

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001244-MR

ESTATE OF JENNIFER ZIMMER, BY AND
THROUGH ADMINISTRATRIX GERALDINE
ZIMMER; GERALDINE ZIMMER, IN HER
CAPACITY AS ADMINISTRATRIX OF THE
ESTATE OF JENNIFER ZIMMER; AND
JESSY ZIMMER, A MINOR, BY AND THROUGH
HER GUARDIAN, GERALDINE ZIMMER

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 11-CI-01239

EATON ASPHALT AND PAVING COMPANY, INC.

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, CHIEF JUDGE; MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The Estate of Jennifer Zimmer, by and through
Administratrix, Geraldine Zimmer; Geraldine Zimmer, in her capacity as

Administratrix of the Estate of Jennifer Zimmer; and Jessy Zimmer, a minor, by and through her Guardian, Geraldine Zimmer, (the Estate) appeal from a judgment entered following a jury verdict in favor of Eaton Asphalt and Paving Company, Inc. The Estate filed this action alleging Eaton negligently planned, constructed, arranged, and maintained a road construction site and failed to comply with the laws, regulations and standards applicable to construction zones.

On appeal, the Estate presents the following issues: (1) whether the trial court erred when it denied its motion for directed verdict on Eaton's breach of duty; (2) whether the trial court erred when it permitted employees of the Kentucky Department of Transportation (KDOT) to testify to matters outside their personal perceptions without being identified as expert witnesses; (3) whether the trial court erred when it permitted a witness to testify to matters on which he was not qualified as an expert and not granting a mistrial when the same witness testified regarding Jennifer's use of a cell phone immediately prior to her fatal car accident; (4) whether the trial properly permitted the admission of evidence regarding Jennifer's blood alcohol content (BAC) at the time of the collision; and (5) whether the trial court erred when it instructed the jury that it may not base its verdict on speculation or conjecture.

The accident occurred on August 1, 2011, at approximately 10:20 p.m. at the intersection (the Intersection) of US Route 27 (US 27) and Siry Road in Campbell County. The evidence at trial was that on the day of her accident,

Jennifer had traveled Siry Road and through the Intersection on two occasions prior to her accident.

On the night of her accident, Jennifer departed the Lazy K Ranch and was traveling west on Siry Road. Kentucky State Police Officer Jason Ritter was traveling northbound on US 27 when his police cruiser struck Jennifer's vehicle on the driver's side door.

When paramedics arrived at the scene, Jennifer was unresponsive and transported to the hospital. She never regained a level of consciousness to allow her to communicate regarding the accident and died from her injuries.

At that time, US 27 was under reconstruction to replace the existing two-lane US 27 with a four-lane divided highway. Pursuant to a contract awarded by the KDOT, Eaton performed the construction work. The old portion of US 27 was open to northbound and southbound traffic and Siry Road was open to eastbound and westbound traffic. As a part of that reconstruction project, the Intersection was redesigned to intersect with US 27 at a 90-degree T-intersection. Traffic on Siry Road was controlled by a stop sign while US 27 was a through road. A motorist proceeding westbound on Siry Road had the option to turn left or right onto US 27 or continue straight across US 27 through a median crossover and proceed north on a temporary detour.

KDOT designed the reconstruction of US 27, including the Intersection and its traffic control systems. It provided plans and specifications to Eaton and Eaton

was to place signage at the Intersection according to those specifications and the Manual on Uniform Traffic Control Devices (the Manual).

The Manual is published by the Federal Highway Administration and adopted by the KDOT. It provides principles governing the design and use of traffic control devices and specifications for specific signs, including stop signs. Notably, the Manual states that it “describes the application of traffic control devices, *but shall be not a legal requirement for their installation.*” Manual, Section 1A.09 (emphasis added).

