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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000334-MR

MICHAEL TILFORD — APPELLANT

APPEAL FROM HICKMAN CIRCUIT COURT
v. HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 04-CI-00044

ILLINOIS CENTRAL RAILROAD CO.,
D/B/A CANADIAN NATIONAL/ILLINOIS
CENTRAL RAILROAD — APPELLEE

AND NO. 2010-CA-000380-MR

ILLINOIS CENTRAL RAILROAD CO. — CROSS-APPELLANT

APPEAL FROM HICKMAN CIRCUIT COURT
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MICHAEL TILFORD — CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,[1] SENIOR JUDGE.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

CLAYTON, JUDGE: Michael Tilford appeals from the January 21, 2010, Hickman Circuit Court judgment and verdict, which dismissed all claims against the Illinois Central Railroad Company (hereinafter "ICRR") in a railroad crossing accident in which an ICRR train collided with his truck. In addition, ICRR files a protective cross-appeal of several interlocutory orders and rulings, which were merged into the trial order and judgment. After careful review, we affirm the judgment.

On August 17, 2003, an Illinois Central Railroad train and a pick-up truck, which was driven by Tilford, collided at a railroad grade crossing on a county road, commonly known as Tommy Via Road, in rural Hickman County. Tilford, who had traversed this crossing numerous times, said that typically he crossed the railroad tracks without stopping unless he heard a train whistle. On this day, he followed his usual pattern. Tilford approached the rural public crossing at approximately twenty-five to thirty miles per hour before slowing down in order to navigate a right turn and incline at the crossing. The railroad crossing intersects the road at nearly a right angle.

Then, Tilford claims that he looked in both directions and proceeded to cross without stopping. He says that he never heard a train whistle although he acknowledged that the windows of the cab were shut and his air conditioner was running. When Tilford suddenly realized that a train was approaching, he immediately put the gear into reverse, stomped on the gas pedal, and attempted to avoid the train. But although he almost cleared the right-of-way, the train hit the

front right portion of the truck. Tilford was knocked around during the collision and did not have his seatbelt fastened.

From the vantage point of the train engineer, T.W. Beadles, and the conductor, J.I. Spees, the collision was unavoidable. Engineer Beadles first observed Tilford's truck approaching the railroad crossing when the train was approximately two thousand feet from it. Engineer Beadles said that he blew the train whistle as he always did when approaching this crossing. Further, when Engineer Beadles saw Tilford's truck on the railroad crossing, he engaged the train's emergency brakes. It was too late, however, to stop the train from colliding with the truck because its two locomotives and fifty-eight cars weighed more than 12,600 tons.

The three-day trial commenced on January 11, 2010, and the jury began deliberations on January 13, 2010. The jury returned with a verdict in approximately one hour. The trial order and judgment reflect that nine of the twelve jurors agreed that the railroad had not violated its duties as explicated in Jury Instruction Number Three. Following the jury verdict, judgment was entered on January 21, 2010, dismissing Tilford's claim. On February 17, 2010, Tilford appealed the judgment, and on February 24, 2010, the ICRR filed a cross-appeal.

Tilford argues that Jury Instruction Number Three did not appropriately state the railroad's duties under Kentucky law. Besides this argument, he also disputes the trial court's exclusion of evidence about the replacement of a missing whistle post after the accident by ICRR. The railroad

company replaced a whistle post that had been in front of the railroad grade crossing, which is the subject of this lawsuit. The trial court excluded the evidence as a subsequent remedial measure under Kentucky Rules of Evidence (KRE) 407. Conversely, ICRR maintains that the jury was properly instructed regarding the railroad's duty to exercise ordinary care to avoid collision upon the discovery of a peril and the trial court did not err in excluding evidence regarding the replacement of a whistle post. ICRR maintains that exclusion of the evidence was proper not only under KRE 407 but also KRE 403, and if any error resulted, it was harmless.

With regard to the standard of review, errors in jury instructions are considered as questions of law and are reviewed by this Court de novo. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). And "[i]nstructions must be based upon the evidence and they must properly and intelligibly state the law." *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (quoting *Howard v. Com.*, 618 S.W.2d 177, 178 (Ky. 1981)). Additional guidance concerning appellate review of instructional error was provided by the Kentucky Supreme Court:

> The rule is that generally an erroneous instruction is presumed to be prejudicial to appellant, and the burden is upon appellee to show affirmatively from the record that no prejudice resulted; and when the appellate court cannot determine from the record that the verdict was not influenced by the erroneous instruction, the judgment will be reversed.

