

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000071-MR

ROBERT LEE DURBIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BRIAN C. EDWARDS, JUDGE  
ACTION NO. 08-CI-002632

CSX TRANSPORTATION, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MAZE, STUMBO AND THOMPSON, JUDGES.

MAZE, JUDGE: Robert Lee Durbin appeals from a judgment of the Jefferson Circuit Court dismissing his claims under the Federal Employers' Liability Act against CSX Transportation, Inc. (CSX) following an adverse jury verdict. Durbin argues that the trial court improperly excluded evidence of subsequent remedial measures taken by CSX, improperly instructed the jury, and improperly dismissed

his claim for unliquidated damages. On the first two issues, we conclude that the trial court's evidentiary ruling was not an abuse of its discretion and the court's instructions to the jury were not clearly erroneous. On the third issue, we find that the trial court erred by concluding that it lacked discretion to allow Durbin to file an untimely supplement to his pre-trial interrogatory response in order to state an amount of damages for pain and suffering. Nevertheless, we conclude that, under the circumstances presented in this case, the trial court's error was harmless.

Hence, we affirm.

Durbin was an employee of CSX and its predecessor for 35 years. His job responsibilities included general maintenance work. On January 21, 2004, Durbin and another employee were assigned to install new drop ceilings, lighting and a floor in a CSX office located in Patio, Kentucky. While dismounting a ladder during the course of this work, Durbin fell and sustained an injury to his right knee.

Subsequently, on January 19, 2007, Durbin filed this action against CSX pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C.A. § 51, *et seq.* Durbin alleged that the ladder which CSX provided him was wobbly and in poor condition. He also alleged that CSX failed to provide him with adequate lighting in which to perform his job duties. As a result of CSX's negligence, Durbin asserted that CSX placed him in a dangerous work environment and caused his injuries.

The trial court issued a civil jury trial order on June 21, 2011, which required, among other things, that the parties submit an itemization of damages at least 30 days before trial. Durbin filed his Itemization of Damages on October 10, 2011, but stated that his damages for pain and suffering were “to be determined.”

The matter came before the court for a jury trial from November 8-10, 2011. At the close of Durbin’s proof, CSX moved for a directed verdict on the issue of unliquidated damages, noting that he had never supplemented his discovery responses. Durbin moved to provide a supplemental response at that point, but the trial court denied the motion. The matter was submitted to the jury on the remaining claims. In its first finding of fact, the jury determined, by a 9-3 vote, that Durbin had failed to meet his burden of proof showing that CSX failed to provide him a reasonably safe place to work. Based on this finding, the trial court entered a judgment in favor of CSX and dismissed Durbin’s claims. The trial court subsequently denied Durbin’s motion for a new trial, and this appeal followed.

Durbin raises three issues on appeal. First, he argues that the trial court improperly prevented him from cross-examining CSX’s witness about the replacement of the ladder after he fell. Second, he contends that the instructions failed to properly set out the parties’ respective burdens of proof. And finally, Durbin maintains that the trial court abused its discretion by denying his motion to supplement his discovery responses concerning claimed unliquidated damages.

In *CSX Transp., Inc. v. Moody*, 313 S.W.3d 72 (Ky. 2010), the Kentucky Supreme Court discussed the purposes of FELA as well as the law applicable to an action brought pursuant to the Act:

The Federal Employers' Liability Act (“FELA”) provides a uniform method for compensating injured railroad workers and their survivors. It is remedial legislation and is to be construed liberally in order to accomplish its humanitarian purpose. The FELA authorizes a federal cause of action, but Congress gave state and federal courts concurrent jurisdiction over FELA claims. The substantive law that governs a FELA action is federal, whether brought in state or federal court, but the law of the forum governs procedural matters. Forum law governs the admissibility of evidence subject to review for an abuse of discretion. It also governs the form of jury instructions.

*Id.* at 79 (citations omitted).

The first issue raised by Durbin concerns the admissibility of evidence of subsequent remedial measures. Rulings upon the admissibility of evidence rest within the discretion of the trial judge and will not be reversed in the absence of a clear abuse of that discretion. *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Prior to trial, CSX moved to exclude any evidence or testimony that it had replaced the ladder from which Durbin fell after the accident. The trial court granted the motion. During the trial, CSX supervisor Frank Walz testified that he had inspected the ladder after the accident. He admitted that the ladder was

wobbly when no weight was applied to it, but stated that it was steady with a person standing on the steps. On cross-examination, Durbin attempted to ask Walz whether the ladder was replaced after the accident. The trial court permitted Durbin to ask Walz if he had any personal knowledge whether the ladder had been replaced, to which Walz replied that he did not know.

