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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000093-MR
AND
NO. 2006-CA-000151-MR

MARY BOURQUE; THE HARTFORD INSURANCE COMPANY — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM
JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLET, JUDGE
ACTION NO. 00-CI-005773

CSX TRANSPORTATION, INC. — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Mary Bourque and the Hartford Insurance Company appeal a judgment of the Jefferson Circuit Court which directed a verdict in favor of CSX Transportation Incorporated (CSX) on Bourque's claims under the Federal Safety Appliance Act (FSAA). The appellants allege the trial court's erred in failing to submit the FSAA claim to the jury. The appellants also contend that the trial court erred in

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

instructing the jury on her common law negligence claim and in admitting photographs that were untimely disclosed. For the reasons stated below, we affirm.[2]

FACTUAL AND PROCEDURAL HISTORY

On September 11, 1999, Bourque sustained personal injuries when she fell from the upper deck of a CSX rail car. At the time of the injury Bourque was employed by ARS, Incorporated and was part of a crew that loads CSX auto rail cars with Ford trucks at Ford's Kentucky Truck Plant. After driving a truck onto the upper deck of a CSX auto rail car, she assisted another employee in removing a bridge plate. She then attempted to transition to the side ladder of the rail car from the upper deck. Bourque testified that she placed her left hand on the vertical handhold/grab-iron and her left foot at the end of the deck. As she attempted to move her right hand to the side ladder, the door moved away from what appeared to be the locked open position making it impossible for her to reach the side ladder with her right hand and she lost her footing on the side ladder with her right foot. This sudden movement caused her to fall from the upper deck to the concrete below. As a result of the fall Bourque suffered multiple fractures in her vertebrae, a fractured right wrist, a fractured left elbow, and a torn rotator cuff in her left shoulder. Bourque attributes her fall to a faulty locking mechanism on the door to which the grab iron was attached.

Bourque subsequently filed a complaint against CSX in Jefferson Circuit Court seeking damages for the personal injuries sustained in the accident. The complaint

[2] CSX has filed a protective cross-appeal, Case No. 2006-CA-000151-MR, which, based upon our disposition of the principal appeal, is moot and is not addressed on the merits.

alleged grounds for relief based upon CSX's violation of the FSAA, the Federal Employer's Liability Act (FELA), and common law negligence. Bourque's FELA claim was dismissed prior to trial. The trial court granted a directed verdict in favor of CSX on the FSAA claim. The case was submitted to the jury upon Bourque's common law negligence theory, and the jury returned a verdict in favor of CSX. This appeal followed.

Before us, the appellants contend that the trial court erred by directing a verdict on her FSAA claim, by failing to instruct the jury of its duty to warn users of the proper method for locking the rail car doors, and by admitting photographs which were untimely disclosed.

DIRECTED VERDICT ON FSAA CLAIM

The appellants' first assignment of error is that the trial court erred in granting CSX a directed verdict upon Bourque's FSAA claim. More specifically they argue that the trial court erred in determining that the locking mechanism was not part and parcel, and inseparably intertwined with the handhold/grab iron.

In ruling on a motion for a directed verdict, "the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable [inference] that the evidence can justify." *Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky. 1991). A directed verdict must not be entered "unless there is a complete absence of proof of a material issue in the action, or if no disputed issue of facts exists upon which reasonable men could differ." *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985). "On appeal, the

appellate court considers the evidence in the same light." *Lovins*, 814 S.W.2d at 922. But "[o]nce 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." *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). Following this standard, we cannot find that the trial court clearly erred by granting a directed verdict in favor of CXS.

We first note that FSAA does not create a private cause of action, but, rather, employees who allege they have been injured as a result of a FSAA violation may sue under FELA. *See Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 166, 89 S.Ct. 1706, 1708, 23 L.Ed.2d 176 (1969); *Magelky v. BNSF Ry Co.,* 491 F.Supp.2d 882, 888 (D.N.D. 2007). As previously noted, Bourque's FELA action was dismissed by summary judgment prior to trial. It follows that her FSAA claim was no longer viable at the time of trial.

