

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002204-MR

DARLENE ABNER, ADMINISTRATRIX
OF THE ESTATE OF GARY ABNER,
DECEASED

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE WILLIAM TRUDE, JUDGE
ACTION NO. 98-CI-00129

CARL JORDAN;
ESTILL COUNTY WATER
DISTRICT NO. 1; AND
VIRGIL WAYNE NESTER

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Darlene Abner, Administratrix of the Estate of Gary Abner, Deceased (Abner), appeals from a trial jury verdict and final judgment entered by the Estill Circuit Court on July 9, 1999, in favor of Carl Jordan (Jordan) and the Estill County Water District No. 1 (the Water District). We affirm.

This appeal stems from a chain of events occurring during the early morning hours of April 23, 1998, which culminated in the death of Gary Abner (Gary). Gary was a

passenger in a car driven by Billy Ormes (Ormes). Becky Norton (Norton) was also a passenger in the Ormes vehicle. Gary, Ormes, and Norton had spent the evening cruising and were heading back to Irvine, Kentucky, on U.S. 89 to drop Norton off. Testimony at trial established that Gary had been drinking that night.

As Ormes was driving, one or more deer suddenly ran in front of the car. Ormes swerved to avoid the deer and ran off the road into a culvert. No one was injured as a result of this accident. Gary and Norton got out of the car and walked back to the road to look for help.

Gary and Norton were successful in flagging down a truck driven by Virgil Wayne Nester (Nester), who was headed north on U.S. 89. Although there was a dispute as to whether Nester's vehicle was entirely in the northbound lane when he came to a stop, that issue is immaterial to the issues raised on appeal. Gary and Norton crossed the road to the driver's side of Nester's truck. Freddie Doyle, a passenger in Nester's truck, testified that Gary appeared to be "a little intoxicated" and that he was staggering. Nester agreed to drive back into town and pay for a tow truck to come back and remove Ormes's car from the ditch. Gary walked to the front of Nester's truck and stood in front of the driver's side headlights in order to take money out of his wallet. Norton remained by the passenger side door.

While Gary was counting his money in the headlights of Nester's truck, Nester noticed another vehicle coming towards them in the southbound lane and told Norton to get back across the road because a car was coming. Norton testified that the

headlights from the oncoming car were fairly far away when she saw them and that she walked back across the road, assuming that Gary was following her. Nester also told Gary to move. The last place anyone saw Gary immediately prior to the accident was in front of Nester's driver's side headlights.

The oncoming vehicle was a truck owned by the Water District and operated by Carl Jordan (Jordan), who was returning home after repairing a water line leak. Several witnesses testified that Jordan was driving the posted speed limit at all times prior to the accident. According to Jordan, he dimmed his lights when he was approached by an oncoming vehicle. No one other than Jordan testified in regard to the existence of this oncoming vehicle. Immediately after the oncoming vehicle passed him, his lights shown on a truck sitting in his lane of traffic and a person standing in front of the truck. Regardless of whose truck was where and Gary's location in relation thereto, Jordan was unable to avoid hitting both Gary and the driver's side of Nester's truck. Gary died of injuries he sustained as a result of being hit by Jordan.

Abner subsequently filed suit against Jordan and the Water District. Jordan and the Water District later filed a third party complaint against Nester. Nester failed to answer, and a default judgment was ultimately rendered against him. All of the remaining parties tendered proposed jury instructions to the trial court prior to trial, and the issues pertaining to the final jury instructions were discussed with the trial court on June 25, 1999. Aside from tendering proposed jury instructions,

counsel for Abner made no formal objection to the jury instructions adopted by the trial court.

