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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000518-MR

INFINITY ENERGY, INC. APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 11-CI-00020

BILLY HENSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

ACREE, JUDGE: Infinity Energy, Inc. appeals the Leslie Circuit Court's February 15, 2016 findings of fact, conclusions of law, and judgment, entered after a bench trial, finding Infinity Energy to be the sole cause of an accident causing the appellee Billy Henson extensive injury, and awarding Henson over $3.2 million in damages. Appellant argues the circuit court's factual findings are not supported by

the record and the judgment must be reversed because the court failed to follow Kentucky law mandating apportionment of fault to all tortfeasors. We disagree and affirm.

FACTS AND PROCEDURE

On February 7, 2009, Henson was travelling south on U.S. Highway 421 when he encountered a loaded coal truck, consisting of a tractor and trailer, driven by Billy Joe Baker (the truck driver) and owned by Robert Butler of RDB trucking (the trucking company). Henson, noticing something was not quite right, maneuvered his vehicle against the guardrail. As the truck was on-coming in the northbound lane, the trailer turned over, burying Henson and his car in coal. The car was crushed with the steering wheel crushing Henson. It took first responders over an hour to extract Henson from the rubble. The coroner was initially called because all preliminary indications were that this was a fatality.

The truck driver testified Infinity Energy had loaded the truck with coal, and that Infinity Energy completely controlled the loading process. It had scales on the loader to inform Infinity Energy how much coal was loaded on the truck. The truck driver testified he traveled in slow traffic on Highway 421 on his way to Breathitt County for the first part of his trip. He testified as he came out of the curve at issue, his truck started going straight, but his trailer was turning over. His truck and trailer then fully turned over. The truck driver got out of the truck

and saw that his trailer had rolled over onto a car completely covering it with coal. At that point, he lost consciousness and later woke up in the hospital.

The truck driver testified he was familiar with Highway 421, having driven it many times. He testified he was traveling between 35 and 38 mph when the trailer started to tip. He stated he did not know how much coal was on the truck because he only received that information at the delivery destination. The driver testified he thought 42 tons was the legal load.

Kentucky State Trooper Richie Miller investigated the accident. When he arrived, he saw an arm sticking up through the coal, and firemen were shoveling coal from the top of the vehicle. After Henson was extracted from the vehicle, Trooper Miller took measurements and photographs, and drew a diagram of the accident. His investigation revealed that the coal truck was travelling north on Highway 421 when it overturned onto Henson's vehicle. Upon overturning, the truck travelled 18 feet, 9 inches. It dragged Henson's vehicle 10 feet to its final resting place between the guardrail and the southbound shoulder. The car was smashed down until no taller than the guardrail. The roof was caved in. Henson was covered with coal. Trooper Miller observed that, once the truck started to overturn, there was no way out of the predicament for either driver.

Henson settled with the trucking company and filed this negligence action against Infinity Energy. Following discovery, the parties opted for a bench trial, which was held on March 19, 2015.

Stanley Bray, previously the superintendent at the mine site where the coal truck was loaded, testified he had worked there for over a year and "every truck that left that mountain was overloaded." Bray testified that Infinity Energy engaged in a pattern of dangerously overloading trucks.

Butler, the owner of the trucking company, testified that the truck driver was a good employee, and that the driver had taken and passed a drug test on the day of the accident. Butler inspected the truck at the scene of the accident. He observed nothing was broken on the truck, and concluded the accident was not caused by a mechanical problem. The truck was a new truck with a new trailer purchased a few months prior to the accident. The circuit court noted that all parties agreed, and the court found, that a mechanical issue with the truck was not the cause of or a contributing factor to the accident.

As did Bray, Butler testified that Infinity Energy always overloaded his trucks. He stated that 45 tons was beyond the legal limit and that his trucks were always loaded between 45 and 50 tons. Butler testified that for his trucks to "haul legal he could haul about 42 ½" to 43 tons of coal.

