

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002192-MR

LILLIAN CAROL SMITH

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT  
HONORABLE SAM H. MONARCH, JUDGE  
ACTION NO. 96-CI-00362

J. C. LEE & SONS, INC.; AND  
STATE FARM INSURANCE COMPANY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Lillian Carol Smith has appealed from a judgment entered by the Grayson Circuit Court on March 9, 2001, which awarded her nothing on her complaint against J. C. Lee & Sons, Inc. for injuries she allegedly sustained in an automobile collision between a vehicle in which she was a passenger and Lee's cow. Having concluded that the claims of error raised on

appeal either were not properly preserved for our review or that no reversible error occurred, we affirm.

On December 28, 1994, Smith, her husband, Roy, and their two daughters were traveling on Kentucky Highway 1214, a public highway in Grayson County, Kentucky. Roy owned and operated the automobile, Smith was a passenger in the front seat, and the couple's daughters were passengers in the backseat. While traveling at approximately 35 miles per hour, the automobile collided with a cow owned by Lee. Lee's property adjoined the highway at the point of collision and one of its cows had wandered from the property onto the highway. The cow apparently jumped a cattle guard, which is a vehicle crossing at an opening in the fence. Smith saw the cow on the highway just before the collision occurred; however, in an effort to ensure the safety of her children, she had turned to check on her children in the backseat when the collision occurred.

As a result of the collision, Smith alleged that she suffered, inter alia, injuries to her neck and spine. Dr. David Changaris testified that subsequent to the collision he "performed an anterior discectomy and fusion of [Smith's] spine and she [] had two postaccident cervical neurosurgical

procedures on her cervical spine." Smith claims medical expenses totaling more than \$91,000.00.<sup>1</sup>

A jury trial was conducted in the Grayson Circuit Court from February 12 through February 14, 2001. The jury was presented with an interrogatory in the instructions asking whether it found "from the evidence that the Defendant, J.C. Lee & Sons, Inc., failed to exercise ordinary care in evaluating, building and maintaining fencing and other structures as necessary to prevent the escapement of livestock owned by it; and further, that, that failure was a direct and substantial cause of the injuries for which the Plaintiff now complains?" The jury unanimously answered this interrogatory in the negative, resulting in no recovery for Smith. Smith then moved the trial court for a judgment notwithstanding the verdict, a new trial, and/or to alter, amend or vacate the judgment. The trial court denied Smith's motions in an order entered on September 10, 2001. This appeal followed.

Smith claims the trial court erred (1) by not striking the jury panel; (2) by limiting the scope of the testimony of one of her expert witnesses; (3) by allowing one of Lee's expert witnesses to testify; (4) by denying her a directed verdict on the issue of liability; (5) by improperly instructing the jury;

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<sup>1</sup> Smith was examined by various medical and psychological professionals.

and (6) by failing to grant a new trial due to the misconduct of the jury.<sup>2</sup>

Smith claims that "[t]he jury panel should have been stricken." Smith stated in her brief as follows:

The Court essentially commented during voir dire that one of the owners of J. C. Lee & Sons, Inc., a "Doc Lee" was a doctor in the community. That person probably known by all in Grayson County or he had delivered them as a baby. Thus, the Court recognized the imbalance and potential prejudice of the panel from the start. Since it was obvious then that all of the prospective jurors know of the Defendant's owners, Appellant could not have a fair and impartial panel, as same was stated by the trial court.

Smith has not identified where this comment appears on the videotape or where she objected during jury selection. This Court will not review an objection to the manner in which the jury was selected unless the alleged error was brought to the attention of the trial court;<sup>3</sup> or unless the alleged error constituted "palpable error."<sup>4</sup> This issue will not be addressed any further.

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<sup>2</sup> We have renumbered Smith's issues by combining two issues and by placing the issues in the sequence in which they would have occurred. We note that Smith's brief does not comply with the requirements of Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv) and (v), as well as CR 98(4)(a). In the statement of the case and argument portions of her brief, Smith has not included any references to the videotape record or the trial court's record. Furthermore, Smith does not inform this Court as to how the issues she raises on appeal were preserved for our review.

<sup>3</sup> Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 75 (2000)(citing Howard v. Commonwealth, Ky.App., 608 S.W.2d 62, 63 (1980)).

<sup>4</sup> CR 61.02.

Smith claims the trial court erred by limiting the scope of the testimony from her expert witness, Dr. Martine RoBards. Smith argues that Dr. RoBards "was more than qualified to testify in the areas that the trial court ruled she could not testify." Smith maintains that "[a]s the Court conducted an in camera evaluation of Dr. RoBards, none of her testimony should have been excluded from being presented to the jury at the trial." Lee correctly points out that Smith did not preserve this assignment of error "because she failed to formally object on the record to the exclusion of the evidence and because she failed to submit the excluded evidence by avowal." The failure to object to the exclusion of the testimony is fatal.<sup>5</sup> Furthermore, to be preserved for review a "reviewing court must have the words of the witness."<sup>6</sup> This issue will not be addressed any further.

