

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001764-MR

NANCY JENKINS

APPELLANT

v. APPEAL FROM CARLISLE CIRCUIT COURT
HONORABLE WILLIAM SHADOAN, JUDGE
ACTION NO. 98-CI-00021

JAMES W. TACKETT

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Nancy Jenkins (Jenkins) appeals from a trial order and judgment entered June 21, 1999, in favor of James W. Tackett (Tackett) in accordance with a verdict returned following a jury trial. We reverse and remand for a new trial.

In the evening of December 17, 1996, Jenkins was struck by a vehicle driven by Tackett while attempting to cross U.S. 51 on foot. The testimony at trial established that Jenkins, who was wearing dark clothing, stepped into the path of Tackett's car. Tackett testified that he did not see Jenkins until a split second before the accident due to glare from the headlights of a

car coming from the opposite direction. Jenkins testified that she remembers attempting to cross the road and waking up in the hospital several hours later.

Prior to trial, the parties entered into an agreed order of settlement which provided in part:

[O]nly the issue of liability as between the Plaintiff and the Defendant shall be tried. Upon a fact finder's determination subject to standard appeal rights of either party that . . . Tackett was not at fault for the pedestrian/motor vehicle accident which is subject matter of this Civil Action, the Plaintiff's Complaint shall be dismissed and the Plaintiff shall take nothing from the Defendant. In the alternative, upon a determination of any percentage of fault at all against . . . Tackett (one (1%) Percent through One Hundred (100%) Percent) the Defendant through his liability insurance company . . . shall pay to the Plaintiff the sum of \$25,000, the limit of its liability, which shall be a full satisfaction of judgment.

At the close of proof, the trial court directed a verdict against Jenkins as to the issue of her liability.

Instruction No. 3 of the jury instructions provided:

It was Nancy Jenkins' duty in crossing the street between intersections to exercise ordinary care for her own safety, and to yield the right-of-way to all vehicles on the street, including James Wilbur Tackett's automobile.

You are instructed that as a matter of law, Nancy Jenkins failed to comply with these duties and that such factor was a substantial factor in causing the accident.

Instruction No. 4 read as follows:

It was the duty of the defendant, James W. Tackett, in driving his vehicle to exercise ordinary care for the safety of other persons using the street, and this general duty included the following specific duties:

(a) To keep a lookout ahead for persons in front of him or so near his intended line of travel as to be in danger of collision;

(b) To have his automobile under reasonable control;

(c) To drive at a speed no greater than was reasonable and prudent, having regard for traffic and for the condition and use of the street, and not exceeding 25 miles per hour;

(d) To sound his horn as a warning to the plaintiff, Nancy Jenkins if you are satisfied from the evidence that such precaution was required by the exercise of ordinary care;
AND

(e) To exercise ordinary care generally to avoid collision with other persons using the street, including the plaintiff, Nancy Jenkins.

If you are satisfied from the evidence that the defendant, James W. Tackett, failed to comply with one or more of these duties and that such failure was a substantial factor in causing the accident, you will find for the plaintiff, Nancy Jenkins; otherwise you will find for the defendant, James W. Tackett.

The jury returned a unanimous verdict in favor of Tackett under Instruction No. 4. The trial court entered a trial order and judgment in favor of Tackett in accordance with the jury's verdict on June 21, 1999. Following denial of her motion for judgment notwithstanding the verdict or a new trial, Jenkins filed this appeal.

Jenkins maintains that the trial court erred in refusing to give the jury an instruction directing it to apportion fault between Jenkins and Tackett. Jenkins contends that despite the fact that a directed verdict was granted against Jenkins as to the question of whether she was at fault, the jury should have been given an opportunity to apportion fault between

Jenkins and Tackett. In her brief on appeal, Jenkins argues that "the absence of an apportionment instruction together with a instruction that [she] was at fault was misleading to the jury in that it was not given any choice but to return an all or nothing verdict as [Tackett's] responsibility for the injuries in this case. We agree.

Pursuant to KRS 411.182:

In all tort actions . . . involving fault of more than one party to the action . . . the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories . . . indicating:

(b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third party defendant, and person who has been released from liability[.]

KRS 411.182(1)(b). In Stratton v. Parker, Ky., 793 S.W.2d 817 (1990), the Kentucky Supreme Court stated:

The law has developed to the point that in tort actions involving the fault of more than one party . . . an apportionment instruction, if requested, must be given whereby the jury will determine the amount of the plaintiff's damage and the degree of fault to be allocated to each claimant [and] defendant[.]

Stratton, 793 S.W.2d at 820 (emphasis added). See also Reffitt v. Hajjar, Ky. App., 892 S.W.2d 599 (1994) (ruling that giving of apportionment instruction is mandatory upon request of either party); Dix & Associates Pipeline Contractors, Inc., Ky., 799 S.W.2d 24 (1990) (holding that apportionment instruction is required to be given if either party requests it). A review of the transcript pertaining to the jury instructions shows that

counsel for Tackett requested an apportionment instruction; thus it was erroneous for the trial court to refuse to give it.

We are mindful of the fact that the settlement agreement between the parties required Tackett's insurer to pay \$25,000 regardless of his percentage of fault in the event that the jury found in Jenkins's favor. However, we agree with Jenkins that the jury may have been confused by the instructions given by the trial court. Furthermore, the language of the settlement agreement itself clearly contemplated the apportionment of liability for the accident. While the jury may be instructed on remand that Jenkins's negligence was "a substantial factor in causing the accident," the jury should also be instructed to apportion fault percentages between Jenkins and Tackett should it find that any breach of duty on behalf of Tackett contributed to the accident. We agree with Jenkins that the absence of the apportionment instruction in this case may have led the jury "to believe that if they found that [Tackett] had breached his duties, he would be fully liable for all of [Jenkins's] damages" despite having been instructed that Jenkins was, in fact, partly at fault in causing the accident.

Because we have decided that a new trial is warranted due to the trial's court's failure to give an apportionment instruction, we need not address Jenkins's argument concerning the failure of the trial court to dismiss a juror for cause.

Having considered the parties' arguments on appeal, the trial order and judgment entered by the trial court on June 21,

1999, is reversed and this matter is remanded for a new trial in accordance with the dictates of this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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