Drury v. Spalding, 812 S.W.2d 713, 717 (Ky.1991) (quoting *Prichard v. Kitchen*, 242 S.W.2d 988, 992 (Ky.1951)). But "[i]f the statements of law contained in the

instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury." *Ballback's Adm'r v. Boland–Maloney Lumber Co.*, 306 Ky. 647, 652–53, 208 S.W.2d 940, 943 (1948). Having determined the standard necessary to review an error in jury instructions, we turn to the case at hand.

The instruction that Tilford complains about on appeal is "Jury Instruction Number 3," which stated as follows:

> It was the duty of Illinois Central Railroad Company (ICRR) and its employees operating the train when approaching the crossing with Tommy Via Road:
>
> A. to sound the whistle or ring the bell at a point not less than eight hundred twenty-five (825) feet from the crossing and to sound the whistle or ring the bell continuously or alternately from that point to the crossing;
>
> B. to keep a lookout ahead for vehicles on or about to pass through the crossing, or approaching it so closely as to be in danger of collision;
>
> C. to exercise ordinary care generally to avoid collision with persons or vehicles using the crossing, once a peril is perceived;
>
> If you believe from the evidence that ICRR or its employees failed to comply with this duty, and that such failure was a substantial factor in causing the accident, you will find for Mr. Tilford; otherwise, you will find for ICRR.

Tilford challenges whether the jury instructions propounded by the trial court accurately replicated the duties of the railroad company.

A review regarding the duties of railroads shows that such duties depend on whether the crossing is ascertained to be private, public, or ultrahazardous. The distinction between public and private railroad crossings is critical because "the duties required of persons who operate railroad trains, when approaching and passing over public crossings, are very different from those which are required of them at private crossings." *Stull's Adm'x v. Kentucky Traction & Terminal Co.*, 172 Ky. 650, 189 S.W. 721, 723 (Ky. App. 1916).

The common law imposes a minimal duty for railroad companies at private crossings. In contrast, "[t]he General Assembly . . . imposes multiple duties on railroads at public crossings. KRS 277.010, et. seq." *See Calhoun v. CSX Transp., Inc.*, 331 S.W.3d 236, 240 (Ky. 2011). In the case at hand, the Tommy Via Road crossing is considered a public crossing.[2] The duties of parties operating a train at a public railroad crossing are explained in KRS 277.190, which says:

> (1) Every railroad company shall provide each locomotive engine running over any of its lines with a bell of ordinary size and a whistle. The bell shall be rung or the whistle sounded at a distance of at least fifty (50) rods from the place where the track crosses upon the same level any highway or crossing where a signboard is required to be maintained. The bell shall be rung or the whistle sounded continuously or alternately until the engine has reached the highway or crossing except as provided in subsection (2) of this section.

[2] Additional duties are imposed if the railroad crossing is ultrahazardous; however, the trial court granted partial summary judgment to ICRR and held that the crossing was not ultrahazardous. This ruling has not been challenged on appeal.

Thus, upon approaching a public grade crossing, Kentucky statutory law imposes on the persons operating a train, the duty to maintain a lookout and provide an audible warning. In addition, in *Louisville & N.R. Co. v. Elzey*, 302 Ky. 407, 411, 194 S.W.2d 962, 964 (Ky. 1946), it was stated that "[t]he only duties appellant owed appellee in the operation of its train were to maintain a lookout ahead, and to use all the means at its command to avoid the collision after discovering appellee's peril." So that, the railroad crew must keep a lookout, ring a whistle, and make every effort to stop once a peril is discovered.