Smith also claims the trial court erred by allowing Lee's expert witness, Dr. Robert Granacher, to testify. Smith claims that Dr. Granacher's testimony should have been excluded because he "merely recited the findings of a staff psychologist." Smith alleges that Dr. Granacher, a psychiatrist, is unauthorized to administer psychological

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<sup>5</sup> Freepartner v. Rutledge, Ky., 405 S.W.2d 290, 291 (1966).

<sup>6</sup> Partin v. Commonwealth, Ky., 918 S.W.2d 219, 223 (1996).

testing and interpret such results and that under 201 KAR<sup>7</sup> 26:115 § 3 his attempt to form conclusions based on those tests was "illegal."<sup>8</sup> Smith argues that since Dr. Granacher lacks either a psychology degree or graduate level training in required psychologically-related courses, the trial court should have either disallowed his testimony or restricted it further. Furthermore, Smith argues that the trial court erred in permitting Dr. Granacher to testify because, contrary to KRE 702, he is not qualified to testify as an expert by knowledge, skill, experience, training, or education. Lee contends that that Dr. Granacher did not interpret any psychological tests and that Smith failed to preserve this alleged error.

Smith also claims that Dr. Granacher's testimony should have been stricken by the trial court because the documents supporting his testimony, which were subpoenaed, were never produced. Once again, Lee claims that Smith failed to preserve this alleged error. We agree with Lee that neither issue related to Dr. Granacher's testimony was properly

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<sup>7</sup> Kentucky Administrative Regulations.

<sup>8</sup> 201 KAR 26:115 § 3 provides that "[s]ervices which are described as 'psychological testing' may only be administered and interpreted by persons credentialed by [the Board of Examiners of Psychologists] or who meet the formal academic training and experience qualifications described above and who are otherwise exempt by statute."

preserved for appellate review.<sup>9</sup> These issues will not be addressed any further.

Smith also contends that the trial court erred by denying her motion for a directed verdict<sup>10</sup> as to liability at both the conclusion of her case and at the conclusion of Lee's case. Smith argues that testimony by Lee and the introduction of certain photographs showing that it had installed a double-fence and replaced the cattle guard with an electric gate after the accident "constituted an admission against interest."

KRE 407 provides as follows:

When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence in connection with the event. This rule does not require the exclusion of evidence of subsequent measures in products liability cases or when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The trial court properly denied the motions for a directed verdict.

Smith further alleges that the trial court erred by improperly instructing the jury on the issue of liability.

Smith proposed the following instruction:

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<sup>9</sup> Gabow, supra.

<sup>10</sup> CR 50.01.

The Defendant, J. C. Lee and Sons, Inc., had the duty to prevent the cattle in its custody from escaping from confinement and wandering upon the highways. If you are satisfied from the evidence that the cow mentioned in this case was not confined by the Defendant, you will find for the Plaintiff, Lillian Carol Smith.

However, the trial court instructed the jury as follows:

It was the duty of J. C. Lee & Sons, Inc., to exercise ordinary care in evaluating, building and maintaining the fencing and other structures as necessary to prevent the escapement of livestock owned by it onto public highways. Therefore, you will find for the Plaintiff, unless you find from the evidence that the Defendant did, in fact, exercise ordinary care in evaluating, building and maintaining fencing and other structures as necessary to prevent the escapement of livestock owned by it.

Smith premised her proposed jury instruction upon KRS<sup>11</sup> 259.210, which provides, in applicable part, as follows:

- (1) No person shall permit any cattle owned by him or under his control or in his custody, to run at large.
- (2) If any damage is committed by cattle permitted to run at large, the owner of the cattle shall be liable for all damages, whether the place where the damages occurred is inclosed by lawful fence or not. The person damaged shall have a lien on the cattle committing the damage for the amount of the damage and cost of suit.

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<sup>11</sup> Kentucky Revised Statutes.

"The fact that an animal is at large is prima facie evidence that it is at large contrary to the terms of [KRS 259.210(1) and (2).]"<sup>12</sup> "[T]he unexplained presence of livestock on the highway creates against the owner or custodian of the livestock a rebuttable presumption of negligence which will entitle an injured plaintiff to a directed verdict as to the defendant's negligence, unless the animal's keeper adduces rebutting evidence on that issue."<sup>13</sup>

Smith argues that KRS 259.210 should be interpreted so that "the owner of the cattle shall be liable for all damages [emphases original]." Smith's argument would require that a negligence per se standard be imposed upon Lee. However, our precedent construing KRS 259.210 has determined that negligence per se was not the intention of the statute.<sup>14</sup>

The applicable standard in the case sub judice is a rebuttable presumption of negligence. Regarding KRS 259.210, "courts have generally held, or recognized, that statutes of this type are not violated in the absence of at least negligence

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<sup>12</sup> Ellington v. Strader, Ky., 285 S.W.2d 497, 498 (1955) (citing Wigginton & Sweeney v. Bruce's Guardian, 174 Ky. 691, 192 S.W. 850, 852 (1917)).

