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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002243-MR
&
NO. 2006-CA-002274-MR

NOLLAIG PREVIS APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 00-CI-00051

PETE DAILEY APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

BUCKINGHAM, SENIOR JUDGE: This is an appeal and cross-appeal from a judgment of the Bourbon Circuit Court in a personal injury case. The appellant/cross-appellee, Nollaig Previs, sued the appellee/cross-appellant, Pete

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Dailey, after she was injured in a collision between her bicycle and a wagon that Dailey was towing behind his truck. The jury in the first trial returned a verdict in favor of Dailey. The Kentucky Supreme Court reversed the judgment and verdict upon finding that Dailey had been negligent *per se*, and it remanded the case for a new trial. *See Previs v. Dailey*, 180 S.W.3d 435 (Ky. 2005).

The jury in the second trial determined that Previs and Dailey were each 50% at fault in the accident. It awarded Previs damages in the amount of $32,611.90, which was reduced in the judgment to an award of $16,305.95 based on 50% comparative fault.

In her appeal, Previs argues that the jury instructions were erroneous and unsupported by the evidence. In his cross-appeal, Dailey argues that he was entitled to a directed verdict on the issue of Previs's negligence, that the jury's award of damages in the amount of $30,000 for pain and suffering was excessive, and that he was entitled to an offset for basic reparations benefits. We affirm.

The facts of the case are set forth in the opinion of the Supreme Court:

> On May 29, 1999, Appellant, Nollaig Previs, was riding her bicycle on the right-hand side of Escondida Road in Bourbon County, when she was approached from behind by a vehicle driven by Appellee, Pete Dailey. Dailey was driving a pick-up truck with an eight-foot bed and camper top that was pulling two flatbed wagons, making the total length of the vehicle approximately forty-eight feet. When Dailey first observed Previs, she was pedaling up a hill at a speed of approximately one or two miles per hour. When Previs crested the top of the hill, Dailey moved his truck over into the left lane of the road to pass Previs. Assuming he had passed her, Dailey maneuvered his truck back into the right-hand lane. As he did so, the

> handlebars of Previs's bike became wedged under the second flatbed wagon. The bike was pulled under the wagon and Previs was thrown into a ditch on the side of the road.
>
> Previs subsequently filed a personal injury action against Dailey in the Bourbon Circuit Court seeking damages. A one-day trial was held on November 8, 2001. The trial court denied both parties' motions for a directed verdict, and the case was thereafter submitted to the jury, which returned a verdict in favor of Dailey.

Id. at 436.

The judgment in favor of Dailey was affirmed by this court. On discretionary review, the Supreme Court concluded that Dailey's own testimony, that he did not look in his rearview mirror before maneuvering his truck back into the right lane, proved he had violated his legal duty, which "required that he not pass Previs unless he could do so without interfering with the safe operation of her bicycle, and that if, in fact, he did pass her that he not drive to the right until he was reasonably clear of her." *Id.* at 438. The Supreme Court held that the manner in which Dailey operated his vehicle was a clear violation of his statutory duties and constituted negligence *per se*. *Id*. at 439. The Court remanded the case back to the circuit court with the following directions:

> We hold that the trial court should have granted Previs a directed verdict on the issue of Dailey's negligence. However, a jury is still entitled to consider Previs's duties in operating her bicycle, and apportion fault should it find that Previs was negligent as well. The jury was given instructions on both Previs's duties and apportionment, but was directed not to consider them upon finding for Dailey. On remand, a jury must consider these additional issues.

Id.

At the second trial, Previs testified that when she was pedaling up the hill, her speed was between one and five miles per hour. She stated that she heard a vehicle behind her but did not turn around to look at it. She had crested the hill when Dailey started to pass her. Previs further testified that Dailey increased his speed when he passed her but that she also increased her speed (since she was now going downhill) to approximately five to ten miles per hour. She also testified that she kept to the right side of the roadway.