Kentucky Rule of Evidence (KRE) 407 provides that evidence of subsequent remedial measures “is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.” However, KRE 407 further provides that “[t]his rule does not require exclusion when the evidence is offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.” Durbin concedes that evidence of CSX’s replacement of the ladder was not admissible to prove that the ladder was defective. Nevertheless, he contends that such evidence was admissible to impeach Walz’s testimony regarding the condition of the ladder.

In support of this argument, Durbin cites to *Patrick v. South Central Bell*, 641 F.2d 1192 (6<sup>th</sup> Cir. 1980). In *Patrick*, the Sixth Circuit, interpreting identical language in FRE 407, allowed evidence of subsequent remedial measures to impeach the defendant’s witness regarding the existence of a dangerous condition. In that case, however, the question concerned whether a phone cable was hung at the proper height. The defendant introduced testimony that the cable

was at the proper height prior to the accident, and the court allowed the plaintiff to introduce evidence that the cable was raised after the accident. *Id.* at 1195-96.

In this case, on the other hand, Walz conceded that the ladder was wobbly without weight applied to it, but asserted that it was steady with a person standing on the steps. Evidence of CSX's subsequent replacement of the ladder does not tend to impeach Walz's testimony regarding the condition of the ladder at the time of the accident. Rather, this evidence merely invited the jury to infer negligence on CSX's part based on its post-accident conduct, which is expressly prohibited by KRE 407. Furthermore, Walz stated that he had no personal knowledge whether the ladder was replaced. Therefore, the trial court did not abuse its discretion by excluding the evidence.

Durbin next argues that the court's jury instructions misled the jury concerning the parties' respective burdens of proof. Errors in jury instructions are considered as questions of law and are reviewed by this Court *de novo*. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006).

"Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (*quoting Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981)). An erroneous instruction is presumed to be prejudicial to appellant, and the burden is upon appellee to show affirmatively from the record that no prejudice resulted; and when the appellate court cannot determine from the record that the verdict was not influenced by the erroneous instruction, the judgment will be

reversed. *Drury v. Spalding*, 812 S.W.2d 713, 717 (Ky. 1991) (quoting *Prichard v. Kitchen*, 242 S.W.2d 988, 992 (Ky. 1951)). However, “[i]f the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury.” *Ballback's Adm'r v. Boland–Maloney Lumber Co.*, 306 Ky. 647, 652–53, 208 S.W.2d 940, 943 (1948).

At the close of trial, Durbin submitted separate proposed jury instructions on negligence, causation, contributory negligence and assumption of risk. Instead, the trial court submitted the following instructions to the jury:

Instruction No. 5

It was the duty of CSXT to exercise ordinary care to provide a reasonably safe workplace for its employees, including Mr. Durbin. Ordinary care, as used in these instructions means such care as would be expected of a reasonably prudent company or person under the same or similar circumstances. CSXT’s duty to provide a reasonably safe place to work is measured by what is reasonably foreseeable under the circumstances and by what, in light of facts then known, should or could have been anticipated. This duty was non-delegable. If you are satisfied from the evidence that CSXT failed to comply with this duty and that such failure caused or contributed to Mr. Durbin’s injury, in whole or part, you will find for Mr. Durbin; otherwise you will find for CSXT.

Instruction No. 6

It was Mr. Durbin’s duty to exercise ordinary care for his own safety. If you find for Mr. Durbin under Instruction No. 5, but are also satisfied from the evidence that he failed to comply with this duty and that such failure on his own part was a cause, in whole or in part, of his injury, you will determine from the evidence and indicate in the spaces provided under Verdict Form B what percentage of the total fault was attributable to each of the parties.

(In determining the percentages of fault you shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between his or its conduct and the damages claimed.)

In a FELA case, the plaintiff has the burden of proving only that the employer's negligence caused or contributed to the injury in any part. *CSX Transp., Inc. v. McBride*, --U.S.--, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011). See also *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506–07, 77 S. Ct. 443, 448–49, 1 L. Ed. 2d 493 (1957), and *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 60 (Ky. 2010). In setting this standard, FELA departs from traditional formulations of proximate causation, and imposes a much lower burden of proof upon a plaintiff. *McBride*, 131 S. Ct. at 2639. Durbin argues that Instruction No. 5 did not clearly emphasize that the jury could find for him if it found that CSX's negligence played any part in causing his injury, no matter how slight.

