RENDERED: APRIL 5, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000787-MR

KIM CARROLL — APPELLANT

v.

APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 06-CI-00027

REUBEN J. WRIGHT; MATTHEW KEETON
D/B/A MATTHEW KEETON TRUCKING;
AND ANTHEM HEALTH PLANS OF KENTUCKY, INC. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Kim Carroll appeals from a Judgment of the Elliott Circuit Court reflecting a jury verdict in favor of Reuben J. Wright, Matthew Keeton d/b/a Matthew Keeton Trucking in Carroll's action alleging negligence resulting in a motor vehicle accident. Carroll contends that the trial court improperly failed to

render a Directed Verdict in her favor, erred in failing to instruct the jury of the specific duty to drive in the right lane, and erred in allowing the Appellees to argue their driver faced an "unforeseeable situation" and did "the best he could" under the situation. For the reasons stated below, we reverse the Trial Verdict and Judgment, and remand the matter to the Elliott Circuit Court on the issue of damages.

Reuben J. Wright was an employee of Keeton Trucking. On the afternoon of September 27, 2005, Carroll was driving north on a two-lane roadway in Elliott County. Wright, who was driving a tractor-trailer owned by Keeton Trucking, was heading south. Wright approached a curve to the right, past which was an intersection. At the intersection, which apparently could not be seen before the curve, one southbound vehicle was stopped as the driver was waiting to turn left. A second driver in another vehicle had stopped behind that vehicle. When Wright rounded the curve and saw the two vehicles stopped at the intersection, he slammed on his brakes and steered to the right to avoid hitting the stopped vehicles. The brakes on Wright's vehicle locked, leaving one hundred feet of skid marks. Although he avoided a collision with the vehicles in the southbound lane, his trailer swung into the northbound lane where it struck Carroll's northbound vehicle. Carroll sustained serious injuries to her legs in the accident.

Carroll filed the instant action against Wright and Keeton Trucking alleging the negligent maintenance and operation of the truck proximately caused the accident and resultant injuries. A jury trial was conducted on December 4, 2007, at

the conclusion of which the jury was instructed on the "sudden emergency doctrine".[1] The jury then returned a verdict in favor of Wright and Keeton Trucking.

Carroll appealed to a panel of this Court, where she argued that the sudden emergency doctrine was not applicable to the facts.[2] Wright and Keeton Trucking (hereinafter referred to collectively as "Wright") argued that the issue was not preserved because, although Carroll moved for a directed verdict, she failed to make any post-verdict motions to set aside the verdict, for a new trial or for a judgment notwithstanding the verdict.

In an Opinion rendered on February 20, 2009, a panel of this Court concluded that 1) Carroll was not entitled to a Directed Verdict, and 2) the trial

---

[1] In Carroll's first appeal, the panel of this Court noted that the Kentucky Supreme Court revived the doctrine of sudden emergency in *Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004), which it defined as follows:

> The common-law doctrine of "sudden emergency" attempts to explain to a jury how to judge the allegedly negligent conduct of a person, plaintiff or defendant, who is suddenly confronted with an emergency situation that allows no time for deliberation. The sudden emergency doctrine does not excuse fault; it defines the conduct to be expected of a prudent person in an emergency situation. In *Harris v. Thompson* [497 S.W.2d 422 (Ky. 1973)], our predecessor court noted the purpose for including the sudden emergency qualification in instructions:
>
> > [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 (emphasis in original) (citations omitted).

[2] *Carroll v. Wright*, 2009 WL 414064 (Ky. App. 2009).

court's application of the sudden emergency doctrine was improper because the purported sudden emergency herein, *i.e.*, cars stopped at an intersection, was not an emergency which Wright could not have anticipated. The Judgment was reversed and the matter remanded.

A second trial was conducted beginning on October 18, 2011, where Wright argued that the accident was created by an unforeseen circumstance during which he did the best he could to avoid striking the vehicles stopped at the intersection. At the conclusion of the trial, the court denied Carroll's request for an instruction that Wright had a duty to drive in the right lane. The jury returned a verdict in favor of Wright upon concluding that he did not fail to comply with the duty to keep his tractor-trailer under reasonable control, operate it at a reasonable speed not exceeding 55 miles per hour, keep a lookout ahead, obey traffic control devices and exercise ordinary care to avoid a collision. This appeal followed.

