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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000190-MR
AND
NO. 2014-CA-000244-MR

ROBERT G. ADKINS — APPELLANT AND CROSS-APPELLEE

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 12-CI-00920

DAVID THACKER; and
PIKEVILLE AFFORDABLE
HOUSING CORPORATION, INC. — APPELLEES AND CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, STUMBO AND KRAMER, JUDGES.

JONES, JUDGE: Robert Adkins appeals from a jury verdict and resulting order of the Pike Circuit Court, which dismissed his claims against the above-named Appellees. Subsequent to the verdict, Adkins moved for either a new trial or judgment notwithstanding the verdict (JNOV), which the trial court denied. The denial of this motion is the subject of the appeal. After a careful review of the record, we AFFIRM the trial court's judgment.

I. Background

This action stems from a June 19, 2012, pedestrian-motor vehicle collision between Appellant, Robert Adkins, and a vehicle driven by Appellee, David Thacker. Adkins alleged that while walking up to a street adjacent to a low-income apartment complex in downtown Pikeville, Kentucky, he was struck by a large utility van operated by David Thacker, who he believed was employed by Pikeville Affordable Housing Corporation, Inc. Adkins filed a civil suit against David Thacker and Pikeville Affordable Housing Corporation, Inc., seeking damages for his injuries. The case was tried before a jury over the course of five days in October of 2013. The jury ultimately determined that the Appellees were not negligent and returned a verdict in their favor.

The facts surrounding the collision itself were disputed throughout trial. Adkins testified that he was visiting his mother at Myers Towers, an apartment complex. He explained that he was walking up the street in front of the apartment complex when he heard a “clicking noise” from behind. He turned to the right to see what was producing the noise and before he had any time to react,

he was struck by the right rear of Thacker's utility van. The force of the impact spun Adkins around and he fell forward to the pavement hitting his right shoulder, hand, and chest. John Nichols testified that he saw the accident occur as he was riding his bicycle on the sidewalk adjacent to the street. Nichols's testimony corroborated Adkins's version of the events.

Thacker testified that he pulled the utility van into the apartment complex parking lot and, after a coworker disembarked, he began to reverse the utility van up the narrow street that connected the parking lots on either side of the apartment building. He testified that while doing so, as he checked his mirrors, he noticed Adkins standing on the curb adjacent to the roadway, speaking to a man on a bicycle. Thacker testified that as he was reversing up the street, Adkins simply walked into the passenger side of the utility van.

Adkins's counsel cross-examined Thacker about his allegedly inconsistent statements to the police officer called to the scene of the accident. The police report indicated that Thacker told the officer that he was reversing the utility van when he heard a noise and then heard someone yelling. The report went on to state that Thacker informed the officer that he stopped, got out of the vehicle, and discovered that he had struck a pedestrian. The report indicated that Thacker told the officer that he simply had not seen Adkins behind the vehicle as he reversed. Thacker maintained that his statements to the officer were not inconsistent with his trial testimony. He believed that the substance of his accounts was the same and only the form differed.

Adkins's counsel also questioned Thacker about the medications he regularly takes and the medications that he had taken on the day of the accident. His testimony as to the medications he takes regularly varied throughout discovery. In his deposition, Thacker indicated that he took a drug called Ambien every day and on the day of the accident. However, at trial, Thacker explained that he had simply made a mistake in his deposition because he was nervous and he actually takes Ativan for anxiety every day, not Ambien as he had previously stated in his deposition. Additionally, evidence was introduced that Thacker had been prescribed Lortab for several years and had taken the prescription medication on the day of the accident. However, Thacker testified that he was not under any driving restrictions and Officer Roberts and others who witnessed Thacker on that day testified that there was no reason to believe Thacker was under the influence or impaired.

Next, Thacker's witnesses, Angie Clevenger and Gary Hartsock, corroborated his version of the events. Angie Clevenger testified that she was walking down Hambley Boulevard toward the parking lot of the apartment complex and witnessed the accident. She stated that she saw Adkins standing on the curb talking to another man. She said Adkins turned, walked into the street and hit the van. Adkins estimated that the van was traveling two to three miles per hour.

