RENDERED: NOVEMBER 25, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000383-MR
AND
NO. 2013-CA-000473-MR

THE ESTATE OF MELVIN R. JONES, BY ADMINISTRATRIX, EVELYN S. JONES — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM GALLATIN CIRCUIT COURT
v. HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 10-CI-00147

PROCESS MACHINERY, INC. — APPELLEE/CROSS-APPELLANT

AND NO. 2013-CA-001139-MR

THE ESTATE OF MELVIN R. JONES, BY ADMINISTRATRIX, EVELYN S. JONES — APPELLANT

APPEAL FROM GALLATIN CIRCUIT COURT
v. HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 10-CI-00147

PROCESS MACHINERY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: The Estate of Melvin R. Jones, by and through Evelyn S. Jones, Administratrix, has appealed from an order of the Gallatin Circuit Court memorializing a jury verdict rendered in favor of Process Machinery, Inc. ("PMI"), in this products liability action. PMI then perfected a protective cross-appeal. Following the subsequent denial of Jones's CR[1] 60.02 motion seeking a new trial, the estate filed a second appeal. The three actions have been consolidated for resolution in a single Opinion. Following careful review of the record, the law, and the briefs, we affirm.

Melvin Jones ("Jones") was a maintenance worker at an aggregate limestone mine owned and operated by Sterling Ventures, LLC, d/b/a Sterling Materials ("Sterling") located in Verona, Gallatin County, Kentucky. PMI designed, manufactured and installed a system of bulk-belt conveyors used by Sterling in both its underground and surface operations at the Verona mine. At approximately 6:15 a.m. on October 19, 2009, Jones climbed onto one of the bulk-belt conveyors to trim off a piece of frayed conveyor belting. The conveyor was approximately 210 feet long and rose 60 feet from the base of one processing building to the top of an adjacent building; a walkway ran along the right-

[1] Kentucky Rules of Civil Procedure.

ascending side of the conveyor. The frayed portion of the forty-two inch wide belt was on the left-ascending—or non-walkway—side. Jones, who was alone and not wearing a safety harness or other fall protection, fell to the ground from the non-walkway side of the conveyor from a height of approximately twenty feet, sustaining severe injuries rendering him a paraplegic and ventilator-dependent. Jones died fifteen months later on January 11, 2011, from complications arising from his injuries.

Jones's estranged wife brought suit against PMI[2] on June 11, 2010, alleging design defects, negligence in the design process, failure to instruct in the safe operation of the conveyor system, and failure to warn of potential dangers associated with the equipment resulted in Jones's fall and untimely demise. Following extensive discovery, the matter proceeded to a jury trial conducted between November 27 and December 10, 2012. The jury returned a unanimous verdict in favor of PMI.

Jones appealed from the trial court's January 7, 2013, judgment memorializing the jury's verdict, and the February 15, 2013, order denying a motion for a new trial, and now contends the trial court erroneously instructed the jury. In its subsequent protective cross-appeal, PMI challenges several of the trial court's evidentiary rulings. Several months after the conclusion of the trial, Jones moved the trial court to vacate the final judgment and sought a new trial based on a newly released report issued by the Mine Safety and Health Administration

[2] The complaint also named additional "John Doe" defendants who are not parties to this appeal.

("MSHA") regarding Jones's fall. The trial court denied the motion by order entered on June 17, 2013; Jones timely appealed the denial. The issues raised in each of these matters are now ripe for our review.

The crux of this appeal is whether the trial court properly instructed the jury. Jones requested the trial court instruct the jury on four separate theories of liability including strict liability for defective design, negligent design, failure to warn of potential dangers, and failure to instruct on safe use. The trial court rejected Jones's tendered instructions and submitted a single strict liability instruction with respect to PMI under which the jury found in favor of PMI. Jones contends the trial court erred in failing to instruct on each individual theory of liability advanced during the trial and argues such error is presumptively prejudicial requiring remand for a new trial. We disagree.

