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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000909-MR

GEORGE JOHNSON — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 07-CI-00700

BETHANY WATSON
AND LIBERTY MUTUAL
INSURANCE COMPANY — APPELLEES

AND NO. 2008-CA-000954-MR

BETHANY WATSON — CROSS-APPELLANT

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 07-CI-00700

GEORGE JOHNSON — CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

STUMBO, JUDGE: George Johnson appeals from an Order of the Fayette Circuit Court overruling his Motion in Limine in his personal injury action against Bethany Watson. Johnson, who was struck by Watson's vehicle during the course of his employment as a sanitation worker, sought to exclude evidence that he violated his employer's safety policy when he walked across a roadway to retrieve garbage. Johnson also contends that the court erred in failing to adopt his proposed jury instructions. In her cross-appeal, Watson argues that the circuit court erred in allowing Johnson to receive double recovery contrary to the Workers' Compensation Act. For the reasons stated below, we find no error and thus affirm.

On the morning of January 10, 2006, Johnson was working on foot collecting garbage in Fayette County, Kentucky, as part of his employment as a sanitation worker for M&M Sanitation. While Johnson was walking across a residential street to retrieve some garbage, he was struck by a motor vehicle operated by Watson. Johnson suffered a broken wrist as a result of the collision. At the time of the incident, Johnson was wearing reflective clothing, and the sanitation truck he was working from had oscillating and flashing lights in operation.

Johnson subsequently filed the instant personal injury action against Watson in Fayette Circuit Court. Prior to trial, he tendered a Motion in Limine seeking to preclude Watson from offering evidence of M&M's Residential Right Side Collection Policy. The policy stated in relevant part that M&M sanitation workers were required to collect garbage from only the right side of the road when a center line was present on the roadway. Johnson allegedly was in the process of violating this policy when he was struck by Watson's vehicle. The Motion was overruled, and the policy was admitted in evidence at trial.

At the conclusion of the trial, Johnson tendered proposed jury instructions which contained what he described as a "bare bones" comparative fault instruction. The instructions were not accepted by the court, which drafted and used its own instructions. Johnson would later maintain that the instructions drafted and relied upon by the court improperly defined his duty under Kentucky law. The matter went to the jury, which returned an award of $56,291.61. It apportioned 51 percent fault to Watson and 49 percent to Johnson, and this appeal followed.

Johnson first argues that the circuit court erred in overruling his Motion in Limine which sought to preclude Watson from placing into evidence M&M's sanitation collection policy. Johnson contends that M&M's policy did not reflect the prevailing safety standard for sanitation workers because none of the

other three Fayette County sanitation companies had such a policy. He maintains that the policy was improperly admitted because it was not relevant to the determination of his standard of care. Johnson notes that Watson relied heavily on the policy, referencing it 13 times during the opening and closing arguments, and that "the weight and negative effect this policy was likely to have on the Appellant's case was undoubtedly substantial."

A trial court has broad discretion in deciding the admissibility of evidence, and our standard of review is limited to whether the trial court abused its discretion. *Simpson v. Commonwealth,* 889 S.W.2d 781, 783 (Ky. 1994). "The test for abuse of discretion is whether the trial judge's discretion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky. 2000).

In the matter at bar, the record contains no written Order setting out the circuit court's basis for overruling Johnson's Motion in Limine. Further, there is no video record of the hearing. A hearing on a Motion in Limine in a civil proceeding is an analog to a suppression hearing in a criminal proceeding, and in each case, it is incumbent upon the appellant to present the court with a complete record for review. *See Steel Technologies, Inc. v. Congleton,* 234 S.W.3d 920, 926 (Ky. 2007); *Davis v. Commonwealth,* 795 S.W.2d 942, 948-949 (Ky. 1990). In *Davis*, the Kentucky Supreme Court noted that the appellant claimed error but

lacked any transcript of the hearing. It stated that it would not entertain the appellant's claim of error because she had failed to avail herself of Kentucky Rules of Civil Procedure (CR) 75.13, which allows an appellant to prepare a narrative statement "for use . . . as a supplement to or in lieu of an insufficient electronic recording" of a hearing. *Id.* at 949.