Eaton’s job superintendent, Terry Hamilton, met with KDOT inspector, William Witte, to determine signs needed at and near the Intersection. KDOT employee Robert Hill testified he inspected the construction site to observe traffic control devices installed at each intersection for compliance with the project plans and KDOT standards. In addition, KDOT inspectors were on site daily to review traffic control. Hill testified he had been at the site three days prior to the accident and found the traffic control signage systems at the Intersection were compliant with all applicable plans and standards. He again inspected the Intersection eight days after the accident and found all signage remained compliant. Witte also daily inspected the Intersection and approved Eaton’s work.

A stop sign was located six to eight feet to the right of the shoulder adjacent the right turn lane, approximately 37 feet from the center of Siry Road. However, the right turn lane was not in operation at the time of the accident

placing the stop sign on the outer edge of an unused lane. A stop bar was also located at the Intersection.

Due to construction, the speed limit on US 27 was 45 mph. An accident reconstruction analysis performed by Kentucky State Police Sergeant Chadwick Mills and by Dr. Richard A. Bragg, an expert retained by Eaton, established Ritter was traveling between 56-68 mph at the time of the accident. The same reconstructions concluded it was impossible to determine if Zimmer entered the Intersection and stopped at the stop sign, rolled through the stop sign, or disregarded the stop sign. However, both agreed Ritter's rate of speed contributed to the accident. Dr. Bragg testified that the permanent and temporary traffic control measures at the Intersection were sufficient based on construction experience and a human factor analysis.

The Estate produced expert testimony that the signage at the Intersection and warnings of the unusual configuration of the Intersection were inadequate and negligently designed and/or maintained. In accordance with the Manual, it maintained Eaton was required to maintain a 600 mm (24") stop bar at the Intersection. Although a stop bar was located at the Intersection there was evidence it had faded and was only 12 inches in width. The Estate also produced evidence that there was no warning of the unusual configuration of the traffic flow at the Intersection and that the placement of the stop sign rendered it difficult to see at night.

Several evidentiary issues were presented in motions in limine and, because various evidentiary issues are presented on appeal, they are pertinent. First, the Estate moved to exclude Hill and Witte's testimony that Eaton's traffic controls at the Intersection complied with the KDOT's plans and specifications and that the KDOT approved the traffic control at the Intersection. The Estate contended such evidence was irrelevant and that Hill and Witte were not identified as experts to render what the Estate viewed as testimony requiring specialized or technical knowledge. The trial court denied the motion and Hill and Witte were permitted to testify regarding Eaton's compliance with the KDOT plans and specifications and the KDOT's approval.

A motion in limine was also filed to exclude Dr. Bragg's testimony on the basis he was not qualified as an expert to testify regarding temporary work traffic control measures and opine regarding human factors that may have contributed to the accident. After a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the trial court found Dr. Bragg was qualified to render opinions in the areas of highway traffic controls and related issues.

The Estate also requested that Dr. Bragg be precluded from referring to any alleged cell phone use by Jennifer while she was driving on the basis that any such references were based on speculation and unsupported by the evidence. The trial court granted the Estate's motion in part and denied it in part ruling as follows:

The Court will ALLOW testimony regarding Jennifer Zimmer's cell phone use. Defendant's counsel represented Eaton does not intend to introduce evidence of the auto text sent to Zimmer's phone, and plaintiffs do not oppose evidence going to a telephone call Zimmer made from her phone from the Lazy K Ranch.

During his testimony, Dr. Bragg referred to Jennifer's use of a cell phone while driving between the Lazy K Ranch and the accident scene. Arguing the reference violated the trial court's pretrial order, the Estate moved for a mistrial which was denied. However, departing from its prior ruling that such evidence was admissible, the trial court admonished the jury to disregard any and all evidence of cell phone use.

Finally, the Estate moved to exclude any evidence regarding Jennifer's low level of alcohol in her system quantified by the Kentucky State Police BAC as 0.013. The trial court denied the motion.

In anticipation that evidence of Jennifer's BAC would be admitted by Eaton, during voir dire, the Estate began to explore with the venire panel the presumption of unimpaired driving provided for in Kentucky Revised Statutes 189A.010 and the potential effect of evidence regarding alcohol in Jennifer's blood on the venire panel. After Eaton objected, the trial court departed from its pretrial ruling and excluded any further reference to Jennifer's BAC.

