

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001840-MR

RONALD B. POSTLEWAIT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 07-CI-005873

CYNTHIA CHILDRESS, EXECUTRIX OF  
THE ESTATE OF JOSEPH L. CHILDRESS, DECEASED;  
THE FRAMING CORPORATION, INC.;  
GREGORY CONSTRUCTION GROUP, INC.;  
MOTORISTS MUTUAL INSURANCE COMPANY

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: KRAMER, D. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Ronald D. Postlewait was injured in a motor vehicle collision on the Salt River Bridge connecting Jefferson and Hardin counties. Joseph Childress, the driver of the other vehicle, was killed. Postlewait sued Childress's

estate and his employer, The Framing Corporation (“TFC”), asserting claims of negligence and vicarious liability.<sup>1</sup> Prior to trial, TFC stipulated Childress’s actions arose in the course and scope of his employment and admitted vicarious liability would operate as a matter of law. Although not dismissed from the case, TFC was excused from participating at trial. At the conclusion of a four-day jury trial, the jury returned verdicts apportioning 30% fault to Postlewait and 70% to Childress and awarding Postlewait \$286,328.69 in damages before apportionment. Postlewait now appeals, alleging the trial court erred in its treatment of TFC for trial purposes and in failing to direct a verdict at varying stages of the trial. He also contends the jury’s verdict was defective and inconsistent. Following a careful review, we agree with Postlewait’s assertion regarding the trial court’s treatment of TFC. Therefore, we must reverse and remand this matter for a new trial.

The factual basis underlying this action is relatively simple and undisputed. In the early morning of October 16, 2005, Childress was driving TFC’s pickup truck northward across the Salt River Bridge when, for unknown reasons, he lost control of his vehicle and entered the southbound lanes of travel. At that moment, Postlewait was travelling southwardly and, to avoid an impending collision with Childress, applied the brakes of his vehicle. Despite Postlewait’s best efforts, his vehicle was struck head-on by Childress’s oncoming truck. A

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<sup>1</sup> Although numerous other parties were named in Postlewait’s complaint, none of the claims related to those parties are pertinent to the instant appeal nor warrant discussion.

second collision occurred when a third vehicle approached the accident site at speed and was unable to avoid colliding with Childress's now-disabled vehicle. Childress was ejected from his vehicle and was killed; it was not determined which collision caused his ejection. Postlewait sustained bodily injuries including fractures of his ankle, sternum, and ribs; internal and exterior bruising; and torn ligaments in his leg. His injuries left him permanently unable to continue working as a paramedic.

Postlewait filed suit against Childress's estate for negligence and against TFC for vicarious liability. TFC actively participated in pretrial activities and was represented by the same counsel as the estate. Following a lengthy period of discovery and motion practice, the matter was set down for a jury trial in March 2009. Most of the procedural and factual events of trial are not relevant to the issues raised in this appeal and require no discussion; in the interest of judicial economy, only those pertinent to this appeal will be mentioned.

Shortly before trial was to commence, TFC's motion to be excused from participating was granted, but its request that no mention of the claims against it be made in front of the jury was denied. TFC agreed Childress was its employee, was driving a company vehicle, and was acting within the course and scope of his employment when the collision occurred. At the beginning of *voir dire*, the trial court read a prepared statement to the venire consistent with TFC's previous agreement. TFC was never identified as a party to the jury in this litigation. References to its potential liability were disallowed based on the trial

court's determination TFC had admitted responsibility for any judgment that might ultimately be returned based on Childress's negligence, and the jury would not be required to make any factual determinations whatsoever regarding TFC. The trial court indicated it would not include reference to TFC in instructing the jury. In essence, although TFC remained a party to the action, the case was tried to the jury as *Postlewait v. Childress*, and nothing more was revealed.

During the trial, Postlewait moved for directed verdict following opening statements, at the close of the plaintiff's case in chief, and again at the close of all proof. All these motions were denied. After closing arguments, the case was given to the jury for deliberations.

The jury returned a verdict apportioning 70% fault to Childress and 30% to Postlewait. The total damages awarded was \$250,000. Upon inspection of the verdict forms, counsel and the trial court determined the jury had incorrectly reduced Postlwait's award for past and future medical expenses by his proportion of fault. Postlewait's oral motion for a mistrial based on his belief the jury had returned an improper quotient verdict was denied, but the trial court did inform the jury of its mathematical error and instructed them to return to the jury room to correct the mistake. The jury complied, ultimately returning a judgment totaling \$286,328.69. Postlewait's renewed oral motion for mistrial was denied.