Carroll first argues that the trial court erred in failing to sustain her Motion for a Directed Verdict. She notes that it is undisputed that Wright was operating the tractor-trailer and that it crossed the center line, proximately resulting in her injuries. She directs our attention to a wealth of case law holding that a motorist's presence on the wrong side of the road at the time of a collision constitutes *prima facie* evidence of negligence, *see e.g.*, *Mulberry v. Howard*, 457 S.W.2d 827, 829 (Ky. 1970), and that court's have "no hesitancy" directing a verdict in favor of the plaintiff under these circumstances. *Davis v. Kunkle*, 302 Ky. 258, 194 S.W.2d 513 (1946). The focus of her argument on this issue is that Wright had statutory

and common law duties to operate the tractor-trailer in his lane and in a prudent and safe manner, that the uncontradicted evidence - including Wright's own testimony - was that he lost control of the trailer and slid into oncoming traffic, and that she was entitled to a directed verdict as to liability. In response, Wright maintains that "no evidence was presented that the tractor-trailer *was steered* to the left and into Appellant's line of travel" (emphasis added) and that when all reasonable inferences are drawn from the evidence in his favor, the trial court properly overruled Carroll's motion for a directed verdict.

In adjudicating the first appeal in this matter, the prior panel of this Court determined that Carroll was *not* entitled to a directed verdict upon concluding that the question of whether Wright was negligent in causing the accident was a jury question. This ruling would usually be considered "the law of the case", but not in this instance. "The law of the case doctrine is 'an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.'" *Brooks v. Lexington–Fayette Urban County Housing Authority,* 244 S.W.3d 747, 751 (Ky. App. 2007), quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r,* 291 S.W.2d 539, 542 (Ky. 1956).

The law of the case doctrine applies to a particular and unique nexus of facts and law. *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982). *Inman* held that,

"if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed

and applied . . . [the law]." *Id.* at 849. The corollary to this holding is that a change in the evidence on retrial does *not* implicate the law of the case doctrine in subsequent appeals. That is to say, when either "the issues or evidence" are different on retrial, a subsequent appellate tribunal is not constrained by the law of the case doctrine. *Id.* *See also*, *Louisville & N.R. Co. v. Cecil*, 155 Ky. 170, 159 S.W. 689 (1913).

In the first trial, Wright testified as to whether the brakes on the tractor-trailer were functioning properly, whether they needed adjustment and if so, how often, and other matters related to the vehicle's braking system. He did not testify that he lost control of the tractor-trailer or caused the accident. In the second trial, however, Wright acknowledged that he had a duty to keep control of his vehicle and operate it in a safe manner, that he lost control of the trailer, that the trailer slid into oncoming traffic causing the accident, and that there was nothing Carroll could have done to avoid the accident. Because additional testimony was adduced at the second trial, and as that testimony was directly relevant to causation and liability, we are not constrained by the law of the case doctrine in this circumstance.[3]

[3] It also merits noting that even if the issues or evidence did *not* change when the matter was retried, a subsequent appellate tribunal is not constrained by the law of the case doctrine in circumstances where applying the doctrine would result in manifest injustice or would sustain palpable error. *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539 (Ky. 1956). *See also* Justice Stephenson's dissent in *Inman*, *supra*, at 852 wherein he quoted *Union Light* in opining that "[i]n such a case it is deemed to be the duty of the court to admit its error rather than to sanction an unjust result and 'deny to [the] litigants or ourselves the right and duty of correcting an error merely because of what we may be later convinced was merely ipse dixit in a prior ruling in the same case.'"