Gary Hartsock testified that he was with David Thacker all day on the date of the incident and that he was not impaired. Hartsock testified that he was

standing in the parking lot and witnessed the entire accident. He explained that the van was hugging the curb closest to the building while backing up and Adkins stepped off the opposite curb and walked into the van. Hartsock further stated that he never saw Adkins walking down the middle of the roadway.

The jury returned a verdict in favor of the Appellees on liability. Adkins moved for a JNOV or, in the alternative, a new trial. The trial court denied Adkins's motion and entered judgment in conformity with the jury's verdict. This appeal followed.

II. Analysis

A. *CR[1] 59.01(f)*

Under CR 59.01(f), a trial court may grant a new trial when a jury's verdict is not sustained by sufficient evidence or is contrary to law. As an appellate court, we review the trial court's denial of the new trial motion for an abuse of discretion and will reverse only if there is clear error. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001); *Rippetoe v. Feese*, 217 S.W.3d 887, 890 (Ky. App. 2007)(citing *Thomas v. Greenview Hosp. Inc.*, 127 S.W.3d 664 (Ky. App. 2005)).

First, Adkins argues that the jury's verdict was not sustained by sufficient evidence. Adkins argues that the evidence of substance in this case was that he was struck by the utility van operated by David Thacker. He claims that the contrary testimony supplied by Appellees and their witnesses was not of sufficient

[1] Kentucky Rules of Civil Procedure.

probative value, due to the inconsistencies of that testimony with the statements provided by the same witnesses in advance of trial.

Any issue with inconsistency goes to the credibility of the evidence and the weight to be afforded to that testimony by the jury. Adkins's counsel was able to adequately cross-examine all of the witnesses at trial about their statements and had ample opportunity to point out to the jurors any inconsistencies that may have existed. As fact-finders, jurors are free to believe and disbelieve witnesses. They may even believe or disbelieve portions of testimony given by the same witness. *See Stroka-Calvert v. Watkins*, 971 S.W.2d 823, 828 (Ky. App. 1998).

The evidence presented two different versions of a pedestrian-vehicle collision. Either the driver of the vehicle was not acting under a reasonable standard of care and hit a pedestrian or the pedestrian was not acting under a reasonable standard of care and walked into a moving vehicle. Based upon the evidence, jurors may have believed David Thacker's version of the events over that of Robert Adkins. While there was conflicting testimony as to the witnesses' recollection of the events, we find that jurors could have reached a conclusion that Appellees were not liable by reasonably weighing the evidence presented at trial. Given the conflicting evidence, the trial court properly refused a new trial. *See Daniel v. H. B. Rice & Co.,* 275 S.W.2d 924 (Ky. 1955) (holding that while the trial court has broad discretion in granting or refusing a new trial, it may not set aside a verdict of a jury because it does not agree with the verdict if there is

sufficient evidence to support it). Accordingly, we must affirm. *Bayless v. Boyer*, 180 S.W.3d 439, 451 (Ky. 2005)(citations omitted).

Next, Adkins argues that the jury verdict was contrary to law. CR 59.01(f). In support of this argument, Adkins points to both KRS[2] 189.290 and KRS 189.080. KRS 189.290 provides, in pertinent part, that "[t]he operator of any vehicle upon a highway shall operate the vehicle in a careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway."[3] KRS 189.080 provides that:

> Every motor vehicle, when in use on a highway, shall be equipped with a horn or other device capable of making an abrupt sound sufficiently loud to be heard from a distance of at least two hundred (200) feet under all ordinary traffic conditions. Every person operating an automobile or bicycle shall sound the horn or sound device whenever necessary as a warning of the approach of such vehicle to pedestrians or other vehicles, but shall not sound the horn or sound device unnecessarily. A bell may be used on a bicycle.

