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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000056-MR

ELLIOTT B. HENDERSON; GOODYEAR TIRE AND RUBBER COMPANY — APPELLANTS

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 01-CI-01127

MARY HENSLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: This matter arises from an automobile collision that occurred on January 20, 2000, in Richmond, Kentucky. Following trial in the Madison Circuit Court, the jury returned a verdict awarding Appellee Mary Hensley $204,014.14. Appellants Elliott B. Henderson and his employer, Goodyear Tire and Rubber Company (Goodyear), argue that the trial court erred in three respects: (1) by directing a verdict

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

in Hensley's favor on the issue of liability; (2) by refusing to allow an instruction concerning negligence on the part of the City of Richmond; and (3) by failing to reduce the final judgment by $61,334.94 in conformance with *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 2000). For the following reasons, we affirm.

On January 20, 2000 at approximately 6:00 p.m., Hensley was driving her vehicle on Main Street in Richmond, Kentucky when she entered the intersection of Main and Maple Streets. At this same instant, a second vehicle, owned by Goodyear, and operated by Henderson[2] also entered the intersection. The two vehicles collided and Hensley was injured. It is undisputed that Henderson drove into the intersection without first stopping at a stop sign on Maple Street. Henderson contends that his view of the sign was obstructed by vehicles illegally parked near the sign.

On October 7, 2002, approximately eleven months following Hensley's filing of her complaint and two years following the accident, Henderson filed a motion with the trial court seeking permission to file a third-party complaint against the City of Richmond on the basis that the City allowed vehicles to park illegally on Maple Street thus obscuring the stop sign

[2] Though both Henderson and Goodyear are appellants herein, because the liability of both is directly dependent on Henderson's actions, they will together be referred to herein simply as "Henderson."

in question. The trial court entered an order on December 6, 2002, denying the motion.

After numerous attempts at mediation,[3] the matter proceeded to trial on September 7 and 8, 2004. At the close of evidence, Henderson moved for a directed verdict, which the trial court denied. Conversely, Hensley also moved for a directed verdict on the issue of liability, which was granted. In Judge Adams' handwritten minutes from the trial, she noted:

> The defendant's motion for directed verdict – renewed and denied. The plaintiff's motion for directed verdict on issue of liability granted – no evidence that the plaintiff operating on superior roadway had reasonable time and/or opportunity to avoid collision with defendant's vehicle sliding through intersection from inferior roadway posted with stop sign. The only evidence offered by defense was the conclusory opinion of reconstructionist T. Conklin that he differed with plaintiff's reconstructionist report concluding that plaintiff was not negligent in that she could have swerved or turned onto Maple St. – no evidence offered tending to prove factually that the plaintiff had sufficient time or actual opportunity, only speculation.

R.A.,[4] p. 644. Additionally, in its September 27, 2004, Trial Order, Verdict and Judgment, the trial court restated its decision to grant the directed verdict:

> Plaintiff's counsel moved the Court for a Directed Verdict on the issue of liability as alleged in Plaintiff's

[3] The trial court's record indicates at least five unsuccessful mediations.
[4] Record on Appeal.

> complaint, and all amendments thereto. The Court heard legal argument on this matter, and subsequently granted Plaintiff's motion for a directed verdict as to the Defendant's liability to the Plaintiff. The Court further ruled that there had been no factual testimony regarding any comparative fault of the Plaintiff, and further directed a verdict as to the Plaintiff's lack of comparative fault.

R.A., p. 647.

As a result of the court's rulings, there was no apportionment instruction as to either Hensley or the City of Richmond. Thus, the jury deliberated only the question of damages and ultimately returned a verdict awarding Hensley $204,014.14.

Subsequently, Henderson filed a motion seeking to set aside the verdict on the grounds that the trial court erred by: (1) granting Hensley a directed verdict; (2) not instructing the jury with respect to negligence committed by the City of Richmond; and (3) not reducing the damage award by $61,344.94 because the past medical expense and pain and suffering awards did not comport with Hensley's final timely-filed interrogatory responses. In its December 7, 2004 order denying the motion, the trial court stated in pertinent part:

> The Court finds that there was no prejudicial error that would necessitate vacating or altering the findings of the jury. Counsel conducted multiple mediations and exchanged and disclosed changing amounts

> of claims made at same, as well as in pre-trial conferences with the judge present. Any claims of surprise are without merit. The Defendant's motions are overruled.