In particular, Tilford argues that Subpart C of Jury Instruction Number Three is incorrect when it states that the railroad's duty to exercise ordinary care to avoid collision arises "once the peril is perceived." He protests that the inclusion of the phrase "once a peril is perceived" is a fundamental misstatement of the law. Notwithstanding jurisprudence, for example, *Elzey*, that has stated a railroad crew has no duty to take action to avoid a collision until a person is discovered at peril, it is simple logic and commonsense that this duty, to stop a train, only occurs upon the discovery of peril. In fact, statutory law allows that trains have the right-of-way at public crossing. KRS 189.560(1)(c). Therefore, the crew of a train is entitled to presume that an approaching motorist will yield the right-of-way, and it is only necessary to exercise ordinary care to avoid a collision when the person puts themselves in a position of peril.

Besides that, a close reading of Jury Instruction Number Three definitively states that not only does the railroad crew have the duty to act once a

peril is discovered, but also Subparts A and B state the additional statutory duties of the railroad crew found in KRS 277.190(1). This portion of the jury instructions elucidates that a railroad crew is to sound the whistle or ring the bell at a point not less than eight hundred twenty-five (825) feet from the crossing; to sound the whistle or ring the bell continuously or alternately from that point to the crossing; and, to keep a lookout ahead for vehicles on or about to pass through the crossing or approaching it so closely as to be in danger of collision. The duties in subpart A and B not only mirror the duties found in KRS 277.190(1) but also conform precisely to Palmore's pattern instruction. *See* John S. Palmore, *Kentucky Instructions to Juries,* Vol. 2, § 25.01 (5th Ed. 2009).

Regarding other arguments by Tilford concerning the jury instructions, we do not agree nor find any legal precedent to support Tilford's suggestion that the instructions should be based on the ICRR's operating rules rather than statutory mandates. The legal duties herein result from the law not a company manual.

Moreover, we are not swayed by Tilford's arguments that the language in the jury instructions, "once the peril is perceived," is a relic of the former contributory negligence scheme and inapplicable in public crossing cases. Before any consideration of comparative fault, the trial court considers the following factors: that at a railroad crossing a train has the right-of-way; that the train is to have a lookout and sound a whistle at a certain point before the crossing; and, that the train crew must do everything possible to stop the train when someone

puts themselves in peril. If it is determined that the railroad breached theses duties, then the issue of comparative negligence is pertinent. The jury in this case did not reach the issue of comparative fault because it found that the crew had met its duty. Jury Instruction Number Three referenced only the duties of the railroad and did not address the actions or duties of Tilford. Hence, we believe the jury instructions properly described the factual situation herein, and consequently, correctly and intelligibly stated the law.

Tilford's second argument is that the trial court's decision to exclude evidence under KRE 407 was erroneous. The language of KRE 407 provides that:

> When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The rationale behind the rule is a public policy concern. Evidence of certain remedial efforts is not admissible so that parties will perform remediation without concern for any possible court action. *Com., Cabinet for Health and Family Services v. Chauvin*, 316 S.W.3d 279, 303 (Ky. 2010) (citing to Robert G. Lawson, *Modifying the Kentucky Rules of Evidence – A Separation of Powers Issue,* 88 Ky. L.J. 581–585 (2000).

Tilford bases his argument about the trial court's error in excluding evidence about the replacement of the whistle post on the following points. First, the action itself was not sufficiently remedial because it was performed under existing railroad policy. Second, the evidence was relevant to prove a disputed fact.

Before addressing this argument, we note that regarding evidentiary matters, our standard of review is limited to a determination of whether the trial court abused its 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 [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. at 581.

To bolster his position, Tilford refers to a Hawaii decision, *Ranches v. City and County of Honolulu*, 115 Hawai'i 462, 168 P.3d 592 (Hawai'i 2007). He suggests that this case supports the proposition that because the replacement of the whistle post was required under company procedures, it was not remedial and should have been admitted into evidence. ICRR observes that this case's relevance is attenuated because it is from a foreign jurisdiction. Moreover, the railroad company states that the circumstance of *Ranches* is not analogous to Tilford's accident. In *Ranches*, the facts involved the completion of a floor resurfacing project, **already in progress**, when the alleged slip and fall occurred. Therefore, the actions of the defendant did not take place at a later date, as is the case here.

ICRR counters that the only case in Kentucky concerning whether a subsequent remedial measure is admissible is *Bush v. Michelin Tire Corp.*, 963 F.Supp. 1436, 1449 (W.D.Ky. 1996). ICRR says that in *Bush* the court rejected the argument that the subsequent measures were not sufficiently remedial when the defendant claimed a design change was adopted for reasons of efficiency not safety.

