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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000479-MR

GEORGE A. SPENCER APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 14-CI-003490

TRAVIS A. ARNOLD AND
CENTRAL TRANSPORT, LLC APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES.

ACREE, JUDGE: George Spencer brings this appeal following a jury verdict and judgment in favor of defendants in his Jefferson Circuit Court personal injury action. Spencer was injured when the vehicle he was driving collided with a tractor-trailer driven by Travis Arnold and owned by Central Transport, LLC. Finding no error, we affirm.

BACKGROUND

On March 2, 2012, Spencer left his work at Transit Authority of River City (TARC), traveling northbound on South 10th Street in his TARC work vehicle, a Ford Taurus. Central Transport driver Arnold was driving his employer's tractor-trailer eastbound on West Broadway.

At the intersection, the front of Spencer's vehicle struck the driver's side of the forty-eight (48) foot-long trailer just in front of the trailer's tandem wheels.[1] The intersection was controlled by a traffic light. Spencer suffered a collapsed lung, fractured ribs, and various scrapes and contusions. His medical expenses totaled over $62,250. Spencer filed a negligence action against Arnold and Central Transport on July 1, 2014. The case was decided by a jury trial.

Both parties testified they entered the intersection under a green light, making this, in the words of defense counsel, a classic "he said/he said" case that hinged largely on the credibility of witnesses. The jury returned a 9-3 verdict in favor of Arnold and Central Transport and the circuit court entered a judgment accordingly. Spencer says the circuit court erred in four ways: (1) failing to strike a juror for cause; (2) refusing to allow Spencer to impeach Arnold using a drug

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[1] Initially, Spencer believed and alleged that Central Transport's tractor struck his vehicle. (Record (R.) at 2). He gave deposition testimony more specifically stating that the front of Central Transport's tractor struck the driver's side front fender and door of the government vehicle he was driving. (Video Record (V.R.) 2/20/18 4:42:10-4:42:54). He corrected his testimony at trial, agreeing with the experts that the impact was between his vehicle and Central Transport's trailer just in front of its tandem wheels. (V.R. 2/20/18 9:47:20-9:48:15).

test; (3) failing to include a jury instruction on Arnold's higher duty; and (4) prohibiting evidence of Central Transport's policies and driving standards references, including the Commercial Driver's License (CDL) manual.

STANDARD OF REVIEW

We review decisions regarding juror strikes and evidentiary rulings for abuse of discretion. *McDaniel v. Commonwealth*, 341 S.W.3d 89, 92 (Ky. 2011). The test for abuse of discretion is whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

"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). When examining jury instructions for error, they must be read as a whole. *Carmical v. Bullock*, 251 S.W.3d 324, 328 (Ky. App. 2007).

ANALYSIS

Striking Juror 1967798

Spencer argues the circuit court erred by not allowing him to strike Juror 1967798 for cause. Compelled to strike Juror 1967798 peremptorily, Spencer exhausted his peremptory strikes and had to allow the seating of another juror he otherwise would have stricken.

Two situations may constitute reasonable grounds to excuse a prospective juror for cause. First, a juror may be excused whenever he or she expresses or shows an inability or unwillingness to act with entire impartiality. *Rankin v. Commonwealth*, 327 S.W.3d 492, 496 (Ky. 2010). Second, a juror may be excused because of "the prospective juror's relationship with some aspect of the litigation . . . ." *Id.*

Spencer asserts Juror 1967798 made several troubling statements demonstrating her inability to be impartial, characterizing them as: (1) her concern that six years had elapsed between the accident and the trial (V.R. 2/19/18 11:52:40-11:53:47); (2) her "unwillingness" to find more than one person at fault because she believed one person is "guilty" and the other is "innocent" (V.R. 2/19/18 12:01:32-12:01:35); and (3) her views about pain and suffering, including her belief that a large pain and suffering award (such as one million dollars) would be difficult "because it takes [her] back to the time lapse." (V.R. 2/19/18 12:23:40-12:25:25). We address each issue in turn.