Expert witness Gabriel B. Alexander testified on Henson's behalf. Alexander described himself as a mechanical engineer who uses physics to solve real-world problems with accident reconstructions and forensic engineering. Alexander visited the scene, gathered vital information, including the manufacturer's specifications for the coal truck, examined characteristics of the vehicles, took road measurements, and observed gouge marks.

Alexander opined that the truck was traveling 50 to 55 mph at the time of the accident – which was not in excess of the posted speed – and calculated it was carrying 50.7 tons of coal. He concluded that, based on his investigation, this was a weight-related rollover, not a speed-related rollover. The gouge marks on the roadway, police photographs, and the calculations performed by Alexander supported his opinion. Alexander explained that if speed had caused the rollover, the rollover would have happened early in the curve, not when the truck was coming out of the curve. He did not attribute any degree of fault or causation to driver error.

The circuit court stated it was impressed by Alexander as well as by his calculations and conclusions. Relying on Alexander's testimony, the circuit court found "this was a weight related rollover." It further found "the rollover to have been caused by the amount of coal loaded on the trailer by" Infinity Energy. "Based on the testimony of Mr. Alexander as supported by the testimony of Billy

Henson" and the truck driver, the circuit court found "the accident to have been solely caused and brought about by the loading of the trailer by" Infinity Energy.

Expert witness Edward R. Crum testified on Infinity Energy's behalf. Crum was a Kentucky State Police officer for 24 years and now works as a private investigator and accident reconstructionist. Crum opined that the accident was caused by the truck driver "traveling faster than he should have been, or inattention, or a combination of both."

His investigation revealed that when the coal truck was negotiating a right-hand curve, the trailer overturned, thereby causing the tractor to overturn. Crum explained that the black marks on the pavement depicted in the accident photographs were caused by a weight shift and indicated the truck driver had crossed the center line and attempted to reestablish his lane of travel when the rollover occurred. Crum's conclusion, stated in his written report, was that "operator input *could* have contributed to the overturning event." (Emphasis added). Crum later testified that operator input was indeed a *contributing* factor to the accident, and ultimately stated that operator input was the *sole causative* factor.

Crum did not dispute Alexander's calculation of rollover speed. He did not find the truck was speeding but did believe it to be traveling faster than it should have traveled under the circumstances. He testified that a truck with that size load should not have traveled the curve at issue at 55 mph.

Crum stated he had not been presented any evidence indicating the truck was overloaded, and that a load of 45 to 50 tons was a reasonable weight to put on a truck of that size. Crum testified he did not believe weight to have been a factor nor did he believe the truck's weight to be in excess of the legal limit.

The circuit court found Crum's expert testimony unpersuasive. It noted that Crum did not dispute Alexander's calculation that the truck was loaded with 50.7 tons of coal at the time of the accident. It also accepted as true Butler's testimony that his trucks could legally haul between 42 ½ and 43 tons. Based on this, the circuit court noted that "the load was obviously overweight" and found "the truck to have been overweight at the time of the accident." It further stated in its findings:

> In any event, the court is not persuaded by the testimony of Mr. Crum. The court finds Mr. Alexander's testimony more persuasive. Again, based on the testimony of Mr. Alexander as supported by the testimony of Henson and [the truck driver] the court finds the accident not to have been caused by operator input, but instead to have been caused by the overloading of the truck by the defendant, Infinity Energy, Inc. which resulted in this foreseeable accident causing injury to [Henson].

(R. 576).

Henson presented, and the circuit court found persuasive and accepted as true, evidence as to his extensive injuries,[1] medical costs, and diminished quality of life. Medical testimony described Henson's limitations from the accident as multiple and severe. The circuit court awarded Henson $280,000 in lost wages; $120,000 for impairment of his future ability to earn money; $2.5 million as compensation for pain and suffering; and $300,822.74 for incurred medical bills. It further noted:

> [Infinity Energy] argues any award to [Henson] should be reduced by the amount of money paid [Henson] by the trucking company. The court is not persuaded. There is no evidence in the record as to the amount or terms of the payment other than Henson's testimony that he received money from the trucking company which he used for medical bills and a home. Nothing in the record established [Infinity Energy] is entitled to a credit for this payment. The accident has been determined to have been solely caused and brought about by [Infinity Energy].