At the close of the case, the jury was instructed concerning the various duties of Jordan, Nester, and Gary, and entered the following verdict¹:

INTERROGATORY NO. 1

1. It was the duty of Carl Jordan in driving his vehicle to exercise ordinary care for the safety of other persons using the highway, and this general duty included the following specific duties:

- (a) to keep a lookout ahead for other persons or vehicles in front of him or so near his intended line of travel as to be in danger of collision;
- (b) to have his vehicle under reasonable control;
- (c) to drive at a speed no greater than was reasonable and careful, having regard for the traffic and the range of his lights and for the condition and use of the highway, and not exceeding 55 miles per hour;
- (d) to sound his horn whenever necessary to warn other drivers and pedestrians of his approach;
- (e) to travel on the right side of the highway;
- (f) to have vehicle lights that met statutory requirements and to keep his lights on the proper beam

AND

- (g) to exercise ordinary care generally to avoid collision with other persons or vehicles on the highway.

¹The footnotes appearing in the jury instructions and verdict have been omitted.

From the evidence did the Defendant Carl Jordan fail to do one or more of these duties?

_____ yes [x] no

If all twelve of you agree, the Foreperson alone can sign. If all twelve of you do not agree, nine or more of you must agree and sign below.

/s Bobby L. Rose
Foreperson

If yes, was the Defendant Carl Jordan's failure a substantial factor in causing the death of Gary Abner?

_____ yes _____ no

If all twelve of you agree, the Foreperson alone can sign. If all twelve of you do not agree, nine or more of you must agree and sign below.

INTERROGATORY NO. 2

1. It was the duty of Defendant Virgil Wayne Nester in stopping his vehicle to exercise ordinary care for the safety of other persons using the highway, and this general duty included the following specific duties:

(a) to exercise ordinary care under the circumstances to avoid collision with other persons or vehicles on the highway;

AND

(b) to avoid stopping on the main-traveled portion of the highway, or on any more of the highway than was necessary under the circumstances;

AND

(c) to exercise ordinary care to warn the drivers of approaching vehicles of his vehicles [sic] presence.

From the evidence, did the Defendant Virgil Wayne Nester fail to do one or more of these duties?

_____ [x] _____ yes _____ no

If all twelve of you agree, the Foreperson alone can sign. If all twelve of you do not agree, nine or more of you must agree and sign below.

/s Bobby L. Rose
Foreperson

In response to Interrogatory No. 4, the jury found Gary to be 100% at fault. The trial court entered its judgment in accordance with the jury's verdict on July 9, 1999, and this appeal followed.

The sole issue raised by Abner on appeal is that the trial court erred in instructing the jury that Gary "had a duty to yield the right of way to all vehicles upon the roadway."⁴ Abner makes no challenge to the jury's verdict that Jordan did not "fail to do one or more of" the duties enumerated under Interrogatory No. 1. Because Abner is not challenging the jury's verdict regarding Jordan, any error in regard to the instructions pertaining to Gary is harmless as the jury had already absolved Jordan of any wrongdoing. "Assuming, without deciding, [that the trial court committed an error], we are persuaded that such error, if any, was not prejudicial since the jury made no finding

⁴Although counsel for Abner did not formally object to the jury instructions used by the trial court, this issue was preserved for our review by Abner's tender of proposed jury instructions prior to trial. "Inasmuch as [Abner] tendered proposed jury instructions, under CR 51(3) no specific objections were necessary to preserve [the] right to appeal the instructions actually given by the trial court. If the offered instructions clearly present a party's position, no further action is required." Surber v. Wallace, Ky.App., 831 S.W.2d 918, 920 (1992).

under it anyway." Illinois Basin Oil Association v. Lynn, Ky., 425 S.W.2d 555, 599 (1968).

It is an invariable rule of appellate practice that a verdict for the defendant in a damages case forecloses any right of the plaintiff to complain of an error in the instructions upon the method of measuring the damages. Obviously, when it is found that the plaintiff is not entitled to recover, it is useless to consider any question respecting the extent of his right of recovery, if the verdict had been for him.

Levi v. Gonzenbach, Ky., 33 S.W.2d 657, 658 (1930). Because any error of the trial court as to this issue is harmless, at best, a new trial is not warranted. CR 61.01.

Having considered the parties' arguments on appeal, the trial verdict and judgment of the Estill Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eric V. Evans
Lexington, KY

BRIEF FOR APPELLEES:

Melinda G. Wilson
Stephen G. Amato
Lexington, KY