R.A., p.715. This appeal followed.[5]

We turn first to Henderson's contention that the trial court committed reversible error in granting Hensley's motion for a directed verdict. Though characterized as a single issue, the directed verdict actually encompasses two distinct rulings. First, the court held that Henderson was negligent as a matter of law because of his failure to stop at the stop sign on Maple Street. The court also ruled, however, that Hensley did not breach her own duty of care applicable to operators of motor vehicles, thus precluding the jury from apportioning liability to her.

The standard for our review of a directed verdict granted by a trial court was recently fully described in *Gibbs v. Wickersham*, 133 S.W.3d 494, 495-96 (Ky. App. 2004).

> The standard of review for an appeal of a directed verdict is firmly entrenched in our law. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ. . . . Where there is conflicting evidence, it is the responsibility of the jury to determine and

[5] Hensley has filed a motion to strike Henderson's appellate brief because of his failure to include citations to the record. Though we are not granting the well-taken motion, counsel for Henderson is directed to review CR 76.12(4)(c)(iv) and CR 76.12(8)(a), the latter allowing for a brief to be stricken for noncompliance with the requirements of CR 76.

> resolve such conflicts. . . . A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. . . . Upon such motion, the court may not consider the credibility of the evidence or the weight it should be given, this being a function reserved for the trier of fact. . . . The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." In such a case, a directed verdict should be given. Otherwise, the motion should be denied.
> . . .
>
> It is well-argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict. . . . While it is the jury's province to weigh evidence, the court will direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture.

Henderson argues his failure to stop at the Maple Street stop sign did not justify the directed verdict against him. However, KRS 189.330(4) requires motor vehicle operators to stop at a stop sign and "[a]fter having stopped . . . [to] yield the right-of-way to any vehicle in the intersection or approaching on another roadway . . . ." Despite his violation of this statute (which was the basis for the directed verdict

entered against him), Henderson contends that his failure to stop prior to the collision was not attributable to his own negligence, but rather to his inability to see the sign due to illegally parked vehicles. Kentucky law, however, does not excuse the failure to stop under such conditions.

In *Walton v. Chevron, U.S.A., Inc.*, 655 S.W.2d 11, 14 (Ky. App. 1982), this Court affirmed a finding of negligence against a driver who, with no prior knowledge of the area in question, failed to stop at the location of a *missing* stop sign:

> Although this appears to be a question of first impression in this jurisdiction, the general rule is that a superior street or thoroughfare does not lose its superior status by reason of a stop or yield sign being misplaced or obscured on an inferior, intersecting street. The policy underlying such a rule is that a motorist proceeding along a through street or highway protected by stop signs is entitled to assume that the driver of the vehicle on an intersecting street will obey the law and stop or yield the right-of-way. . . .
>
> Although there are holdings in other jurisdictions to the effect that absence of a stop or yield sign relieves the driver of a vehicle on a secondary road of the duty to yield the right-of-way, Kentucky does not appear to be adopting such position. . . .
>
> Accordingly, the trial court's judgment was correct in that the appellant had the duty to yield the right-of-way to the appellee.

Therefore, even taking Henderson at his word that he was unable to see the stop sign until he was approximately fifteen feet

from it and then did all that he could in an attempt to stop, we must agree with the trial court that Henderson was negligent when he failed to stop before entering the intersection. Thus, the trial court did not err when it directed a verdict as to Henderson's liability.

We next turn to the failure of the trial court to allow an apportionment instruction regarding Hensley's negligence, if any. Henderson argues that he was entitled to such an instruction given Hensley's alleged failure to attempt to avoid the collision. It is true that a "driver approaching an intersection with the right-of-way has no absolute right to proceed so unconditional that she can ignore duties of reasonable lookout, sounding a horn when necessary, and avoiding collision when there is reasonable opportunity to do so." *Wittmer v. Jones*, 864 S.W.2d 885, 888 (Ky. 1993). In other words, "the duty to yield is not absolute, since the failure to so yield does not absolve the favored driver of his duty to exercise reasonable care to avoid collision." *Bailey v. Barnett*, 470 S.W.2d 331, 333 (Ky. 1971). Indeed, "[w]hether that carelessness [of the motorist on the inferior road] is the only proximate cause depends on whether the other driver had reasonable time and opportunity to avoid the collision after he is able to apprehend the negligence of the first motorist." *Browning v. Callison*, 437 S.W.2d 941, 943 (Ky. 1969) *quoting*

Tilford v. Garth, 405 S.W.2d 6, 8 (Ky. 1966). Thus, even though Hensley had the right-of-way, if by the exercise of ordinary care she should have realized that Henderson was not going to yield, then she had a duty to exercise ordinary care to avoid the collision. *Covington v. Friend Tractor and Motor Co., Inc.*, 547 S.W.2d 771 (Ky. App. 1977).

