict in favor of CSX could have rested upon any one of *at least four* different rationales, including:

- CSX exercised ordinary care to keep from filling up a drainage ditch along a public road so as to interfere with the purposes for which it was made; exercised ordinary care to keep from placing obstructions in a

road; and, therefore, evidence of causation was irrelevant even if it existed and was compelling.

- CSX failed to exercise ordinary care to keep from filling up a drainage ditch along a public road so as to interfere with the purposes for which it was made; CSX also failed to exercise ordinary care to keep from placing obstructions in a road; but, no compelling evidence demonstrated that either of these failures caused any of the injuries at issue.
- CSX exercised ordinary care to keep from filling up a drainage ditch along a public road so as to interfere with the purposes for which it was made; therefore, even though compelling evidence demonstrating that a filled-up drainage ditch along a public road did interfere with the purposes for which it was made, and did cause the accident in question, that evidence was irrelevant. Conversely, CSX failed to exercise ordinary care to keep from placing obstructions in a road, but no compelling evidence demonstrated that this failure caused any of the injuries at issue.
- CSX failed to exercise ordinary care to keep from filling up a drainage ditch along a public road so as to interfere with the purposes for which it was made, but no compelling evidence demonstrated that this failure caused any of the injuries at issue. Conversely, CSX exercised ordinary care to keep from placing obstructions in a road, even though compelling

evidence demonstrated that this failure caused some or all of the injuries at issue.

It is impossible to tell what rationale the jury used to resolve this case. Because the appellants are asserting error, the consequences of this inadequacy fall upon them. This is so because the rationale behind a judgment or verdict is an essential ingredient of a complete record. It is the duty of the appellant to ensure the record is complete in order to facilitate adequate appellate review, and, in the absence of a complete record, we must assume the omitted portions support the trial court's ruling. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Stated differently, if the appellants cannot show on this record reversible error that would relate to every rationale that could apply to the above jury instruction, they cannot prevail here. By parity of reasoning, *see, e.g., Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979) ("when a judgment is based upon alternative grounds, the judgment must be affirmed on appeal unless both grounds are erroneous."); *see also Sword v. Scott*, 293 Ky. 630, 169 S.W.2d 825, 827 (1943) ("In the absence of the court's specifying the ground or grounds for his dismissal of the petition, it will be assumed that it was upon any or all of the grounds which the proof sufficiently established."); *Lyons v. Walsh & Sons Trucking Co., Ltd*., 337 Or. 319, 96 P.3d 1215 (2004) (same, in the context of compound questions contained in a single jury instruction).

With this in mind, the appellants argue that the trial court committed error by 1) admitting two expert opinions into evidence; 2) failing to give

additional instructions to the jury regarding negligence *per se*; 3) refusing to give an additional instruction to the jury defining "substantial causative factor"; and 4) providing the jury with an apportionment instruction. We will address each of these arguments in turn.

1. Admitting two expert opinions into evidence

a. Accident reconstructionist testimony

A trial court's ruling as to the admissibility of evidence is reviewed for abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The standard for review is harmless error when considering whether the admission or exclusion of evidence at trial is reversible error. Civil Rule (CR) 61.01. Thus, we will reverse or modify a judgment only when the error prejudices the substantial rights of the complaining party. *Davidson v. Moore*, 340 S.W.2d 227 (Ky. 1960).

The appellants argue that the trial court erred by allowing one of CSX's witnesses, accident reconstructionist Frank Entwisle, to give expert testimony. The field of accident reconstruction has been previously accepted as scientifically reliable given proper expert qualifications. *See Ryan v. Payne*, 446 S.W.2d 273, 277 (Ky. 1969). The appellants do not contest that Entwisle was qualified to testify as an expert in that field, nor do they challenge the validity of any particular theory of accident reconstruction or the techniques used in the field. They only challenge Entwisle's application of those theories and techniques in this

case and assert that if the trial court had conducted a *Daubert*[4] hearing in this matter, part of his testimony would have been properly excluded.