"Appellate review of jury instructions is a matter of law and we will examine them under a *de novo* standard of review. *Reece v. Dixie Warehouse & Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). Kentucky law mandates that jury instructions provide only the "bare bones" of the issue presented to the jury, allowing counsel to further elaborate and flesh out the issues during counsel's closing argument. *Hamby v. Univ. of Kentucky Med. Ctr.*, 844 S.W.2d 431, 433 (Ky. App. 1992) (citation omitted). A court's concern is that "[the instructions] must be sufficiently clear to reveal precisely the jury's conclusions: 'An instruction should be free of ambiguity and not open to various interpretations by

the jury.'" *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006) (quoting *Coe v. Adwell*, 244 S.W.2d 737, 740 (Ky. 1951)).

In the case at bar, the jury instructions read, in pertinent part, as follows:

INSTRUCTION NO. 2

The term "ordinary care" as used in these instructions with respect to Melvin Jones means such care as an ordinarily prudent person would exercise under the same or similar circumstances.

The term "ordinary care" as used in these instructions with respect to Sterling Materials means such care as an ordinarily prudent company engaged in the same type of business would exercise under the same or similar circumstances.

Please proceed to Instruction No. 3

INSTRUCTION NO. 3

It was the duty of the Defendant, Process Machinery, Inc. to place the conveyor on the market in such condition that it was not defective and unreasonably dangerous to the extent that an ordinarily prudent designer, manufacturer, assembler and installer of conveyors, being fully aware of the risk, would not have put it on the market.

QUESTION NO. 1

Are you satisfied from the evidence that Process Machinery, Inc., failed to comply with its duty under Instruction No. 3 and that such failure was a substantial factor in causing Melvin Jones' injuries?

Answer: Yes _____ No _____

. . . .

If you answered "Yes" proceed to Instruction No. 4
If you answered "No" return to the Courtroom as your verdict is complete

INSTRUCTION NO. 4

Sterling Materials had a duty to exercise ordinary care for the safety of its employee, Melvin Jones. This general duty included the following specific duties:

a. Provide to Melvin Jones training on safety standards, safety rules and safe working procedures as to operation of the subject conveyor;

b. Provide safe access to the subject conveyor;

c. Require Melvin Jones to use fall protection when working where there was a danger of falling.

QUESTION NO. 2

Are you satisfied from the evidence that Sterling Materials failed to comply with one or more of its duties as set forth in Instruction No. 4 and that such failure was a substantial factor in causing the injuries to Melvin Jones?
ANSWER: Yes _____ No _____

. . . .

Please proceed to Instruction No. 5

INSTRUCTION NO. 5

You are instructed that Melvin Jones failed to exercise ordinary care for his own safety in using the conveyor which is the subject of this action.

QUESTION NO. 3

Are you satisfied from the evidence that the failure of Plaintiff, Melvin Jones, to exercise ordinary care for his

> own safety as set forth in Instruction No. 5 was a substantial factor in causing his injuries?
>
> **ANSWER: Yes _____ No _____**
>
> . . . .

After deliberating for one and one-half hours, the jury returned a unanimous verdict answering "No" to Question No. 1, thereby eliminating the need to reach the additional instructions.

Relying on *Clark v. Hauck Mfg. Co.,* 910 S.W.2d 247 (Ky. 1995) (*overruled on other grounds by Martin v. Ohio County Hospital Corp.*, 295 S.W.3d 104 (Ky. 2009)), Jones claims the trial court should have instructed the jury on defective design, failure to warn, and general negligence, in addition to the single strict liability instruction actually given. We believe Jones reads *Clark* too narrowly.