It does not necessarily follow, however, that Henderson was entitled to an apportionment instruction as to Hensley. Rather, in order for such an instruction to be given, there must have been at least some evidence of record from which a jury could reasonably infer that Hensley failed in her duty. *See, e.g., Mahan v. Able,* 251 S.W.2d 994 (Ky. 1952). Having examined closely the record before us, we agree with the trial court that no such evidence was introduced at trial that could have supported a finding of negligence on Hensley's part. Of the three pieces of evidence cited by Henderson to support an apportionment instruction, not one addresses the question of whether Hensley had a "reasonable opportunity" to avoid the collision.

First, Hensley herself testified that she briefly saw Henderson's truck approaching the stop sign on Maple Street although she had no idea of the distance between the two vehicles. According to Hensley, even though it seemed that Henderson's truck was moving quickly, she had no reason to

believe that Henderson could not or would not stop at the stop sign. She further testified that because she then looked straight ahead, she did not see Henderson's truck again until the moment of impact, leaving her with no time to take any evasive action.[6]

The second piece of evidence is the written report of Henderson's expert witness, Thomas J. Conklin.[7] Conklin stated on page 8 of his report that "[t]he damage to the front left side of the Pontiac, which was fairly uniform across the entire damaged area, and the lack of skid marks prior to the collision indicated that Hensley made no attempt to avoid the collision." This conclusion, however, does nothing to support Henderson's argument. Assuming that Conklin is correct in his conclusion that Hensley "made no attempt to avoid the collision," his report is silent as to whether she had the opportunity to do anything. His report neither contradicts nor casts doubt on Hensley's testimony that she had no time to take evasive action.

The last possible source for the requisite evidence is Conklin's testimony. At trial, after testifying about the conclusions contained in his own report,[8] Conklin was asked to

[6] Conversely, Henderson testified concerning his inability to see the stop sign and said nothing whatsoever with respect to Hensley's actions or inactions prior to the collision. Statements to the contrary in Henderson's brief are totally without support in the record.
[7] Conklin's report was introduced into the trial record as Defendant's Exhibit No. 2.
[8] At no time during his testimony concerning his own report did Conklin contend that Hensley had time to take evasive maneuvers but did not do so.

name the three things about which he most disagreed with Hensley's expert witness, Dennis L. McWilliams. The first item noted by Conklin was McWilliams's conclusion that Hensley had no time to react prior to the collision. Conklin did not state the basis for his disagreement other than he believed Hensley had time to brake or turn onto Maple Street. Notably, Conklin's own detailed report is silent as to whether Hensley had time to take either action. Moreover, he offered no facts upon which this trial testimony rested. In fact, at no point in the trial was any evidence introduced even suggesting the distance between the two vehicles when Hensley first noticed Henderson's truck. Without such a foundation, we are of the opinion that the trial court was correct that Conklin's statement was merely conclusory. *See Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000) (court not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of an expert witness). As such, there was no basis upon which the jury could render an apportionment verdict that was anything other than speculative. *Gibbs v. Wickersham, supra* at 496(court should direct a verdict rather than allow jury to reach verdict based on mere speculation or conjecture).

Next we turn to Henderson's contention that the trial court erred when it failed to include an apportionment instruction as to the City of Richmond. The allocation of fault

among parties is governed by KRS 411.182. This statute states, in pertinent part:

> (1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
>
> (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
>
> (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 under subsection (4) of this section.
>
> . . .
>
> (4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.

Our examination of the record indicates that the City of Richmond was never a party to this action and never entered

into any settlement or other agreement releasing it from liability with respect to this incident. Therefore, a simple reading of KRS 411.182 leads us to the conclusion that Henderson was not entitled to an apportionment instruction as to the City of Richmond.

Further, we find no error in the trial court's denial of Henderson's motion seeking to add the City of Richmond as a third-party defendant. Pursuant to CR 14.01, a court has discretion in allowing or rejecting a third-party complaint. *See, e.g., Commonwealth, Dep't of Highways v. Louisville Gas & Electric Co.*, 346 S.W.2d 536 (Ky. 1961); *Gray v. Bailey*, 299 S.W.2d 126 (Ky. 1957); *American Hardware Mut. Ins. Co. v. Fryer*, 692 S.W.2d 278 (Ky. App. 1984). In the matter *sub judice,* Henderson's grounds for attempting to assert a claim against the City of Richmond (*i.e.,* the allegedly obstructed view of the Maple Street stop sign caused by illegally parked cars) were obviously known to him as of the day of the accident. Despite this, he failed to make any attempt to assert his third-party claim until nearly two years after the accident and only three months prior to the scheduled trial date. Because of this, it is probable that Henderson's claim was barred by the statute of limitations at the time he moved to assert it. *See* KRS 413.140(1)(providing one year limitation period for personal

injury actions). In any event, the trial court did not abuse its discretion by denying Henderson's request.

