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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000999-MR

MELISSA SHEA — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 08-CI-00952

BOMBARDIER RECREATIONAL PRODUCTS, INC. AND BRP US INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Melissa Shea appeals from the May 16, 2011, order of the Boone Circuit Court denying her motion for a new trial and judgment notwithstanding the verdict, following entry of a final judgment in favor of Bombardier Recreational Products, Inc. and Bombardier Recreational Products,

US, Inc. (hereinafter collectively referred to as "Bombardier") in accordance with the jury verdict. For the following reasons, we affirm.

Shea purchased a 2007 Bombardier Can-Am Outlander 650 XT all-terrain vehicle ("ATV") from Pleasant Valley Outdoor Power, LLC ("Pleasant Valley") in Florence, Kentucky on March 31, 2007. On May 20, 2007, Shea and her fiancé, Butch Martin, were taking turns riding the ATV on a farm in Crittenden, Kentucky. During Shea's third attempt climbing a certain hill, the ATV flipped and she suffered fractures of her C4 and C5 vertebrae, rendering her a permanent quadriplegic. Shea brought claims of strict liability (defective design and failure to warn) and negligence in Boone Circuit Court against the dealer, Pleasant Valley, and the manufacturers, Bombardier. A settlement was reached with Pleasant Valley during trial. Following the trial, the jury returned a verdict in favor of Bombardier. Shea filed a post-trial motion for a new trial and JNOV, which the trial court denied. This appeal followed.

First, Shea claims that the trial court abused its discretion by admitting into evidence a video depicting Bombardier's test track facilities which Bombardier failed to disclose during discovery. We disagree.

We review a trial court's rulings on evidentiary issues for an abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). An abuse of discretion occurs if "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v.*

Thompson, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted). Further, pursuant to CR[1] 61.01, a verdict should not be disturbed for error in the admission of evidence by the court unless the error violates substantial justice, *i.e.*, affects the substantial rights of the parties.

The record shows that during the discovery process, Shea requested Bombardier disclose all "pre-production hill-climbing tests" conducted by or for Bombardier on the subject ATV. On December 16, 2008, the trial court ordered Bombardier to produce copies of the test reports and videos that Shea requested. On February 18, 2009, the trial court ordered Bombardier to produce, at Shea's expense, copies of the actual test documents in the form in which they were generated, or to make the documents available for Shea's attorney to inspect and copy. The court's March 10, 2009, order setting this case for jury trial required the parties to identify and produce for inspection and copying all exhibits intended to be used at trial no more than ten days before trial.

On January 10, 2011, Bombardier produced two videos depicting its test track facilities as exhibits to be used during trial. Shea filed a motion in limine to exclude the videos because they were not produced during discovery. Bombardier asserted that it does not regularly film its tests and therefore did not have videos to produce during discovery. Bombardier argued that the videos were prepared expressly for trial to assist with witness testimony and were not completed until January 7 or 8, 2011. The record reveals that the videos were produced for Shea in

[1] Kentucky Rules of Civil Procedure.

compliance with the court order requiring exhibits to be produced no more than ten days before trial. Accordingly, we fail to appreciate how Shea was unfairly surprised or prejudiced by the admission of the videos, and find that the trial court did not abuse its discretion by admitting the videos into evidence.

Next, Shea claims that she was entitled to a new trial because Bombardier presented misleading and prejudicial testimony regarding a brake warning on the ATV. We disagree.

During closing arguments, counsel for Bombardier stated that a message scrolls across the instrument panel of the ATV if the parking brake is applied. This statement was based upon the testimony of Jean-Yves LeBlanc, Director of Product Safety for Bombardier, who testified that when a driver of the ATV applies the brake with the pedal, the word "brake" scrolls across the instrument panel. Post-trial, Shea supplied a report by Thomas Eaton, an engineer, who opined that the scrolling brake message does not appear until after the brake has been engaged for 17 seconds or more. As a result, Shea contends LeBlanc's testimony was misleading and prejudicial, and is grounds for a new trial.

However, we are unable to appreciate any misleading or prejudicial aspect of LeBlanc's testimony. Shea claims to be surprised by LeBlanc's testimony; however, the ATV's Operating Guide, produced by Bombardier during discovery, specifically states that the word "brake" appears on the instrument panel after the parking brake is applied for 15 seconds or more. Shea did not object to LeBlanc's testimony, question him further to clarify his comments regarding the brake

message, or present impeachment evidence. With respect to the post-trial report of Eaton, Shea fails to explain why the evidence could not have been discovered or produced at trial under the exercise of due diligence, and thus is not grounds for a new trial. *See Leeds v. City of Muldraugh*, 329 S.W.3d 341, 346 (Ky.App. 2010) (holding that a new trial could not be granted on basis of newly discovered evidence when party failed to exercise due diligence to discover the evidence before the trial).

