

CASE NO. 21-CI-415

JEFFERSON CIRCUIT COURT
JUDGE ERIC J. HANER
DIVISION ONE (1)

THOMAS BIRCHFIELD

PLAINTIFF

v.

OPINION & ORDER

JOHN HUBER

DEFENDANT

This matter is before the Court on Plaintiff Thomas Birchfield's motion for a new trial (CR 59.01) and/or motion to alter, amend or vacate the judgment entered on June 27, 2023 (CR 59.05). The motion has been fully briefed, and both parties agreed to submit the motion to the Court for a decision without oral argument. An AOC-280 was filed on August 1, 2023, and the motion is now ripe for a decision.

On June 20, 2023, the Court commenced a jury trial in this case which involved a pedestrian versus motor vehicle collision which occurred on or about September 19, 2023, at the intersection of Bardstown Road and Wrocklage Avenue in Louisville, Kentucky. At the conclusion of the proof, the Court instructed the jury on the law of the case and sent the jury out for deliberations. The jury returned a verdict for the Defendant by Interrogatory under the Court's Instruction No. 1, which is the basis for Plaintiff's motion. That Instruction was as follows:

INSTRUCTION NO. 1

You will find for the Plaintiff, Thomas Birchfield, under this Instruction if you are satisfied from the evidence that at the time he left the sidewalk and entered the crosswalk the crossing signal was in his favor, and that the Defendant, John Huber, had not already entered the intersection in his automobile while the traffic light was in his favor; otherwise you will find for the Defendant.¹

¹ Instruction No. 1 was taken from the pattern instructions set forth in *Palmore & Cetrulo, Kentucky Instructions to Juries*, Vol. 2, 6th Ed., Rel. 12/2018, 16.01.

The Court then followed the Instruction with an Interrogatory:

Do you find for the Plaintiff under this Instruction?²

YES _____ NO _____

The answer from the jury was “NO” and the verdict was signed by ten (10) of the twelve jurors. The Court subsequently entered a Final Judgment in favor of the Defendant and dismissed the action.

Plaintiff's contention is that Instruction No. 1 was “confusing, misleading and a misstatement of the law.” *Mot.* ¶ 5. Plaintiff supports his contention by stating that the Court's instruction was taken from a pattern jury instruction which is based on law which pre-dated the comparative fault decision in *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984). Specifically, Plaintiff directs the Court to the commentary of the pattern instruction that references cases which were decided prior to the *Hilen* decision. Plaintiff's central argument is that the Court's instruction embodied elements of contributory negligence, which is contrary to current law.

Defendant disputes Plaintiff's contention and argues that Instruction No. 1 comports with current law and the jury made a proper decision because the evidence at trial warranted the jury's verdict.

CR 59.01 allows a Court to grant a new trial for several enumerated reasons. Errors in jury instructions is one of those reasons. If the court “finds that the challenged jury instruction did misstate the law, a presumption of prejudice arises and the challenging party is entitled to a new trial unless the responding party is able to show affirmatively that the error did not affect the verdict.” *Norton Healthcare, Inc. v. Disselkamp*, 600 S.W.3d 696, 724 (Ky. 2020). “In contrast, if the [court] finds that the jury instructions did not misstate the law, no presumption of prejudice arises and the complaining party is only entitled to a new trial if she is able affirmatively to show prejudice, meaning that the error affected the verdict.” *Id.*; See also *Osborne v. Keeney*, 399 S.W.3d 1, 13 (Ky. 2012).

To assess the arguments herein and the standard the Court must employ, the Court will briefly revisit some of the testimony at trial.³

² The Court included an Interrogatory, although the pattern instruction did not.

³ The Court is not making any findings of fact or conclusions as it relates to the testimony being referenced herein; instead, the Court is demonstrating for purposes of this order some of the testimony the jury did hear, some of which was conflicting, from the witnesses about what the Plaintiff was doing, and what the Defendant was doing leading up to and at the time of the actual collision.

- Plaintiff testified that cars had stopped on Bardstown Road and that he “had the signal.” The collision occurred in the middle lane, almost half of the way across the intersection. On cross-examination, Plaintiff testified that the crossing signal was in the process of changing when he stepped out and that it was possible that it had not turned white when he first went off the sidewalk. He further testified that he was paying attention and noticed cars stopping because the traffic light had turned red.
- Defendant testified that it was a “long” intersection and he had the green light but then it went from yellow to red while he was in the intersection, and he could not stop. He testified that he did nothing wrong and could not just stop in the middle of the intersection despite it turning red. He also testified that he did not see Plaintiff until right at the time of impact.
- A witness at the scene, Brandon Castillo, testified that he had the green light when he saw the Defendant “barreling” though the intersection and hit the Plaintiff. When he started to pull out into the intersection, all other cars on Bardstown Road were at a stop and it was only the Defendant coming through the intersection. He also saw the Plaintiff flip on the hood of the Defendant’s vehicle at impact. He believed the Defendant was traveling over 35 m.p.h.
- Another witness at the scene, Edward Sanders, testified that he had the green light, that the other traffic on Bardstown Road had stopped, and so the Defendant must have had the red light. He further testified that the Plaintiff had crossed three (3) lanes of traffic before he was hit by the Defendant.

