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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-000001-MR

GREEN RIDGE FARM, INC. D/B/A  
GREEN RIDGE TREE FARM

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KEN M. HOWARD, JUDGE  
ACTION NO. 07-CI-02386

ROBERT W. AND JEANNANE SHIPP,  
INDIVIDUALLY AND D/B/A SHIPP FARMS,  
AND SHIPP FARMS, LLC; AND  
GRANGE MUTUAL CASUALTY COMPANY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MAZE, MOORE AND TAYLOR, JUDGES.

MAZE, JUDGE: Appellant, Green Ridge Farm (hereafter “Green Ridge”), appeals from the trial order of the Hardin Circuit Court denying its motion for directed verdict and granting the motion for directed verdict on the matter of punitive damages filed by Appellees, Shipp Farms (hereafter “Shipp”). After reviewing the

record and relevant law, we find that the trial court acted correctly and within its discretion regarding both motions. Therefore, we affirm.

### **Background**

Green Ridge operates a tree farm which is adjacent to, or in the vicinity of, several farms operated by Shipp. Green Ridge grows and sells trees to garden centers and wholesale brokers throughout a large part of the United States. In doing so, Green Ridge uses herbicides and pesticides. The only herbicide Green Ridge uses on its trees is commonly known as “Roundup.” Green Ridge maintains that its use of Roundup has caused only minimal damage to branches initially buried in the soil that emerged after spraying.

Shipp primarily uses 2, 4-D herbicide in its agricultural business. 2, 4-D carries with it instructions regarding proper application times, weather conditions and equipment settings due to its tendency to drift across adjacent crops and properties. Shipp, and his second in command, Larry Chenault (“Chenault”), were in sole control of the spraying operations at Shipp’s farms during the time in question, making all decisions regarding equipment settings, as well as timing of sprays and the appropriate weather conditions during sprays.

On May 7, 8, and 15, 2007, Chenault sprayed three farms operated by Shipp and adjacent to Green Ridge using 2, 4-D, as well as other pesticides. Upon surveying his crop of trees on May 22 and 23, 2007, the operator of Green Ridge, Gary Phelps (“Phelps”), noticed at least some damage to every tree on the farm. This damage was described by Phelps as looking like the trees had been “fried.”

Dr. Amy Fulcher and Dr. John Hartman of the University of Kentucky, as well as the Department of Agriculture, investigated upon Phelps's request. Samples of tree leaves sent to the University of Kentucky showed signs of abnormal development, such as cupping. Other samples collected were inconclusive for the presence of a growth-regulating herbicide like 2, 4-D.

As a result of the damage to Green Ridge's trees, the farm had no sales for the 2007 calendar year. Subsequently, on November 19, 2007, Green Ridge filed suit against Shipp seeking compensatory and punitive damages for the losses it had incurred, alleging those losses to be the result of negligent and reckless spraying by Shipp of 2, 4-D upon his farm which caused vapor to drift to Green Ridge.

During the discovery process and at trial, a number of experts offered their testimony regarding the cause or causes of the damage to Green Ridge's trees. Dr. Fulcher concluded that Shipp's spraying of 2, 4-D at times when weather and other conditions should have prohibited it was the cause of Green Ridge's damage. Dr. Green of the University of Kentucky concluded from the analyzed samples that the observed damage was not attributable to insects or weather, but to drift of some type of growth-regulating herbicide spray. Dr. Hartman testified to the occurrence, prior to Shipp's use of 2, 4-D and the observed damage, of above-normal temperatures in March, followed by a late hard freeze in April. He testified that such conditions, in close succession, could have caused the type of damage observed at Green Ridge. Meteorologist Tom Wills also testified to the extreme and

uncommon nature of the early warm-up and late freeze experienced in the spring of 2007. Phelps testified to a 5% loss in his crop due to the late freeze. Green Ridge's expert, Dr. Larry Kuhns, conceded that other causes, such as insects and weather-related factors, can mimic the damage caused by herbicide drift.

At the close of proof, Green Ridge moved the court for a directed verdict on liability based on the doctrine of *res ipsa loquitur*. Green Ridge argued that there was no dispute as to what and who caused the damage to its trees and that Shipp had complete and exclusive control over the instrumentalities which caused the damage. The trial court denied the motion, finding that the various experts' testimonies demonstrated a dispute as to the cause of the damage and whether the cause was Shipp's negligent application of 2, 4-D or something else.

Also at the close of proof, Shipp moved the court for a directed verdict on Green Ridge's demand of punitive damages. Shipp argued that the statutory requirements for a jury's rendering of punitive damages were not met under the proof before the jury. The trial court sustained this motion, finding that nothing in the proof established the requisite "outrage" or malice for an award of punitive damages. As a result of the trial, the jury returned a verdict for Shipp by a vote of 10-2. As a result of the trial court's rulings on the two motions for directed verdict, Green Ridge's appeal follows.

### **Standard of Review**

Green Ridge's argument on appeal is two-fold. They argue that the trial court wrongfully denied their motion for directed verdict and that they were

entitled to such based on the doctrine of *res ipsa loquitur*. Green Ridge also argues on appeal that the trial court's decision to grant Shipp's motion for a directed verdict regarding punitive damages was in error.

In *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204 (Ky. App. 2009), this Court stated the appropriate standard of review of a ruling on a motion for a directed verdict. "When a directed verdict is appealed, the standard of review on appeal consists of two prongs. The prongs are: '[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.'" "

*Daniels*, 300 S.W.3d at 215 (citing *Bierman v. Klapheke*, 967 S.W.2d 16, 18–19 (Ky. 1998)). "A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *Id.* (citing *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988))(internal citations omitted).