Without citation to the record, the appellants contend that they raised this point in a motion for limine filed somewhere in the several boxes of record in this case. Having located and reviewed the motion in question, we find that it sought to exclude certain examples of expert evidence, but that it made no specific request for a *Daubert*-type hearing. We are not inclined to find that a court must conduct a formal *Daubert* hearing *sua sponte* each time that the admissibility of expert testimony is challenged. *See Mondie v. Commonwealth*, 158 S.W.3d 203, 212 (Ky. 2005); *Tharp v. Commonwealth*, 40 S.W.3d 356, 368 (Ky. 2000). A trial judge has wide latitude in investigating and determining reliability of evidence, *Dixon v. Commonwealth*, 149 S.W.3d 426, 430 (Ky.2004), and the record need only be "complete enough to measure the proffered testimony against the proper standards of reliability and relevance." *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002).

However, even if the appellants had preserved a *Daubert* challenge, the admission of Entwisle's testimony was, at worst, harmless error. As the appellants note in their respective briefs, Entwisle testified with regard to the following subjects:

[4] In *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), the Kentucky Supreme Court adopted the analysis of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), in which the United States Supreme Court set out key considerations for admitting expert testimony under the Federal Rules of Evidence.

> 1) the speed of the Johnson vehicle; 2) that the Commonwealth of Kentucky was at fault; and 3) that the wreck was not caused by CSX. . . . The crux of Mr. Entwisle's opinion, although he admits the wreck could have been caused by a number of factors, is that the Johnsons were at fault due to excessive speed and/or a failure to maintain control.

Entwisle's testimony did not concern whether CSX failed to exercise ordinary care or otherwise breached any duty it owed the appellants (which, as noted, was at least one of several potential bases of the jury's verdict). Moreover, the appellants raise no objection to Entwisle's testimony that, upon his review, no evidence supported that any action or inaction on the part of CSX was causally related to the failure of the operator of the Johnson vehicle to negotiate the curve and leave the road at the Lost Branch overpass of KY 467 (*e.g.*, the second alternate basis of the jury's verdict noted above). Instead, the appellants take issue with the testimony Entwisle offered relating to the separate issues of whether the Johnsons or the Commonwealth acted negligently, and, in particular, Entwisle's estimated calculation of how fast the Johnson's vehicle was traveling when it left the road (*i.e.*, Entwisle estimated it at 30 miles per hour).

Stated differently, the appellants' objections concern testimony that was relevant only to issues of comparative negligence and apportionment—two issues which, in light of the verdict in this matter, the jury had no occasion to consider. For that reason, the appellants were not prejudiced by the admission of Entwisle's testimony. Furthermore, to the extent that the appellants are attempting to argue that Entwisle's speed calculations were otherwise prejudicial to their case

(*e.g.*, that if the jury had believed that the Johnson's vehicle was traveling at a *lower* rate of speed, their verdict would have been different in some way), three legal precepts weigh against them. First, as the plaintiffs below, it was their obligation to prove their case. *See* CR 43.01. Second, a plaintiff cannot prove its case by resorting to speculation or conjecture. *See Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 216 (Ky. App. 2009)). And third, in their own briefs, both appellants acknowledge that the "other reconstructionists [who testified in this matter] stated that it would have been impossible to determine the speed of the car, given the circumstances." In short, anything contrary to Entwisle's speed calculations was merely speculation and conjecture. Thus, the trial court committed no reversible error by admitting Entwisle's testimony.

b. Toxicology reports[5]

The trial court admitted into evidence two postmortem toxicology reports based upon autopsies of Kendra and Glenn. One report indicated that Kendra had ingested a supratherapeutic amount of diphenhydramine prior to the accident, the other report indicated that Glenn had ingested an amount of cocaine at about the same time. Glenn's Estate argues that when the trial court entered

