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Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002173-MR

WILLIAM WAYNE HIBBARD and PAMELA HIBBARD — APPELLANTS

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 91-CI-000346

BENCO MINING, INC.; EAST MANUFACTURING COMPANY; ROY OSBORNE, d/b/a ROY OSBORNE TRUCK PARTS and R & T TRUCKING — APPELLEES

AND NO. 1996-CA-002284-MR

EAST MANUFACTURING COMPANY — CROSS-APPELLANT

v.

CROSS-APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 91-CI-000346

MOUNTAIN TARP & AWNING, INC. — CROSS-APPELLEE

AND NO. 1996-CA-002285-MR

BENCO MINING, INC. — CROSS-APPELLANT

v. CROSS-APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 91-CI-000346

ROY OSBORNE, d/b/a ROY OSBORNE TRUCK PARTS and R & T TRUCKING; MOUNTAIN TARP & AWNING, INC.; WILLIAM WAYNE HIBBARD and PAMELA HIBBARD; and EAST MANUFACTURING COMPANY — CROSS-APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE, and GARDNER, Judges.

DYCHE, JUDGE. Following a fifteen-day trial, a Perry Circuit Court jury returned a verdict finding that East Manufacturing Company (East) and Benco Mining, Inc. (Benco) were not responsible for the devastating injuries suffered by William Hibbard when he fell from his coal-hauling trailer on April 21, 1991. Mr. Hibbard and his wife now appeal from a judgment entered in accordance with that jury verdict, and the denial of their motion for a new trial. We affirm.

Hibbard was a truck driver who picked up loads of coal at the Benco loading facility in Perry County and delivered the coal to a buyer in Nashville, Tennessee. On the day in question, Hibbard's trailer was loaded by Benco employees in the manner

which Hibbard directed; that is, the coal was piled on the trailer higher than the sideboards, necessitating the use of a tarp to keep the coal from spilling from the trailer, and thereby violating Kentucky Revised Statute (KRS) 189.150.[1] Benco did not allow truckers to apply tarps at the loading facility, and did not furnish a "tarping rack" for use by the truckers.

Hibbard's trailer, designed to his specifications and assembled from various parts attached to a wrecked remainder of a trailer originally manufactured by East, had no ground-operated tarping system. As above mentioned, the trailer was designed to be loaded (or overloaded) so that the coal had a mound in the middle of the load higher than the sideboards. The use of "bows" to hold the tarp up off the load was required by the design of the trailer and the method of its loading, and prevented the use of a ground-operated system.

After Hibbard's trailer was loaded, he left the Benco facility and drove a short distance before pulling off the road to apply the tarp by hand. While on top of the trailer, roughly 12-16 feet off the ground, Hibbard lost his balance, fell to the ground, and was rendered a quadriplegic by his injuries.

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[1] **Escaping contents - Shifting or spilling loads.**

(1) No vehicle shall be operated upon any highway unless it is so constructed as to prevent its contents from escaping.

(2) No vehicle shall be operated upon any public highway for a distance of over one (1) mile whose load is susceptible to shifting or spillage unless said load is covered with a device suitable for prevention of spillage.

Hibbard and his wife initially brought this action against Benco alone, alleging a failure to provide him with a safe place or opportunity to apply the tarp, and creation of an unsafe condition by overloading the trailer and then spraying the coal with diesel fuel (as the contract required). East was later added by amended complaint; it was alleged to have defectively designed or constructed the trailer, causing an unsafe condition of which, Hibbard alleged, it was required to warn.

Both defendants denied the allegations and the existence of any duties toward Hibbard. The issues thus joined, the action ran its course, concluding with the hard-fought trial. This appeal followed.

East urges us to find that any error which occurred below was harmless (Ky. R. Civ. Pro. 61.01) because the defendants should have been granted directed verdicts. East maintains that the claims of Hibbard were patently meritless, and should never have been presented to the jury. While we might be inclined to agree, we will nevertheless examine the errors alleged by appellants.

The Hibbards find fault with the conduct of juror Edgar Collins, who failed to acknowledge his attorney-client relationship with one of the lawyers for the Hibbards. The attorney was representing Collins as a member of a class in a class action suit which was "bumped" from the trial docket by the length of the trial of the present case. Collins is further alleged to have made improper statements, in violation of the

court's admonition (Ky. Rev. Stat. 29A.310), relating to the merits of the present case, or collateral results from a jury verdict one way or the other. Juror Collins was not finally selected as a member of the panel which rendered the verdict herein.

While we certainly do not condone juror Collins's conduct, we find no error in the action of the trial court. Neither Collins nor the juror to which his remarks were addressed took part in the decision of the case. We are presented with no evidence that his remarks were heard by any juror who actually did decide the case. Conspicuously absent is an affidavit of any juror who sat on the case, and who heard Collins's remarks.

> First, juror misconduct only results in a new trial when the misconduct so prejudices a party that a fair trial was not obtained. Second, it is the role of the trial judge, entrusted with broad discretion, to determine the prejudicial effect of juror misconduct--including the impact of extra-judicial information.
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> . . . .
>
> The trial court's decision[] to overrule the motion[] for . . . a new trial cannot be disturbed on appeal absent a[n] . . . abuse of discretion.

Gould v. Charlton Company, Inc., Ky., 929 S.W.2d 734, 740-1 (1996)(citation omitted). We find no such abuse of discretion.

Appellants next claim that counsel for East prejudiced the jury during his *voir dire*, intimating, they say, that his client lacked insurance to cover any judgment which might be rendered against it. Appellants argue that they were entitled to

retaliate for this comment. We simply say that such an interpretation strains credulity. There was nothing improper in the statement of counsel for East, and no retaliation was necessary or permissible.

The trial court's allowing East to read several pages of the Hibbards' expert's deposition into the record after the witness had been subjected to thorough cross-examination and finally discharged is the next ground raised by appellants. We find no prejudice, even if this were found to be error.

The Hibbards allege that they were prejudiced by the failure of the trial court to give an instruction concerning Benco's duty to provide a safe means of, or place to, tarp his trailer if it was reasonably foreseeable that he would need to perform that act after being loaded at Benco. We have carefully examined the instructions given in this case, and find no error. The instructions followed the law and the facts as presented.

The final error alleged pertains to an admonition given by the trial court for the jury not to consider certain testimony concerning the vehicle identification number of the trailer. The admonition was given at the time of the testimony of Mrs. Hibbard, and withdrawn at the end of the Hibbards' case in chief. We find no abuse of discretion and no other error in this action of the trial court. Counsel had ample opportunity and time to bring the evidence to the jury's attention. The trial court withdrew the admonition, and the jury was permitted to consider the evidence.

Having ruled thus, it is unnecessary to reach the cross-appeals. The judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

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