

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001211-MR

DEBORAH J. CASCHERA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 11-CI-04029

CHARLES M. GLADSTONE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Following a jury trial at which the jury returned a verdict in favor of Charles M. Gladstone on the issue of liability stemming from a motor vehicle collision, the Jefferson Circuit Court entered a judgment dismissing the action filed by Deborah J. Caschera. She now appeals, raising challenges to the trial court's rulings on evidentiary matters and the instructions given to the jury. Following a careful review, we affirm.

On the evening of January 14, 2010, Caschera and Gladstone were involved in a collision at the intersection of Wexford Drive and Bashford Manor Lane in Louisville, Kentucky. Moments before the collision, Caschera had left her home on Wexford Drive to run an errand. Caschera came to a complete stop at the stop sign at the intersection with Bashford Manor Lane. Perceiving no oncoming traffic in either direction, she commenced a left turn onto Bashford Manor Lane when she was struck in the driver's side by the vehicle operated by Gladstone. Both vehicles were heavily damaged. Caschera sustained injuries in the collision; Gladstone was uninjured. The driver of a vehicle trailing immediately behind Gladstone observed he did not have his headlights illuminated prior to the crash.

Caschera sued, alleging Gladstone's negligence in the operation of his vehicle was a substantial factor in causing the collision and her subsequent serious and permanent injuries. No settlement could be reached between the parties and the matter was put to a jury trial in June of 2014.

From the outset, Caschera attempted to exclude from consideration any documents related to her having applied for or received payments for disability or retirement benefits from her employer. Gladstone was ultimately permitted to introduce two documents over Caschera's objection—an Application Summary for Disability Insurance Benefits filed with the Social Security Administration and Applicant's Statement of Disability filed with the Civil Service Retirement System—which the trial court agreed went to Caschera's claim for lost wages.

During trial, Caschera testified Gladstone did not have his headlights illuminated prior to the crash. An independent witness corroborated this testimony. Gladstone indicated he could not recall whether he had his lights on, saying only that after the collision he turned the headlight switch to the off position and it functioned normally. He testified the ambient lighting conditions were such that he would not have noticed whether his lights were on and no other drivers flashed their lights to notify him his headlights were off. Caschera argued the sole cause of the collision was Gladstone's failure to turn on his headlights. In rebuttal, Gladstone presented evidence of the presence of a large shrub at the intersection of Bashford Manor Lane and Wexford Drive which could have impeded Caschera's ability to observe his vehicle. He alleged it was, in fact, Caschera's failure to look around the bush and her subsequent failure to yield the right-of-way which caused the crash.

Based on Gladstone's inability to contradict her testimony and that of the eyewitness regarding his failure to illuminate his headlights, Caschera moved for a directed verdict on the issue of liability. The trial court denied the motion. Caschera then moved for a jury instruction on negligence *per se*.¹ The trial court

¹ In 1942, the Kentucky General Assembly enacted Kentucky Revised Statutes (KRS) 446.070 to codify the common law principles of negligence *per se*. *St. Luke Hosp., Inc. v. Straub*, 354 S.W.3d 529, 534 (Ky. 2011). KRS 446.070 provides: "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

denied the motion. Following deliberations, the jury returned a verdict in favor of Gladstone. This appeal followed.

Caschera presents three allegations of error in seeking reversal. First, she contends the trial court erred in denying her motion for directed verdict on liability. Next, she challenges the trial court's failure to give an instruction on negligence *per se*. Finally, Caschera alleges it was error to admit documents related to her disability and retirement applications. Discerning no reversible error, we affirm.

The standard for reviewing a trial court's ruling on 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 Gladstone.

We review a trial court's decision to admit or exclude evidence under the abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* at 581 (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Finally, any alleged 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).

“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). “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).

Id. With these standards in mind, we now turn to the issues presented in the instant case.

Caschera first argues the trial court erred in failing to grant a directed verdict in her favor on the issue of liability. Inextricably intertwined with this contention is Caschera’s allegation that the trial court should have instructed the jury on negligence *per se*. As such, we shall address these two contentions together.

Caschera relies on KRS 446.070 to argue the unexcused violation of a statute is negligence *per se*. She maintains Gladstone violated KRS 189.030, which she argues is a safety statute requiring motorists to illuminate their headlights at certain times. That statute provides:

- (1) Headlamps, when required on a vehicle, shall be illuminated:
 - (a) During the period from one-half (1/2) hour after sunset to one-half (1/2) hour before sunrise; and
 - (b) At such other times as atmospheric conditions render visibility as low as or lower than is ordinarily the case during that period.
- (2) Provisions as to distances that lights must be visible refer to visibility under normal atmospheric conditions.

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):

[i]n 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 statute herein is intended to protect motorists from injury on the highway, and Caschera is a motorist, we move to the next step in the analysis.

Caschera maintains because Gladstone failed to illuminate his headlights as required by statute, he is negligent *per se*. She argues sunset occurred on the date of the collision at 5:46 p.m. and Gladstone did not have his headlights switched on when the wreck occurred at 7:30 p.m., a time well past the thirty minutes after sunset required under KRS 189.030(1)(a) at which he was required to illuminate his lights. She thus appears to be suggesting proof of a statutory violation creates strict liability.

A “violation of a statute does not necessarily create liability.” *Hargis v. Baize*, 168 S.W.3d 36, 46 (Ky. 2005). Not only must the statute “intend to prevent the type of occurrence that took place, [the occurrence also] must have

been a substantial factor in causing the result.” *Id.* (citation omitted). Thus, even though KRS 189.290(1) 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 KRS 189.030 is even more particular as to Gladstone’s alleged driving actions, Caschera must still demonstrate Gladstone’s negligence was the cause of her 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. Before liability attaches, even with a statutory violation, the negligence must be the cause of the injury. *Id.* While we are unable to locate a case with facts exactly like those presented herein, 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, the Supreme Court of Kentucky held the driver was not subject to strict liability. Rather, the Court held prior to a finding of fault, it must be established the driver alleged to be at fault violated the duty of ordinary care. *USAA Casualty Insurance Company v. Kramer*, 987 S.W.2d 779, 782 (Ky. 1999).