[5] To the extent that Glenn's estate is attempting to argue that admitting the report dealing with Kendra's asserted use of diphenhydramine caused any prejudice to Kendra's estate, it has no standing to do so. We further note that Kendra's estate has not adopted or raised this argument in its separate appeal.

these respective reports into evidence, it erred as a matter of law and caused prejudice.[6]

Even if it were conceded that the trial court's decision to admit the toxicology reports was erroneous, there was no prejudice to Glenn's Estate; it was harmless error at best. Both reports were merely relevant to whether Kendra and Glenn were comparatively negligent in this matter. Because the jury ultimately determined that CSX either exercised ordinary care and breached no duty owed to the appellants, or did nothing to cause the appellants' injuries, the jury never had any reason or occasion to consider whether Kendra or Glenn was comparatively negligent. For these reasons, this argument does not point to any reversible error.

2. Additional instructions regarding negligence *per se*

Prior to when this matter was submitted to the jury, the appellants tendered and the trial court refused four instructions to the jury relating to negligence *per se*. The appellants now assert that the trial court's refusal constitutes reversible error.

The first of these instructions was based upon CSX's alleged violation of a federal regulation, 49 Code of Federal Regulations (C.F.R.) § 213.33. It is unnecessary to discuss the substance of that regulation or the appellants' instruction, however, because in Kentucky negligence *per se* may only be based upon the violation of a Kentucky statute. *St. Luke Hosp., Inc. v. Straub*, 354

[6] Glenn's estate has failed to indicate where in the record it preserved any objection to the admissibility of the two toxicology reports or any expert testimony interpreting them. CR 76.12(4)(c)(v).

S.W.3d 529, 534-35 (Ky. 2011). Therefore, the trial court committed no error in that respect.

The second instruction related to Kentucky Revised Statute (KRS) 177.106. As tendered, the instruction provided:

> It was the duty of both defendants, CSX and OVA,[7] to exercise ordinary care to both (a) apply for a permit and (b) to obtain a permit from the Kentucky Department of Highways before encroaching upon Kentucky Route 467 at Bridge 19. No encroachment on a Kentucky Road is permitted if it, in any way, would interfere with the safe, convenient and continuous use and maintenance of that road.
>
> If you are satisfied from the evidence that either of the Defendants failed to comply with this duty and that such failure was a substantial factor in causing the Johnson car to leave the road and land in Lost Branch Creek resulting in the death of the Johnson family, you will find for the Plaintiff; otherwise you will find for Defendants.

To the extent that this instruction asserts that CSX could have been negligent *per se* because it failed to apply for and receive a permit to encroach upon Kentucky Route 467, this instruction was properly refused because the absence or possession of a permit relates only to the authority for engaging in an activity and not the manner thereof. *See, e.g., Baber v. Merman*, 249 S.W.2d 142, 144 (Ky. 1952) (holding in an action for injuries sustained in a collision between plaintiff's motorcycle and defendant's automobile, evidence that plaintiff had no driver's license as well as contradictory testimony as to whether or not policeman had given plaintiff permission to operate his motorcycle without a license, was

[7] Ohio Valley Asphalt, LLC, or "OVA," was dismissed as CSX's co-defendant before this matter was submitted to the jury.

irrelevant). Moreover the remainder of this instruction is merely duplicative of the instruction that the jury answered in this matter, and we cannot say that the omission of this instruction significantly misstated the law to the jury. Therefore even if it was error to omit this instruction, that error was harmless.

The third instruction related to KRS 179.380. In relevant part, it provided:

> It was the duty of both [sic] Defendant CSX Transportation, Inc., to exercise ordinary care to construct and keep in repair all approaches to and from a public road. No land owner is permitted to fill up any ditch or place anything in any ditch so as to interfere with the purpose of the ditch.
>
> If you are satisfied from the evidence that Defendant CSX failed to comply with this duty and that such failure was a substantial factor in causing the Johnson car to leave the road and land in Lost Branch Creek resulting in the death of the Johnson family, you will find for the Plaintiff; otherwise you will find for the Defendant CSX.