The jury found that Previs had failed to comply with one or more of her duties and that such a failure was a substantial factor in causing the accident. The jury further found Previs and Dailey each to be 50% at fault. It awarded damages in the following amounts: past medical and drug expenses, $2,346.90; damages to personal property, $265; past and future mental and physical pain and suffering, $30,000.[2] Judgment was entered for Previs in the net amount of $15,132.50, which represented her total award reduced by her 50% comparative fault and further offset by $1,173.45 representing basic reparations benefits.

Previs filed a motion for judgment notwithstanding the verdict and/or motion for a new trial or, in the alternative, to amend the judgment. The trial court denied all motions except the motion to amend the judgment, which it granted by

[2] The amounts of the past medical and drug expenses and the personal property damages had been stipulated by the parties.

removing the offset of $1,173.45. The court also awarded Previs costs and interest on the judgment.

On appeal, Previs's main argument concerns the jury instructions which defined her duties as a bicyclist. These differed substantially from the instructions presented at the first trial.

The instructions at the first trial regarding Previs's legal duties, which were never submitted to the jury because of its verdict that Dailey had not violated his legal duties, stated:

> INSTRUCTION NO. 4
>
> The Court instructs the jury that it was the duty of the Plaintiff, Nollaig Previs, upon the occasion about which you have just heard evidence, in riding her bicycle, to exercise ordinary care for her own safety and for the safety of other persons using the roadway, and this general duty included the following specific duties:
>
> 1. To keep said bicycle under reasonable control;
>
> 2. To keep a lookout ahead for other persons and vehicles in front of her or so close to her intended line of travel as to be in danger of collision;
>
> 3. To operate her bicycle in such a manner as to avoid collision with other persons and vehicles using the highway.
>
> Do you believe from the evidence that the Plaintiff, Nollaig Previs, failed to exercise one or more of the above described general and specific duties and that such failure was a substantial factor in causing the collision?

The instructions at the second trial stated:

INSTRUCTION NO. 4

> It was the duty of Plaintiff Nollaig Previs in riding her bicycle to exercise ordinary care for her own safety and for the safety of other persons using the highway, and this general duty included the following specific duties:
>
> A. To keep lookout to the rear for other vehicles near enough to be affected by the intended movement of her bicycle;
>
> B. If she was about to be overtaken and passed by the Defendant's vehicle, to give way to the right in favor of the Defendant's vehicle;
>
> C. If she became aware that the Defendant's vehicle was passing or attempting to pass, to give the Defendant such assistance and cooperation as the circumstances reasonably demanded in order to obtain clearance and avoid an accident; and
>
> D. To exercise ordinary care generally to avoid collision with other persons or vehicles on the highway.

"Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review." *Hamilton v. CSX Transportation, Inc*., 208 S.W.3d 272, 275 (Ky.App. 2006)(citation omitted). "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)(citation omitted).

Previs argues that the trial court was bound by the ruling of the Kentucky Supreme Court to use the instructions from the first trial. She contends that by imposing additional duties on her in the second set of instructions, the trial

court saddled her with a prejudicial burden and mitigated the finding of the Supreme Court that Dailey had acted with negligence *per se*. We disagree.

The Supreme Court did not direct the trial court to use any particular instructions on remand. Furthermore, in remanding the case, the Supreme Court unmistakably contemplated the possibility that there may have been contributory negligence on Previs's part. *See Previs* at 439. While we understand that the instructions were required to specify Previs's legal duties and that the instructions set forth no legal duties concerning Dailey since his negligence had been determined, instructing the jury in that manner was necessary and proper even though the emphasis may have appeared to be on Previs. It was incumbent upon Previs's attorney to clarify to the jury any confusion it may have had in that regard. We fail to see how the new instructions in any way undermined the Supreme Court's finding that Dailey was negligent *per se* since that finding was unaccompanied by any assignment of percentage of fault.