Postlewait filed a written motion for mistrial asserting the same grounds as previously argued. This motion was denied the same day the trial court entered its final judgment comporting with the jury's verdict.

Postlewait subsequently moved for a new trial pursuant to CR<sup>2</sup> 59. He timely appealed to this Court, and the appeal was placed in abeyance awaiting the trial court's ruling on the CR 59 motion. Over three years later, and in response to the filing of a petition for writ of mandamus, the trial court entered an order denying the motion. The case was removed from abeyance and returned to this Court's active docket. However, the case was again abated for nearly two years awaiting correction, supplementation and re-certification of the record on appeal. A brisk motion practice occurred following return of the matter to the active docket. Nearly seven years after the appeal was taken, briefs were filed and the matter was finally submitted to this panel for decision.

Before addressing the merits of Postlewait's arguments, we must resolve a preliminary procedural issue. Childress has moved to strike Postlewait's brief or, alternatively, to review his allegations of error only for manifest injustice, based on noncompliance with CR 76.12(4)(c)(v) which requires an appellant to state at the beginning of each argument where in the record and how an error is preserved for review. Postlewait responded, alleging his brief substantially complied with the rule and requesting full review of the issues raised. "[A]n appellate court cannot consider items that were not first presented to the trial court." *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. 2012). Thus, CR 76.12(4)(c)(v) serves an important purpose. "It is not so much to ensure that opposing counsel can find the point at which the argument is preserved, it is so that

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<sup>2</sup> Kentucky Rules of Civil Procedure.

we, the reviewing Court, can be confident the issue was properly presented to the trial court . . . .” *Id.* This Court has held “substantial compliance” with this rule is mandatory. *Id.* See also *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990).

While Childress is correct—Postlewait’s brief does not technically comply with the rule—our review reveals the brief is in substantial compliance. We elect not to impose sanctions and proceed with our review; and we do so with confidence Postlewait’s counsel will more strictly comply with the mandates of CR 76.12 in future appeals.

Postlewait asserts three allegations of error in seeking reversal. First, he argues the trial court erred in failing to inform the jury TFC was a party defendant.<sup>3</sup> Second, he contends the trial court erred in denying his motions for a directed verdict. Finally, Postlewait challenges the jury’s verdict as defective and inconsistent. We agree with the first assertion; reversal and remand will therefore be required. Because it is unlikely the actions underlying the remaining allegations of error will be repeated on retrial, no discussion of them is warranted.

In his first challenge, Postlewait argues the trial court should have identified TFC to the jury as a party defendant. He contends the failure to do so acted to “perpetrate[] a charade and legal fiction upon the jury” which severely prejudiced the case and requires reversal. We agree.

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<sup>3</sup> Postlewait’s brief alludes to additional bases of alleged error, but those allegations are unsupported by either argument or citation to legal authority. We will not search the record to make an argument for a party or find support for its contention. *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) (citations omitted). Thus, no mention of these tangential arguments is warranted.

Under Kentucky law, an employer is jointly and severally liable for the negligence of any employee who is acting within the course and scope of employment at the time of the negligence. *Bowen v. Gradison Constr. Co.*, 224 Ky. 427, 6 S.W.2d 481, 482-83 (1928). Childress cites no authority to support precluding a jury from being made aware of both the identity and relationship between Childress and TFC, or that TFC was a named party who had not been dismissed from the action. In *Williamson v. Schneider*, 205 S.W.3d 224 (Ky. App. 2006), a panel of this Court held it was reversible error to preclude the jury from knowing the defendant-employer was a named party defendant in a negligence action. *Id.* at 229-30 (citing *Earle v. Cobb*, 156 S.W.3d 257, 260-61 (Ky. 2004)). “One cannot be a party for purposes of motion and discovery, and later strategically conceal its identity at trial.” *Id.* at 228-29 (citations omitted).

While we appreciate the trial court’s decision to exclude TFC based on its belief the jury would not be called upon to make any factual determinations regarding it, the

failure to name a contractually liable defendant at trial leaves the jury to speculate about the exact role of the [defendant] in the lawsuit, perpetuating the charades in trials. Precedent, parity, and fairness demand that this Court put an end to charades and legal fictions . . . [and] failure to identify to the jury a named party defendant at trial . . . is . . . reversible error.

*Id.* at 229 (internal quotation marks and citations omitted). Thus, because TFC should have been identified to the jury as a named party defendant, we are

constrained to reverse and remand this matter for a new trial. Based on this resolution, we need not address the remainder of Postlewait's allegations of error.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is REVERSED and the matter is REMANDED for further proceedings consistent with this Opinion.

ALL CONCUR.

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