

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000408-MR

CRYSTAL MAGGARD
AND HILDA BROCK

APPELLANTS

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 12-CI-00091

SHANNON TURNER AND
KENTUCKY EMPLOYERS MUTUAL INSURANCE

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, LAMBERT, AND SPALDING,¹ JUDGES.

ACREE, JUDGE: Crystal Maggard² and Hilda Brock (Appellants) appeal the Leslie Circuit Court's *sua sponte* order granting a directed verdict in favor of

¹ Judge Jonathan R. Spalding concurred in this opinion prior to the expiration of his term of office. Release of this opinion was delayed by administrative handling.

² The record sometimes refers to Crystal Maggard as Crystal Baker or Crystal Maggard Baker.

Shannon Turner. Appellants contend they adequately proved Turner breached his duty as the Leslie County Road Foreman, thereby precluding a directed verdict. Appellants also believe the trial court erred by asking leading questions to the witness. After careful review, we reverse the trial court's directed verdict and remand for further proceedings.

BACKGROUND

On April 26, 2011, a school bus for the transport of handicapped students, driven by Crystal Maggard, left the roadway and went over an embankment. Appellants contend the accident was caused by improper maintenance of the one-lane, gravel road on which the bus traveled – Stone Coal Branch Road. According to the residents, Stone Coal Branch Road was in “very poor condition.” Residents frequently complained about potholes and the instability of the road. The issue in this case was the cause of the accident – did Stone Coal Branch Road give way under the weight of the bus because of improper maintenance or did Maggard drive too close to the edge of the road, lose control, and leave the roadway solely because of her negligent driving.

This case was previously before this Court on an interlocutory appeal when Turner claimed immunity. In *Sizemore v. Maggard*, No. 2014-CA-001293-MR, 2016 WL 675914 (Feb. 19, 2016) (hereafter “*Sizemore*”), this Court held that

Turner had a ministerial duty according to KRS³ 179.070(1). Specifically, his statutory duty was: (1) to have general charge of all county roads and bridges within the county; (2) to see that county roads and bridges are improved and maintained as provided by law; (3) to supervise the construction and maintenance of county roads and other work of like nature undertaken by the fiscal court; and (4) to remove trees or other obstacles from the right-of-way of any publicly dedicated road when it becomes a hazard to traffic. KRS 179.070(1)(a), (1)(b), (1)(c), and (1)(j); *but see Mason v. Barnett*, No. 2016-CA-000778-MR, 2018 WL 5726387, at *16-*17 (Ky. App. Nov. 2, 2018), *discretionary review denied and ordered not published* (Ky. Aug. 21, 2019) (holding KRS 179.070(1)(j), adopted as part of the County Through Road System, imposes a duty only upon road engineers in a county containing a city of the first class or a consolidated local government).

After returning the case to its docket, the trial court conducted a trial to determine whether Turner breached his identified duties. At the close of the Appellants' case-in-chief, Turner moved for a directed verdict, arguing Appellants failed to present evidence of Turner's breach. The trial court initially overruled the motion but, during Turner's case-in-chief, *sua sponte* reconsidered its denial and found Appellants failed to present sufficient evidence of a breach.

³ Kentucky Revised Statutes.

The trial court's order granting directed verdict states there was testimonial evidence that Maggard "steered to the right attempting to avoid a pothole located on Stone Coal Branch Road at which time . . . the road gave way." The order also refers to "evidence that [Turner] did not investigate complaints of Stone Coal Branch Road [residents] and further did not inspect work when done to ensure it was done properly" and even that Turner "acknowledged . . . [Maggard] complained about the road two weeks before the accident occurred." There was testimony by Maggard's "expert . . . that the road gave way and that [Maggard] did not just drive off the road."

The trial court then held that, "considering all evidence . . . in the light most favorable to the Plaintiffs, insufficient evidence was presented to prove that Defendant, Shannon Turner breached any duty charged to him under KRS 179.070(2) [sic] or otherwise. There being no duty which was breached there can be no liability."

Appellants filed a timely notice of appeal.

STANDARD OF REVIEW

Appellate review when a trial court grants a directed verdict in a civil case has been stated as follows:

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 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 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.