We do not agree that Juror 1967798 disqualified herself by expressing her concern about the lapse of time. The Juror actually said, "When they said the time lapse, I, you know, I could make a fair decision and all, but I was just going like, 2012? . . . [inaudible]. (V.R. 2/19/18 11:53:00). Counsel asked whether the delay between the accident and the trial would impede her ability to make a fair

decision. She said, "Even with the [delay] I could still be fair." (V.R. 2/18/19 11:53:11-11:53:38). Simple inquisitiveness about the time lapse is not sufficient evidence of her partiality and it was not abuse of discretion to so hold.

Spencer also misconstrues the Juror's views on apportionment of fault. When asked if she believed only one person could be at fault for an accident, the Juror raised her hand and stated, "I believe that one can be at fault." Counsel then asked, "If the evidence supports it, can . . . if there's two cars involved in the crash, can both [drivers] be at fault?" The Juror answered affirmatively, stating, "If the evidence supports it." (V.R. 2/18/19 12:02:31-12:02:44). When Counsel asked if anyone had a further problem with the concept, she did not raise her hand. We consider this merely evidence that Juror 1967798 did not understand the concept of shared fault, but when explained to her, she agreed she would rely on the evidence to make her decision.

Spencer's third concern relates to Juror 1967798's comments regarding pain and suffering. Her initial comment was that "pain and suffering is something you can never put a price tag on." (V.R. 2/18/19 12:23:56-12:24:05). Later, she declared, "I can be fair and impartial on pain and suffering." (V.R. 2/18/19 12:24:50 – 12:24:55). The circuit court clarified her position further by asking about "pain and suffering" and her "reaction to that"; then, the court asked, "[D]oes that mean that, once you hear the proof, the number is in flex, right?" She

responded, "Yeah, it's still in the back of my mind but I can put all that aside to make a fair decision is what I'm trying to say." (V.R. 2/18/19 12:25:20-12:25:41). She was asked moments later if her feelings on pain and suffering would keep her from viewing the parties as being on a level playing field. She unequivocally stated, "No." As *voir dire* continued, Juror 1967798 did state the time lapse would affect her ability to award a million dollars for pain and suffering. (V.R. 2/18/19 12:36:56-12:37:10). However, because Spencer capped his pain and suffering claim at $250,000, the comment was irrelevant and harmless. (R. at 208). Nevertheless, the circuit court stepped in and asked the Juror, hypothetically, if she could award a million dollars, if that was what the case was worth. Juror 1967798 retracted her statement and said if she believed the case was worth a million dollars, she could award that amount. (V.R. 2/18/19 12:45:35-12:46:02).

Given the circuit court's broad discretion, we find no error here. The court did not abuse that discretion by declining to strike Juror 1967798 for cause.

<u>Impeachment</u>

Spencer believed Arnold lied in his deposition and sought to reveal that lie to the jury. On cross-examination during the defense case, Spencer's counsel began asking Arnold questions about his employment at Central Transport. Although the deposition itself is not a part of the record on appeal, the trial video

transcript shows Arnold confirming his September 22, 2015 deposition testimony beginning at page 10, line 22, as follows:

> Q: When did you stop working for Central [Transport]?
>
> A: Five months ago.

(V.R. 2/20/18 3:50:13-3:50:36). Arnold then agreed with Spencer's counsel's conclusion that this meant he stopped working for Central Transport in April 2015. (*Id.*). After pursuing a line of unrelated questioning, Spencer's counsel asked for a sidebar and proffered to the circuit court the following:[2]

> In Mr. Arnold's deposition, I asked him point blank if he had ever taken a drug test and if he ever failed a drug test and he said no. In fact, three months prior to that he had been drug tested by Central Transport and failed that drug test. I concede to you that that's not relevant [garbled] but the fact that he lied about it under oath is. And under [KRE[3]] 608, I'm allowed to cross[-examine] him on that. . . . This whole case is about who's telling the truth here. [KRE] 608(b), "specific instances of conduct." I've got a good faith basis. I've got the report. I can show him the report.

