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Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-000152-MR

DONALD HOLBROOK and DIANE HOLBROOK — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
CIVIL ACTION NO. 93-CI-000225

E. I. DuPONT de NEMOURS AND COMPANY and COYNE TEXTILE SERVICES — APPELLEES

AND: NO. 1996-CA-000243-MR

COYNE TEXTILE SERVICES — CROSS-APPELLANT

v.

CROSS-APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
CIVIL ACTION NO. 93-CI-000225

DONALD HOLBROOK and DIANE HOLBROOK — CROSS-APPELLEES

AND: NO. 1996-CA-000244-MR

E. I. DuPONT de NEMOURS AND COMPANY — CROSS-APPELLANT

v.

CROSS-APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
CIVIL ACTION NO. 93-CI-000225

DONALD HOLBROOK and DIANE HOLBROOK — CROSS-APPELLEES

OPINION AND ORDER

1) ORDER GRANTING APPELLANTS' MOTION TO AMEND BRIEF
2) AFFIRMING NO. 96-CA-0152-MR
3) DISMISSING CROSS-APPEAL NO. 96-CA-0243-MR
4) DISMISSING CROSS-APPEAL NO. 96-CA-0244-MR

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Donald and Diane Holbrook (collectively Holbrook) appeal from a trial judgment and verdict entered by the Boyd Circuit Court on November 20, 1995, which dismissed their claims against appellees, E. I. DuPont de Nemours and Company (DuPont) and Coyne Textile Services (Coyne). We affirm on appeal and dismiss both cross-appeals.

DuPont manufactures a flame-resistant fiber called Nomex III which is used in protective clothing to minimize burns in the event of a flash fire or electric arc-over. DuPont does not manufacture uniforms made out of Nomex III, but instead sells Nomex III fibers to fabric mills to be made into fabric which is then sold to garment manufacturers. Coyne purchases uniforms from garment manufacturers, leases them to industrial customers, and then launders them as part of its commercial laundering operation.

Coyne supplied work uniforms to Donald Holbrook's employer, Ashland Oil, Inc. (Ashland). In 1990 Ashland contacted Coyne regarding the possibility of leasing uniforms made from Nomex III. Meetings were held between DuPont, Coyne, and Ashland where the properties of Nomex III uniforms were discussed.

Ashland was told that static resistant garments made with No-Mo-Stat fibers were available, but Ashland decided to go with the Nomex III uniforms. Ashland and Coyne entered into a contract whereby Coyne would provide Nomex III uniforms to Ashland and pick up soiled uniforms for laundering. The Nomex III uniforms were provided to Ashland beginning in 1991.

Shortly after the switch to Nomex III uniforms, Ashland employees began to complain to both their supervisors and a Coyne deliveryman about problems with static. Ashland contacted Coyne about the problems and provided its employees with cans of anti-static spray. In response to Ashland's complaints, Coyne added an anti-static rinse to the laundering cycle. When the complaints persisted, Coyne switched to a different anti-static rinse on the advice of a DuPont representative. According to all Ashland employees, except for Donald, the problems with static stopped after they were given anti-static spray and Coyne added the anti-static rinse. Coyne representatives testified that they received no further complaints once the anti-static rinse was added to the laundering process.

On August 9, 1992, Donald, who was a light oil pumper, was in the process of filling a railroad tanker car with flammable toluene liquid when the toluene vapors ignited and exploded. Donald sustained burns on his face and arms as a result of the explosion and a shoulder injury as a result of falling off the railroad car. At the time of the accident Donald was wearing a Nomex III uniform supplied by Coyne. Ashland paid Donald's medical expenses and also paid temporary total

disability benefits to Donald until he returned to work approximately two months later.

Ashland's investigation of the accident showed that the explosion occurred when Donald was lowering a bronze sample catcher into the car while splash loading it. Splash loading occurs when the loading nozzle is not placed at the floor of the car being loaded, thus allowing the liquid to free-fall into the tank. Evidence produced at trial showed that the splash loading combined with the tendency of toluene to hold a charge could have generated an electrostatic charge in the vapors.

Testimony at trial also established that Donald's taking of a sample while the car was being loaded violated Ashland's safety procedures. It was also shown that Donald further violated safety procedures in that at the time of the accident Donald's sleeves were unbuttoned and rolled up. The part of Donald's body which was covered by the Nomex III uniform was not burned, and Donald credited the uniform with saving his life.

