

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

GERARD P. MENGWASSER,

Appellant,

v.

ANTHONY KEMPKER TRUCKING, INC.,

Respondent.

DOCKET NUMBER WD70835

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: March 23, 2010

APPEAL FROM

The Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge

JUDGES

Division Three: Welsh, P.J., and Pfeiffer and Mitchell, JJ.

CONCURRING.

ATTORNEYS

Randy W. James
Lee's Summit, MO

Attorney for Appellant,

Russell F. Watters, Chad M. deRoode, and Patrick A. Bousquet
St. Louis, MO

Attorneys for Respondent.



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

GERARD P. MENGWASSER,)
)
) **Appellant,**)
)
)
) **v.**)
)
)
) **ANTHONY KEMPKER TRUCKING,**)
) **INC.,**)
)
) **Respondent.**)

**ORDER FILED:
March 23, 2010**

WD70835

Cole County

Before Division Three Judges: James Edward Welsh, Presiding Judge, and
Mark D. Pfeiffer and Karen King Mitchell, Judges

This is a negligence case in which the jury returned a verdict for the defendant. The plaintiff appeals, arguing that the trial court abused its discretion in admitting certain evidence, refusing to admit certain other evidence, and in failing to give a jury instruction proposed by the plaintiff.

AFFIRMED.

DIVISION THREE HOLDS:

Appellant Gerald P. Mengwasser was a passenger in a pick-up truck that collided with a dump truck which was operated by Dennis Braun and owned by Respondent Anthony Kempker Trucking, Inc. ("Kempker"). The driver of Mr. Mengwasser's vehicle was his wife, Sandra Mengwasser. At the time of the accident, Mrs. Mengwasser and Mr. Braun were driving on a two-lane highway. Both vehicles were traveling in the same direction, with Mr. Braun in the lead and several vehicles between his dump truck and Mrs. Mengwasser's pick-up. Seeing a line

of slow-moving or stopped vehicles in front of her, Mrs. Mengwasser pulled into the left (oncoming traffic) lane and attempted to simultaneously pass at least three, and as many as seven, vehicles, one of which was an eighteen-wheeler. The Mengwassers' vehicle struck the driver's side of the Kempker truck as the truck turned left.

Prior to trial, Mr. Mengwasser settled any claims that he had against Mrs. Mengwasser. Kempker filed an amended answer, asserting a setoff for the amount received by Mr. Mengwasser in settlement proceeds, \$50,000. As it had done in its initial answer, Kempker pled that Mr. Braun did not act negligently and that he did not proximately cause Mr. Mengwasser's injuries. In addition, Kempker pled the affirmative defense of comparative fault. Mr. Mengwasser filed a motion *in limine* to exclude all evidence and argument tending to show that Mrs. Mengwasser was at fault in causing the accident. The trial court ultimately overruled the motion.

Near the close of trial, Mr. Mengwasser moved to admit evidence of the settlement agreement between Mr. Mengwasser and Mrs. Mengwasser and to instruct the jury that "[i]n determining the amount of plaintiff's damages, you are not to consider any evidence of prior payments to plaintiff. The judge will consider any such payment and make an adjustment if required by law." The court noted that the instruction, Missouri Approved Instruction ("MAI") 34.05, should be given "[i]f the case is submitted under comparative fault" and that Kempker had not yet submitted a comparative fault instruction. At this time, Kempker formally withdrew its affirmative defense of comparative fault. The trial court then overruled Mr. Mengwasser's motion.

During closing argument, counsel for Kempker stated that the accident occurred "[b]ecause somebody was in a hurry to get to the destination, made a bad mistake, and now does not want to take responsibility for that mistake." Counsel for Mr. Mengwasser then renewed Mr. Mengwasser's motion for the MAI 34.05 instruction and asked that counsel be permitted to mention the settlement in her closing argument. The trial court overruled the motion.

The jury returned a defense verdict. Judgment was entered, noting that the jury had found Kempker to be 0% at fault. This appeal follows.

Mr. Mengwasser argues that the trial court abused its discretion in permitting Kempker to argue that Mrs. Mengwasser was negligent and that her actions proximately caused the accident. We deny this point, holding that evidence showing that Mrs. Mengwasser's negligence was the sole cause of the accident was relevant in that it tended to disprove necessary elements of Mr. Mengwasser's claim, namely that Mr. Braun was negligent and that his conduct proximately caused Mr. Mengwasser's injuries. We also reject Mr. Mengwasser's argument that Kempker failed to prove that Mrs. Mengwasser's conduct was an intervening, superseding cause of the accident; Mr. Mengwasser mischaracterizes Kempker's argument. Kempker argues and presented evidence that Mrs. Mengwasser's conduct was the sole cause of the accident.

Mr. Mengwasser argues further that the trial court abused its discretion in refusing to admit evidence of Mrs. Mengwasser's settlement and in failing to instruct the jury that it should

disregard prior payments in determining the amount of Mr. Mengwasser's damages. We deny these points, holding that the trial court did not abuse its discretion.

Opinion by Karen King Mitchell, Judge

March 23, 2010

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THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.