Like the deposition, the report is not a part of the record on appeal. However, during the sidebar, counsel read parts of it, including that it showed a "verified result positive for . . . amphetamine, methamphetamine." It is dated "June 8, 2015, three months before the deposition," which also means it was dated two months

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[2] The quotations that follow are excerpts from the sidebar. (V.R. 2/20/18 4:05:54-4:22:30).

[3] Kentucky Rules of Evidence.

after Arnold's employment with Central Transport ended. Central Transport produced it in response to Spencer's discovery request. Nothing was proffered to show Arnold was ever aware of the test results.

Assessing the proffer, the judge asked Spencer's counsel, "How do you prove that up? You've got a report from whom that says what?" Spencer's counsel responded, "Well, I'm going to, from that. But I've asked about it. . . . The Kentucky Manual on Evidence says that you can give him a document to refresh his recollection. . . ." Spencer's counsel stated the report is his good faith basis under KRE 608 to ask Arnold the question, but everyone agreed the document itself was inadmissible.

Attempting to bolster his argument, Spencer's counsel said, "This [pointing to the report] coincides with the time he alleges he quit working for Central Transport. I believe he was terminated from Central Transport because that is a non-negotiable, terminatable offense in accordance with Central Transport's regulations. And I believe he lied about why he quit, too."

After expressing doubt that such an inquiry was permissible under KRE 608(b), the circuit court stated another concern, that if Arnold knew about the report and was asked whether he ever failed a drug test, he would be put in the untenable position of having to admit a crime or commit perjury. Said the court,

"Well, the other issue is because it is a criminal behavior, he could take the Fifth Amendment and not answer your question."

After removing the jury from the courtroom, the circuit court explained the evidentiary dilemma to Arnold in lay terms and questioned him about his knowledge of his right to assert his Fifth Amendment privilege against self-incrimination. The court asked Arnold if he was willing to answer the question, "Have you ever failed a drug test?" Arnold expressed concern that if the jury heard him "plead the Fifth" it would prejudice his case. The court assured him he would not have to assert the privilege in the jury's presence. With the jury still absent, Arnold chose not to answer the question; the circuit court responded, "I accept your assertion of your Fifth Amendment right," and prohibited Spencer from pursuing this line of questioning.

The circuit court's first instinct was correct. Spencer's question is prohibited by KRE 608(b). The rule says:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry under

> this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.

KRE 608(b).

As Professor Lawson points out, KRE 608(b) is comprised of two rules within a rule. The "First Rule" is "a general proposition against introduction of specific acts to attack or support credibility of witnesses." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 4.25[4][b], at 364 (2019 ed.). Without this prohibition, "collateral issues will overwhelm decisive issues, waste court time, and confuse decision makers . . . . [T]he bad effects of admitting such evidence would simply outweigh its probative value." *Id.* Spencer wanted to present evidence to prove the very kind of collateral issue the rule prohibits.

Spencer's problem begins with the very question he wanted to ask – whether Arnold ever failed a drug test.[4] No matter how that question is answered, it is not probative of Arnold's credibility for telling the truth. *See United States v. Sellers*, 906 F.2d 597, 602 (11th Cir. 1990) ("[P]rior instances of drug use are not relevant to truthfulness for purposes of Fed. R. Evid. 608(b)."); *United States v. Tanksley*, 35 F.3d 567, at *3 (6th Cir. 1994) (same). To demonstrate Arnold's deposition testimony was false would require additional questions; even more questions would be required to show Arnold knew his answer was false. The rule

[4] The circuit court expressly ruled, "You can't say, 'Hey, were you fired because you failed a drug test?'" (V.R. 2/20/18 4:20:30-4:20:34).

prohibits that. *Miller v. Commonwealth*, 585 S.W.3d 238, 243 (Ky. App. 2018) (KRE 608(b) "allows *inquiry* into a witness's specific instances of past conduct for purposes of impeachment, not *extrinsic evidence*.").