Finally, Henderson argues that the trial court erred by not reducing the final judgment amount of $204,014.14 by $61,334.94. The jury awarded damages as follows:

Past medical expenses	$ 18,644.94
Future medical expenses	$ 3,332.00
Past physical and mental pain and suffering	$ 22,464.00
Future physical and mental pain and suffering	$100,000.00
Past lost wages	$ 13,000.00
Future lost wages	$ 46,573.20

According to Henderson, on September 23, 2002, he propounded interrogatories to Hensley which included a request that she provide an itemized list of the damages she was seeking. On November 20, 2002, Hensley responded by claiming itemized damages which totaled $335,960.00. Subsequently, on August 23, 2004, Hensley amended her response to this interrogatory to reflect total damages of $806,200.00. At a meeting to discuss jury instructions held during trial in Judge Adams' chambers, Hensley's counsel agreed that she would not seek total damages in excess of $285,000.00. When informed that this gross amount was substantially less than the amount initially claimed by Hensley in her original interrogatory response, Henderson

withdrew any objection he had to the damage amount being claimed at trial.

Despite Henderson's withdrawal of his objection, he now contends that even though the total damages sought by Hensley at trial were less than the amount disclosed in her initial discovery response, the damage award must be reduced because she sought higher damage amounts in certain categories of damages than was initially claimed. Specifically, Henderson states that Hensley improperly sought $18,644.94 in past medical expenses as compared to the $6,200.00 claimed in her 2002 interrogatory answers and $100,000.00 in pain and suffering as opposed to $51,100.00 stated in the same answers. However, Henderson did not raise this issue in the trial court, and, thus, he did not properly preserve it for appeal. It is well-established that "[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett,* 770 S.W.2d 225, 228 (Ky. 1989). Moreover, we are under no obligation to scour the record on appeal to ensure that an issue has been preserved. *See Phelps v. Louisville Water Co.,* 103 S.W.3d 46, 53 (Ky. 2003); and CR 76.12(4)(d)(iii) and (iv). Though the matter of damages was argued off the record, the Supplemental Record on Appeal (S.R.A.) establishes what transpired in Judge Adams' chambers.

According to both an affidavit prepared by Hensley's counsel[9] and the trial court's Order Supplementing the Record,[10] Henderson expressly waived any objection to the amount of damages being sought by Hensley because the total amount was significantly less than that originally sought by her. Henderson's failure to contest these supplements to the record concerning the unrecorded in-chambers meeting lends further credence to our conclusion. As a result, we find that Henderson waived any argument he may have had on appeal respecting damages.

Additionally, even if Henderson had properly preserved this issue, he would still not be entitled to relief. As noted, Henderson's claim concerns not the total damage amount sought by Hensley, but rather the specific itemized amounts comprising that total. In support of his argument, Henderson relies on the Kentucky Supreme Court's decisions in *Fratzke v. Murphy,* 12 S.W.3d 269 (Ky. 2000) and *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474 (Ky. 2002). In short, these decisions stand for the proposition that pursuant to CR 8.01, a party seeking damages is limited to the amounts disclosed in compliance with the controlling scheduling orders. However, in *Thompson v. Sherwin Williams Co., Inc.*, 113 S.W.3d 140, 144 (Ky. 2003), our Supreme Court clarified its earlier decisions by stating "the purpose and the only requirement of CR 8.01(2) is that information be

[9] S.R.A., pp. 14-16.
[10] S.R.A., pp. 28-30.

furnished as to the 'amount claimed' in unliquidated damages, not an itemization of each category of unliquidated damages for which that amount is claimed." Thus, despite the fact Hensley may have changed the damage amounts sought within certain itemized categories,[11] because the total amount sought at trial and the amount that was ultimately awarded by the jury were substantially below the amount initially disclosed by her, the court did not err when it refused to reduce the jury's verdict.

For the foregoing reasons, the judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Daniel Farrell
Farrell, Kibbey & Apple
Lexington, Kentucky

BRIEF FOR APPELLEE:

Yvette Hourigan Thomas
Lexington, Kentucky

[11] Hensley's point that past medical expenses will necessarily increase and future medical expenses decrease as a case proceeds from the discovery stage to trial is well-taken. She is further correct that Henderson waived any objection to this particular portion of the award when he stipulated Hensley's past medical bills at trial.