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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002367-MR

BRIAN MCFALL — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, JUDGE
ACTION NO. 95-CI-00326

RICHARD FERRELL; FERRELL'S LOGGING & LUMBER, INC.; and, ROCKHOUSE WOOD PRODUCTS, INC. — APPELLEES

AND

NO. 1998-CA-002366-MR

ROCKHOUSE WOOD PRODUCTS, INC. — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, JUDGE
ACTION NO. 95-CI-00326

RICHARD FERRELL D/B/A FERRELL LOGGING AND LUMBER COMPANY, AND FERRELL'S LOGGING AND LUMBER COMPANY, INC. — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GARDNER, GUIDUGLI, AND KNOX, JUDGES.

KNOX, JUDGE: In this personal injury action involving claims of negligence and products liability, appellants, Brian McFall (plaintiff below) and his employer, Rockhouse Wood Products, Inc. (Rockhouse Wood), appeal from a jury verdict and judgment finding that Rockhouse Wood's failure to exercise ordinary care for the safety of its employees caused McFall's injuries. The jury assessed one hundred percent (100%) fault against Rockhouse Wood. The jury further found that defendants below and appellees herein, Richard Ferrell and Ferrell Logging and Lumber, Inc., were neither negligent in this matter nor were they "sellers" for purposes of McFall's products liability claim. We affirm.

On October 17, 1994, McFall, an employee of Rockhouse Wood, was unloading lumber when his clothing and shoe got caught in the chain of the conveyor table, pulling his leg into the chain. McFall suffered severe injury to his right leg, which ultimately had to be amputated just below the knee. The evidence in the record establishes that in September 1993, Rockhouse Wood purchased the "used" conveyor table from Ferrell Lumber and Logging, Inc. (Ferrell Lumber), which had advertised the table in a trade magazine.

In October 1995, McFall sued Ferrell Lumber in Letcher Circuit Court, alleging it had sold the table in a defective and dangerous condition, had failed to warn of the condition or

otherwise provide precautions for the safe use of the table, and, further, had been negligent in the condition and sale of the table.[1] Shortly thereafter, Rockhouse Wood intervened in the action as a party plaintiff, asserting its right to be reimbursed to the extent it had paid McFall workers' compensation benefits. In its answer to Rockhouse Wood's intervening complaint, Ferrell Lumber asserted negligence on the part of Rockhouse Wood.[2]

A trial in the matter was held on November 3, 1997. The jury found that: (1) Ferrell Lumber was not a "seller" of the conveyor table for purposes of McFall's products liability claim; (2) Ferrell Lumber did not fail to comply with its duty of ordinary care owed McFall; (3)McFall was not responsible for, nor did he contribute to, his own injuries; (4) Rockhouse Wood, McFall's employer, failed to comply with its duty of ordinary care owed McFall, which failure was a substantial factor in causing McFall's injuries; and, (5) Rockhouse Wood was one hundred percent (100%) at fault in causing McFall's injuries. On February 11, 1998, judgment was entered in favor of Ferrell Lumber. This appeal ensued.

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[1]McFall also sued Begley Lumber Company, which had apparently owned the table prior to Ferrell Lumber. McFall later agreed to voluntarily dismiss Begley Lumber Company as a party, due to a statute of limitations problem.

[2]Similarly, in its answer to Rockhouse Wood's intervening complaint, defendant Begley Lumber Company, ultimately dismissed as a party, alleged it was entitled to apportionment for any negligence, failure to warn, improper training, etc., on Rockhouse Wood's part.

The following two (2) instructions, concerning negligence on the part of Rockhouse Wood, were submitted to the jury:

> No. 7: It was the duty of Rockhouse Wood Products, Inc., to exercise ordinary care for the safety of others who use the chain conveyor, including the Plaintiff, Brian McFall.
>
> As used in this Instruction, "ordinary care" means such care as the jury would expect an ordinarily prudent company or person, engaged in a business similar to that of Rockhouse Wood Products, Inc., should exercise under similar circumstances.
>
> Do you find from the evidence that Rockhouse Wood Products, Inc., failed to comply with its duty of ordinary care and that such failure was a substantial factor in causing the injuries to the Plaintiff?
>
> No. 8: You will determine from the evidence and indicate in the following blank spaces what percentage of total fault is attributable to the persons hereafter named, you find to have been at fault, as follows:
>
> Richard Ferrell and Ferrell's Logging & Lumber, Inc. ____ %
>
> Brian McFall ____ %
>
> Rockhouse Wood Prod., Inc. ____ %

On appeal, McFall and Rockhouse Wood argue that the jury should not have received instructions concerning negligence on Rockhouse Wood's part. We are mindful of CR 51(3), which requires that a party appealing an instruction issue voice an exception or objection to the instruction in order to preserve

the issue on appeal. Specifically, the party must "present[] his position by an offered instruction or by motion, or . . . make[] objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection." CR 51(3).