The "First Rule's" limitation on this kind of extrinsic evidence "is essential to the part of KRE 608(b) that removes from the general prohibition specific acts that can be proved through cross-examination (the 'second rule')." Lawson, § 4.25[4][b], at 365. Hence, under the "Second Rule," Spencer could make a limited inquiry of Arnold specifically regarding whether his deposition testimony was truthful; provided, of course, that in the circuit court's discretion, Spencer had a good faith, factual basis for doing so.

The circuit court appears to have accepted the drug test report as a factual basis for the inquiry, even though it was placed in Arnold's Central Transport personnel file two months after he left Central Transport's employ. We cannot say that was an abuse of discretion. However, that good faith, factual basis only allowed Spencer to make a limited inquiry of Arnold, phrasing the question similarly to the very example Professor Lawson gives: "KRE 608(b) permits a party to cross-examine witnesses about specific acts that are probative of character for truthfulness or untruthfulness (*i.e.*, to ask on cross if a witness . . . lied under oath in another proceeding)." Lawson, § 4.25[4][b], at 365. The permissible question is whether Arnold lied during his deposition. Spencer never sought to ask

that question. If we assume he had sought to ask that permissible question, the circuit court correctly noted that under KRE 608(b), no matter how Arnold answered, Spencer could have asked nothing further. *Sneed v. Burress*, 500 S.W.3d 791, 794 (Ky. 2016) ("'[T]he cross-examiner is bound by the witness's answer and is not authorized to contradict that answer by introduction of what the Rule calls "extrinsic evidence."'" (quoting Lawson § 4.25[4][c], at 319 (5th ed., 2013))). As the circuit court said when referencing KRE 608(b), "If he says, 'No,' you're stuck with that." (V.R. 2/20/18 4:08:58-4:09:03).

Spencer's specific proposed questions were appropriately disallowed by the circuit court's proper application of KRE 608(b). Discussion of Fifth Amendment rights outside the presence of the jury was superfluous, irrelevant, and harmless. Therefore, we decline to address whether it was proper for the circuit court to raise the issue. That takes us to Spencer's next argument – improper jury instruction.

Jury Instructions

Circuit courts must instruct the jury on every theory reasonably supported by the evidence. *McAlpin v. Davis Construction, Inc.*, 332 S.W.3d 741, 744 (Ky. App. 2011). An "erroneous instruction is presumed to be prejudicial." *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997) (citation omitted). The question here is: did the evidence support an instruction on Arnold's duty under a

federal regulation, or would an instruction based on that regulation have been erroneous? We conclude the evidence did not support the proposed instruction. Furthermore, we conclude on these facts that the parties' duties to one another were equal and reciprocal and giving an instruction imposing a higher duty on one driver would have been error.

Spencer argued the evidence reasonably supported a jury instruction that Arnold owed a higher duty to exercise extreme caution and should have reduced his speed. This duty, he says, derives from federal regulation of commercial vehicle drivers, incorporated by Kentucky law. Specifically, Spencer claims Arnold was required to "exercise extreme caution in the operation of a tractor trailer" under "hazardous conditions" including "mist, rain," and that such conditions required that Arnold's "speed shall be reduced when such conditions exist." (Appellant's brief, p. 6 (citing 49 C.F.R.[5] § 392.14 and 601 KAR[6] 1:005)). He claims failure to instruct the jury on the duty imposed upon Arnold by 49 C.F.R. § 392.14, part of the Federal Motor Carrier Safety Regulations, or FMCSR, was error. We disagree.

The regulation upon which Spencer based his claim to instruct the jury on Arnold's higher duty of care says:

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[5] Code of Federal Regulations.

[6] Kentucky Administrative Regulations.

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated. Whenever compliance with the foregoing provisions of this rule increases hazard to passengers, the commercial motor vehicle may be operated to the nearest point at which the safety of passengers is assured.