(R. 582).

Infinity Energy filed a CR[2] 59.05 motion to alter, amend, or vacate the judgment and for additional factual findings under CR 52.04 related to

[1] The circuit court found that Henson suffered from a posterior pelvic ring fracture, an anterior pelvic ring fracture, a history of open reduction of pelvic fractures, low back pain from the fractures, innominate bone fracture (the big flaring bone on each of the pelvis), right and left side L3 traverse process factures, left tibia fracture with bilateral distal tubal fractures, left zone 2 sacral fracture, ditosis of the SI joint, left sacral fracture, right acetabular fracture, left lower extremity deep thrombosis, impotence due to decreased sensation of the pelvic area, compression fractures at T10, T11, and T12, as well as the implanting of a green field filter in the vena cava.

[2] Kentucky Rules of Civil Procedure.

apportionment of fault among the parties. It argued that, if the Court believed the accident to have been solely caused by Infinity Energy, "the Judgment should be amended to reflect a 0% apportionment of fault to the truck driver. But if – as the evidence proves – [the truck driver's] actions caused, in whole or in part, the accident, then Kentucky law requires fault to be apportioned to" the truck driver. Infinity Energy also faulted the circuit court for failing to account for Henson's settlement with the trucking company. This was the extent of Infinity Energy's apportionment argument. The circuit court denied its motion. Infinity Energy appealed.

STANDARD OF REVIEW

Because this is an appeal following a bench trial, CR 52.01 sets forth our standard of review. The rule directs the circuit court to make specific findings of fact and state separately its conclusions of law relied upon to render its judgment. CR 52.01; *Barber v. Bradley*, 505 S.W.3d 749, 754 (Ky. 2016). The circuit court's factual findings shall not be set aside by this Court "unless clearly erroneous, and due regard shall be given to the opportunity of the [circuit] court to judge the credibility of the witnesses." CR 52.01. Factual findings are clearly erroneous if they are unsupported by substantial evidence. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001). Substantial evidence is evidence which, "when taken alone or in light of all the evidence, has sufficient probative value to induce

conviction in the mind of a reasonable person." *Gosney v. Glen*, 163 S.W.3d 894, 898 (Ky. App. 2005). The circuit court's legal conclusions are reviewed *de novo*. *Barber*, 505 S.W.3d at 754.

ANALYSIS

Infinity Energy argues that the circuit court erred in two ways. First, the court's factual findings were erroneous because they were not supported by the record. And, second, the court erred in failing to apportion fault to the trucking company and its driver.

A. The Circuit Court's Factual Findings Are Supported by Substantial Evidence

Infinity Energy asserts the circuit court's findings that the truck was overweight and that its weight was the sole cause of the accident are clearly erroneous and not supported by evidence in the record. We disagree.

We reiterate that, in a bench trial, the circuit court, acting as the trier of fact, is tasked with judging the credibility of witnesses and weighing the evidence. *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004) (quoting *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)). When the evidence is conflicting, it is within the exclusive purview of the circuit court to determine which evidence to believe. *Id.* "That one side presents more testimony than the other, or that one side's evidence seems superior to the other's, at least from the appellate

perspective, has no bearing." *D.G.R. v. Commonwealth, Cabinet for Health and Family Services*, 364 S.W.3d 106, 114 (Ky. 2012).

The circuit court found that the truck was overweight at the time of the accident. Infinity Energy argues there was no direct evidence presented at trial establishing the truck was in fact overloaded. There was no pre-accident documentation to confirm the weight of the load, nor was any weigh ticket submitted into evidence.

Henson's expert calculated the truck's load at the time of the accident to be 50.7 tons. Infinity Energy's expert did not disagree with this calculation. Butler and the truck driver both testified the truck could legally haul around 42 to 43 tons of coal. Butler testified 45 tons of coal is beyond the legal limit. It was reasonable from this evidence for the circuit court to conclude that the truck was overweight. Its finding is supported by the record. It is not clearly erroneous.