Previs further contends that the instructions at the second trial, specifically Instruction No. 4 (B) and (C), which are predicated on Kentucky Revised Statutes (KRS) 189.350(1) and (2), were erroneous because the duties created by that statute are not applicable to bicyclists. The statute provides that

> (1) The operator of a vehicle about to be overtaken and passed shall give way to the right in favor of the overtaking vehicle if the overtaking vehicle is a motor vehicle.
>
> (2) In all cases of meeting, passing, or overtaking of vehicles such assistance shall be given by the operator

> and occupants of each vehicle, respectively, to the other as the circumstances reasonably demand, in order to obtain clearance and avoid accidents.

KRS 189.350.

In *Thomas v. Dahl*, 170 S.W.2d 337 (Ky. 1943), a case cited by Dailey that involved a collision between a boy on a bicycle and a delivery truck, the Court stated, in construing Sec. 2739g-37, Ky.Stats., now KRS 189.330, that "[a] bicycle is a vehicle . . . within the definitions of the statute." *Id.* at 338. Previs argues that *Thomas* is an insufficient basis on which to justify the use of the statute in this case. But the applicability of KRS 189.350 to bicyclists was confirmed in a later case, *Toombs v. Williams*, 439 S.W.2d 946 (Ky. 1969), which also involved a collision between a child on a bicycle and a truck. In that case, the appellate court stated that

> It was the duty of the truck driver, about to pass the boy on the bicycle, and the duty of the boy on the bicycle, about to be passed, to render such assistance to the other as the circumstances reasonably demanded in order to obtain clearance and avoid accidents. KRS 189.350. The jury reasonably could have found that ordinary care required that the boy be given a clearance warning. The proximate cause of this accident is a jury question, and it is for it to decide.

Id. at 948-49. Relying on *Thomas* and *Toombs*, we hold that the trial court did not err in using an instruction based upon the duties set forth in KRS 189.350.

Previs next argues that, even if the statute is applicable to bicyclists, this was simply not the type of accident which KRS 189.350 was designed to prevent. She relies on two cases, both of which we find to be distinguishable. In

Barrett v. Stephany, 510 S.W.2d 524 (Ky. 1974), Stephany was driving his automobile in the right-hand lane of the highway. According to Stephany, Barrett was ahead of him, driving his truck in the left-hand lane with the left-turn signal operating. Stephany continued along in the right lane, intending to pass Barrett's truck, when Barrett's truck suddenly turned right. Stephany was unable to stop in time and struck the truck. According to Barrett, however, his truck was entirely in the right-hand lane with its right-turn signal operating, and he had pulled only slightly to the left in order to negotiate the right turn.

The jury returned a verdict in favor of Stephany and Barrett appealed, arguing that KRS 189.350 was applicable and that the jury should have been instructed regarding Stephany's duties to assist the other vehicle to obtain clearance and avoid accidents. The court disagreed, stating that

> all of Stephany's duties for which there was evidentiary support were stated and there was nothing in the evidence to suggest anything more he might or could have done in the way of "assisting" the driver of the truck. This simply was not the type of accident KRS 189.350(1) was designed to prevent.

Id. at 528. Previs argues that, similarly, there was no probative evidence in her case from which the jury could possibly have concluded that she operated her bicycle in such as a manner as to suggest that she either failed to give the right-of-way in favor of Dailey or failed to give him reasonable assistance and cooperation in order to obtain clearance and avoid an accident. We disagree.

In *Barrett*, the jury had to believe either Barrett or Stephany. If the truck had indeed been in the right lane as Barrett claimed, then Stephany would not have been passing and the statutory duties related to that activity would be irrelevant. If the facts were as Stephany claimed, it is indeed difficult to know what he could have done to "assist" Barrett. In Previs's case, however, there was evidence provided by her own testimony that she did not turn to look at the approaching vehicle and that she accelerated while Dailey was attempting to pass. This evidence was sufficient to support an instruction on her duty to assist and cooperate in passing.