49 C.F.R. § 392.14.

Focusing on the pertinent parts of the regulation, it says: "Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by . . . mist, [or] rain . . . , adversely affect visibility or traction." *Id.* The rationale underlying this federal regulation is mirrored in Kentucky's own statute governing speed. KRS 189.390(2) says that, notwithstanding a posted speed limit, "[a]n operator of a vehicle upon a highway shall not drive at a greater speed than is reasonable and prudent, having regard for the traffic and for the condition and use of the highway." The obvious predicate when seeking to hold a driver to the duties under either of these laws is proof of driving conditions. At a minimum, Spencer needed to present evidence that visibility or traction was adversely affected by mist or rain when the accident occurred. Such evidence is lacking.

Spencer does not cite this Court to any part of the record that describes weather or road conditions at the time of the accident. However, we have examined the record in search of such support. Spencer himself testified that he believed Arnold could not see his own red light because "the sun was in his eyes . . . ." (V.R. 2/20/18 10:20:39-10:21:10). He shortly thereafter said it was a "stormy day, sun comes in and out." (V.R. 2/20/18 10:37:01-10:37:13). Arnold testified only that it was a "gloomy day." (V.R. 2/20/18 03:37:01-03:31:13). The photographs taken immediately after the accident show a damp roadway; however, there is no indication of standing water or puddles of any kind, no indication of rain on either Spencer's vehicle or Arnold's vehicle, no persons in the photos are using umbrellas or other protective weather gear such as raincoats or hats, and the wipers of passing vehicles are in the down position.[7]

In short, no evidence indicates any "hazardous conditions . . . adversely affect[ed] visibility or traction . . . ." 49 C.F.R. § 392.14. That alone justifies rejecting Spencer's proposed instruction.

Furthermore, Spencer labels this case a "he said/she said" case as to who ran a red light. The critical mutual duties here were to obey a traffic control device. The duties, each to the other, were equal and reciprocal. As said in *Railway Express Agency, Inc. v. Bowles*:

[7] Exhibits 3, 4, and 5, and Plaintiff's Exhibits G (series of 7 photos) and I (series of 3 photos).

> Where the circumstances of an automobile collision are such that the duties of the respective drivers are equal and reciprocal, it is prejudicial error to give instructions imposing upon the drivers unequal duties. Williams v. Coleman's Adm'x, 273 Ky. 122, 115 S.W.2d 584 [(1938)]; Dixie Ohio Express Co. v. Vickery, 306 Ky. 171, 206 S.W.2d 821 [(1947)]. The circumstances in the instant case are substantially the same as those in the two cited cases, wherein the judgments were reversed because the instructions did not place the same duties on both drivers.

325 S.W.2d 337, 338 (Ky. 1959).

Railway Express and the two cases it cites addressed accidents involving one car and one truck, and in *Dixie Ohio Express Co. v. Vickery*, the truck was identified as a tractor-trailer. Although these cases predate the federal regulation, we conclude the regulation would have made no difference. The opinions in these cases share a common theme expressed in the earliest of them – that a party is unjustifiably prejudiced by disparate instructions defining his duty both under the common law and again by a refined statutory definition of the care that should be taken to satisfy that duty. The Court in *Dixie Ohio* assessed this argument as follows:

> '[A]lthough the duties of the drivers of the truck and car when meeting and attempting to pass each other on this occasion were reciprocal and the same, the instructions as given did not impose the same duties on both or so admeasure them, but unequally imposed upon the truck driver the observance of two duties, imposed respectively both by the statutes and the common law, whereas only the one duty of [exercising ordinary] care was imposed upon Coleman, the driver of the car.

> 'Appellants contend, and we conceive properly, that by reason of such unwarranted difference and discrimination made in the two instructions, so specifically detailing and defining the duties of the defendants' driver while not so defining like duties as imposed upon Coleman, the defendants were prejudiced and therefore entitled to a reversal.'

