

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000935-MR

WAYNE NEISZ

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 06-CI-000524

CSX TRANSPORTATION, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS AND LAMBERT, JUDGES; AND SHAKE,¹ SENIOR
JUDGE.

COMBS, JUDGE: Wayne Neisz appeals from a judgment of the Jefferson
Circuit Court entered in favor of CSX Transportation, Inc., as well as a subsequent
order of the court denying his motion for a new trial. After our review, we affirm.

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Neisz began his employment with CSX in 1981. From 1997 until he was terminated by CSX in February 2008, Neisz worked as a boom truck operator. In the last six months of 2008, Neisz worked for R.J. Corman Railroad Group and for Cooper Rail Service, Inc. He was reinstated to his former position at CSX in March 2009.

In January 2006, Neisz filed an action against CSX pursuant to the Federal Employers' Liability Act, 45 U.S.C. Sec. 51, *et seq.* (FELA). In his complaint, Neisz alleged that he had suffered physical injuries to his upper extremities (including his hands, wrists, fingers, and elbows) as a result of employment with CSX. Neisz contended that his injuries were attributable to the failure of CSX to provide a safe work environment. CSX answered and denied Neisz's substantive allegations. CSX also argued that the lawsuit was barred by the terms of a settlement agreement.

CSX filed a motion for summary judgment in January 2009, contending that Neisz had executed agreements for settlement and final release of all claims in 2001 and 2002. CSX argued that these agreements waived any and all claims related to any upper extremity injuries that Neisz had allegedly suffered while in its employ. Neisz filed a motion for leave to file an amended complaint. Leave was granted, and the amended complaint was filed on March 24, 2009. In his amended complaint, Neisz alleged that he had suffered injuries to his knees and lower extremities as a result of the failure of CSX to provide a safe work environment.

Again, CSX answered and denied the substantive allegations. The trial court dismissed the allegations related to Neisz's upper extremities.

The parties undertook extensive discovery, and on April 30, 2009, CSX filed a motion *in limine* to exclude any reference to Neisz's termination from his employment in February 2008 and his subsequent reinstatement in March 2009. CSX argued that the termination and subsequent reinstatement were irrelevant to Neisz's allegation that it had failed to provide a safe work environment and that the evidence might tend to prejudice the jury unfairly against CSX.

In his response, Neisz argued that the contested evidence was plainly relevant and that CSX could not show that the evidence would unfairly prejudice the defendant under the provisions of Kentucky Rule[s] of Evidence (KRE) 403. Neisz argued that the "fact that this firing occurred **after** the original complaint was filed **and** that on appeal [Neisz] was reinstated shows that there is a likely probability of wrongdoing on [CSX's] part . . . and that [Neisz's] discharge might have had something to do with the present case against [CSX]." Plaintiff's Response to Defendant's Memorandum of Law in Support of First Set of Motions in Limine at 2. Neisz asked the court to deny the motion of CSX to exclude evidence related to the termination and reinstatement. By order entered on June 25, 2009, the trial court granted the motion of CSX and ordered that evidence of Neisz's termination and subsequent reinstatement would be **excluded** from trial.

At a pre-trial conference conducted by the court on August 20, 2009, an issue arose as to how Neisz's interruption in employment with CSX would be

explained to the jury. Neisz's counsel believed that including any reference to the other employers (R.J. Corman and Cooper Rail Service) would confuse the jury since jurors were not to know that he had been terminated and subsequently reinstated by CSX. However, counsel for CSX believed that information related to Neisz's full employment history was critical. As a solution, **counsel expressly agreed** during the pre-trial conference that the evidence indicating that CSX had terminated then reinstated Neisz **would be admitted** at trial. The trial court amended its previous order in open court and acknowledged the amendment on its written order by initialing the change. As of August 20, 2009, the parties were in accord that evidence related to Neisz's termination and reinstatement by CSX **would be admitted** at trial.