It is also worth noting that Johnson has not complied with CR 76.12(4)(c)(v), which requires the appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey,* 706 S.W.2d 409 (Ky. App. 1985).

Arguendo, even if the records were complete and the matter properly preserved, we would find no error. Evidence was presented at trial that Johnson received and signed a copy of the policy, and a co-worker testified that the purpose of the policy was to prevent workers from walking across the center line and into oncoming traffic. A plaintiff's knowledge of a specific danger is relevant in establishing his contributory negligence. *Daniels v. Kershner*, 519 S.W.2d 386 (Ky. 1974). Johnson's demonstrated knowledge of the danger of crossing the

center line on foot is relevant to the issue of his comparative fault - if any - in bringing about his injury.

The burden, however, does not now rest with Watson to demonstrate the admissibility of the policy. Rather, the burden rests with Johnson to demonstrate that the trial court abused its discretion because its decision to admit the policy was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Thompson, supra.* Johnson has not met that burden, and as such we find no error on this issue.

Johnson also argues that the circuit court erred when it provided a detailed and erroneous definition of ordinary care to the jury in its instructions. He directs our attention to *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967), and *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226 (Ky. 2005), in support of his contention that in adult pedestrian cases, the correct instruction states that a plaintiff is under a duty to exercise ordinary care without enumerating specific duties. He maintains that he offered such a "bare bones" instruction, but that the court rejected it and improperly used an instruction which set out a specific duty in addition to the general duty of ordinary care. Johnson also argues that the specific duty was erroneous because it improperly sets out the duty of an operator of a motor vehicle rather than a pedestrian. In sum, Johnson claims that the instruction improperly created a heightened standard of care entitling him to a new trial.

Johnson tendered the following instruction, which the court rejected:

> It was the duty of George Johnson to exercise ordinary care for his own health and safety. Based on the evidence, did George Johnson fail to comply with his duty and was that failure a substantial factor in causing the collision? Was George Johnson at fault?

The court drafted and used the following instruction:

> It was the duty of George Johnson to exercise ordinary care for his own safety. This general duty included the following specific duties: (a) to keep a lookout ahead for persons so near his intended line of travel as to be in danger of collision. Do you believe from the evidence that George Johnson failed to comply with any of his duties and was that failure a substantial factor in causing the collision?

Both instructions set out Johnson's duty to exercise ordinary care for his own safety, whereas the latter instruction added the specific duty of Johnson to watch for persons so near his line of travel as to be in danger of collision. We find no error in the usage of the instruction which includes Johnson's specific duty. The parties are in agreement that Johnson has a duty of ordinary care, which comports with the pedestrian instruction in *Kentucky Instructions to Juries* by John S. Palmore. As Watson properly notes, though, the Kentucky Supreme Court has recognized that a pedestrian "was under obligations to look to the left while crossing the southerly half of the boulevard and to look east when crossing the northerly half thereof." *Meredith v. Crumpton*, 434 S.W.2d 648, 650 (Ky. 1968). Similarly, it has held that a trial court "should have told the jury that it was [the

pedestrian's] duty when crossing the roadway at a point other than the regularly designated crosswalk for pedestrians to keep a lookout for approaching cars . . . ." *Louisville Taxicab and Transfer Company v. Byrnes*, 178 S.W.2d 4, 6 (Ky. 1944).

Johnson correctly notes that the specific duty cited by the trial court sounds like a motorist's jury instruction because it speaks of a duty to watch for persons "near his intended line of travel." Nevertheless, we believe it properly sets out a pedestrian's specific duty to watch for approaching vehicles, and conforms to a pedestrian's general duty to exercise ordinary care for one's safety. In order to reverse a judgment based on an erroneous jury instruction, the instruction must be prejudicial to the appellant's substantial rights or have affected the merits of the case resulting in an unjust verdict. *Miller v. Miller*, 296 S.W.2d 684, 687 (Ky. 1956). The trial court's determination that the jury be instructed on Johnson's duty to "look ahead" for approaching persons with whom he might collide while crossing the street comports with the specific duty to be observant as set out in *Meredith*, *Byrnes*, and elsewhere in the caselaw. This instruction is not prejudicial to Johnson's substantial rights, and Johnson has not demonstrated that it adversely affected the merits of the case resulting in an unjust verdict. Accordingly, we find no error on this issue.