In *Lareau v. Trader*, 403 S.W.2d 265 (Ky. 1965), the other case upon which Previs relies, a thirteen-year-old boy, Craig Lareau, was cycling along a highway. A car driven by Trader came up behind him and pulled to the left to pass. Lareau was struck by the car and killed. Trader admitted that she did not sound her horn in order to warn Lareau of her intent to pass and that when she pulled out, her left wheels were around the center line of the highway. She testified that the boy then suddenly turned in her path. The evidence presented at trial (which included measurements of the width of her car and the width of the right lane) showed that she gave the boy very little clearance in passing. A contributory negligence instruction was given, based upon KRS 189.380(1) and (2), which imposed upon the boy a duty

> to exercise ordinary care not to turn his bicycle from a direct course upon the highway unless and until such movement could be made with reasonable safety and not

> to turn his bicycle to the left if any other vehicle could be affected by such movement without giving a signal to turn left by extending his hand and arm horizontally for at least the last 100 feet traveled by his bicycle before turning.

Id. at 268.

The appellate court in *Lareau* determined that the instruction was inappropriate and prejudicial because it implied that the boy had been planning to turn and had failed to take the proper precautions, whereas there was absolutely no evidence that he had been planning to turn at that point beyond the self-interested testimony of the driver and her passenger. The court stated as follows:

> It must be remembered that Craig admittedly was in his own lane of traffic, close to the shoulder of the road, had had no statutory warning of the approach of the Trader automobile when the accident happened, and that the point where he normally would have turned to go to the bowling alley was a substantial distance ahead. Although Mrs. Trader and Kathy [her passenger] testified that Craig "turned suddenly," the clearance she allowed him in passing was so frugal at most that he had little space for deviating from his course. If we concede arguendo that the statute was intended to cover deviations of direction in one's own lane of traffic, we must still conclude that it was not the words used to describe Craig's movements which should govern invoking the statute, but the factual situation itself which should govern. We conclude that the imposition of this statutory duty upon Craig by the instruction in these circumstances was not justified and was so prejudicial that we must reverse the judgment.

Id. at 268-69.

Previs argues that the only probative evidence in her case indicated that Dailey had failed to provide Previs with any clearance and actually ran her off

the side of the road. She claims that this is supported by the statement in the opinion of the Supreme Court that "[a]pparently, Dailey believed that it was solely Previs's obligation to make sure he safely passed her. Clearly that is not the law." *See Previs* at 438. But the Supreme Court's wording unmistakably indicates that there was an obligation on both parties to make sure that the passing was conducted safely.

Previs testified that she did not look at Dailey's vehicle when she heard it approaching and that she accelerated after she got to the top of the hill, even though she was aware that Dailey was passing. We conclude that this evidence supports an instruction regarding her duty to facilitate the passing – namely, to assist and cooperate to obtain clearance and avoid an accident.

Previs also argues that the trial court erred in its wording of Instruction No. 6 and that the trial itself was unfairly slanted in that it focused almost entirely on her negligence rather than Dailey's. She acknowledges that, in keeping with the Supreme Court's directive in the first appeal, the evidence presented at the second trial focused largely on her duties in operating her bicycle. As a consequence, Previs contends, the jury heard only limited testimony regarding Dailey's gross disregard for her safety and were only informed briefly in Instruction No. 3 that the Court had previously decided that Dailey had breached his duty of ordinary care and that said breach was a substantial factor in causing the accident.

But any imbalance in this regard was a direct result of Previs's trial strategy. On several occasions during the course of the trial, when Previs's attorney objected to Dailey's testimony, the judge stressed that it would be necessary to present more testimony from Dailey in order to assist the jury in assessing the comparative fault of the parties. The trial court was concerned that

> [I]f we don't get to the part about what he did, how is the jury supposed to decide what percentage of fault she has? In other words, you've got [to] compare - my view of this case in trying to figure out specifically what each of you was arguing, how is the jury to decide what her percentage of fault is if they don't get to hear about what his fault is.
>
> There's a distinct difference between defending his actions and making sure that the jury knows, making sure the jury knows what he did and what his percentage, what his responsibility was for what happened.