In *Clark*, an instruction to the jury presented a concern of "whether a plaintiff must prove that a product is both defective and has inadequate warnings." *Id.* at 250. Under such an instruction, a jury could reach the absurd result that the product was defective or that the warnings were wholly inadequate, but still find the defendant was not liable. 2 Palmore Kentucky Instructions to Juries, § 49 .01, p. 49–3 (5th ed. June 2008 Supp.). Our Supreme Court held "the trial judge committed reversible error by using 'and' instead of 'or' in the instructions. This improperly linked two distinct theories of recovery. Thus the burden of proof was misstated." *Id.* at 251. The case before us presents a different issue.

> Unlike the many jurisdictions that use pattern instructions, and otherwise explain the law of the case to

> the jury, the practice in Kentucky abjures the abstract and requires the trial court, applying (rather than stating) the underlying legal principles, to frame the dispositive issue.
>
> > "Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire." *Cox v. Cooper*, Ky., 510 S.W.2d 530, 535 (1974).

Ford Motor Co. v. Fulkerson, 812 S.W.2d 119, 122 (Ky. 1991).

There does exist, as Jones vehemently argues, "a basic tenet of Kentucky law, to wit: that a party is entitled to a jury instruction in every duty supported by the facts[.]" *Clark*, 910 S.W.2d at 251. However, we believe the trial court satisfied that entitlement with its strict liability instruction—Instruction No. 3 and Question No. 1. Strict liability allows a plaintiff to recover in several ways, such as a theory of defective design, defective manufacture, or failure to warn of danger. *Worldwide Equip., Inc. v. Mullins*, 11 S.W.3d 50, 55 (Ky. App. 1999) (citation omitted). Under any theory of strict liability, the plaintiff must establish causation. *Holbrook v. Rose,* 458 S.W.2d 155, 157 (Ky. App. 1970). Undeniably, if a defendant had a duty to warn, the issues to be resolved are "whether an adequate warning was given and, if not, whether the failure to give it proximately caused the injury." *Post v. Am. Cleaning Equip. Corp.*, 437 S.W.2d 516, 522 (Ky. App. 1968). As the Supreme Court said in *Fulkerson*,

> we believe the trial court properly stated the products liability issue in Instruction No. 2. Since the time Kentucky adopted the doctrine of "strict liability" in products cases as stated in the Restatement, Second, Torts, § 402A, in the case of *Dealer's Transport*

> *Company v. Battery Distributing Company*, Ky., 402 S.W.2d 441 (1966), the Kentucky practice has been to state the liability issue in the terms of [the] Restatement: Did the defendant manufacture, sell or distribute the product "in a defective condition unreasonably dangerous to the user . . . ?"

Fulkerson, 812 S.W.2d at 122; *see also Nichols v. Union Underwear Co., Inc.,* 602 S.W.2d 429, 431 (Ky. 1980) ("The instructions given were based on section 402A of the Restatement."). Our Supreme Court further concluded considerations such as "*warnings* and instructions, . . . while they have a bearing on the question as to whether the product was manufactured 'in a defective condition unreasonably dangerous,' are all factors bearing on the principal question *rather than separate legal questions.*" *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 780–81 (Ky. 1984) (emphasis added). "A trial court is well advised to leave consideration of these evidentiary factors to the arguments of counsel rather than attempting to frame them up in the instructions on the ultimate questions." *Fulkerson*, 812 S.W.2d at 124.

We are convinced Jones's proposed failure to warn instruction was redundant with the strict liability instruction actually given. In considering whether the conveyor was unreasonably dangerous, the jury was obligated to consider as one of the factors in reaching its determination whether warnings were required and, if so, whether those warnings were properly given. While the strict liability instruction did not explicitly identify this duty to warn, the warning issue was addressed by Jones's witnesses and in closing arguments. Under these

circumstances, a separate negligence instruction regarding failure to warn would have been redundant with the strict liability instruction.

Likewise, we believe Jones's tendered defective design and negligence instructions were unnecessary and redundant. It is unnecessary to give a redundant instruction. *Reynolds v. Commonwealth*, 257 S.W.2d 514, 516 (Ky. 1953).