Faced with this turn of events and its realization it needlessly suggested to the jury that Jennifer had consumed alcohol on the night of the accident, the Estate requested an admonition. The court refused to give any

admonishment to the venire panel and again refused when the jury received the case and jury instructions.

With the summary of the evidence and the pertinent pretrial rulings stated, we address the issues.

At the close of proof, the Estate moved for a directed verdict arguing Eaton breached its duty to provide a safe construction zone by failing to maintain the stop bar at the Intersection and failing to place adequate warning of the construction ahead of the Intersection. The motion was denied and the case submitted to the jury. The jury found Eaton either did not fail to comply with its duties, or that its failure was not a substantial factor in causing the accident.

The Estate contends the trial court should have directed a verdict on the issue of whether Eaton breached its duties to Jennifer. In *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985) the standard is described:

In ruling on either a motion for a directed verdict or a motion for a [JNOV], 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 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 [JNOV] 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.

“We may not disturb the [trial court’s] ruling unless the decision is clearly erroneous.” *Estate of Moloney v. Becker*, 398 S.W.3d 459, 461 (Ky.App. 2013).

A decision to deny a directed verdict is clearly erroneous if “the verdict was

palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice.” *Id.* (quoting *Peters v. Wooten*, 297 S.W.3d 55, 65 (Ky.App. 2009).

Notwithstanding the stringent standard for a directed verdict, a directed verdict is proper where, “drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude the moving party was entitled to a verdict.” *Buchholtz v. Dugan*, 977 S.W.2d 24, 26 (Ky.App. 1998). It is “an established doctrine that, where the facts of a case are undisputed and but one legitimate inference can be drawn from them, the court, and not the jury, should determine their effect.” *Blackburn v. Kentucky & West Virginia Power Co.*, 243 S.W.2d 995, 996 (Ky. 1951)(quoting *Equitable Life Assur. Soc. of U.S. v. Spencer*, 262 Ky. 478, 90 S.W.2d 704, 707 (1936)). Although generally the breach of a duty and causation are factual issues, “where only one reasonable conclusion can be reached, a court may decide those issues as a matter of law.” *Lewis v. B & R Corporation*, 56 S.W.3d 432, 438 (Ky.App. 2001).

Under the applicable standard of review, we do not agree with the Estate’s contention that only one reasonable conclusion could be reached regarding Eaton’s liability. As a contractor with the KDOT, when performing its duties at the construction site in compliance with plans and specifications mandated by the Commonwealth, Eaton cannot be liable for Jennifer’s death “in the absence of a negligent or a willful tortious act[.]” *Gilbert v. Murray Paving Co., Inc.*, 147 S.W.3d 736, 740 (Ky.App. 2003) (quoting *City of Louisville v. Padgett*, 457

S.W.2d 485, 488-90 (Ky. 1970)). The Court recited the reason for the rule as follows:

The purpose of having the State engineering department for these public improvements is to lay out these projects and to tell the contractor where to do its work. The contractors work is not the engineering job of laying out the project but is merely in doing what it is instructed to

do. So long as it does this work as it is instructed to do by its superior in a workman like manner, *not negligently*, then the contractor is not liable.

Id.

There was lay and expert testimony that Eaton was merely implementing the KDOT's plans and design for the construction project and that the KDOT directed the placement of signage and approved the signage. Although there was expert testimony that the signage at the Intersection was negligently placed and inadequate, there was sufficient testimony to the contrary so that a directed verdict was not warranted.

The Estate contends that despite the differing opinions regarding the adequacy of the signage, it was undisputed that the stop bar was only 12 inches wide and worn and there was no warning of the atypical configuration of the Intersection contrary to the Manual. As we noted, the Manual sets forth principles, not mandates. Even if we were to conclude that such principles could be the basis for negligence per se, a directed verdict would not be proper based on the facts.