Previs rejected this approach because she found Dailey's testimony to be self-serving, and she feared it would undermine the Supreme Court's finding that he had been negligent *per se*. Previs's attorney repeatedly insisted that the only actions being judged at the trial were those of Previs, stating

> It's plain and simple. It says only Previs. The jury is only entitled to consider Previs's duties, and first of all they should find that Previs was negligent. That's all we hear about.

Previs's argument on appeal, that the trial was unfair because the jury did not hear enough evidence about Dailey's negligence, is therefore essentially unpreserved because her attorney followed a trial strategy that limited Dailey's testimony. He chose to adopt this strategy and may not now complain about the

results. An appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Edwards v. Hickman*, 237 S.W.3d 183, 191 (Ky. 2007), *quoting Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

Previs also argues that Instruction No. 6 should have only required the jury to determine the percentage of Previs's fault, not the percentages of both parties' fault. She maintains that "[i]n order for the jury to have competently assessed a percentage of total fault attributable to each of the parties, they would have had to have heard all evidence regarding the operation of Dailey's vehicle." Further, Previs argues in her reply brief that "[t]he wording of Instruction No. 6 created the impression that each party bore some responsibility for the collision[.]" Additionally, she complains that the instruction was erroneous and prejudicial because it stated that "You must find at least one percent (1%) of fault attributable to Pete Dailey."

First, as we have noted above, if there was any lack of evidence of fault by Dailey, it was because Previs herself sought to limit testimony in that regard. Second, as to Previs's statement that the instruction's wording created an impression that both parties were at fault, we note that this instruction was not subject to the jury's consideration until it had found Previs to be at fault under Interrrogatory A. Language at the end of Instruction No. 5 made it clear that the jury was not to consider Instruction No. 6 unless it had found Previs to be in violation of her legal duties under Interrogatory No. 4 and had answered "YES" to

Interrogatory A. Third, once the jury determined that Previs had violated one or more of her legal duties, it was proper for the court to submit a comparative fault instruction to the jury so that fault could be apportioned. The jury could not fairly determine Previs's percentage of fault without determining Dailey's percentage of fault at the same time. Finally, any error in instructing the jury that they must find Dailey at least one percent at fault was harmless. *See* Kentucky Rules of Civil Procedure (CR) 61.01.

On cross-appeal, Dailey raises three issues: that he was entitled to a directed verdict, that the jury's award of damages in the amount of $30,000 for pain and suffering was excessive, and that he was entitled to an offset for payable basic reparation benefits.

His first argument regarding a directed verdict is moot in light of our decision to affirm the judgment.

As to the award of $30,000 for past and future mental and physical pain and suffering, Dailey argues that the trial court erred in refusing to grant a new trial on the issue as the amount was excessive and disproportionate in light of the fact that Previs's medical expenses and property damages were only $2,346.90 and $265 respectively. He points out that her scars were not "extremely noticeable" at the time of trial and that she only experienced physical pain for a few months following the accident. The jury was not given a limiting instruction on the amount of the award for pain and suffering, nor did Dailey request one.

Our review of this issue consists only of determining whether the trial court's refusal to grant a new trial was clearly erroneous.

> ... [T]he trial court and appellate court have different functions.... the trial court is charged with the responsibility of deciding whether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witnesses first-hand and viewed their demeanor and who has observed the jury throughout the trial.
>
> . . .
>
> On the other hand, the appellate function is properly described in *Prater v. Arnett*, Ky.App., 648 S.W.2d 82 (1983):
>
> "... the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge ..."
>
> . . .
>
> Once the issue [excessive or inadequate damages] is squarely presented to the trial judge, who heard and considered the evidence, neither we, nor will the Court of Appeals, substitute our judgment on excessiveness [or inadequacy] for his unless clearly erroneous."

Cooper v. Fultz, 812 S.W.2d 497, 501 (Ky. 1991), *overruled on other grounds by Sand Hill Energy, Inc.*, 83 S.W.3d 483 (Ky. 2002), *quoting Davis v. Graviss*, 672 S.W.2d 928, 932-33 (Ky. 1984).