Holbrook filed suit against DuPont and Coyne on March 11, 1993. As to DuPont, Holbrook alleged that the uniforms made with the Nomex III fibers were "defective due to their unreasonably dangerous propensity to accumulate electrostatic energy and emit that energy in the form of a spark," and that DuPont failed to warn about the danger of using Nomex III around volatile materials. As to Coyne, Holbrook alleged that it was negligent in failing to properly apply anti-static rinse or failing to use it at all. Holbrook also alleged that Coyne

failed to warn about the dangerous propensity of the Nomex III uniforms.

None of the parties on appeal raised any claims against Ashland until after April 21, 1993, when Ashland intervened as a plaintiff to protect its subrogation rights as to workers' compensation payments made to Holbrook as a result of the accident. Coyne counterclaimed against Ashland for contribution and/or indemnity, arguing that Ashland was responsible for Donald's injuries because it breached its duty to provide a safe workplace and equipment. Ashland's intervening complaint against Coyne and Coyne's counterclaim were dismissed under the terms of an agreed order entered June 27, 1994. Ashland's intervening complaint against DuPont was dismissed under the terms of a stipulation and agreed order entered April 27, 1995.

At trial, the jury was instructed to apportion fault for the accident between Donald, Ashland, Coyne, and DuPont. The jury found that neither Coyne nor DuPont breached any respective duties owed to Donald and that Donald and Ashland were responsible for the accident. Apportionment was listed by the jury as 49% to Donald and 51% to Ashland. In accordance with the jury's verdict, Holbrook's claims against DuPont and Coyne were dismissed under the terms of a trial verdict and judgment entered by the trial court on November 20, 1995. This appeal followed.

I. SHOULD HOLBROOK'S APPEAL BE DISMISSED DUE TO FAILURE TO COMPLY WITH CR 76.12(4)(c)(iv)?

Holbrook's appellate brief failed to comply with CR 76.12(4)(c)(iv) because the argument sections failed to provide "at the beginning of the argument a statement with reference to

the record showing whether the issue was properly preserved for review and, if so, in what manner." DuPont and Coyne pointed out Holbrook's non-compliance in their briefs and DuPont asked that we not consider Holbrook's arguments due to the non-compliance. In response to appellees' non-compliance arguments, Holbrook filed a motion to amend brief with this Court on March 7, 1997, which contained the omitted material. Holbrook's motion was passed to the merits of the case by order of a three-judge motion panel entered April 4, 1997. Holbrook also included the omitted material in his reply and response brief to DuPont's combined brief.

Failure to comply with CR 76.12(4)(c)(iv) is not to be treated lightly as the effect of non-compliance results in a waste of this Court's time in having to plow through the record to determine if arguments on appeal have been preserved for appellate review. Elwell v. Stone, Ky. App., 799 S.W.2d 46, 47 (1990). In cases where an appellant fails to remedy the non-compliance after it has been brought to his attention, dismissal is proper. Surber v. Wallace, Ky. App., 831 S.W.2d 918, 920 (1992). However, where an appellant corrects a procedural deficiency related to CR 76.12(4)(c)(iv) in a reply brief it is proper for this Court to address the merits of the case. Hollingsworth v. Hollingsworth, Ky. App., 798 S.W.2d 145, 147 (1990). Although we do not condone Holbrook's disregard for CR 76.12 in his appellate brief, the matter was corrected in the reply brief. Holbrook's motion to amend is therefore granted, and we will proceed to consider the merits.

II. DID THE TRIAL COURT ERR IN ALLOWING THE JURY TO CONSIDER THE FAULT OF ASHLAND EVEN THOUGH IT WAS NO LONGER A PARTY TO THE CASE?

Holbrook argues that the trial court erred in instructing the jury on the duties owed by Ashland to Holbrook and in allowing the jury to apportion fault to Ashland in the event that it found Ashland breached its duties to Holbrook. Holbrook maintains that this was an unpermissible expansion of Dix & Associates Pipeline Contractors, Inc. v. Key, Ky., 799 S.W.2d 24 (1990), because Ashland was a non-settling non-party to the action. We disagree.

In Dix, the Kentucky Supreme Court held:

> In this case, what otherwise would have been tort liability of Dix & Associates to the injured worker has been extinguished by reason of the workers [sic] compensation coverage. As a practical matter, workers compensation coverage constitutes a settlement between the employee and the employer whereby the employee settles his tort claim for the amount he will receive as compensation. For all practical purposes, in this case, Dix & Associates occupied the position of a tort-feasor which has settled the tort claim against it.

Dix, 799 S.W.2d at 29. (Emphasis added). Under the reasoning in Dix, Ashland is properly treated as a settling tortfeasor by virtue of the fact that it operated under Kentucky's Workers' Compensation Act. Dix recognizes that whether benefits are ultimately paid under the Workers' Compensation Act makes no difference in whether an employer is treated as a settling tortfeasor because the employer's tort liability is "automatically extinguished" by virtue of the Workers' Compensation Act itself and not by any payments made thereunder.