“A negligence per se claim is merely a negligence claim with a statutory standard of care substituted for the common law standard of care.” *Lewis* 56 S.W.3d at 438 (quoting *Real Estate Marketing Inc. v. Franz*, 885 S.W.2d 921, 927 (Ky. 1994)). As in all negligence cases, the plaintiff claiming a statute or regulation creates a duty subject to liability is required to show defendant’s violation was a substantial factor in causing the injury. *Id.* “In order to be a legal cause of another’s harm, it is not enough that the harm would not have occurred had the actor not been negligent[.] *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 92 (Ky. 2003)(quoting Restatement (Second) of Torts § 431 comment (a)).

“Section 434 of the Restatement (Second) of Torts addresses when legal causation is a question of law for the court and when it is a question of fact for the jury.” *Id.* It is the court’s “duty to determine whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff.” *Id.* (quoting Restatement (Second) of Torts § 431(1)(a)).

Even if it could be said that Eaton’s breach of duty was purely a legal question, whether that breach was a substantial factor in causing the accident was factually disputed. In addition to the stipulation that Ritter was speeding, there was expert testimony that the accident could have been caused by Jennifer’s failure to stop or completely stop at the sign or to see Ritter in the oncoming lane of US 27. Despite evidence that the signage was inadequate or non-existent, the jury was free to conclude from the evidence that any negligence on Eaton’s part was not a

substantial factor in causing the accident. Consequently, the trial court did not err by denying the Estate's motion for a directed verdict.

The remaining issues presented concern the admission and exclusion of certain evidence. As a general rule, the trial court's rulings regarding the admission and exclusion of evidence are within the trial court's discretion.

Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000).

"The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581.

The Estate contends the trial court erred in admitting the testimony of KDOT employees Hill and Witte regarding Eaton's compliance with KDOT's plans and specifications and KDOT's approval of the work. It argues that such evidence is not relevant to whether it negligently placed and maintained the traffic controls and warnings at the construction site.

We agree with Eaton that the holding in *Gilbert* teaches that compliance with applicable plans and specification of the KDOT would not be the basis for a summary judgment or a directed verdict in favor of a road construction contractor. *Gilbert*, 147 S.W.3d at 741-42. However, we do not agree with the Estate's inverse reasoning that because such compliance does not absolve the contractor, it is not relevant to whether the contractor was negligent.

Kentucky Rules of Evidence (KRE) 401 defines "relevant evidence" as that which has any tendency to make the existence of any material fact more probable or less probable than it would be without the evidence. Although compliance with

the KDOT's plans and specifications and the KDOT's approval of the arrangement and placement of traffic control devices and the maintenance of those devices at or near the accident site would not necessarily absolve Eaton from liability, it is relevant evidence as to whether it was negligent in its performance of the road project.

We also disagree that Hill and Witte testified to matters outside their personal perceptions and, therefore, were required to be identified as expert witnesses. KRE 701 states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness,
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Hill and Witte only testified regarding facts gained by their personal observations made in the carrying out their duties as KDOT inspectors. Neither expressed any opinion regarding matters based on scientific, technical or other specialized knowledge.

The Estate maintains the trial court abused its discretion when it ruled Dr. Bragg was qualified to testify regarding traffic control in construction zones and human factors analysis. KRE 702 provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education" may provide opinion

testimony if scientific, technical, or specialized knowledge will assist the trier of fact.

Dr. Bragg holds a Ph.D. in civil engineering and since 1988 has been employed as a forensic engineer. He has over 25 years experience performing traffic accident reconstruction analysis and analyzing highway traffic design. In addition to attending and speaking at transportation safety conferences, Dr. Bragg has worked for state and city agencies in the area of highway and traffic design. He has performed hundreds of traffic accident reconstructions and repeatedly studied and utilized human factors principles and theories.