If there is conflicting evidence, it is the responsibility of the jury, the trier of fact, to resolve such conflicts. Therefore, when a directed verdict motion is made, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *Hornung*, 754 S.W.2d at 860 (citing *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952)).

Moreover, "[i]t is well argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict." *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968). Hence, "a

reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.” *Bierman*, 967 S.W.2d at 18.

### **Analysis**

We first address Green Ridge’s claim that the trial court erred in denying their motion for directed verdict on *res ipsa loquitur*. *Res ipsa loquitur* “is an evidentiary doctrine which allows a jury to infer negligence on the part of the defendant.” *Sadr v. Hager Beauty School, Inc.*, 723 S.W.2d 886, 887 (Ky. App. 1987); *see also Bell & Koch, Inc. v. Stanley*, 375 S.W.2d 696 (Ky. App. 1964). This doctrine “simply recognizes that as a matter of common knowledge and experience the very nature of an occurrence may justify an inference of negligence . . .”. *Stanley* at 697. It is the plaintiff’s burden, however, to prove that the doctrine of *res ipsa loquitur* applies to a given set of facts. *See Bowers v. Schenley Distillers, Inc.*, 469 S.W.2d 565, 568 (Ky. App. 1971). To do so, it must be shown that (1) the defendant had full control of the instrumentality which caused the injury; (2) the accident could not have happened if those having control had not been negligent; and (3) the plaintiff’s injury resulted from the accident. *See Sadr, supra*, at 887 (citing *Bowers*). Expanding on the latter two elements, the doctrine does not apply unless the “circumstances according to common knowledge and experience . . . create a clear inference this accident would not have happened in the absence of negligence upon the part of [the defendants].” *Herrin’s Administratrix v. Jackson*, 265 S.W.2d 775, 777 (Ky. 1954). Furthermore, “[t]he

doctrine does not apply if it is shown that the injury may have been due to some voluntary action on the plaintiff's part." *Sadr, supra*, at 887.

If *res ipsa loquitur* is found to apply under the above analysis, "a rebuttable presumption of negligence" then exists. *Baxter v. AHS Samaritan Hospital, LLC*, 328 S.W.3d 687, 691 (Ky. App. 2010). It then becomes the defendant's burden to rebut the presumption of negligence on his/her part. See *Schechter v. Hann*, 205 S.W.2d 690, 692 (Ky. 1947); *Vernon v. Gentry*, 334 S.W.2d 266 (Ky. 1960). "On occasion, the presumption may be strong enough to require a directed verdict." *Baxter, supra*, at 691; see also *Sadr, supra*, at 887.

The testimony at trial, consisting mostly of expert testimony, raised a dispute of fact regarding the cause of the damage at Green Tree and whether Shipp's actions constituted negligence or recklessness. Though some of the experts testified that the alleged use or misuse of herbicide was the more likely cause of the damage, others, including at least one of Green Ridge's experts, conceded that other factors could have caused the observed damage to Green Ridge's trees. As a result, and as the trial court pointed out in its ruling, there existed a dispute of fact upon which reasonable minds could differ; specifically, whether insect, weather or herbicide was the true cause of the damage.

On evaluating a motion for directed verdict where such a dispute of fact exists, it was not the trial court's place to weigh the probability of one cause over the other or to evaluate the credibility of the various experts. Rather, the trial court was required to take all of the testimony and all of the evidence, and view it

in a light most favorable to Shipp. Doing so, according to *Hornung*, required the trial court to admit those facts which favor Shipp, primary among these being that other factors, such as insects or extreme weather (or both) may have caused the damage for which Green Ridge wishes to hold Shipp accountable.

These facts, when admitted as true pursuant to *Hornung*, indicate that the elements of *res ipsa loquitur* are not met. In particular, these facts undermine Green Ridge's arguments that Shipp was in "full control of the instrumentality that caused the injury," and that Green Ridge's injury was caused by Shipp's negligence. Hence, a dispute in evidence and "of fact exist[ed] upon which reasonable minds could differ", and the trial court properly left the resolution of that dispute to the jury as the trier of fact. *Bierman*, 967 S.W.2d at 18–19.

During argument to the court in favor of its motion for directed verdict, Green Ridge's counsel seemed to concede that the result of such a dispute in evidence must be that the jury decide that dispute.

Court: [The] experts that [Green Ridge] have presented have testified; some have testified that evidence of drift alone is not evidence that it was negligently, recklessly or carelessly applied. Some have testified that that *does* mean that it was negligently applied. And you've had a couple that have testified both ways. So, what is the court to do with that?

Counsel for Green Ridge: The court is to let the jury decide the case.

The trial court agreed with counsel for Green Ridge, and so do we.



Green Ridge next argues that the trial court erred in granting Shipp's motion for a directed verdict on the issue of punitive damages. Green Ridge contends that, at the very least, disputes of fact existed as a result of the evidence presented and, therefore, the matter of punitive damages was required to go to the jury. We disagree; however, that we believe Shipp's conduct did not rise to the level of bad faith required under Kentucky law makes an examination of punitive damages law unnecessary given our finding above and the jury's verdict. Therefore, in the absence of liability, the matter of punitive damages is moot, and we elect against addressing it further.

### **Conclusion**

For the aforementioned reasons, we find that the trial court properly denied Green Ridge's motion for a directed verdict on the matter of *res ipsa loquitur*, thus making moot the matter of the court's directed verdict regarding punitive damages. Hence, the order of the Nelson Circuit Court is hereby affirmed.

ALL CONCUR.

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