The trial began on January 12, 2010, and it concluded on January 14, 2010. Evidence was presented, and following the presentation of the court's instructions and closing statements, the jury retired to deliberate. Ultimately, the jury returned a unanimous verdict in favor of CSX, finding no negligence and awarding no damages. On January 19, 2010, the trial court's judgment was entered, and the claims against CSX were dismissed.

On January 29, Neisz filed a motion to set aside the judgment and to order a new trial. He argued that he had been denied a fair trial because of the trial court's decision to permit the introduction of evidence related to his termination by CSX in February 2008. He also contended that matters not in evidence had been

included in the closing statement offered to the jury by CSX. Neisz claimed that these comments by counsel resulted in an unfair proceeding.

In response to Neisz's post-trial motion, CSX reviewed the record and recounted the discussion that led to the trial court's decision to amend its initial order excluding evidence related to Neisz's termination and subsequent reinstatement by CSX. CSX also argues that its closing argument had been wholly proper.

In his reply, Neisz continued to argue that the closing argument was improper. However, Neisz did not respond to the contention of CSX that the parties had agreed at the pretrial conference that the trial court should amend its June 25 order that had originally excluded the challenged testimony. The trial court denied Neisz's motion. This appeal followed.

Neisz argues that the court's decision to permit evidence indicating that he had been terminated and subsequently reinstated by CSX caused the jury to be unfairly prejudiced against him and deprived him of a fair trial. He contends that the liability of CSX was premised in part upon his own testimony that CSX knew or should have known of his unsafe work environment. Once the jury learned that he had been terminated, Neisz maintains that he lost credibility with the jury; consequently, all was lost. Neisz contends that counsel for CSX misled the trial court about its prior ruling by indicating that his termination and reinstatement were to be admitted at trial. Neisz did not reply to the assertion of CSX in its brief that the initial order was amended pursuant to the express agreement of counsel.

We have reviewed the video record of the pre-trial conference held nearly five months before trial. We have also inspected the court's written record. It is clear from both that the video and the written records which the court amended in its initial order excluding evidence related to Neisz's termination and reinstatement **pursuant to the agreement of counsel**. The parties acknowledged in open court that they "were on the same page" and expressly agreed that this evidence **would be admitted** at trial. Under these circumstances, the trial court assuredly did not err by allowing the challenged evidence.

Next, Neisz contends that the trial court erred by permitting counsel for CSX to make a statement during his closing that was unsupported by the evidence. Specifically, Neisz challenges counsel's statement to the jury that the boom truck had not been manufactured by CSX. "The only attempts made to elicit such information were made during [CSX's] cross examination of [Neisz's] liability expert, Dr. Tyler Kress." Appellant's Brief at 11. "Kress merely testified that he did not know who manufactured the Boom Truck or who designed the Boom Truck or the step in question." *Id.* at 11-12. Neisz also contends that this information was irrelevant since an employee who suffers an injury caused in whole or in part by a railroad's negligence may recover full damages from the railroad regardless of whether the injury was also caused, in part, by the actions of a third party.

We are not persuaded that Neisz is entitled to a new trial because the trial court overruled his objection to counsel's statement during closing argument.

Relying on the video-taped testimony of Tyler Kress, Ph.D., plaintiff's expert safety engineer, counsel for CSX drew a reasonable inference that CSX had not manufactured the boom truck and could not be held liable on that basis. Counsel did not belabor the point, and the trial court did not abuse its discretion by permitting the brief reference to this part of Kress's testimony. Moreover, the jury was properly instructed that CSX could be held liable in damages to any employee suffering injury **in whole or in part** as a result of its negligence. The trial court did not err by overruling Neisz's objection, and a new trial was not warranted.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Finis R. Price, III
Prospect, Kentucky

BRIEF FOR APPELLEE:

Rod D. Payne
Darryl S. Lavery
Louisville, Kentucky