

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000971-MR

LYNDALL C. BONNER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 99-CI-01232

STEVIE BROWN; EXPEDITED
DELIVERY SERVICE, INC.; and
RUSH TRUCKING COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

BAKER, JUDGE: Lyndall C. Bonner brings this appeal from a
February 20, 2002, judgment of the McCracken Circuit Court. We
affirm.

This case stems from a motor vehicle accident
occurring on Interstate 24 in McCracken County, Kentucky.
Appellant claimed that appellee, Stevie Brown's, negligence
caused the accident and instituted an action in McCracken
Circuit Court to recover damages.

After a five-day trial, the jury returned a verdict in favor of appellees. Appellant moved for a new trial, which was denied by the court, thus precipitating this appeal.

Appellant contends that the trial court erred by improperly instructing the jury. Specifically, appellant complains of Jury Instruction three and Jury Instruction five, which read as follows:

INSTRUCTION NO III

It was the duty of the defendant, Stevie Brown, in driving his vehicle to exercise ordinary care for his own safety, and this general duty included the following specific duties:

- (a) To keep a lookout ahead for other persons and vehicles in front of him or so near his intended line of travel as to be in danger of a collision;
- (b) To have his vehicle under reasonable control;
- (c) To drive at a speed no greater than was reasonable and prudent, having regard for the traffic and for the condition and use of the street;
- (d) To exercise ordinary care generally to avoid collision with other persons or vehicles using the street.

If you are satisfied from the evidence that defendant, Stevie Brown, failed to comply with one or more of his duties as set forth in this instruction and that such failure was a substantial factor in causing

the accident, you will find for the plaintiff, Lyndal [sic] Bonner. Otherwise, you will find for the defendant, Stevie Brown.

Do you find for the defendant, Stevie Brown?

INSTRUCTION NO V
COMPARATIVE FAULT

If you are satisfied from the evidence that one or both of the Defendants failed to comply with their respective duties as set forth in Instruction No. 3 and Instruction No. 4, and that such failure was a substantial factor in causing the accident, you will determine from the evidence and indicate in the following blank spaces what percentage of the total fault was attributable to each of them, as follows:

. . . .

In determining the percentages of fault you shall consider both the nature of the conduct of each of the Defendants and the extent of the causal relation between the conduct and the damages claimed.

As to Jury Instruction Three, appellant submits that the instruction failed to properly address the duty owed by appellee, Stevie Brown, to third parties and that the instruction gave a prominence to a "finding for Stevie Brown." As to Jury Instruction Five, appellant contends that the court failed to ask the jury to make a determination of fault as required by Kentucky Revised Statute (KRS) 411.182(2).

We initially observe that appellant's brief does not comport with Kentucky Rule of Civil Procedure (CR)

76.12(4)(c)(v); hence, we must presume that the jury instructions were unpreserved. Upon review of the record, we are of the opinion that the jury instructions did not constitute substantial error under CR 61.02. We, thus, reject appellant's contention that the jury instructions constituted reversible error.

Appellant next contends that the trial court erred by failing to give a "curative instruction concerning Stevie Brown's testimony that he never had a wreck." Appellant argues that this testimony was highly prejudicial. We disagree. Even if the trial court should have given a "curative instruction," we believe such omission constituted harmless error. We are unable to fathom how the result of the trial would have differed absent the admission of this evidence or if a curative instruction had been given. Thus, we deem the error harmless. Kentucky Rule of Evidence (KRE) 103. CR 61.01.

Appellant also argues that the trial court abused its discretion by "failing to read portions of depositions to the jury when the jury requested the depositions during deliberation." It is well-established that the trial court has wide discretion in determining whether to permit the rereading or replaying of certain testimony given at trial. See On the whole, we simply see no abuse of that discretion in this case.

Appellant further maintains that the trial court committed reversible error by failing to exclude the testimony of Mahlon Sparks that he "thought old man was guilty." Appellant contends that Sparks was referring to the other alleged tortfeasor, Ellis Hudson, and that this was improper as "the cause of the wreck was an issue for the jury to decide." Again, we believe any admission of this evidence to constitute harmless error as appellant has made no showing that the jury verdict would have differed absent its admission. KRE 103. CR 61.01.

