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# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-001041-MR

RICHARD DAVID DOWNS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 06-CI-02341

CSX TRANSPORTATION, INC.;
GENERAL ELECTRIC COMPANY;
AND LG ELECTRONICS, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Richard David Downs brings this appeal from an April 30, 2010, judgment of the Jefferson Circuit Court upon a jury verdict dismissing his claims of negligence against CSX Transportation, Inc. (CSX) and General Electric Company (GE). We affirm.

Downs was employed as a railroad worker for over thirty years with Louisville & Nashville Railroad and then with CSX. On the night of July 4, 2005, Downs was working as a carman for CSX at General Electric Company's Appliance Park in Louisville, Kentucky. As part of his duties, Downs began opening doors on CSX railcars. The railcars were full of refrigerators manufactured by LG Electronics, Inc. (LG). The refrigerators were loaded by LG's employees onto CSX's railcars in Mexico per a contract between LG and GE. After loading the refrigerators, the railcar doors were sealed, and CSX ultimately transported the refrigerators to Appliance Park for unloading. Downs opened the first railcar door, and a 22 cubic foot refrigerator fell from an upper rack of the railcar landing directly upon Downs. He suffered various injuries.

On March 14, 2006, Downs filed a complaint against CSX and GE seeking damages for injuries he sustained as a result of the refrigerator falling upon him. Therein, Downs claimed that CSX negligently failed to provide a safe working environment in violation of the Federal Employers' Liability Act (FELA)[1] and that GE negligently failed to properly load the refrigerators, failed to utilize proper precautions for opening railcar doors, and failed to properly warn of falling objects from railcars.

Both CSX and GE filed answers, and CSX filed a third-party complaint against LG. Kentucky Rules of Civil Procedure (CR) 14.01. In the third-party complaint, CSX alleged that LG negligently loaded the refrigerators

[1] The Federal Employers' Liability Act (FELA) is codified in 45 U.S.C.A. §§ 51-60 (West 2013).

onto CSX railcars, thus causing Downs' injury. Specifically, CSX sought "apportionment, contribution, and/or indemnification" from LG.

After summary judgment motions were filed by both GE and LG, the circuit court rendered a partial summary judgment in favor of LG as to CSX's claims of apportionment and contribution and dismissed these claims.[2] Thus, the only surviving third-party claim by CSX against LG was for indemnity.

A jury trial ensued. Of import to this appeal are the instructions submitted to the jury by the circuit court. Downs objected to the jury instructions as to LG. He basically argued that the negligence and apportionment instructions as to LG were improper. The circuit court, nevertheless, submitted separate jury instructions upon LG, GE, CSX, and Downs' duties of care, and if such duties were breached, instructed the jury to apportion fault between LG, GE, CSX, and Downs.

The jury ultimately returned a verdict finding that CSX and GE breached no duty of care to Downs and, thus, were not negligent. However, the jury found that LG was negligent and that Downs was negligent. It apportioned 50 percent fault to LG and 50 percent fault to Downs. The jury also awarded a total of $500,000 in damages. As Downs asserted no direct claim against LG, Downs recovered nothing.[3] The circuit court rendered judgment in conformity with the jury verdict. Downs, thereupon, pursued an appeal of the judgment to this Court.

[2] The partial summary judgment dismissing CSX Transportation, Inc.'s (CSX) claims of apportionment and contribution against LG Electronics, Inc. (LG) was entered March 19, 2010.
[3] As previously noted, Richard David Downs did not assert a claim against LG. The only claims against LG were asserted by CSX.

Downs' sole contention is that the circuit court committed reversible error in the instructions submitted to the jury. In particular, Downs alleges that the circuit court erred by instructing the jury as to LG's standard of care and by instructing the jury it could apportion fault to LG. Downs points out that the only claim against LG was asserted by CSX and was for indemnity. Downs argues that apportionment of fault in an indemnity claim is erroneous as a matter of law. Downs also believes that FELA imposes a nondelegable duty on CSX to provide a safe work environment and does not authorize apportionment between railroad and nonrailroad causes. Downs maintains that the erroneous jury instructions confused and misled the jury.

We have thoroughly reviewed the record, the videotaped proceedings, and applicable law. For the reasons hereinafter stated, we conclude that the circuit court's jury instructions as to LG were erroneous but merely constituted harmless error. CR 61.01.

We begin by setting forth the relevant instructions submitted by the circuit court to the jury:

> INSTRUCTION NO. 4
>
> It was the continuing duty of CSX as an employer to exercise ordinary care to provide a reasonably safe workplace for its employees. This duty does not mean that CSX is a guarantor or insurer of the safety of the workplace. CSX's duty to provide a reasonably safe workplace may not be delegated to a third party, even when an employee's duties require the employee to enter property or use equipment owned or controlled by a third party.

Do you believe from the evidence that CSX failed to comply with its duty and that its failure was a cause, in whole or in part, of [Downs'] injuries?

INSTRUCTION NO. 5

It was the duty of Defendant, [GE], to exercise ordinary care for the safety of others.

Do you believe from the evidence that GE failed to comply with this duty and that its failure was a substantial factor in causing [Downs'] injuries?