The Court in Dix further held:

> In Kentucky, when an injured employee proceeds for workers' compensation against his employer and separately, in a tort action, against a negligent third party, if the employer is made a third-party defendant in the tort action, the jury should be instructed to determine the total damage sustained by the employee and to apportion liability between the employer and the third party according to the respective fault of each. The judgment against the negligent third party should be for only that percentage of the total damage which has been apportioned to him, and he will not have any claim for contribution against the employer. The employer shall then be entitled to recoup from the proceeds of the worker's settlement or judgment a percentage of the amount paid or payable as compensation benefits equal to the percentage of fault apportioned to the negligent third party.

Dix has been interpreted to mean that "[a]pportionment applies to defendants, third-party defendants, and tortfeasors who have settled with the defendant." Kevin Tucker & Associates, Inc. v. Scott & Ritter, Inc., Ky. App., 842 S.W.2d 873, 874 (1992). We have no difficulty finding that Ashland is properly characterized as a settling tortfeasor in this case under the rationale of Dix.

We also reject Holbrook's contention that Ashland is a nonparty. The record clearly demonstrates and even Holbrook admits that at one time Ashland was a party to the action by virtue of its intervening complaint as well as Coyne's cross-complaint. This case is not like Baker v. Webb, Ky. App., 883 S.W.2d 898 (1994), and Bass v. Williams, Ky. App., 839 S.W.2d 559 (1992), where the tortfeasor was never a party to the action. As noted in Baker, the thrust of KRS 411.182, considered in its entirety, limits allocation of fault to those who actively assert

claims, offensively or defensively, as parties in the litigation or who have settled by release or agreement." Baker, 883 S.W.2d at 900. Ashland actively asserted a claim and was required to defend against Coyne's counterclaim. We have no problem in finding Ashland to be subject to the apportionment rule of KRS 411.182. Because Ashland was a settling tortfeasor and was not a mere nonparty, DuPont and Coyne were entitled to introduce evidence of Ashland's negligence in order to reduce any potential recovery against them by an amount equal to Ashland's negligence.

We do not believe Copass v. Monroe County Medical Foundation, Inc., Ky. App., 900 S.W.2d 617 (1995), requires us to reach the opposite conclusion on this issue. In Copass, the plaintiff filed his complaint in Jefferson County. Several of the defendant tortfeasors, who were residents of Monroe County, were dismissed due to improper venue. The plaintiff argued that "[s]ince liability is now to be apportioned according to the degree of fault involved,...fundamental fairness requires that all potential tortfeasors be tried in a single trial with a single jury." Copass, 900 S.W.2d at 619. This Court held that although KRS 411.182 precludes adjudication of liability of those who are not before the Court or have settled, there was nothing which would authorize "a court to exercise jurisdiction over persons who could not otherwise be summoned in that jurisdiction." Id. Under our reading of Copass, the trial court was concerned with the issue of propriety of venue only, and not with the issue of when the liability of a non-party or settling tortfeasor could be apportioned by the jury.

II. WAS THE JURY INSTRUCTION REGARDING ASHLAND'S DUTY TO PROVIDE A SAFE WORK PLACE PROPER?

As to Ashland's duty to provide a safe work place, the jury was instructed that "It was further the duty of Ashland Oil, Inc., to exercise ordinary care to furnish Donald Holbrook a reasonably safe place to work." Holbrook argues that this instruction was improper because it did not give the jury any guidance aside from telling it that Ashland had a duty to provide a safe work place.

The duty of an employer to an employee in regard to the work place is "to provide its employee with a place reasonably safe having regard for the character of work and reasonably safe tools and appliances for doing the work. The measure of duty is to exercise ordinary or reasonable care to do so." Happy-Scuddy Coal Co. v. Combs, Ky., 219 S.W.2d 968, 970 (1949).

Under Kentucky law, jury instructions "should not contain an abundance of detail, but should provide only the bare bones of the question for jury determination. The skeleton may then be fleshed out by counsel on closing argument." Rogers v. Kasdan, Ky., 612 S.W.2d 133, 136 (1981). Jury instructions are not to provide a laundry list of the way a defendant is required to behave in order to meet its duty of care. Rogers, 612 S.W.2d at 136. To the extent that Holbrook argues that the jury instructions are improper because they failed to specify exactly how Ashland should have acted, the argument is without merit.