However, Instruction No. 5 clearly advised the jury that it should find for Durbin if CSX's negligence "caused or contributed to Mr. Durbin's injury, in whole or part, . . ." While the instruction did not precisely parallel the language suggested by the United States Supreme Court in *McBride*, the "in whole or part" language uses the wording set out in FELA. 45 U.S.C. § 51. We conclude that the instruction adequately advised the jury of the appropriate burden of proof for Durbin's FELA claim.

Durbin also contends that Instruction No. 6 improperly equated CSX's burden of proof on contributory fault with his burden of proving CSX's liability for

negligence. However, Instruction No. 5 clearly advised the jury to address the issue of CSX's negligence before reaching the later issue of contributory fault. Since the jury found that CSX was not negligent under Instruction No. 5, it is speculative to assume that they confused the burden of proof on that issue with the burden of proof for contributory fault under Instruction No. 6. Moreover, when read as a whole, Instruction No. 6 focuses only on the issue of contributory fault, and does not conflate the parties' respective burdens of proof or standards of care. Under the circumstances, we conclude that the trial court's jury instructions were substantially correct and were not misleading.

Finally, Durbin focuses on the trial court's dismissal of his claim for unliquidated damages. In *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999), the Kentucky Supreme Court held that Kentucky Rule of Civil Procedure (CR) 8.01(2) requires a party who seeks unliquidated damages to state the amount of such damages sought in response to an interrogatory. *Id.* at 271-72. Durbin admits that he did not specify any amount of unliquidated damages in his last supplemental interrogatory prior to trial. But he notes that a trial court has the discretion to allow a party to supplement an interrogatory response to state an amount of unliquidated damages even during trial. *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474, 480 (Ky. 2002).

Durbin argues that the trial court failed to exercise its discretion to allow him to file supplemental responses to CSX's damages interrogatory. However, *LaFleur* clearly requires that the plaintiff has the burden to seasonably

update his answers to interrogatories. *Id.* While a trial court has the discretion to allow a plaintiff to file an untimely supplement to those answers, the plaintiff also has the burden to show that the increase in the amount of unliquidated damages does not prejudice the defendant. *Id.* See also *Prater v. Castle*, 139 S.W.3d 921, 926 (Ky. App. 2003).

Unfortunately, the trial court did not recognize that it had the discretion to allow Durbin to file an amended interrogatory. Generally, the trial court's failure to recognize that discretion would be reversible error. *Prater*, 139 S.W.3d at 926. In this case, however, we find three significant reasons to conclude that any error was harmless.

First and most importantly, the jury found for CSX on the underlying issue of negligence. Consequently, the jury never reached the question of damages. Contrary to Durbin's argument, it would be speculative to presume that the jury's view of the causation issue was affected by the lack of evidence regarding unliquidated damages.

But even if such prejudice could be found, that lack of evidence was not caused by the trial court's failure to allow Durbin to file an untimely supplement to CSX's interrogatory in order to state an amount of unliquidated damages. Indeed, Durbin did not claim any specific amount of unliquidated damages during his case in chief. Contrary to the express dictates of *Fratzke* and *LaFleur*, he argued that he was not required to do so.

And finally, Durbin never attempted to comply with CR 8.01. In his pre-trial memorandum filed 10 days before trial, Durbin generally claimed damages “in excess of \$350,000.” He argues that this disclosure was sufficient to put CSX on notice of the amount of unliquidated damages. However, Durbin did not identify what type of damages was covered by the \$350,000 amount listed in his pre-trial memorandum.

Moreover, Durbin did not bring this to the trial court’s attention when CSX made its motion for summary judgment. When he made his motion to file a supplemental response, counsel only offered to state that Durbin was seeking “more than \$1 in damages of pain and suffering.” The purpose of CR 8.01(2) is to allow a party to discover the *amount* an opposing party is seeking for unliquidated damage claims. *Greer v. Hook*, 378 S.W.3d 316, 321 (Ky. App 2012), *citing Tennill v. Talai*, 277 S.W.3d 248, 250 (Ky. 2009). Durbin’s vague offer did not comply with the requirements of the rule or *Fratzke* and *LaFleur*. Given these circumstances, the trial court’s finding that it lacked discretion to consider Durbin’s motion was clearly harmless.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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