INSTRUCTION NO. 6

It was the duty of Defendant, [LG], to exercise ordinary care for the safety of others.

Do you believe from the evidence that LG failed to comply with this duty and that its failure was a substantial factor in causing [Downs'] injuries?

INSTRUCTION NO. 7

It was [Downs'] duty in performing his job to exercise ordinary care for his own safety and protection.

Do you believe from the evidence that [Downs] failed to comply with his duty and that his failure was a substantial factor in causing his own injuries?

INSTRUCTION NO. 8

If you have answered "Yes" to one or more of the questions under Instruction Nos. 4, 5, 6 and/or 7, please determine from the evidence what percentage of the total fault of [Downs'] injures was attributable to each party and indicate your finding below. If you have answered "No" to any of the questions under Instruction Nos. 4, 5,

> 6 and/or 7, please enter "0" in the blank by the name of that party, if any.
>
> In determining the percentages of fault, please consider both the nature of the conduct of each of the parties at fault and the extent of the causal relation between the conduct and the damages claimed. The sum of the percentages of fault shall total 100 percent.
>
> | | | |
> |---|---|---|
> | CSX Transportation Inc. | _____ | percent |
> | General Electric Co. | _____ | percent |
> | LG Electronics, Inc. | _____ | percent |
> | [Downs] | _____ | percent |
> | TOTAL: | 100 | percent |

When submitting instructions to the jury, the circuit court must instruct upon all claims supported by the evidence adduced at trial, and such instruction must accurately set forth the law. *Hainline v. Hukill*, 383 S.W.2d 353 (Ky. 1964). Jury instructions should simply set forth the issues and correctly reflect the law. *CSX Transp., Inc. v. Moody*, 313 S.W.3d 72 (Ky. 2010); *Baker v. Sanders*, 347 S.W.2d 529 (Ky. 1961). When a jury instruction is challenged as inaccurately setting forth the law, our review proceeds *de novo*, as it does with all issues of law. *See Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272 (Ky. App. 2006). And, an erroneous jury instruction will only result in reversal when:

> An error in a court's instructions must appear to have been prejudicial to the appellant's substantial rights or to have affected the merits of the case or to have misled the jury or to have brought about an unjust verdict in order to constitute sufficient ground for reversal of the judgment.

*Miller v. Miller*, 296 S.W.2d 684, 687–88 (Ky.1956) (quoting *Maupin v. Baker*, 302 Ky. 411, 194 S.W.2d 991, 993 (1946)).

FELA was enacted to provide a nationally "uniform method of compensating injured railroad workers and their survivors." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 57-58 (Ky. 2010). Under FELA, an employer possesses the nondelegable duty to provide employees with a reasonably safe working environment. FELA imposes liability upon an employer for injuries sustained by an employee due in whole or in part to the negligence of its officers, agents, or employees or due to defects in its equipment. 32B Am. Jur. 2d *Federal Employers' Liability, Etc.* § 5 (1996). In particular, 45 U.S.C.A. § 51 (West 2013) provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Under 45 U.S.C.A. § 51 (West 2013) of FELA, the employer is entirely responsible in damages to an employee whose injury is caused in part5 or in whole

by its negligence. *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003). As an employer is liable for injury caused only in part by its negligence, FELA does not permit apportionment between an employer's negligence and other jointly liable tortfeasors. Stated differently, FELA strictly forbids apportionment between railroad causes and nonrailroad causes. *Ayers*, 538 U.S. 135.

Under FELA, "an employee who suffers 'injury' caused 'in whole or in part' by a railroad's [employer] negligence may recover his or her full damages from the railroad, regardless of whether the injury was also caused 'in part' by the actions of a third party." *Ayers*, 538 U.S. at 165-66 (citation omitted). So, FELA permits an employee to recover his entire damages from the employer if the employer's negligence caused at least some of his injury.[4] *Ayers*, 538 U.S. 135; 30 C.J.S. *Employers' Liability* § 425 (2012). Consequently, apportionment is plainly prohibited under FELA. *Ayers*, 538 U.S. 135. Hence, the jury may not be instructed to apportion liability or fault between railroad and nonrailroad causes in a FELA action.

FELA, however, does permit the employer to bring an action for indemnity against a third-party tortfeasor pursuant to applicable state law. *Ayers*, 538 U.S. 135.[5] Under such an indemnity claim, the employer may seek recoupment from a

[4] FELA does allow apportionment or allocation of fault between the employer and the employee.

[5] FELA provisions govern an employer's right to apportionment; however, state law governs the employer's right to indemnity, if any. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003); *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52 (Ky. 2010).

third-party tortfeasor who contributed to an employee's injuries. As indemnity is a state law issue under FELA, we must turn to Kentucky jurisprudence.

In this Commonwealth, a claim for indemnity "is available to one exposed to liability because of the wrongful act of another with whom he/she is not in *pari delicto*." *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 780 (Ky. 2000). Generally, indemnity falls into two classes:

> (1) Where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury."