In any event, the section of the Act relied upon by the appellants, 49 U.S.C. § 20302 provides, in relevant part, as follows:

> a) General.--Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines--
>
> (1) a vehicle only if it is equipped with--
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;
>
> (B) secure sill steps and efficient hand brakes; and

> (C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;
>
> (2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;
>
> (3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;
>
> (4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and
>
> (5) a train only if--
>
> (A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and
>
> (B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

Generally, a statute is open to construction only if its language is ambiguous. If the language is clear and the application of its plain meaning would not lead to an unreasonable result, then further interpretation is unnecessary. *Overnite Transp. Co. v. Gaddis*, 793 S.W.2d 129, 131 (Ky.App. 1990). However, if a statute is ambiguous and its meaning uncertain, then legislative intent should be determined by considering the whole statute and the purpose to be accomplished. *Dep't of Motor*

Transp v. City Bus Co., 252 S.W.2d 46, 47 (Ky. 1952). Furthermore, we presume the legislature is familiar with the law on issues on which it legislates, on notice of previous legislation, and judicial construction of statutes. *Manning v. Ky.Bd. of Denistry*, 657 S.W.2d 584, 587 (Ky.App. 1983).

By its plain language the statute does not include rail car door locking mechanisms. As such, we believe the trial court properly granted a directed verdict upon Bourque's FSAA claim. Bourque argues, in effect, that since the grab iron was connected to the door which, in turn, was attached to the locking mechanism, the locking mechanism should be considered part and parcel to the grab iron. However, we believe the connection between the grab iron and locking mechanism is too attenuated to support this argument. We accordingly affirm upon this assignment of error.

FAILURE TO INSTRUCT ON DUTY TO WARN

Borque also contends that the trial court erred by failing to instruct the jury "that CSX had a specific duty to adequately instruct or warn users on the proper method of locking the doors." We disagree.

In the Commonwealth, trial courts are required to instruct the jury on the whole law of the case including "instructions applicable to every state of the case deducible or supported to any extent by the [evidence]." *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). Additionally, we consider any alleged errors regarding jury instructions to be questions of law; thus, we review such assignments of error *de novo*. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky.App. 2006).

Bourque's negligence claim was submitted to the jury upon the following instruction:

> It was the duty of the defendant CSX Transportation, Inc. to exercise ordinary care to maintain its railcars in a reasonably safe condition for the use of its customers, including plaintiff Mary Bourque. You will find for plaintiff May Bourque if you [are] satisfied from the evidence that on September 11, 1999:
>
> (a) that by reason of the door locking mechanism, the railcar was not in a reasonable safe condition for the use of its customers, including plaintiff Mary Bourque;
>
> AND
>
> (b) that in the exercise of ordinary care, defendant CSX Transportation, Inc., should have anticipated that a customer would be injured as a result of the door locking mechanism.
>
> Otherwise, you will find for defendant CSX Transportation, Inc.

Ultimately, the jury found that the rail car was in a reasonably safe condition, implicitly rejecting Bourque's theory that there was an unsafe condition associated with the locking mechanism. Thus, in substance, this argument is premised upon the contention that reversible error occurred because Bourque was denied a jury instruction stating that CSX had a duty to warn against something that was eventually determined by the jury not to be unsafe.

We do not believe reversible error occurred as a result of the trial court's failure to give the instruction. The proposed instruction presupposed that the door locking mechanism was unsafe and that there was something to warn about. Ultimately,

this premise was rejected. As such, any error was harmless. CR[3] 61.01 ("No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties").

ADMISSION OF PHOTOGRAPHS

The appellants' final argument is that the trial court erred by permitting CSX to introduce at trial photographs which were submitted to them 60 days prior to trial whereas the trial court's pretrial order required disclosure of all trial exhibits 90 days prior to trial. The appellants also contend that introduction of the photographs was improper because they were taken by counsel for CSX, thereby preventing them from cross-examining the photographer concerning the circumstances under which the photographs were taken.

As a general rule, we review a trial court's evidentiary rulings for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "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).

[3] Kentucky Rules of Civil Procedure.

We are not persuaded that the trial court abused its discretion in admitting the photographs. Though the photographs were provided 60 (rather than the required 90) days prior to trial, nevertheless, this provided the appellants with ample time to review the exhibits, have them examined by their experts, and prepare any necessary rebuttal. Moreover, the appellants have identified no specific prejudice resulting from their inability to cross-examine the photographer. As such, we find no reversible error relating the the admission of the pictures.

CONCLUSION

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

ALL CONCUR.

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