It is axiomatic that to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of the duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436–37 (Ky. App. 2001). The issues of causation and injury would clearly be the same under either a negligence or strict liability standard. *Huffman v. SS. Mary and Elizabeth Hospital*, 475 S.W.2d 631, 633 (Ky. 1972). The issue of duty is likewise the same under either theory. Under either a negligence or strict liability theory, PMI's fundamental duty was not to place a product on the market in a defective and unreasonably dangerous condition. In fact, Jones's burden of proof was simplified under the strict liability theory, because full knowledge of the condition and dangers of a product is presumed, as opposed to the burden under a negligence theory, in which case PMI must have known or reasonably should have known of the condition and dangers of the product. Thus, the proposed negligence and defective design instructions were subsumed within the strict liability instruction, as the trial court found.

> It [is] apparent that when the claim asserted is against a manufacturer for deficient design of its product, the distinction between the so-called strict liability principle

> and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned. In either event the standard required is reasonable care.

Jones v. Hutchinson Manufacturing, Inc., 502 S.W.2d 66, 69–70 (Ky. 1973). "Thus, the fact finder in a design defect case must decide whether the manufacturer that placed in commerce the product made according to an intended design acted prudently, i.e., was the design a defective condition which was unreasonably dangerous." *Nichols*, 602 S.W.2d at 433. The strict liability instruction given to the jury in this case adequately took into consideration any evidence presented by Jones with respect to negligence and design defects.[3] The controlling issue is not which set of proposed instructions best stated the law, but whether the delivered instructions misstated the law. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 230 (Ky. 2005). The instructions in the case *sub judice* clearly did not misstate the law. Discerning no error in the jury's verdict, we hold remand is not necessary.

Based on our resolution of the claims surrounding the alleged instruction errors, the matters raised in PMI's protective cross-appeal are rendered moot. Therefore we need not comment on the merits of those contentions and no further discussion is warranted.

Finally, we turn to Jones's second appeal and the contention that the trial court erred in denying the CR 60.02 motion seeking a new trial based on the

[3] While Jones attempts to distinguish "design defects" from "defects in the design process" as though they represent two distinct legal or factual theories, the distinction is one without a difference in products liability cases because the focus is, by definition, on the condition of the product.

2013 MSHA report which was released several months after the conclusion of the trial. We again discern no error.

Whether to grant a CR 60.02 motion is left to the sound discretion of the trial court. *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327, 329 (Ky. 1994). In pertinent part, CR 60.02 states:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02[.]

Jones contends the 2013 report demonstrates the MSHA concluded the conveyor was defectively designed which ultimately resulted in Jones's fall. Jones further posits the report contradicts PMI's expert and lay testimony while corroborating the testimony elicited on the estate's behalf. Thus, Jones argues the trial court abused its discretion in denying the CR 60.02 motion. These arguments, while compelling, are unavailing.

Here, the 2013 MSHA report does not provide any basis for relief. "'[N]ewly discovered evidence' is limited to evidence in existence at the time of trial and does not extend to evidence arising after trial." *Alliant Hospitals, Inc. v. Benham,* 105 S.W.3d 473, 478–79 (Ky. App. 2003). We recently reaffirmed this rule in *Leeds v. City of Muldraugh*, 329 S.W.3d 341, 346 (Ky. App. 2010), and Jones presents no persuasive reason to retreat from these holdings. That the facts forming the basis of the report existed at the time of trial does not change the

reality that the report itself—the only piece of evidence relied on by Jones in the CR 60.02 motion—did not exist at the time of trial. This single, immutable truth is fatal to Jones's contention. Thus, we conclude the trial court did not abuse its discretion in denying the motion seeking a new trial.

For the reasons stated herein, the challenged judgments and orders of the Gallatin Circuit Court are AFFIRMED.

ACREE, CHIEF JUDGE, CONCURS.