Infinity Energy also argues it was clearly erroneous for the court to have found the overweight load of the truck to be the sole cause of the accident. The circuit court was presented with conflicting expert testimony. Henson's expert testified the accident was caused by a weight-related rollover. He supported his testimony with personal observations, evidence from the scene, police and other photographs, and his own calculations. He explained why, in his opinion, the rollover was not speed related. By contrast, Infinity Energy's expert testified the

accident was caused by a speed-related rollover brought about by driver input error. The expert did not find the truck driver to be speeding, but that he was traveling faster than safe under the circumstances, which we know retrospectively included a load of coal exceeding 50 tons. He pointed to evidence from the scene that the truck crossed the centerline and then maneuvered quickly back into its lane, causing the rollover and accident.

The circuit court chose to believe Henson's expert witness. It described Henson's expert as impressive, his testimony convincing and more persuasive than Infinity Energy's, and noted the testimony was supported by other lay testimony. Henson's testimony was relevant and substantive; it was sufficient to lead a reasonable person to conclude that a weight-related rollover, not speed or driver input, caused the accident. The circuit court's determination of the verity of the testimony is unchallengeable. We cannot say that the circuit court was clearly erroneous in choosing to believe the witnesses and, specifically, Henson's expert testimony.

It matters not that other evidence supports Infinity Energy's theory of liability. In a trial such as this there will almost always be conflicting evidence on essential issues. It was within the circuit court's exclusive province, as the trier of fact in this case, to assess credibility and weigh the evidence. *Barber*, 505 S.W.3d at 754; *Mays v. Porter*, 398 S.W.3d 454, 459 (Ky. App. 2013). It found the

evidence and testimony submitted by Henson, including his expert witness's opinion, convincing. The circuit court's findings were supported by substantial evidence and a product of the exercise of sound discretion. Infinity Energy has identified no viable grounds to disturb those findings. On this issue, we affirm.

B. Apportionment

Infinity Energy asserts that if the circuit court's findings related to the truck's weight and speed are affirmed, then the circuit court committed legal error in failing to apportion fault to the trucking company and the truck driver. Again, we disagree.

Kentucky is a comparative fault state. KRS[3] 411.182. Comparative negligence "calls for liability for any particular injury in direct proportion to fault . . . [by] divid[ing] the damages between the parties who are at fault." *Regenstreif v. Phelps*, 142 S.W.3d 1, 4 (Ky. 2004) (footnotes omitted). "The core principle of comparative negligence is that '[o]ne is liable for an amount equal to his degree of fault, no more and no less.'" *Id.* (quoting *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 803 (Ky. 2005)).

Apportionment is the tool utilized by the courts to segregate the amount of fault attributed to each tortfeasor. When appropriate, it is the fact-finder's task to determine the shares of damages "in proportion to the fault of each

[3] Kentucky Revised Statutes.

party." *Ryan*, 177 S.W.3d at 804. Apportionment applies equally to settling defendants, provided certain parameters are met.

Apportionment is appropriate "[i]f there is an active assertion of a claim against joint tortfeasors, and the evidence is sufficient to submit the issue of liability to each[.]" *Floyd v. Carlisle Const. Co., Inc.*, 758 S.W.2d 430, 432 (Ky. 1988). Our Supreme Court tells us that "[e]mpty-chair defendants who have settled are to be treated no differently than participating defendants in regard to what must be proved to apportion fault against them [even t]hough the empty-chair defendant will not actually be held liable in the trial, since it is literally not on trial[.]" *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 74 (Ky. 2010).

CertainTeed awkwardly states the rule in terms of how phantom tort defendants "are to be treated" – *i.e.*, the same as always. That is to say, the party who benefits by the jury's belief in the fault of the empty-chair defendant bears the burden of proving by a preponderance of the evidence *every element* of the empty-chair defendant's liability, just as if he or she was still exposed to indeterminate liability and still had a presence in the courtroom. "The burden of proof . . . [therefore,] is effectively shifted, since it is the participating defendant, not the plaintiff, who seeks to show that the empty-chair defendant is responsible." *Id.* at 73. "[A] participating defendant must still *prove liability* on the part of the

[co-]tortfeasor onto whom it seeks to shift some of the blame." *Id.* at 74 (emphasis added).