Caschera cites several cases to support her proposition that because Gladstone has admitted he may not have had his headlights illuminated, and thus violated a statute, it was negligence *per se*. These cases do not alter our reasoning

that Caschera still must establish Gladstone's actions were the proximate cause of her injuries.

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

Therefore, Caschera's belief she is entitled to a directed verdict on liability because Gladstone did not illuminate his headlights is overly simplistic. She must not only establish negligence, she must also show proximate causation. In other words, she must demonstrate Gladstone's negligent conduct was a substantial factor in bringing about the collision and her subsequent injuries.

"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 case, proximate causation was an issue for the jury to decide. In *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 92 (Ky. 2003), our Supreme 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 Caschera and Gladstone’s factual dispute as to the illumination of his headlights, ambient lighting conditions and environmental factors and whether Gladstone’s actions were the substantial cause of Caschera’s injuries. Caschera says she did not observe Gladstone because he did not turn his headlights on, and his negligent failure to do so was the sole cause of the collision. On the contrary, Gladstone contends ambient conditions would have permitted Caschera to observe

his vehicle had she cautiously operated her vehicle and maneuvered it in such a way as to safely see around the large bush at the corner of Wexford Drive and Bashford Manor Lane. Therefore, he maintains Caschera's failure to yield the right-of-way was the cause of the accident. The jury apparently believed Gladstone's version of the events, or at least disbelieved Caschera's version to the extent it did not find Gladstone had breached any of the duties imposed upon him as referenced in the instructions. Therefore, the jury determined Gladstone's actions were not the proximate cause of Caschera's injuries.

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 Gladstone was the prevailing party, he was entitled to all reasonable inferences the trial court could give the facts and evidence. Here, we concur with the trial court's assessment that disputed issues of fact existed upon which reasonable minds could differ. The evidence heard by the jury was that Caschera pulled into the path of Gladstone's vehicle and the two made contact.

The precise cause of the collision was clearly disputed. Because it was disputed whether Gladstone was the proximate cause of Caschera's injuries, the trial judge was constrained from granting a directed verdict on the issue of liability.

Therefore, after careful review of the proceedings, we are convinced based on 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, the jury verdict was so palpably or flagrantly against the evidence as to indicate it was reached as a result of passion or prejudice. Consequently, consistent with *Lewis*, the court did not err in denying Caschera's motion for a directed verdict. Likewise, we are unable to conclude the trial court erred in refusing to instruct the jury on a theory of negligence *per se*² as we believe the instructions were based on the evidence and properly stated the applicable law. *Hamilton*, 208 S.W.3d at 275.

Finally, Caschera argues the trial court erred in admitting her application for retirement and disability benefits and her statement of disability. She contends the application for benefits constituted inadmissible hearsay and should have been excluded. Caschera alleges her statement of disability was

² In so concluding, we note the trial court did, in fact, include the text of KRS 189.030(1)(a) in its instruction in addition to the general duties of ordinary care imposed upon the parties. While Gladstone contends inclusion of this language converted the trial court's instruction into a negligence *per se* instruction, we need not—and do not—go so far as such a conclusion is unnecessary based on our discussion above.

improperly admitted to offset her lost wages claim and the “malingering exception” set forth in *Peters v. Wooten*, 297 S.W.3d 55 (Ky. App. 2009), was inapplicable. As stated in *Thompson*, 11 S.W.3d at 577–78, a trial court has broad discretion in ruling on the admissibility of evidence, and our standard of review is limited to whether the trial court abused its discretion. Applying this standard, we conclude the trial court did not err in admitting the challenged documents.

As a preliminary matter, we note Caschera’s argument related to the admission of the statement of disability is wholly dissimilar to the argument she presented to the trial court. It is axiomatic that a party may not “feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010) (citations omitted)). As the trial court was not presented with this additional argument, nor given the opportunity to rule thereon, we shall not consider it for the first time on appeal. Therefore, we conclude the question is not properly before us and requires no further discussion.

We now turn to Caschera’s contention her application for disability benefits constituted inadmissible hearsay. After hearing extensive arguments from counsel, the trial court determined the documents contained statements by Caschera which went directly to the core of the issues on trial, *i.e.* whether she was injured, what caused the injury and what damages she was entitled to recover.

Each of the documents included statements that Caschera considered herself disabled several months *prior* to the collision from causes wholly unrelated to the crash. The trial court thus determined the documents were relevant and admissible. No ruling was ever made as to whether the document was hearsay. Although Caschera initially objected on this ground, the discussion turned to relevance and never returned to hearsay to be fully explored. Regardless, the application clearly contained prior statements and admissions made by Caschera—which she verified during her direct testimony—and would therefore not be excluded by the hearsay rule. *See* KRE³ 801A. In addition, the portion of the document to which Caschera primarily objects—the declaration that she considered herself disabled prior to the wreck—was duplicative of the assertion claimed in her handwritten statement of disability to which she did not object on the grounds of hearsay. Thus, even were we to agree the application was erroneously admitted, we fail to discern any substantial prejudicial effect upon Caschera’s claims. A non-constitutional evidentiary error is deemed harmless “if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.” *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009). We are confident the admission of this single document did not sway the verdict.

³ Kentucky Rules of Evidence.

For the foregoing reasons, the judgment of the Jefferson Circuit Court
is AFFIRMED.

ALL CONCUR.

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