

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001080-MR

WESTERN-SOUTHERN LIFE ASSURANCE COMPANY

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 99-CI-00068

ALFREDA MADDOX

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Western-Southern Life Assurance Company has appealed from a final order and judgment of the Greenup Circuit Court entered on August 29, 2002, which, following a jury trial, granted Alfreda Maddox a judgment against Western-Southern based on a life insurance policy owned by her. Having concluded that no reversible error occurred, we affirm.

On the evening of September 4, 1998, Kevin Wade Maddox, son of Alfreda Maddox, went for a ride on his

motorcycle. Kevin was accompanied by another motorcyclist, his friend Lewis Evans. As the two young men crossed the Ohio River and entered Russell, Kentucky, Officer Denver Stewart of the Russell Police Department attempted to stop Kevin. According to Officer Stewart, he suspected that Kevin was driving impaired when he observed Kevin "wobble[]" and "appear[] to be unstable" while operating his motorcycle. Officer Stewart testified that after he turned on the rotating lights of his marked police cruiser, Evans immediately pulled his motorcycle over, but Kevin did not. Rather than pulling over, Officer Stewart testified that Kevin "turned right on U.S. 23 and sped up."

Officer Stewart stated that he then realized Kevin did not intend to stop and he activated his police siren. According to Officer Stewart, a pursuit ensued in which his police cruiser and Kevin's motorcycle reached speeds of 65-70 miles per hour in speed zones ranging between 45-55 miles per hour. As the chase neared Raceland, Kentucky, Officer Elaine Elder of the Raceland Police Department offered her assistance in attempting to stop Kevin. Officer Elder stationed her cruiser at the intersection of U.S. 23 and Pond Run Road. Officer Stewart testified that Kevin almost hit Officer Elder's cruiser as he turned left off of U.S. 23 onto Pond Run Road. Shortly after turning onto Pond Run Road, Kevin lost control of his motorcycle, left the road,

and hit a tree. Kevin died as a result of the injuries he sustained in the accident.

Approximately 17 years prior to Kevin's fatal accident, Alfreda had purchased a life insurance policy on her son with Western-Southern, naming herself as the beneficiary. Alfreda made all of the required monthly premium payments. On November 12, 1998, approximately two months after the accident, Western-Southern mailed a letter to Alfreda stating that it did not intend to pay the death benefit on her life insurance policy. As the basis for its refusal to pay, Western-Southern cited an exclusion in the policy which stated that no benefits would be paid if, inter alia, the death resulted from the commission of a felony. Western-Southern's letter to Alfreda stated that "according to the police[,] the insured was resisting the order to stop his motor vehicle, while driving under the influence of alcohol. This is a felony."

On February 12, 1999, Alfreda filed her complaint in Greenup Circuit Court seeking to recover \$25,000.00 in damages, the amount of the life insurance policy in question. The case proceeded to a jury trial, which was conducted on April 15 and 16, 2002. At the close of evidence, motions for a directed verdict by both parties were denied by the trial court. Following deliberations, the jury returned a verdict in favor of Alfreda in the amount of \$25,000.00. The trial court entered an

order and judgment on April 17, 2002, for the policy amount of \$25,000.00, plus post-judgment interest at the rate of 12%. On August 29, 2002, the trial court entered an amended judgment in favor of Alfreda in the amount of \$31,849.40, plus 12% post-judgment interest. The \$6,849.40 increase reflected pre-judgment interest at 8% that was calculated from November 12, 1998, the date of Western-Southern's letter refusing payment, until the entry of judgment on April 17, 2002. This appeal followed.

Western-Southern's principal argument on appeal is that the trial court erred in not granting its motion for a directed verdict at the conclusion of proof. As the basis for this argument, Western-Southern claims that it conclusively established at trial that Kevin had violated KRS¹ 520.095, a Class D felony.

In Taylor v. Kennedy,² this Court discussed the standard for a trial court to follow when ruling on a motion for a directed verdict:

In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is

¹ Kentucky Revised Statutes.

² Ky.App., 700 S.W.2d 415, 416 (1985).

required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ [emphasis added][citation omitted].

Further, in Bierman v. Klapheke,³ our Supreme Court discussed the standard for an appellate court to follow when reviewing a trial court's ruling on a motion for a directed verdict:

When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous [citations omitted].

For the following reasons, we hold that the trial court did not err in denying Western-Southern's motion for a directed verdict.

Under KRS 520.095, a person is guilty of fleeing or evading police in the first degree when, inter alia, the following elements have been proven:

(a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer,

³ Ky., 967 S.W.2d 16, 18 (1998).

and at least one (1) of the following conditions exists:

. . .

2. The person is driving under the influence of alcohol or any other substance or combination of substances in violation of KRS 189A.010;

. . .

4. By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property[.]

In the case at bar, there is no dispute between the parties that Kevin either "knowingly or wantonly disobey[ed] a direction to stop" his motorcycle. The dispute lies with whether the proof offered at trial established that Kevin violated either subsection 1, driving under the influence as defined in KRS 189A.010, and/or subsection 4, causing or creating a substantial risk of serious physical injury or death.