The mere fact that a party has been sued or has settled, in itself, does not permit the factfinder to allocate part of the total fault to that party. *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467, 482 n.5 (Ky. 2001); *Savage v. Three Rivers Medical Center*, 390 S.W.3d 104, 118 (Ky. 2012). Instead, "the court or the jury [must] first find[] that the [settling] party was at fault; otherwise, the party has no fault to allocate." *Savage*, 390 S.W.3d at 118 (quoting *Parrish*, 58 S.W.3d at 471 n.5).

Fault, in this context, is synonymous with liability. "When, under the evidence, only one party is shown to have caused an injury, fault and its resulting liability cannot legally or rationally be apportioned elsewhere." *Morgan v. Scott*, 291 S.W.3d 622, 634 (Ky. 2009) (plurality opinion). Neither comparative negligence nor its apportionment counterpart "give a party the right to apportion fault to persons whose liability has been judicially determined not to exist." *Jenkins v. Best*, 250 S.W.3d 680, 686 (Ky. App. 2007). "This means sufficient evidence of all the elements of the tort must be presented against every tortfeasor to which fault is assigned. If there is insufficient evidence as to a tortfeasor, the jury [or the court in the case of a bench trial] cannot properly apportion fault against it." *CertainTeed*, 330 S.W.3d at 73.

Here, the circuit court found only one party at fault – Infinity Energy. *See* KRS 411.182(1) (apportionment appropriate "[i]n all tort actions . . . involving fault of more than one (1) party to the action[.]"). It found Infinity Energy's overloading of the truck to be the sole cause of the accident. Because Infinity Energy failed to prove to the circuit court's satisfaction that the trucking company or the truck driver's alleged negligence caused the accident, it failed to prove "all the elements of the tort" of negligence.[4] That is, there is no liability – no fault – attributable to the trucking company or its driver and, therefore, nothing to apportion to either.

Infinity Energy also argues that the actions of the trucking company and the truck driver constitute negligence *per se* and, therefore, the circuit court was legally required to assign some measure of fault to those settling tortfeasors. It contends the trucking company and its driver breached independent legal duties to inspect every load and not drive with an overweight load, and the truck driver breached his duty to drive the coal truck at a safe speed and to stay in his own lane of travel. Infinity Energy then cites numerous state statutes,[5] a state regulation,[6] a

[4] "A common law negligence claim requires proof of (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury." *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 213 (Ky. 2012).

[5] KRS 177.9771; KRS 189.224; KRS 189.290(1); KRS 189.300; KRS 189.390(2); KRS 189.420.

[6] 601 Kentucky Administrative Regulations (KAR) 1:005.

federal regulation,[7] and provisions of the CDL[8] manual that the trucking company and its driver allegedly violated, thereby constituting their negligence, *per se*. This argument fails for a variety of reasons.

Generally, we agree that, in Kentucky, the violation of a statute constitutes negligence *per se*. KRS 446.070 (codifying the common-law doctrine of negligence *per se*). "A negligence *per se* claim is merely a negligence claim with a statutory standard of care substituted for the common law standard of care." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 438 (Ky. App. 2001) (quoting *Real Estate Marketing Inc. v. Franz*, 885 S.W.2d 921, 927 (Ky. 1994)); *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 728 (Ky. App. 2008) ("KRS 446.070 converts the standard of care required by the violated statute into a statutory standard of care for the negligence claim, the violation of which is negligence *per se*.").

However, "Kentucky courts have held that the 'any statute' language in KRS 446.070 is limited to Kentucky statutes and does not extend to federal statutes and regulations or local ordinances." *Young v. Carran*, 289 S.W.3d 586, 589 (Ky. App. 2008); *T & M Jewelry, Inc. v. Hicks ex rel. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006); *Alderman v. Bradley*, 957 S.W.2d 264, 266-67 (Ky. App. 1997). The Kentucky legislature did not intend it "to embrace the whole of federal laws

[7] 49 Code of Federal Regulations (C.F.R.) 392.9(a).