In light of CR 51, we note that in spite of expressing to the court some reservation about the above instructions, counsel for McFall specifically agreed to submit them to the jury. The following represents comments made by counsel for McFall in the court's chambers, at the close of the evidence:

> There's some question in my mind as to whether or not a comparative negligence instruction can be given here without a crossclaim having been filed, or whatever you would call it, against Rockhouse Wood Products. And, none has been filed. But, I don't want any possibility, this is too big and important to have any possibility of error. And I want to avoid it . . . . Now, ordinary care instructions on the plaintiff, ordinary care instruction on Rockhouse Wood Products, then a comparative negligence instruction, then the damages instruction. Now, that's the way I see we preclude the instructions questions.

During this same discussion in chambers concerning the instructions, upon the court's reference to the issue of whether or not the above-referenced ordinary care instruction should be submitted to the jury, counsel for McFall responded, "I'm not saying to exclude that, Judge. I think an ordinary care instruction would be appropriate." Given that counsel for McFall did not take exception or object to the instructions at issue, but rather, specifically agreed that they were appropriate to

submit to the jury, we believe McFall has waived this issue on appeal.

We turn now to Rockhouse Wood's argument. We note that the original defendant in this matter, Begley Lumber Company (Begley Lumber), ultimately dismissed as a party due to a statute of limitations problem, filed a "counterclaim" against Rockhouse Wood in answer to Rockhouse Wood's intervening complaint. The counterclaim essentially asserted Begley Lumber's right to apportionment in the event the jury determined that Rockhouse Wood had been negligent in this matter. Rockhouse Wood then answered Begley Lumber's counterclaim and, additionally, responded to requests for discovery propounded by Begley Lumber.

In December 1996, Rockhouse Wood moved the court for an order holding its subrogation claim in abeyance, arguing that none of the parties disputed its right to be reimbursed workers' compensation benefits paid McFall. It noted that Ferrell Lumber had asserted a claim of "contributory negligence" against it, and assured the court in its motion that Ferrell's "counterclaim for indemnity, contribution and/or apportionment against Rockhouse, will still be defended." Shortly thereafter, Rockhouse Wood tendered its proposed instructions to the court. Two (2) of those instructions were virtually identical to those which Rockhouse Wood now argues were inappropriate:

> Are you satisfied from the evidence that Rockhouse Wood Products, Inc., failed to use ordinary care to properly inspect, maintain, and service the chain conveyor in question, and that such failure was a substantial cause of the accident and Brian McFall's injuries?

> You will now determine from the evidence and indicate on the following blank spaces what percentage of the total fault was attributable to each of the parties, as follows:
>
> Brian McFall ____ %
>
> Ferrell Logging & Lumber ____ %
>
> Rockhouse Wood Products ____ %

On appeal, Rockhouse Wood argues that because the circuit court ultimately granted its motion to hold its subrogation claim in abeyance, it was not truly a "party" before the court at the time of trial. Thus, it maintains, the jury should not have had the opportunity to pass upon its duty of care in the matter, or apportion any percentage of fault against it. Further, Rockhouse Wood argues, because it was not brought in as a third-party defendant in this action, an apportionment instruction against it was improper.

We disagree. First, we note that Rockhouse Wood stated its intent, by way of its pleadings, to defend the apportionment claim against it at trial, yet did not do so. Further, Rockhouse Wood submitted proposed instructions containing the very language to which it now objects. Most significantly, however, KRS 411.182, addressing allocation of fault in tort actions, states in pertinent part:

> (1) In all tort actions, including products liability actions, involving fault of more than one party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:

> . . . .
>
> (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
>
> . . . .
>
> (4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution . . . .

Given that an injured worker cannot collect from both his employer and a third-party tortfeasor, in the event he is injured on the job (see KRS 342.700(1)), the employer is essentially immunized from tort liability if the worker sues a third party for damages. Our highest court has characterized the employer, in such a situation, as a tortfeasor which has settled the tort claim against it:

> In *Stratton v. Parker*, Ky., 793 S.W.2d 817 (1990), we held:
>
> > "The law has now developed to the point that in tort actions involving the fault of more than one party, including third-party defendants and persons who have settled the claim against them, an apportionment instruction, if requested, must be given whereby the jury will determine the amount of the plaintiff's damage and the degree of fault to be allocated to each claimant, defendant, third-party defendant, and person who has been released from damage. The extent of the liability of each is a several liability and is limited to the degree of fault apportioned to each."

> In this case, what otherwise would have been tort liability of [the employer] to the injured worker has been extinguished by reason of the workers[’] compensation coverage. As a practical matter, workers[’] compensation coverage constitutes a settlement between the employee and the employer whereby the employee settles his tort claim for the amount he will receive as compensation. For all practical purposes, in this case, [the employer] occupies the position of a tort-feasor which has settled the tort claim against it.

Dix & Assoc. Pipeline Contractors, Inc. v. Key, Ky., 799 S.W.2d 24, 28-29 (1990). In light of the above case law, we believe that Rockhouse Wood constituted a party which was released under subsection (4) of KRS 411.182 and, therefore, was a party subject to an apportionment instruction under subsection (1)(b) of that statute.

Appellants’ second and final argument on appeal is that the issue of whether Ferrell Lumber was a “seller” under products liability law should not have been submitted to the jury, but rather, the court should have granted McFall a directed verdict on this issue as a matter of law. McFall brought his products liability claim pursuant to section 402A of the Restatement (Second) of Torts, which states in pertinent part:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product[.]

We are mindful of the following:

> On a motion for directed verdict, the trial judge must draw all fair and

> reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.
>
> In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented. Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. The reviewing court, upon completion of a consideration of the evidence, must determine whether the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. If it was not, the jury verdict should be upheld.

Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18-19 (1998) (citations omitted).

We have reviewed the videotape of this matter, particularly the testimony provided by appellee, Richard Ferrell. Mr. Ferrell testified that he is in the "lumber" business, i.e. he processes it, upgrades it, and ships it to manufacturers. He began operation of his sawmill in 1988 and, at the present time, the business grosses two (2) million dollars in annual sales of lumber. Since 1988, he testified, he has sold two (2) conveyor

tables, including the one he sold to Rockhouse Wood in 1993, and other equipment a "few" times. Over the past several years, he estimated he had averaged the sale of only one (1) or two (2) pieces of equipment per year. Mr. Ferrell testified that it is his practice to sell the equipment he plans to replace. He advertised the table at issue in "Taladega Machinery," a monthly trade magazine. Countering McFall's products liability claim, Mr. Ferrell maintained that he is only an occasional seller of his used equipment and that, certainly, the sale of his equipment is not a meaningful part of his business, but rather, merely incidental to it.

In reviewing this issue, we note the following products liability law:

> The liability imposed by section 402A relates to the sale of a defective product by one engaged in the business of selling. "It is axiomatic that one basic requirement for the application of the rule of strict liability under section 402A is that the defendant must be engaged in the business of selling the chattel." The liability imposed by section 402A is special liability limited to manufacturers and distributors engaged in the business of selling the product in question.
>
> The otherwise valuable rule of strict liability does not apply to the occasional seller of an allegedly defective product. When a product is sold only on an occasion or incident to the business of the seller, the transaction does not come within the purview of the doctrine of strict liability.

Griffin Indus., Inc. v. Jones, Ky., 975 S.W.2d 100, 102-03 (1998) (citations omitted).

We conclude that Mr. Ferrell presented evidence sufficient to submit the issue to the jury. Given the law of

products liability concerning the evidence necessary to establish "seller" status, and considering Mr. Ferrell's testimony, we believe that reasonable minds could differ concerning whether Ferrell Lumber is engaged in the business of selling used equipment such as the conveyor table at issue or whether, on the other hand, Ferrell Lumber is merely an occasional seller of such equipment. We do not believe the jury's determination that Ferrell Lumber is not a "seller" of sawmill equipment was flagrantly against the evidence such as would indicate passion or prejudice on the jury's part.

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

ALL CONCUR.

BRIEF FOR BRIAN MCFALL:

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