JONES, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JONES, JUDGE, DISSENTING: Respectfully, I dissent with respect to the issue concerning the instructions given to the jury. I believe a separate instruction was necessary to properly ensure that the jury was appropriately instructed on the duty to warn.

"The 'bare bones' principle does not, and should not, prevent the law of the case from being presented to the jury." *Osborne v. Keeney,* 399 S.W.3d 1, 12 -13 (Ky. 2012). "[W]hile simple instructions are preferred, correct and complete instructions are required." *Id.* "As former Justice William S. Cooper wryly stated, 'I have no quarrel with the 'bare bones' approach to instructing juries in Kentucky—so long as the jury is given all of the bones.'" *Id.* (quoting *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601, 607 (Ky.2005) (Cooper, J. dissenting)).

Citing *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991), the majority indicates that an instruction which tracks Section 402A of the

Restatement, Second, Torts is sufficient to instruct the jury on a defendant's separate duties to properly manufacture, design and warn. I believe reliance on Section 402A to encapsulate three separate and distinct duties is inappropriate and tends to place an overemphasis on the manufacturing defect theory to the exclusion of the warning theory. "Section 402A [was] created to deal with liability for manufacturing defects." *Restatement (Third) of Torts* (1998), § 1, Comment A.[4] It can "not appropriately be applied to cases of design defects or defects based on inadequate instructions or warnings." *Id*.

I am at a loss to identify any place in the tendered instructions where the jury is fairly apprised of PMI's duty to warn even in a bare bones fashion. The instructions mention design, manufacture, assemble and install; they do not include one mention of the word warn. I find this very troubling. It is hard to fathom that the jury would adequately understand its role in terms of assessing whether the product PMI placed on the market was unreasonably dangerous for lack of a warning where the instructions do not even mention the word warning.

This is not to say that a separate instruction on each duty is required. What I believe is required is a single instruction that adequately explains the defendant's overall duty to the jurors without placing emphasis on one theory to the

[4] While Kentucky has not officially adopted the *Restatement (Third) of Torts: Products Liability*, our Supreme Court regularly cites to and draws guidance from it. *See, e.g., Pearson ex rel. Trent v. National Feeding Systems, Inc*. 90 S.W.3d 46, 51 (Ky. 2002); *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d 530, 536 (Ky. 2003); *Presnell Const. Managers, Inc. v. EH Const., LLC,* 134 S.W.3d 575, 587 (Ky. 2004) (J. Keller, concurring); *Toyota Motor Corp. v. Gregory,* 136 S.W.3d 35, 42 (Ky. 2004).

exclusion of the others. The instruction in this case mentioned both a manufacturing defect and a design defect without any mention whatsoever of a warning defect. To me, this created a situation where the jury was given just enough information to confuse them into believing that the manufacturer only owed the specifically mentioned duties. Indeed, in my opinion, it would have almost been better if the instructions simply stated that the manufacturer had a duty of reasonable care without any further elaboration.

In sum, I do not believe that the jury was fully and adequately instructed on law of the case, particularly with respect to the warning aspect of the case. The jury was presented with a portion of the theory of products liability but they received far less than a whole skeleton. For this reason, I would reverse and remand.

I also pause to note that I am troubled by the fact our case law relies on lawyers to flesh out jury instructions during closing arguments, yet trial judges repeatedly tell our juries that it is the judge's responsibility to instruct them on the law. We set up a scenario where we place the burden of "fleshing" out the law of the case on the attorneys, yet discredit them by continually admonishing the jury that the judge instructs them in the law and that the arguments of counsel are not evidence.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:

Justin L. Lawrence
Florence, Kentucky

James B. Helmer, Jr.
Paul B. Martins
Erin M. Campbell
Cincinnati, Ohio

BRIEF FOR APPELLEE/CROSS-APPELLANT:

Peter J. Sewell
Thomas N. Peters
Charles A. Walker
Louisville, Kentucky