Additionally, appellant asserts that the trial court erred by allowing appellees' expert to opine that "this accident occurred differently than defendant testified." As grounds thereof, appellant alleges that the expert's testimony should have been excluded because it "ignored the testimony of Stevie Brown and therefore, the expert's opinions are not applied readily to all the facts." We reject such a contention and hold that the testimony was properly admitted under KRE 702 because the expert's testimony assisted the trier of fact in understanding a disputed issue of fact.

Appellant further maintains that the trial court erred by allowing appellees to use deposition testimony. The testimony appellant complains of is as follows:

Q. Does looking at whatever marked as Exhibit 5 for identification refresh your recollection as to Ellis Hudson is?

A. Yes.

Q. Okay. And who was he, or your understanding of who he was? (*emphasis added*)

A. My understanding, that he was the gentleman that the truck driver to pull out - pull over on me. (Bonner depo, p. 143, line 11-19).

It appears that appellant, in her trial testimony, disavowed any knowledge of Ellis Hudson. Consequently, appellees utilized appellant's testimony by deposition for purposes of impeachment. We believe such testimony was properly admitted as a prior inconsistent statement of a party. KRE 801(A). CR 43.07. Here, we are of the opinion that appellant's depositions testimony was properly admitted to impeach her inconsistent testimony at trial.

Appellant, at last, asserts that the evidence was insufficient to sustain the jury verdict. We disagree. There was sufficient evidence to sustain the jury verdict. In this case, the testimony of appellees' expert and the testimony of appellee, Stevie Brown, were sufficient to sustain the verdict. We, thus, view this contention without merit.

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

EMBERTON, CHIEF JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN PART, CONCURS IN RESULT ONLY IN PART, AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART, AND CONCURRING IN RESULT ONLY IN PART: I concur with the Majority Opinion on all issues except the issue of jury instructions. The appellees contend that jury instruction No. 3 "clearly defined Defendant Steve Brown's duties in accordance with Kentucky law[,]" and that it was a "standard [instruction from] Palmore's Kentucky Instructions to Juries." The Majority Opinion bases its affirmance of the trial court's judgment on its presumption that the jury instruction issue is unpreserved for appellate review because of the appellant's failure to comply with CR 76.12(4)(c)(v) and its conclusion that "the jury instructions did not constitute substantial error under CR 61.02." From my review of the record, I agree that the error in jury instruction No. 3 was not preserved. As to the question of whether the giving of jury instruction No. 3 rises to substantial error under CR 61.02,¹ I first state that not only was the instruction

¹ "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

not consistent with the instruction provided in Kentucky Instructions to Juries,² the instruction is also clearly contrary to established case law.³ Thus, the instruction did constitute palpable error—it is obvious that a driver owes a duty to the “other driver” not just to himself. However, under the mandatory preservation requirements of CR 51(3), I am of the opinion that even if this obvious error affected the appellant’s substantial rights, she is not entitled to relief because a manifest injustice did not result from the error. The jury instruction preservation cases make it clear that a party cannot have “two bites at the apple”—i.e., a party cannot sit back and allow the jury to be instructed erroneously in the hope of prevailing with the jury, and should he fail with the jury, then raise the unpreserved issue on appeal in an attempt to have a second bite with the jury. “One who participates in or invites an error may not complain. The maxim *omnis consensus tollit errorem* applies.”⁴

² Palmore Sec. 16.16 provides in relevant part: “It was the duty of D [driver of the passing car] in driving his automobile to exercise ordinary care for his own safety and for the safety of other persons using the highway, and this general duty included the following specific duties: . . .” [emphasis added].

³ See Burns v. Level, Ky., 957 S.W.2d 218 (1997); Wemyss v. Coleman, Ky., 729 S.W.2d 174 (1987); House v. Kellerman, Ky., 519 S.W.2d 380 (1974); and City of Louisville v. Maresz, Ky. App., 835 S.W.2d 889 (1992).

⁴ Burton v. Spurlock’s Adm’r, 294 Ky. 336, 342, 171 S.W.2d 1012, 1051 (1943). See also Sparks v. Doss, Ky., 253 S.W.2d 245 (1952).

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