Gibbs v. Wickersham, 133 S.W.3d 494, 495-96 (Ky. App. 2004) (citations omitted).

ANALYSIS

Appellants argue the trial court erred by granting the directed verdict, *sua sponte*, in the middle of Turner’s presentation of evidence. The timing of the directed verdict aside, we agree the grant of directed verdict was reversible error.

This Court previously held that Turner owed a ministerial duty pursuant to KRS 179.070(1)(b) and (c). *Sizemore* at *8. That decision, whether correct or incorrect, is the law of the case. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007) (“[A]n opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.” (quoting *Union Light, Heat & Power Co. v. Blackwell’s Adm’r*, 291 S.W.2d 539, 542 (Ky. 1956))).

This Court made it clear that, pursuant to KRS 179.070(1)(b) and (1)(c), Turner owed a duty to Maggard to “[s]ee that county roads . . . are . . . maintained . . . [and to s]upervise the . . . maintenance of county roads and bridges and other work of like nature” KRS 179.070(1)(b), (1)(c). The duty hurdle, therefore, has already been cleared.

Whether “care was exercised in discharge of a duty is generally a question for the jury.” *New St. L. & Calhoun Packet Corp. v. Pa. R. Co.*, 302 Ky. 693, 194 S.W.2d 977, 982 (1946). More specifically and directly applicable, “Whether [a county road engineer] acted negligently by failing to perform a ministerial duty is an issue for the jury to determine.” *Storm v. Martin*, 540 S.W.3d 795, 801 (Ky. 2017) (quoting *Wales v. Pullen*, 390 S.W.3d 160, 167 (Ky. App. 2012)).

As noted above, the trial court described more than enough evidence that Turner might have breached his statutory duties to survive a directed verdict. Turner, himself, testified he did not supervise or inspect any work that was done on Stone Coal Branch Road – particularly the month before the accident. (Video Record (VR) 11/29/17 at 4:29:10-4:30:00). Such evidence is sufficient, if believed by the jury, to sustain a verdict.

This Court’s position is not changed by Turner’s argument that KRS 179.070 should be read in conjunction with KRS 67.080(2)(b), which provides in relevant part, “the fiscal court shall . . . as needed, cause the construction, operation, and maintenance of all county buildings and other structures, grounds, roads and other property[.]” His contention that he could not perform his duty because he is bound by the fiscal court’s authorization of the construction is unpersuasive.

A directed verdict only raises questions of law as to whether there is any evidence to support a verdict. *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968). We conclude there was evidence that could support a verdict and that compels reversal.

Our reversal of the directed verdict renders moot Maggard’s argument that it was error for the trial court to ask leading questions of the witness.

However, the trial court should consider Kentucky jurisprudence regarding this practice before repeating it.

KRE⁴ 614(b) provides that the court may interrogate witnesses.

However, because a “trial judge’s observations and comments usually carry such weight with the jury . . . they must be subject to safeguards against abuse.” *Terry v. Commonwealth*, 153 S.W.3d 794, 802 (Ky. 2005) (citing *Davidson v. Commonwealth*, 394 S.W.2d 911, 912 (Ky. 1965)). When questioning a witness, a trial judge should avoid imposing its opinion as to the credibility of that witness and must avoid crossing the line between impartial arbiter and advocate. *Id.* at 803; *Transit Auth. of River City (TARC) v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992). To guide trial judges, the Supreme Court of Kentucky adopted the three-factor test used in federal courts.

First, in a lengthy, complex trial, judicial intervention is often necessary for clarification. Second, if the attorneys in a case are unprepared or obstreperous or if the facts are becoming muddled and neither side is succeeding at attempts to clear them up, judicial intervention may be necessary for clarification. Third, if a witness is difficult, if a witness’ [sic] testimony is unbelievable and counsel fails to adequately probe, or if the witness becomes inadvertently confused, judicial intervention may be needed.

⁴ Kentucky Rules of Evidence.

Terry, 153 S.W.3d at 803 (citing *United States v. Slone*, 833 F.2d 595, 597 (6th Cir. 1987)) (emphasis in original).

CONCLUSION

We reverse the trial court's order granting directed verdict in favor of defendant, Shannon Turner, entered December 20, 2017, and remand the case for further proceedings.

ALL CONCUR.

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