In her cross-appeal, Watson contends that the trial court erred in allowing Johnson to receive double recovery contrary to the Workers'

Compensation Act. She notes that Kentucky statutory law disallows a plaintiff from collecting the same damages from both his employer and a third-party tortfeasor, and that negligent third parties are entitled to a set-off for workers' compensation benefits previously paid to the plaintiff. After the jury returned its verdict, Watson moved for the entry of Judgment reflecting a reduction in the award based on the Workers' Compensation set-off. The trial court denied Watson's motion, instead rendering a Judgment which apportioned the set-off in the same percentage reflected in the jury's 51 percent to 49 percent comparative fault award. The trial court stated as follows:

> The Defendant presented proof that the Plaintiff received workers' compensation benefits from his employer for past medical expenses in the amount of $13,693.96 and for wage loss benefits in the amount of $3,415.93 as a result of the automobile accident giving rise to this case. The Defendant supplemented the Court record to indicate Liberty Mutual Fire Insurance Company paid personal injury protection benefits to the Plaintiff in the amount of $1,599.47 in wage benefits.
>
> The Court finds, pursuant to *AIK Selective Self-Insurance Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002), set-offs and credits are subject to the same apportionment as damages. Thus, the workers' compensation lien is reduced to 51% and the personal injury protection credit is also reduced to 51%. Further, the workers' compensation lien set-off is offset dollar for dollar by the Plaintiff's legal fees and expenses pursuant to *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415 (Ky. 2006).

> The Plaintiff, George Johnson, has incurred legal fees in pursuing judgment in the amount of $9,560.00 and litigation expenses of $2,870.63. The combined total of legal fees and expenses is $12,430.63. The workers' compensation lien at 51% totals $8,863.47, a sum less than the Plaintiff's legal fees and expenses. The personal injury protection set-off totals $815.72. The total adjusted damages after apportionment of fault equal $27,893.00.

The Court then entered a Judgment in favor of Johnson in the amount of $27,893.00.

We find no error in the trial court's calculus. While Watson correctly argues that negligent third parties are entitled to a set-off for workers' compensation benefits previously paid to the plaintiff, see Kentucky Revised Statutes (KRS) 342.700(1), *Minton* operates to reduce that set-off dollar-for-dollar for legal fees and litigation expenses. In the matter at bar, the circuit court determined that Johnson's legal fees and expenses were $12,430.63, which exceeded the workers' compensation lien of $8,863.47. As such, Watson could not rely on the workers' compensation lien to reduce the jury award. Stated differently, since the legal fees and expenses exceeded the workers' compensation lien, Johnson did not receive a double recovery in violation of KRS Chapter 342. The total adjusted damages after apportionment of fault was $27,893.00, and the circuit court properly so found.

For the foregoing reasons, we affirm the Judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT AND COMBINED REPLY BRIEF FOR APPELLANT/BRIEF FOR CROSS-APPELLEE, GEORGE JOHNSON:

Wesley Browne
Richmond, Kentucky

COMBINED BRIEF FOR APPELLEE/CROSS-APPELLANT, BETHANY WATSON AND CROSS-APPELLANT'S REPLY TO COMBINED BRIEF:

H. Caywood Prewitt, Jr.
Lexington, Kentucky

NO BRIEF FILED FOR APPELLEE, LIBERTY MUTUAL INSURANCE COMPANY; ATTORNEY FOR APPELLEE, LIBERTY MUTUAL INSURANCE COMPANY:

Donald L. Miller, II
Louisville, Kentucky