Our first observation is that the *Bush* case is not directly on point. It refers to Federal Rule of Evidence (FRE) 407, which is not the same as KRE 407. Plus, *Bush* is not on point as to whether a measure, based on company policy, is remedial or not. The Court in *Bush* decided that evidence about a manufacturer's design, which was adopted after an accident with another tire by the manufacturer, was inadmissible under Federal Rule of Evidence 407. The Court held this even though the defendant was testing the alternative design at least one year before it manufactured the tire involved in the accident. For the purposes of FRE 407, however, the Court still considered it a "subsequent" remedial measure. But the Court's reasoning did not encompass a discussion of the effects of company policy and its impact on subsequent remedial action.

But another case proffered by ICRR, *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008), again a case from a foreign jurisdiction, does clearly reject the argument proffered by Tilford. We find its reasoning more persuasive in the present situation. In *Martin*, the plaintiff sought to introduce evidence that the railroad had subsequently cleared vegetation after an accident.

The plaintiff was alleging that the vegetation obstructed motorists' view. They argued that "that the clearing was not remedial because it was carried out in accordance with Norfolk's internal policies rather than with the intent of remedying the condition that allegedly lead to Mrs. Martin's death." *Id. at 88.* The Tennessee Supreme court held that:

> We conclude that these arguments are without merit. The clearing is remedial because it corrected an allegedly dangerous condition and made the crossing safer for future motorists. *Rothstein,* 60 S.W.3d at 813. That the clearing was carried out pursuant to corporate policy does not undermine the remedial nature of the action. In addition, the clearing of the vegetation undisputedly followed the accident giving rise to this action. *See Id.* That it occurred over two years later does not make the event any less subsequent. Accordingly, we conclude the trial court did not abuse its discretion in determining that Norfolk's clearing of the vegetation is a subsequent remedial measure.

Id. Since no Kentucky case is specifically on point, we find the holding in this case to be instructive. The fact that the whistle post was replaced following the collision in our case and the fact that ICRR's operating rules purportedly mandated damaged or missing whistle posts be replaced does not change that the character of the action – was both subsequent and remedial. Therefore, the trial court properly excluded the evidence of the replacement of a whistle post under KRE 407.

In making this decision, it is noteworthy that Tilford did not introduce any evidence demonstrating that the whistle post replacement was contemplated or commenced prior to the collision with his truck or was part of a company policy.

Indeed, Tilford provided nothing to show that the replacement of the whistle post by ICRR was pre-planned or under a company policy.

Tilford also disputes the trial court exclusion of the evidence about the whistle post because, under his analysis, KRE 407 does allow for the introduction of evidence of remedial measures for other purposes such as to prove a disputed fact. According to Tilford, when he called Conductor Spees as a rebuttal witness, Spees answered "yes," in response to Tilford's question "[i]sn't it true that you remember Mr. Beadles sounding the whistle at the whistle post." As pointed out by ICRR, the phrase "at the whistle post" has numerous meaning in railroad jargon. Furthermore, other than this question, Tilford never asked any additional questions about the whistle post. Finally, Tilford did not preserve this issue for appeal. Thus, Tilford has not established during the trial that introduction of evidence about replacement of the whistle post was required to clear up a disputed fact.

Notwithstanding Tilford's arguments about a disputed fact, the jury was aware that the whistle post might have been missing. A witness for Tilford, Tommy Via, testified that the whistle post was missing on the day of the accident. Additional witnesses also testified that the whistle post was missing. Given that the standard of review for evidentiary ruling is an abuse of discretion, we do not believe that the trial court's decision to exclude the evidence about the whistle post, even if erroneous, rises to the level of an abuse of discretion. The trial court

judge's ruling was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Regarding ICRR's cross-appeal, a cross-appeal is appropriate only when the judgment fails to give the cross-appellant all the relief they had demanded or subjects them to some degree of relief that they seek to avoid. *Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982). ICCR requested that our Court affirm the decision of the Hickman Circuit Court, which we have done. Thus, it is not necessary for us to address the issues presented on cross-appeal.

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

ALL CONCUR.

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