[8] Commercial driver's license.

and the laws of other states and thereby confer a private civil remedy for such a vast array of violations." *T & M Jewelry, Inc.*, 189 S.W.3d at 530. KRS 446.070 and the doctrine of negligence *per se* extend only to those "laws enacted by *our* General Assembly." *Alderman*, 957 S.W.2d at 267. To the extent Infinity Energy relies on a federal regulation and the CDL manual as the basis for its negligence *per se* claim, those sources are beyond the scope of Kentucky's negligence *per se* statute, and their argument necessarily fails.

Infinity Energy's negligence *per se* arguments cannot pass muster for another reason. Proof even of a statutory violation does not get a party claiming negligence *per se* over the causation hurdle. "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*." *Hargis v. Baize*, 168 S.W.3d 36, 46 (Ky. 2005) (emphasis added). Here, the circuit court, acting as the finder of fact, found Infinity Energy's conduct in overloading the truck to be the sole cause of the accident. It attributed no fault to the trucking company or the driver. Stated another way, it found the trucking company and its driver's actions were not a cause of, or a contributing factor to, the accident. Failure to prove causation is fatal to Infinity Energy's negligence *per se* claim. *See Wright*, 381 S.W.3d at 213 (noting a negligence *per se* claim is simply "a negligence claim with a statutory [or

regulatory] standard of care substituted for the common law standard of care"). Again, because the circuit court declined to find liability on behalf of the trucking company or its driver, there is no fault to apportion.

Further, we are not convinced Infinity Energy adequately brought this argument to the circuit court's attention. When an issue has not been addressed in the order on appeal, there is nothing for us to review. "Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court." *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017). "[A]n appellant preserves for appellate review only those issues fairly brought to the attention of the trial court." *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012).

While Infinity Energy did request that the circuit court apportion fault to the trucking company and the truck driver, it did so superficially and made no reference to negligence *per se*. It argued, generally, that Kentucky law mandates the apportionment of fault to all tortfeasors, including settling defendants. In its post-trial brief, Infinity Energy argued that, because the trucking company had settled with the truck driver prior to litigation, the circuit court must make a finding as to the percentage of fault the trucking company and the truck driver have regarding this claim. Similarly, in its post-judgment CR 59.05 motion, Infinity Energy argued the judgment should be amended because settling defendants are

subject to apportionment at trial despite no longer being subject to actual liability. Furthermore, went the argument, "Paragraph 13 of the Judgment states that accident has been determined to be solely caused or brought about by Infinity Energy Inc." and if the settling defendants were not at fault, "the Judgment should be amended to reflect a 0% apportionment of fault to the truck driver . . . ." (R. 587). Seemingly holding out hope the factfinder would rethink liability, Infinity Energy then said, "But if – as the evidence proves – [the driver's] actions caused, in whole or in part, the accident, then Kentucky law requires fault be apportioned to [the driver] accordingly." (*Id.*).

Nowhere in its pre-trial, post-trial, or post-judgment motions did Infinity Energy argue that the actions of the trucking company and its driver constituted negligence *per se* and that, therefore, the circuit court was legally required to assign fault to those settling parties. Nor did Infinity Energy argue that the trucking company and its driver breached any administrative or statutory duties. It did not cite a single statute or regulation in any of its motions discussing apportionment.

"A new theory of error cannot be raised for the first time on appeal." *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999). The circuit court "must be given an opportunity to rule on a claim before it can be addressed by an appellate court." *Brooks v. Byrd*, 487 S.W.3d 913, 919 (Ky. App. 2016). We

cannot fault the circuit court for failing to find merit in Infinity Energy's negligence *per se* argument when that argument was never fairly presented to the circuit court. *See Commonwealth v. Young*, 487 S.W.3d 430, 440 (Ky. 2015) ("[A] trial court should not be found to have acted in error on a ground that was never presented to the court.").

CONCLUSION

We affirm the Leslie Circuit Court's February 15, 2016 findings of fact, conclusions of law, and judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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