

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**:
JOHN ROUSE**

APPELLANT,

**v.
KEITH CUVELIER, ET AL.**

RESPONDENTS.

DOCKET NUMBER WD73653

DATE: March 20, 2012

Appeal From:

Mercer County Circuit Court
The Honorable Daren L. Adkins, Judge

Appellate Judges:

Division Two: Gary D. Witt, Presiding Judge, Joseph M. Ellis, Judge and Mark D. Pfeiffer,
Judge

Attorneys:

Gary M. Steinman and Andrew F. VanNess, Gladstone, MO, for appellant.

Matthew M. Krohn, Trenton, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Before Division Two: Gary D. Witt, Presiding Judge, Joseph M. Ellis, Judge and Mark D. Pfeiffer, Judge

John Rouse filed suit against Keith Cuvelier and Super Gro of Iowa, Inc. based on a vehicular collision. At trial, the jury found Rouse 100% at fault and a verdict was entered in favor of Cuvelier.

On August 16, 2007, Cuvelier was traveling northbound in his F-350 Ford pickup truck on Highway 65. At that time, Cuvelier was on his way home, hauling a load of organic fertilizer on a fourteen foot trailer for a company, Super Gro that he owns. At approximately 4:00 pm, Cuvelier came upon Rouse, who was also traveling northbound in a John Deere tractor equipped with a front end loader with a two-prong hay fork attached to the front. The speed limit of the highway at this juncture was sixty miles per hour, and Rouse was traveling significantly slower than the posted speed limit. Two other cars were between Rouse and Cuvelier.

After following Rouse's tractor for approximately one mile, the vehicles entered a portion of the highway where passing was allowed. Cuvelier activated his left turn signal and pulled out into the northbound lane of traffic to pass the other three slow moving vehicles in front of him. Cuvelier passed the first two vehicles, and as he passed Rouse's tractor, Rouse initiated a left turn.

Rouse did not see Cuvelier approaching. Cuvelier realized that Rouse was turning left toward him and Cuvelier attempted to avoid the accident by swerving to the left. The hay fork on Rouse's tractor struck the passenger side mirror of Cuvelier's truck and scraped down the side of the truck. Subsequently, Cuvelier's trailer came into contact with Rouse's front tractor tire, causing the tractor to turn over onto its side.

Because of this accident, Rouse suffered injuries to his "neck, back, shoulder and arms." Specifically, Rouse tore a muscle in his shoulder, experienced numbness in his foot, and still has pain and/or "trouble" with his knee, hip, and arms. At the conclusion of trial, the jury found Rouse 100% at fault and a verdict was entered in favor of Cuvelier. Rouse now appeals.

AFFIRMED

Division Two holds:

Rouse brings six Points on appeal, some of which this Court addresses out of turn for ease of analysis. In Point One, Rouse argues that the trial court erred in submitting a comparative fault instruction because there was not substantial evidence supporting submission of Rouse's comparative fault based on Rouse's alleged failure to keep a careful lookout. Rouse has failed to demonstrate that the trial court erred in submitting the comparative fault instruction because there was substantial evidence to support the submission. The party seeking a 'failure to keep a lookout' instruction has the burden of showing that the other party could have reacted in time to avoid the accident had he or she been keeping a careful lookout. Rouse argues that Cuvelier did not meet this burden, but when reviewing the record in the light most favorable to submission of the instruction, we disagree.

Here the parties were traveling northbound on U.S. Highway 65. At that time, Rouse was driving between twenty to twenty-five miles per hour in a sixty mile per hour zone. Rouse was aware that there was at least one vehicle behind him. Prior to turning, Rouse slowed down his tractor "to about 7 to 5 miles an hour." Despite the fact that he was traveling at such a slow speed on a highway, there was sufficient evidence from which the jury could conclude that Rouse did not use the "means" available to him to avoid "the danger" of colliding with Cuvelier's passing car. Specifically, while Rouse claimed at trial that he looked into his rear-view mirror prior to turning, Rouse was impeached with his deposition testimony that he "never checked [his] rearview mirror" prior to turning. Rouse also testified at trial that he did not "turn around to [his] left and look" because "[h]ell, no, I've got a mirror." Based on these facts, there was evidence from which the jury could have reasonably apportioned some fault to Rouse, in that Rouse could "have seen the danger" of Cuvelier's oncoming pick-up by simply looking over his left shoulder to check behind him prior to or during his turn, thereby allowing Rouse to avoid the collision altogether by refraining from turning while Cuvelier passed in his vehicle in the other lane of traffic. Point One is denied.