Western-Southern first argues that it was entitled to a directed verdict on the issue of Kevin's alleged intoxication at the time of his accident. On the date Kevin was killed, KRS 189A.010 stated that a person was guilty of driving under the influence if his blood alcohol content measured 0.10 or greater.⁴ At trial, Western-Southern introduced evidence that Kevin's blood alcohol content near the time of his accident measured

⁴ Since that time, KRS 189A.010 has been amended. The current maximum blood alcohol content is 0.08.

0.189. This evidence was introduced in the form of expert testimony by Dr. Cristin Roth, a physician who performed an autopsy on Kevin on behalf of the state medical examiner's office. Western-Southern argues that this evidence, coupled with the statutory presumption of intoxication under KRS 189.520(3)(C),⁵ entitled Western-Southern to a directed verdict with regard to the driving under the influence element of KRS 520.095. We disagree.

In Bridges v. Commonwealth, our Supreme Court stated that although KRS 189.520 creates a presumption of intoxication if one's blood alcohol level is above the legal limit, that presumption is rebuttable by other evidence.⁶ Further, the ultimate question of intoxication is a question properly reserved for the jury to determine.⁷ In the case sub judice, although there was evidence suggesting that Kevin's blood alcohol level was above the legal limit at the time of his accident, there was also evidence to the contrary.

⁵ At the time of Kevin's accident, KRS 189.520(3)(C) stated "[i]f there was 0.10 percent (1/10%) or more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages."

⁶ Ky., 845 S.W.2d 541, 542 (1993)(holding that "[e]ven the statutory presumption of KRS 189.520(3)(c), that a concentration of 0.10 percent or greater by weight of alcohol in the blood renders a person under the influence, is rebuttable").

⁷ Marcum v. Commonwealth, Ky., 483 S.W.2d 122, 127 (1972)(holding that "[i]t is true that the instruction made it clear that the results of the test created a rebuttable presumption which the jury was to consider with all of the evidence, and it left the determination of intoxication for the jury to resolve, as it must be").

Evans, Kevin's riding companion on the night of the accident, testified that the two men had only consumed two beers each in a four-hour period, and that he did not notice anything improper with regard to Kevin's handling of his motorcycle. Dr. Roth also conceded that as a body decomposes, the blood alcohol level can rise postmortem, and that no determination was made as to the stage of the decomposition of Kevin's body.⁸ Further, Ralph Ginter, a Kentucky State Trooper who conducted a reconstruction of the accident, testified that there was no smell of alcohol at the scene, and that Officer Stewart made no mention to him of the possibility that alcohol was a factor in the accident. Based upon this evidence, we cannot conclude that "no disputed issue of fact exist[ed] upon which reasonable men could differ," nor can we conclude that the trial court's denial of Western-Southern's motion for a directed verdict was "clearly erroneous." Accordingly, Western-Southern was not entitled to a directed verdict on this issue.

Western-Southern next argues that it was entitled to a directed verdict on the issue of whether Kevin was causing or creating a substantial risk of serious physical injury or death under KRS 520.095(4). In addition, Western-Southern argues that the trial court erred by not including this provision as a

⁸ The autopsy was conducted on September 6, 1998, approximately 36 to 48 hours after Kevin's death.

possible defense to its liability in the jury instructions. For the following reasons, we reject both arguments.

Pursuant to KRS 304.12-230, it is considered an unfair claims settlement practice to, among other things, "[fail] to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement[.]"⁹ In the case sub judice, Western-Southern, in its letter to Alfreda, wherein it refused to pay the benefits under the policy, stated that the sole basis for this refusal was its belief that Kevin had been under the influence of alcohol at the time of the accident. Further, no mention of the alleged defense under KRS 520.095(4) was made in Western-Southern's answer to Alfreda's complaint. Hence, we conclude that Western-Southern's failure to offer this defense in a timely manner was a proper basis for the trial court to deny Western-Southern's motion for a directed verdict, and to refuse to include such a defense in the instructions to the jury.

Finally, Western-Southern argues that the trial court erred in not including an instruction to the jury stating that Kevin's blood alcohol level was above 0.10. First, we note that

⁹ See also Kentucky Administrative Regulations (KAR) 806 KAR 12:092(2)(9). "When a claim is denied, written notice of denial shall be sent to the claimant within fifteen (15) calendar days of the determination. The notice shall refer to the policy provision, condition, or exclusion upon which the denial is based."

Western-Southern has failed to adhere to CR¹⁰ 76.12(4)(c)(v), which requires that a brief contain "reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Second, under the recommended jury instructions for an alleged violation of KRS 189A.010, there is no instruction such as the one proposed by Western-Southern.¹¹ Accordingly, the trial court committed no error in refusing to give Western-Southern's proposed instruction.

Based on the foregoing, the judgment of the Greenup Circuit Court is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Phillip Bruce Leslie
Greenup, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Richard W. Martin
Ashland, Kentucky

¹⁰ Kentucky Rules of Civil Procedure.

¹¹ See 1 Cooper, Kentucky Instructions to Juries § 8.64A (4th ed. 1999).