Previs testified about the considerable pain and discomfort she suffered as a result of the accident, the lengthy healing process she endured, and

the fact that she has been advised by a dermatologist never to expose the scarred parts of her body to the sun. Faced with this evidence, we conclude that the trial court's judgment that the damages were not excessive was not clearly erroneous.

Finally, Dailey contends that the trial court erred in not allowing an offset of $1,173.45 (his 50% share of the medical expenses) for basic reparations benefits (BRB) to which Previs was entitled. Previs agrees that pedestrians are entitled to BRB, but she contends that bicyclists are in the same position as motorcyclists, who are not entitled to BRB from any source unless they have purchased it as optional coverage. We agree with Dailey that a bicyclist is in the same position as a pedestrian under the Motor Vehicle Reparations Act. *See* KRS 304.39-050 ("A pedestrian, as used herein, means any person who is not making 'use of a motor vehicle' at the time his injury occurs.") Nonetheless, the trial court did not err in amending the judgment to remove the offset, because there was no proof that Previs was covered by the provisions of the no-fault act.

This issue was addressed by the Kentucky Supreme Court in *Whiteman v. Lowe*, 702 S.W.2d 436 (Ky. 1986), yet another case involving a collision between a motor vehicle and bicycle. We set forth herein the pertinent portion of that opinion:

> K.R.S. 304.39-060(1) provides:
>
> > Any person who registers, operates, maintains or uses a motor vehicle on the public roadways of this Commonwealth shall, as a condition of such registration, operation, maintenance or use of such motor

> vehicle and use of the public roadways, be deemed to have accepted the provisions of this subtitle, and in particular those provisions which are contained in this section.

For those to whom the provisions of the no-fault act are applicable, tort liability with respect to accidents occurring in this Commonwealth arising from the ownership, maintenance or use of a motor vehicle is abolished for damages because of bodily injury, sickness or disease to the extent that basic reparations are applicable. KRS 304.39-060(2)(a). Tort liability for pain and suffering is recoverable only in the event that thresholds set forth in KRS 304.39-060(2)(b) are met.

Tort liability is not so limited, however, for injury to a person who is not an owner, operator, maintainer or user of a motor vehicle. KRS 340.39-060(2)(c).

Karla Whiteman was nine years old and was riding a bicycle when she was injured. There is no evidence in this record that she either registered, operated, maintained or used a motor vehicle upon the public highways of this Commonwealth. There is nothing in this record which would make the Act applicable to her.

Respondent argues that there is a presumption that every person involved in a motor vehicle accident is presumed to be covered by the Act.

The General Assembly expressly extended the presumption of acceptance of the provisions of the Act to only four categories of persons, namely, (1) those who register, (2) operate, (3) maintain, or (4) use a motor vehicle upon the highways of this Commonwealth. KRS 304.39-060(1).

. . .

Because there was no evidence in this case that Karla Whiteman had registered, operated, maintained or used a motor vehicle upon the highways of this Commonwealth,

> we hold no presumption existed that she accepted the provisions of the Act. In the absence of some showing that she accepted the provisions of the Act, the abolition of tort liability contained in the Act was not applicable to her.
>
> Respondent contends that the burden was upon movant to show that she met the threshold requirements of KRS 304.39-060(2)(b) or the exemptions itemized in KRS 304.39-060(2)(c). It is our view that before these provisions come into play it must be established that the person seeking recovery falls within the coverage of the Act. They are designed to permit tort recovery in certain instances by a person to whom the Act is applicable where recovery would otherwise be precluded by the Act.

Id. at 438-39.

Dailey can point to no evidence in this case that Previs registered, operated, maintained, or used a motor vehicle upon the highways of this Commonwealth, and therefore there is no presumption that she accepted the provisions of the Act. The trial court correctly denied the offset.

The judgment of the Bourbon Circuit Court is affirmed.

ALL CONCUR.

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