Holbrook also contends that the trial court improperly held that violations of OSHA regulations were admissible.

Holbrook cites Stinnett v. Buchele, Ky. App., 598 S.W.2d 469 (1980), in support of its argument. We find Stinnett to be inapplicable to this case. While Stinnett held that violations of an OSHA regulation did not give rise to a tort action against an employer by an employee, it did not hold that violations of such standards are always inadmissible.

Although there is no Kentucky case law dealing directly with the admissibility of OSHA violations, the accepted rule appears to be that evidence of OSHA violations is admissible to show evidence relating to the standard of care in negligence actions. See Bailey v. V & O Press Co., Inc., 770 F.2d 601 (6th Cir. 1985) (holding that OSHA regulations are admissible in negligence action to show standard of care); Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231 (5th Cir. 1982) (violation of OSHA regulation properly admitted as evidence of negligence); Martin v. Mapco Ammonia Pipeline, Inc., 866 F.Supp. 1304 (D. Kan. 1998) (OSHA regulations admissible to show evidence relating to standard of care but not as conclusive proof of negligence or absence thereof); Hansen v. Abrasive Engineering & Manufacturing, Inc., 856 P.2d 625 (Ore. 1992) (holding that OSHA regulations are relevant to establish standard of care). Furthermore, the Kentucky Supreme Court has recently affirmed an opinion of this Court which held that OSHA standards are admissible as evidence of standard of care. See Griffin Industries, Inc. v. Jones, Ky., ___ S.W.2d ___ (1998). This holding is in conformity with earlier opinions which have held that violation of an employer's safety rules are admissible as evidence of the standard of care

owed to the employee. See Chesapeake and Ohio Railway Co. v. Biliter, Ky., 413 S.W.2d 894 (1967).

III. WAS IT IMPROPER FOR THE TRIAL COURT TO INSTRUCT THE JURY THAT ASHLAND HAD A DUTY TO PROVIDE A SAFE UNIFORM?

The jury was instructed as follows regarding Ashland's duty to provide a safe uniform:

> It was the duty of Ashland Oil, Inc. to supply its employees with uniforms that would not be unreasonably dangerous in their intended use by its employees, including Donald Holbrook, and even though the uniform being used by Donald Holbrook at the time of the subject incident may not have been defective in its design or manufacture, nor unreasonably dangerous for the use intended, if it was reasonably foreseeable that the uniform would be used or misused in a way such that the use or misuse would create an unreasonably risk of danger of Donald Holbrook, then Ashland Oil, Inc., had a duty to provide an adequate warning, advising Donald Holbrook of the dangerous consequences of such use or misuse of the product.

Holbrook maintains that in instructing the jury that Ashland had a duty to provide a safe uniform the trial court impermissibly gave a "products liability like" instruction. We disagree.

We agree with DuPont's assertion in its brief that "[t]he duty of Ashland to provide Holbrook with reasonably safe tools and equipment arises from the common law duty of ordinary care that an employer owes its employees to provide a safe place to work," and that this duty of care reasonably includes the duty to provide protective clothing to employees who work around flammable substances. While we agree with Holbrook that Ashland is entitled to rely on DuPont and/or Coyne to provide safe uniforms, Ashland still has a duty to make sure that appropriate

protective clothing is provided to its employees. If No-Mo-Stat uniforms would have provided more protection from static than uniforms made with Nomex III and Ashland was aware of that fact, then it would be permissible for the jury to find that Ashland breached its duty to provide a safe uniform.

IV. DID THE JURY INSTRUCTIONS RESULT IN AN INCONSISTENT VERDICT?

Holbrook maintains that the jury instructions resulted in an inconsistent verdict in that it found that DuPont and Coyne provided a safe uniform but Ashland breached its duty to provide a safe workplace. We disagree. There was plenty of evidence in the record to support a finding that Ashland breached its duty to provide a safe workplace in ways other than failing to provide a safe uniform.

V. DID THE TRIAL COURT ENGAGE IN IMPROPER EX-PARTE CONTACT?

Holbrook maintains that the trial court maintained improper ex-parte contact with counsel for Ashland by phone, by notes, and in person. However, Holbrook makes no showing as to how they were adversely affected by the ex-parte contact. In the absence of any explanation as to how the alleged ex-parte contact resulted in prejudice to their claim, we are unable to say that reversible error occurred.

Having considered the parties' arguments on appeal, the trial verdict and judgment entered by the Boyd Circuit Court is affirmed. Because of the affirmance of the trial court's judgment, the cross-appeals of DuPont and Coyne are dismissed as moot.

ENTERED: January 29, 1999

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ALL CONCUR.

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