<sup>13</sup> Rankin v. Blue Grass Boys Ranch, Inc., Ky., 469 S.W.2d 767, 769 (1971).

<sup>14</sup> Rankin, supra; Oliver Trucking Co. v. Harris, Ky., 441 S.W.2d 775 (1969); Sparks v. Doe, Ky., 379 S.W.2d 252 (1964); Ellington, supra; Wigginton, supra.

by the owners of the animals."<sup>15</sup> The former Court of Appeals has reasoned that

[a]fter the plaintiffs established that the accident happened and offered proof that the defendant owned the guilty cow, it seems to us that it would not be unreasonable to require the owner of the cow, who had peculiar means of access to the facts as to how the cow got out, to make those facts known to the court. Such procedure is much more logical and sensible than to require the plaintiffs to offer proof as to how the cow escaped.<sup>16</sup>

Since Smith established a prima facie case of negligence on Lee's part, Lee was required to offer evidence that it was not negligent.<sup>17</sup> However, Smith's proposed jury instructions were tantamount to negligence per se. As previously mentioned, Kentucky courts have not construed KRS 259.210 to encompass a negligence per se standard.

The burden was upon Lee to rebut Smith's prima facie negligence claim. At trial, Howard Lee, Lee's president, testified that a cattle guard was installed at one portion of his fence around the pasture; that, to his knowledge, there were no holes in the fence at the time the accident occurred; that there was not a gate over the cattle guard at the date the

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<sup>15</sup> M. O. Regensteiner, Annotation, Owner's liability, under legislation forbidding domestic animals to run at large on highways, as dependent on negligence, 34 A.L.R.2d 1285, 1289 (1954); see also Wigginton, 192 S.W. at 850.

<sup>16</sup> Ellington, 285 S.W.2d at 498.

<sup>17</sup> Id. at 498; Sparks, 379 S.W.2d at 254.

accident occurred, but that the cattle guard was in place in lieu of a gate; that Lee's fence was mostly comprised of three strands of barbed wire; and the fence was made of both steel and wooden posts; and that some cows can jump a fence as high as the lectern that Howard Lee made reference to in the courtroom. Harlan Jewell, Jr., one of Lee's employees, testified at trial that, after determining the cow was unharmed, he checked the fences which ran along side Highway 1214 and found that "everything seemed to be all right." Jewell further testified that he had never known of any cattle to get across the fence's cattle guard.

There was evidence on Lee's behalf that both the fence and cattle guard were adequate and in good working order on the date the accident occurred.<sup>18</sup> As such, the question became whether there was "enough evidence of the exercise of ordinary care by [Lee], in rebuttal of the presumption of negligence arising from the presence of [its] cow in the road, so that it could no longer be said that there was but one conclusion to be drawn by reasonable men[.]"<sup>19</sup> Although Lee did not demonstrate how the cow escaped from the enclosed fence, it did argue that the cow jumped across the cattle guard. As reasoned by the

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<sup>18</sup> Sparks, 379 S.W.2d at 255. Smith does not allege that Lee's fence was damaged or in a state of disrepair on the date of the accident.

<sup>19</sup> Id. at 255.

former Court of Appeals, Ellington "did not imply that the [cow's] owner must always be convicted of negligence unless he succeeds in showing just how the escape occurred."<sup>20</sup>

The trial court properly submitted the issue of Lee's negligence to the jury.<sup>21</sup> Similarly, the trial court submitted the proper negligence instruction to the jury as it was within the jury's province to determine if Lee exercised ordinary care in maintaining its fence. Smith's proposed instruction was not used since it would have applied the negligence per se standard against Lee.

Smith also claims the jury failed to follow both the law as presented in the jury instructions and the trial court's directions concerning the jury's reading of the instructions, choosing a jury foreman, and discussing the case. Smith stated in her brief as follows:

As the Court is aware, the jury was out less than four (4) minutes when the deputy sheriff was notified that a verdict was had. Based upon an interview with a juror, the jury did not follow the Court's instructions. Said juror said that there was no review nor reading of the instructions but immediately went to a vote, and without any discussion. Also, a foreman was only elected after the verdict vote was completed.

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<sup>20</sup> Sparks, 379 S.W.2d at 255.

<sup>21</sup> Rankin, 469 S.W.2d at 767; Sparks, supra; Ellington, 285 S.W.2d at 497; Wigginton, 192 S.W. at 850.

This assertion that the jury failed to follow the trial court's instructions is not supported by the record. In order to preserve allegations of jury misconduct, they must be submitted to the trial court in support of a motion for a new trial.

For the foregoing reasons, the judgment of the Grayson Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT ONLY.

BRIEF AND ORAL ARGUMENT FOR  
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