In Point Five, Rouse brings an almost identical argument as raised in Point One arguing that the trial court erred because "there was not substantial evidence submitted at trial which supported respondents' comparative fault jury instruction submitted to the jury in that respondents failed to present substantial evidence that appellant failed to keep a careful lookout." For the reasons articulated in Point One, we also reject this claim on appeal.

In Point Six, Rouse argues that the "trial court erred in denying appellant's motion for judgment notwithstanding the verdict, or alternatively, motion for new trial because the verdict for respondents was against the weight of the evidence in that there was substantial evidence presented that respondent Cuvelier failed to keep a careful lookout and was the sole cause of the automobile collision at issue." Here, there can be no doubt that Rouse, as plaintiff, bore the burden of proof at trial. Accordingly, the jury was entitled to disbelieve Rouse's evidence that Cuvelier's negligence caused the collision in question. Therefore, Rouse was not entitled to a directed verdict, JNOV, or motion for new trial. For all of these reasons, Point Six is denied.

In Point Two, Rouse argues that the trial court erred "in allowing [Cuvelier's] counsel to repeatedly argue to the jury and infer that [Rouse] had a legal duty to pull off on to the right

shoulder of the highway and allow trailing traffic to pass when no such legal duty or obligation exists,” and Rouse further argues that he was prejudiced because these arguments “lead [sic] the jury to believe that [Rouse’s] failure to pull over and allow trailing traffic to pass caused the accident at issue as reflected in the jury’s assessment of 100% fault to [Rouse] in its verdict.” On appeal, Rouse highlights nine specific times when Cuvelier injected this type of allegedly improper evidence into the trial. However, of the nine occasions that Rouse cites alleging that Cuvelier engaged in “improper cross-examination,” the record shows that Rouse failed to object the vast majority of the time. It was only after much of this questioning had already occurred that Rouse first raised an objection, and by this time the evidence, even if improper, was of a cumulative nature. Cumulative evidence is additional evidence that reiterates the same point. A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence. Even if the trial court had sustained the objections to the later offered evidence the first time an objection was raised, that same evidence was already before the jury on multiple occasions without objection. Point denied.

In Point Three, Rouse complains of four specific instances wherein “[Cuvelier’s] improper cross-examination of [Rouse] inferred that [Rouse] solely caused the accident because [Rouse] did not have permission, or that he was breaking the law, by turning into the Missouri Department of Transportation’s drive.” However a review of the record shows that Rouse never made this objection before the trial court. To preserve evidentiary questions for appeal, there must be an objection giving the grounds at the time the evidence is sought to be introduced, and the same objection must be set out in the motion for new trial then carried forward in the appeal brief. Because Rouse failed to raise this insufficiency or competency argument with the trial court, it is not preserved. In this case, although we have discretion to review the claim for plain error, we will not because Rouse failed to [specifically] object to the evidence. For all of these reasons, Point Three is denied.

In Point Four, Rouse argues that the trial court erred “in allowing information contained in medical records not admitted into evidence be presented to the jury over objection because the hearsay contained in the medical records regarding prior injuries were prejudicial to appellant in that this evidence inferred . . . Appellant was somehow prone to automobile accidents.” In this Point, Rouse raises seven distinct arguments as to why the “trial court erred by allowing Respondent’s expert to read from medical records not admitted into evidence and to testify to hearsay contained in medical records not admitted into evidence.” Simply put, Rouse has failed to demonstrate that any prejudice occurred to him based on any of these arguments that entitles him to relief on appeal. In his brief, the only argument Rouse makes as it pertains to prejudice from the admission of this complained of evidence was that “Appellant was prejudiced in that Appellant’s medical records reflecting prior injuries were presented to the Jury with no basis that these prior injuries were the same as those Appellant claims in this cause. As a result, Appellant was prejudiced and did not receive a fair trial.” Rouse ignores the fact that evidence pertaining to Rouse’s prior injuries is admissible on the issue of damages to the extent that they impact his claim of pain and suffering from the same parts of his body in the instant lawsuit. Furthermore, this evidence pertained to the extent of Rouse’s *damages*, not to what caused the underlying accident itself. But here, where the jury found Rouse 100% at fault for the accident and found that no alleged negligence on the part of Cuvelier caused the accident, the jury did not even have to reach the issue of damages and, therefore, any error in this regard was at best harmless. When

the evidence relates to damages, the error, if any will be considered harmless if the jury rules against the appellant on the issue of liability. Because the jury found against Rouse on the issue of liability, he cannot demonstrate any prejudice as it pertains to this evidence regarding Rouse's damages. For all of the aforementioned reasons, Point Four is denied.

The judgment of the circuit court is hereby affirmed.

Opinion by Gary D. Witt, Judge

March 20, 2012

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