Dixie Ohio, 206 S.W.2d at 823 (quoting *Williams*, 115 S.W.2d at 588).

We conclude that if the circuit court had granted Spencer's request for lop-sided duty instructions, it would have invited a strong argument for prejudicial error under *Railway Express*. Even without that argument, the instruction Spencer asked the circuit court to give was not supported by the evidence. The circuit court instructed the jury in accordance with Palmore's Jury Instructions. We hold there was no error in the jury instructions.

<u>Evidence of Requirements of CDL Manuals and the Like</u>

At the pretrial conference, Arnold moved to exclude reference to Central Transport's manuals and policies, arguing Arnold should be held to the same legal duty as all motorists. Arnold and Central Transport argued that the issue was which driver entered the intersection in violation of a traffic control device; *i.e.*, a lighted red traffic signal.

Not inconsistently with our discussion of the jury instruction, *supra*, the circuit court expressed a belief that reference to other standards alleged to be applicable to one driver but not applicable to both would confuse the jury and lead

them to believe failure to comply with a manual is failure to comply with legal duties. However, the circuit court did not grant Arnold and Central Transport's motion. The court's written order held the issue in abeyance "in anticipation of content and context necessary to issue a ruling being developed at trial." (R. at 342-43). Spencer never sought to introduce any evidence from the manual at trial.

The circuit court made a similar ruling, not expressly refusing evidence of the contents of the CDL manual and FMCSR, as the following exchange shows:

> Court: There's a way to do it that is perfectly acceptable if you can do it deftly. Essentially you are saying, and the way you do it is to tie it into one of those actual duties. But you cannot create a separate standard, you cannot create a separate set of duties, the jury is not going to be instructed about ---
>
> Counsel: Just for the record, we cannot reference the Kentucky CDL manual, is that accurate.
>
> Court: I don't know if you can or not, that's not what I am saying. What I'm saying is that anything that you talk about has to be a violation of the applicable law. And the CDL manual alone is not the applicable law. It can be done. It just has to be done in a way that's, um, not going to confuse the jury or run the risk of confusing the jury about what the actual standard is. So, I am not saying you can't talk about it. I'm saying, I don't know how to say it any differently, anything that you talk about in terms of the violation of the applicable standard of care is in

> the instruction. Those are the only duties that anybody has. . . .

(V.R. 2/20/18 9:24:24-9:25:50).

The circuit court expressed a similar determination referring to the FMCSR. Said the court, "If it doesn't translate into a direct violation of one of the actual duties that he has, it's not going to be admitted." (V.R. 2/20/18 9:19:56).

We can find no error here. After the circuit court declined to unequivocally grant Arnold and Central Transport's motion to exclude the evidence, Spencer never tested the extent to which evidence of the various standards expressed in the documents might be allowed.

To the extent Spencer argues Central Transport's manual, the CDL handbook, and FMCSR establish separate duties, we are unpersuaded. Industry standards or manuals can inform the standard of care that will satisfy a duty, but neither establishes the duty itself. *See Carman v. Dunaway Timber Co., Inc.*, 949 S.W.2d 569, 571 (Ky. 1997) (Appellee permitted "to introduce evidence of custom within the industry to prove this standard of care [and] Appellant was permitted to introduce the KOSHA regulation as evidence to the contrary. The jury instructions accurately framed the issue of whether [Appellee] had complied with its common law duty.); *Vick v. Methodist Evangelical Hosp., Inc.*, 408 S.W.2d 428, 429-30 (Ky. 1966) ("[E]ven though there was expert testimony that [defendants] acted in

accordance with good and accepted standards . . . the jury could reject this evidence and find negligence . . . .").

We hold there was no error in the circuit court's treatment of Spencer's efforts to introduce matters relating to Central Transport's manual, the CDL manual, or the FMCSR.

CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court's February 23, 2018 judgment upon a jury verdict dismissing the complaint.

ALL CONCUR.

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