Both parties tendered proposed jury instructions which did not include the pattern instruction; however, the Court chose to give the pattern instruction since the case involved a pedestrian and a motor vehicle in an intersection that was governed by traffic lights and pedestrian crosswalk signals. The Court determined this instruction to be a correct statement of the law of the case based upon a review of KRS 189.338⁴ which sets forth the right of way duties of a pedestrian and a motor vehicle in this type of intersection. While the Court believes Instruction No. 1 is a correct statement of the law under the statute, the Court also believes that after reconsidering the evidence at trial, other duties were in play, and the jury should have been able to consider those duties under a comparative fault analysis.

These other duties relate specifically to the Defendant, and would include a duty to keep his vehicle under reasonable control, to keep a lookout, and to exercise ordinary care generally to avoid

⁴ Plaintiff objected to the Court’s use of this statute as a basis for Instruction No. 1 arguing that a “criminal” statute should not be the basis for a legal duty instruction to a jury in a civil case; however, while not dispositive to the current motion, the Court disagrees. First, the statute’s title references the “rules” for vehicular and pedestrian traffic. Second, traffic statutes are commonly used in instructions in motor vehicle accident cases. *See* illustrative instructions in *Palmore & Cetrulo, Kentucky Instructions to Juries*, Vol. 2, Chapter 16, Automobiles; *See also Wemyss v. Coleman*, 729 S.W.2d 174, 180 (Ky. 1987) (“The ‘general duty,’ breach of which gives rise to liability, is the duty to exercise ordinary care, and properly drafted instructions utilize ‘specific duties’ *as imposed by statutes* as an amplification of the ‘general duty.’ Where there is a statutory duty, the usual instruction, after explaining the general duty, will then specify that such general duty ‘includes’ certain enumerated specific duties.”) (*emphasis added*).

collision with other vehicles, including pedestrians, using the roadway.⁵ The Court should have instructed the jury on these duties because there was evidence in the record to support such an instruction.⁶ The source of this evidence was Defendant's own testimony that the light had changed to red while he was still in the intersection, that he chose not to stop and continued to proceed, and that he did not perceive the Plaintiff until the time of impact even though the collision occurred in the middle of the roadway. There was also testimony from the witnesses at the scene that implicated speed as a factor. All this testimony was relevant to whether Defendant complied with those other legal duties, not just his dependent duty to yield as set forth in KRS 189.338 and the Court's pattern Instruction No. 1.

So, while the Court's Instruction No. 1 was not technically a misstatement of the law, the Court finds that by being incomplete, the failure to fully instruct the jury on the entire law of the case is the equivalent of a misstatement of the law by omission. Instruction No. 1 prevented the jury from considering all of the evidence at trial and confined the jury to only one inquiry. This error unquestionably affected the verdict in this case since the jury was only able to deliberate on a limited duty to yield, and not the other legal duties in play given the evidence presented at trial. In doing so, Instruction No. 1 resulted in an all or nothing situation for the Plaintiff and left the jury without the ability to consider the other evidence leading up to the collision.⁷

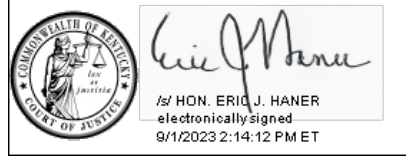
In conclusion, the Court believes the jury should have been instructed on all the legal duties applicable to the parties in this instance based on the evidence at trial. Next the jury should have been allowed to proceed to weigh each of those duties in light of the evidence at trial and make a decision on liability based on a comparative fault analysis. The Court's instructions did not allow any of that to occur and handicapped the jury from being able to adequately deliberate on all the evidence they heard from the witnesses and exhibits, since they only were allowed to render a verdict on the dependent duties to yield as set forth in the statute, which was, in retrospect, a clear error on the part of the Court which consequently deprived Plaintiff of a fair trial.

⁵ The Court notes that these specific duties were included in the Defendant's proposed jury instructions filed with the Court on February 14, 2023.

⁶ See *McAlpin v. Davis Const., Inc.*, 332 S.W.3d 741, 744 (Ky. App. 2011) (“[t]he rule is well settled that “[e]ach party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it.”) (citing to *Farrington Motors, Inc. v. Fidelity & Cas. Co. of N.Y.*, 303 S.W.2d 319, 321 (Ky. 1957)).

⁷ The Court also acknowledges that the use of an Interrogatory and the end of Instruction No. 1 also likely had the net result of a “contributory negligence” bar to Plaintiff's recovery; however, the prejudicial error in the Court's instructions is as stated herein.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiff's motion for a new trial is hereby **GRANTED**, and Judgment on the jury verdict entered on June 27, 2023, is hereby vacated, and held for naught.



ERIC J. HANER
JEFFERSON CIRCUIT COURT

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