Carroll points us to *Paducah Area Public Library v. Terry*, 655 S.W.2d 19 (Ky. App. 1983), wherein a "bookmobile" successfully avoided a car stopped in the roadway by swerving off the road. However, after returning to the pavement, the vehicle crossed the center line causing a collision and resultant personal injury. The Kentucky Supreme Court stated therein that,

> We find no error in directing a verdict on the question of liability. When a vehicle is struck in its own traffic lane, the vehicle in the wrong or improper lane is presumptively at fault. There are situations where one's presence in the wrong lane can be excused as a matter of law but they are rare, indeed. There are also situations where one's negligence in being in the wrong lane may be weighed by the jury under a "sudden emergency" instruction, but this succor to a defendant does not exist where his presence in the wrong lane is brought about by his own negligence, or where the situation causing his departure from the correct lane could reasonably have been anticipated.

Paducah Area Public Library, 655 S.W.2d at 22.

A motorist's presence on the wrong side of the road at the time of a collision constitutes *prima facie* evidence of negligence. *Mulberry*, *supra.* Applying this principle to the facts before us, including the holding of *Paducah Area Public Library* that a vehicle in the wrong lane at the time of an accident is presumptively at fault, we must conclude that the presence of Wright's vehicle in the wrong lane at the time of the accident demonstrates his presumptive fault. Uncontroverted testimonial and documentary evidence - notably including Wright's direct testimony - demonstrates that he was driving in a manner which precluded his ability to safely brake; that he lost control of the trailer; that the trailer slid into the

wrong lane; that Carroll was not at fault and could have done nothing to avoid the accident;[4] and that the trailer's presence in the wrong lane caused the accident. Additionally, Carroll, her husband and an expert witness each testified that Carroll received serious injuries in the accident, and this testimony was unrebutted.

While testifying, Wright also acknowledged various duties shared by all drivers, including his duty to remain in control of his vehicle and the duty to stay in his lane. In addition, Wright had a specific statutory duty to stay in his lane - except to safely pass a vehicle - wherein the Legislature employed mandatory "shall" language. KRS 189.300(1) states that, "[t]he operator of any vehicle when upon a highway shall travel upon the right side of the highway[.]"

When presented with a motion for directed verdict, "the trial court must 'draw all fair and rational inferences from the evidence in favor of the party opposing the motion, and a verdict should not be directed unless the evidence is insufficient to sustain the verdict.'" *Kroger Co. v. Willgruber,* 920 S.W.2d 61, 64 (Ky. 1996) (quoting *Spivey v. Sheeler,* 514 S.W.2d 667, 673 (Ky. 1974)). We will review a trial court's refusal to direct a verdict under a clear error standard. *Radioshack Corp. v. ComSmart, Inc.,* 222 S.W.3d 256 (Ky. App. 2007). The question of whether to direct a verdict rests on a determination of whether the jury's verdict can be supported with all evidence construed in favor of the prevailing party. *Lewis v. Bledsoe Surface Mining Co.,* 798 S.W.2d 459, 461 (Ky. 1990). An appellate court may reverse the denial of a directed verdict if it

[4] The circuit court granted a directed verdict in favor of Carroll on the question of her comparative negligence.

determines, after reviewing the evidence in favor of the prevailing party, that the verdict is "'palpably or flagrantly' against the evidence so as to 'indicate that it was reached as a result of passion or prejudice.'" *Id.* at 461-62, *quoting Nat'l Collegiate Athletic Ass'n v. Hornung,* 754 S.W.2d 855, 860 (Ky. 1988).

Given the uncontroverted testimony that Wright lost control of his trailer, that it slid into oncoming traffic causing an accident and the resultant injuries, and that in so doing he violated statutory and common law duties to stay in his lane and safely operate his vehicle, we must conclude that Carroll was entitled to a directed verdict and that the Elliott Circuit Court erred in failing to so rule.

For the foregoing reasons, we reverse the Judgment of the Elliott Circuit Court and remand the matter for retrial as to damages.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

William H. Wilhoit
Grayson, Kentucky

BRIEF FOR APPELLEES REUBEN J. WRIGHT AND MATTHEW KEETON D/B/A MATTHEW KEETON TRUCKING:

John G. McNeill
Elizabeth Deener
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEES REUBEN J. WRIGHT AND MATTHEW KEETON D/B/A MATTHEW KEETON TRUCKING:

John G. McNeill
Lexington, Kentucky