The fourth instruction related to KRS 179.290 and, in a similar vein, provided:

> It was the duty of Defendant CSX Transportation, Inc., to exercise ordinary care to keep from placing obstructions in a road or the clear zone by the road and keep that road in as good a condition as it was before the obstructions were placed on the road. It was the duty of Defendant CSX to exercise ordinary care to not allow water, mud, ice, gravel or stone from its railroadbed [sic] or gabion baskets[[8]] to create a condition on Kentucky Route 467 at Bridge 19 involving an unreasonable risk of injury to persons using the roadway, including the Johnson family,

[8] A "gabion" is defined as "a basket or cage filled with earth or rocks and used esp. in building a support or abutment." MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 510 (11th ed. 2003).

> and if such condition arose, to exercise ordinary care to discover and remedy it.
>
> If you are satisfied from the evidence that Defendant CSX failed to comply with this duty and that such failure was a substantial factor in causing the Johnson car to leave the road and land in Lost Branch Creek resulting in the death of the Johnson family, you will find for the Plaintiff; otherwise you will find for Defendant CSX.

As with the second instruction, these third and fourth instructions are merely duplicative of the instruction that the jury answered in the negative. Similarly, we cannot say that the omission of these instructions significantly misstated the law to the jury.

In addition to that, there is a more fundamental reason why the trial court committed no reversible error in refusing these instructions. A trial court's refusal to give an instruction on negligence *per se* is only harmless error if no evidence presented at trial demonstrates that any injuries were caused by a violation of the statute in question. *See, e.g., Whitehead's Adm'r v. Peter Knopf's Sons*, 262 Ky. 493, 90 S.W.2d 709, 711 (1936); *Tinsley's Adm'r v. Slate*, 251 S.W.2d 883, 886 (Ky. 1952); *see also O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) ("[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation.") (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). And, aside from casually mentioning in their briefs that "[c]ausation remained for the jury to decide," neither of the appellants' briefs cites to any evidence of record

supporting that anything attributable to CSX, let alone anything described in their tendered third and fourth instructions, played any role in causing the Johnsons' vehicle to leave the road. Indeed, CSX cites a litany of evidence and expert testimony demonstrating that nothing attributable to it played a role in causing the Johnson's vehicle to leave the road. The appellants have not rebutted this by citation to evidence in the record.

3. Refusing to give an additional instruction to the jury defining "substantial causative factor"

The above heading, which is a quote from Glenn's Estate's brief, is a misnomer. During deliberations, the court received a note from the jury asking for an additional definition of the phrase, "substantial causative factor." The court called a bench conference regarding the issue of whether an additional instruction should be given. Counsel for the respective parties agreed that no additional instruction or definition should be given. Accordingly, the court gave the jury no additional instruction or definition of the phrase.

On appeal, Glenn's estate nevertheless argues that it was error for the trial court to refuse to give the jury an additional instruction defining "substantial causative factor." Glenn's estate makes no attempt to indicate where in the record it preserved this objection, nor has this Court's viewing of the bench conference in question revealed that either of the appellants made any such request. Consequently, Glenn's estate is now prohibited from raising this matter as a point of error. *See* CR 51(3).

4. Providing the jury with an apportionment instruction

Lastly, the appellants argue that the trial court erred by submitting an instruction to the jury that would have allowed the jury to consider any negligence on the part of the Kentucky Transportation Cabinet when apportioning liability to CSX. However because the jury was specifically instructed not to consider apportionment unless it first reached a threshold finding of liability against CSX, and because the jury found that CSX was not liable, any error in the apportionment instruction was necessarily harmless. *See Combs v. Stortz*, 276 S.W.3d 282, 291 (Ky. App. 2009) ("[E]ven if the court had committed error by providing the apportionment instruction, any such error was harmless as it was cured by the verdict in this matter") (citation omitted).

CONCLUSION

For these reasons, the judgment of the Gallatin Circuit Court is AFFIRMED.

ACREE, CHIEF JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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