*Id.* at 780 (quoting *Louisville Ry. Co. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S.W.2d 36, 39 (1934)). Indemnity has been more eruditely explained as being applicable:

> Where one of two parties does an act or creates a hazard and the other, while not concurrently joining in the act, is, nevertheless, thereby exposed to liability to the person injured, or was only technically or constructively at fault, as from the failure to perform some legal duty of inspection and remedying the hazard, the party who was the active wrongdoer or primarily negligent can be compelled to make good to the other any loss he sustained.
>
> . . . .
>
> The primary, efficient and direct cause of the accident was the positive antecedent negligence of the fuel company's employee in failing to replace the manhole lid securely. This exposed the hotel company to liability.

> Its fault was a negative tort in failing to check upon the act of the coal delivery man and in failing to observe its affirmative duty to the public to see that the way was free of obstruction or the pitfall. Both were in fault but not the same fault toward the party injured. The employees of the two companies were not acting jointly or concurrently or contributorily in committing the tort. They were not *in pari delicto*.
>
> . . . .
>
> Under the statute there may be contribution among parties *in pari delicto*. Under the common law rule there may be complete indemnity where one party's liability is secondary because it arose from the negligence of the other party and would not have arisen but for it. This right is not derived from the statute but stands entirely on principles of equity.

*Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165, 167-68 (1949). When joint tortfeasors are *in pari delicto*, they "are guilty of concurrent negligence of substantially the same character which converges to cause the plaintiff's damages." *Degener*, 27 S.W.3d at 778. Whereas, indemnity "is available to one exposed to liability because of the wrongful act of another within whom he/she is not *in pari delicto*." *Id.* at 780.

With the advent of comparative negligence under Kentucky Revised Statutes (KRS) 411.182, there was disagreement upon whether a claim for indemnity survived or whether the jury would simply apportion or allocate fault among all joint tortfeasors. Our Supreme Court answered this legal quandary and held that apportionment or allocation of fault per comparative negligence principles as codified in KRS 411.182 "has no application to the common law right of a

constructively or secondarily liable party to total indemnity from the liable party with whom he/she is not *in pari delicto*." *Degener*, 27 S.W.3d at 780. The Court explained that apportionment or allocation of fault mandated under KRS 411.182 is only applicable to tortfeasors *in pari delicto*, and in a claim for indemnity, the tortfeasors do not act *in pari delicto*.

It is clear that apportionment of fault under KRS 411.182 is inapplicable in an indemnity claim. *Degener*, 27 S.W.3d 775. And, "[r]elative fault in the context of indemnity will almost always be an issue of law for the Court, because the question of whether joint tortfeasors are *in pari delicto* will depend upon their relative positions at law."[6] 2 Palmore, *Kentucky Instructions to Juries* § 46.05 Comment (5th ed. 2012).

In this case, the sole viable claim against LG was asserted by CSX and was for indemnity.[7] The circuit court submitted jury instructions upon whether LG breached its duty of care, thus causing Downs' injury, and if so, the jury was instructed to apportion fault to LG. These jury instructions were erroneous under

[6] As noted in 2 Palmore, *Kentucky Instructions to Juries* § 46.05 (5th ed. 2012), there are rare circumstances where an issue of fact may be presented in an indemnity claim. It gives the following instruction as an example of such rare circumstance:

> 1. You will find for P [hotel] against D [fuel company] if you are satisfied from the evidence that P's employees did not actually discover that the manhole in question had been left uncovered in sufficient time to prevent the injury to X. Otherwise, you will for for D.

2 Palmore, *Kentucky Instructions to Juries* § 46.05 (5th ed. 2012).

[7] CSX originally sought indemnity, contribution, and apportionment in its third-party complaint against LG Electronics, Inc. However, by partial summary judgment entered March 19, 2010, the circuit court dismissed CSX's contribution and apportionment claims.

FELA and inaccurately set forth Kentucky law as to indemnity. Under FELA, the jury should never be instructed to apportion fault between railroad and nonrailroad causes, as was done in this case.[8] And, because CSX only asserted an indemnity claim against LG, Kentucky law is clear that the jury does not apportion fault between CSX and LG under KRS 411.182. Therefore, we conclude that the circuit court erroneously instructed the jury as to LG.

Although these jury instructions were erroneous, the jury ultimately found that neither GE nor CSX breached any duties of care to Downs. It is axiomatic that a finding of fault necessarily precedes apportionment of fault; consequently, a jury's finding that a defendant did not breach the standard of care naturally eliminates the question of apportionment of fault, as there is no fault to apportion. Since the jury found that neither GE nor CSX breached their respective duties of care, the error in the jury instructions apportioning fault to LG was effectively cured by the jury's ultimate verdict. *See People's Bank of N. Ky., Inc. v. Crowe Horwath*, 390 S.W.3d 830 (Ky. App. 2012). Accordingly, we are constrained to conclude that the erroneous jury instructions as to LG did not prejudice Downs' substantial rights, thus resulting in mere harmless error. *See* CR 61.01; *Miller*, 296 S.W.2d 684.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

[8] It may have been appropriate for the jury to apportion fault directly to LG, if LG had previously been an agent of CSX for purposes of FELA. Also, the jury may, of course, apportion fault to the claimant under FELA.

ALL CONCUR.

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