Although Dr. Bragg is generally described as a civil engineer, his education and experience in traffic control and human factors analysis sufficiently qualified him as an expert in such matters. We cannot say the trial court abused its discretion in finding Dr. Bragg qualified as an expert. “Any lack of specialized training goes only to the weight, not to the competency, of the evidence.”

Owensboro Mercy Health System v. Payne, 24 S.W.3d 675, 677 (Ky.App. 2000) (quoting *Washington v. Goodman*, 830 S.W.2d 398, 400 (Ky.App. 1992)).

The remaining two evidentiary issues concern Jennifer’s cell phone use at or near the time of the accident and her BAC level. Although on both issues the trial court deviated from its pretrial rulings, those deviations alone were not erroneous. KRE 103(d) provides:

A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or

may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. *Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.* [Emphasis added].

It is unnecessary for this Court to resolve whether the trial court properly excluded the evidence regarding Jennifer's cell phone use. There was no reversible error based on the established rule that it is presumed the jury will "follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). In *Shabazz v. Commonwealth*, 153 S.W.3d 806, 810 (Ky. 2005), the Court emphasized that a trial court's decision to deny a motion for a mistrial will be reversed only if a manifest necessity exists for a new trial. It explained:

The purpose of this standard is to reserve the extraordinary relief of declaring a mistrial for situations in which an error has been committed that is of such magnitude that the litigant would be denied a fair and impartial jury absent a new trial. It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. In accordance with this standard, appellate courts review a trial court's refusal to grant a mistrial for an abuse of discretion.

Id. at 810-11(internal footnotes and quotations omitted).

Thus, a denial of a timely motion for a mistrial must be affirmed unless it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire*, 11 S.W.3d at 581. The Estate has not overcome the

presumption that the admonition cured any resulting prejudice by Dr. Bragg's reference to Jennifer's cell phone use and, therefore, we conclude there was no reversible error.

The final evidentiary issue concerns Jennifer's BAC. The Estate argues the trial court's pretrial ruling led it to prejudice its own case by informing the venire panel that Jennifer had alcohol in her bloodstream. It argues an admonition to the venire panel to ignore the references to Jennifer's BAC was warranted.

Without commenting on the correctness of the trial court's ruling regarding the admissibility of Jennifer's BAC, we believe an admonition would have been proper after the trial court ruled such evidence was inadmissible and an admonition requested. Nevertheless, as with any error, it must be subjected to a harmless error analysis.

Kentucky Rules of Civil Procedure 61.01 provides that judgments should not be disturbed for errors that do not affect a party's substantial rights. We are not convinced the reference to Jennifer's consumption of a slight amount of alcohol on the night of her accident and the trial court's refusal to admonish the jury not to consider her BAC in rendering its verdict were so prejudicial that a new trial is warranted. This was a lengthy trial and the jury heard both lay and expert testimony regarding not only Eaton's performance of its duties pursuant to the KDOT contract but also as to the cause of the accident. We conclude the isolated

references to Jennifer's BAC during voir dire did not substantially affect the jury's verdict and, therefore, any error was harmless.

The Estate's final contention is the trial court erred by giving the following instruction: "Your duty as jurors is to decide this case on the evidence and the proof. You may not base your verdict on speculation or conjecture." The Estate maintains this instruction exceeded the bare bones instruction required by Kentucky law and suggested to the jury that it was required to determine with "100% certainty" what happened when Jennifer entered the Intersection.

"[T]he 'bare bones' principle does not, and should not, prevent the law of the case from being presented to the jury." *Osborne v. Keeney*, 399 S.W.3d 1, 13 (Ky. 2012). It is a basic tenant of our jury process that a verdict may not be based on speculation or conjecture. *Harris v. Cozatt, Inc.* 427 S.W.2d 574, 575 (Ky. 1968). Informing the jury that it may not base its verdict of speculation or conjecture is merely redundant to informing the jury that it must base its verdict on the evidence and proof. We conclude there was no error.

Based on the forgoing, the judgment is affirmed.

ALL CONCUR.

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