Adkins argues that Thacker was backing up his vehicle in the wrong direction and did not use his horn and therefore violated his statutory duty to him. We find that Adkins misinterprets KRS 189.290 and KRS 189.080 as requiring that motorists must always use horns when backing up. Instead, the statutes state that motorists "shall use the horn or sound device *whenever necessary*."

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[2] Kentucky Revised Statutes.

[3] KRS 189.010 defines a "highway" as "any public road, street, avenue, alley or boulevard, bridge, viaduct, or trestle and the approaches to them and includes private residential roads and parking lots" and even "off-street parking facilities offered for public use, whether publicly or privately owned." KRS 189.010(3).

The Court in *Lieberman v. McLaughlin*, 26 S.W.2d 753 (Ky. 1930), explained that the sounding of a horn is not required unless it is found to be necessary under the circumstances. Thus, the sounding of a horn is not a mandate under Kentucky law, but only required if necessary and if the exercise of ordinary care requires such action. Ordinarily, the question of necessity of sound signal is one for the jury. *Chappell v. Doepel*, 192 S.W.2d 809, 810 (Ky. 1946). This is consistent with the jury instructions that stated that Mr. Thacker had a duty to "sound his horn as a warning to Robert Adkins if you believe from the evidence that such a precaution was required by the exercise of ordinary care." The jury was able to hear all of the evidence at trial and consider whether they believed it was necessary for Thacker to have sounded his horn under the circumstances.

The proffered evidence supported the jury's conclusion that David Thacker exercised the degree of care and skill expected of a reasonable driver acting under the same circumstances. Thus, Adkins has offered this Court no grounds for reversal of the jury verdict.

B. Jury Instructions

Lastly, Adkins argues that jury instructions were improper. Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (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).

Specifically, Adkins objects to Instruction No. 4 which reads in its entirety:

> It was the duty of Plaintiff, Robert Adkins, in crossing the street between intersections to exercise ordinary care for his own safety, keep a lookout for vehicles in his line of travel, not leave the safety of the curb and walk into the path of a vehicle which is so close as to constitute an immediate hazard, or in walking on the roadway to walk as near as practicable to the left, outside edge of the roadway, and to yield to the right of way of all vehicles on the street, including David Thacker's vehicle.

Adkins argues that he was not "crossing the street," but was rather "walking up the street" at the time of the collision. He argues that by including "crossing the street" in the instruction, the trial court accepted Appellees' version of the events as true. However, it is undisputed that there is no crosswalk in the area that the collision occurred. At trial, Adkins testified that he was going to see his mother who lived in Myers Tower. He stated that he "started walking right in the middle, straight up the street right in front of Myers Towers that leads to the front entrance." We find that the mere fact that Adkins was walking up the middle of the street as his method to cross to the other side does not relieve his duties under the statute.

The duties stated in the jury instructions come directly from KRS 189.570 regarding pedestrians on the roadway. Pursuant to KRS 189.570(6)(a), Adkins had the duty in "crossing a roadway at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection to yield the right of way to all vehicles upon the roadway." KRS 189.570(9) also states that a

pedestrian shall not leave a curb or place of safety and "walk or run into the path of a vehicle which is so close as to constitute an immediate hazard." Finally 189.570(14) includes that a pedestrian walking on or along the highway must "walk only on the left side of the roadway."

We find that the jury instructions were consistent with the testimony and issues arising from trial and were proper. The jury instructions were based upon the evidence and properly and intelligibly stated the law.

Further, even if the jury instruction was improper, the jury never considered Instruction No. 4 because they found that Appellees had no liability under the duties found in Instruction No. 1. Thus, we find that error, if any, was harmless.

C. Remaining Issues

Given that we have affirmed the trial court's denial of Appellants' motion for new trial, we find that all additional issues asserted by Appellees on cross-appeal are moot as the matter has been resolved in their favor.

III. Conclusion

For these reasons, we AFFIRM the Pike Circuit Court.

ALL CONCUR.

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