Finally, Shea claims that the trial court's instructions to the jury were erroneous. Shea requested that the trial court provide three separate instructions on her claims of negligent failure to warn, strict liability failure to warn, and strict liability defective design. Ultimately, the court submitted a strict liability instruction, under which the jury found in favor of Bombardier. Shea maintains the trial court erred by combining the elements of her strict liability claims of defective design and failure to warn into one instruction because it was misleading. Further, Shea claims the jury should have been instructed on her claims of negligent design and failure to warn. We disagree with both claims of error.

Appellate review of jury instructions is a matter of law and we will examine them under a *de novo* standard of review. *Reece v. Dixie Warehouse & Cartage Co.*, 188 S.W.3d 440, 449 (Ky.App. 2006). Kentucky law mandates that jury instructions should only provide the "bare bones" of the issue presented to the jury, and further elaboration may be fleshed out during counsel's closing argument. *Hamby v. Univ. of Kentucky Med. Ctr.*, 844 S.W.2d 431, 433 (Ky.App. 1992)

(citation omitted). A court's concern is that "[the instructions] must be sufficiently clear to reveal precisely the jury's conclusions: 'An instruction should be free of ambiguity and not open to various interpretations by the jury.'" *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (quoting *Coe v. Adwell,* 244 S.W.2d 737, 740 (Ky. 1951)).

In the case at bar, the jury instructions read, in pertinent part, as follows:

> Defendant, Bombardier, had a duty to provide an "adequate warning" regarding the ATV in this case. You will find for the Plaintiff, Melissa Shea, if you are satisfied from the evidence that:
>
> 1. The ATV, as designed, manufactured, or distributed by Bombardier, is defective and unreasonably dangerous;
>
> OR
>
> 2. As marketed and distributed by Defendant, Bombardier, the ATV was unreasonably dangerous, without reasonable notice or warning of danger, and the owner's manual or labeling of the ATV was not reasonably adequate to warn an ordinary prudent person that she might be injured during the operation of the ATV;
>
> AND
>
> 3. Such failure(s) was a substantial factor in causing the accident and injuries to Plaintiff, Melissa Shea.

Strict liability allows a plaintiff to recover in several ways, such as a theory of defective design, a theory of defective manufacture, or a theory of a failure to warn of danger. *Worldwide Equip., Inc. v. Mullins*, 11 S.W.3d 50, 55 (Ky.App. 1999) (citation omitted). Under any theory of strict liability, the plaintiff must

establish causation. *Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky.App. 1970). Indeed, if a defendant had a duty to warn, the issues to be resolved are "whether an adequate warning was given and, if not, whether the failure to give it proximately caused the injury." *Post v. Am. Cleaning Equip. Corp.*, 437 S.W.2d 516, 522 (Ky.App. 1968).

In the case at hand, Shea argues the instruction was erroneous because it does not reveal whether the jury found the product to be defective or whether Bombardier failed to adequately warn of the ATV's dangers. Though we are unable to discern whether the jury found the ATV to be defective or that Bombardier gave inadequate warnings, the verdict form is clear that the jury believed neither was a substantial factor in Shea's injuries. Such an instruction adequately informed the jury that Bombardier was strictly liable if the ATV was defective, or if the ATV was unreasonably dangerous without adequate warnings, and either the condition or lack of warning caused Shea's injuries. This particular instruction has been approved by the Kentucky Supreme Court. *See Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 250-51 (Ky. 1995), *overruled on other grounds by Martin v. Ohio County Hosp. Corp.*, 259 S.W.3d 104 (Ky. 2009). Since the controlling issue is whether the instruction correctly stated the law, *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 230 (Ky. 2005), the trial court did not err by joining both theories of strict liability into one instruction because the instruction did not misstate the law.

Additionally, with respect to Shea's claims of negligent design and negligent failure to warn, we find those claims were subsumed by the strict liability instruction to the jury. We acknowledge Shea's argument that she was entitled to have her theory of the case submitted to the jury, *Clark*, 910 S.W.2d at 250; however, redundant instructions are unnecessary. *Reynolds v. Commonwealth*, 257 S.W.2d 514, 516 (Ky. 1953).

Negligence and strict liability theories of recovery overlap to the degree that, in either instance, the plaintiff must prove the product was defective and the legal cause of the injury. *See Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1150 (6th Cir. 1996) (holding that under Kentucky law, theories of negligence or strict liability both require that a jury first find the product was defective), *Holbrook*, 458 S.W.2d at 157 (whether the action involves negligent design, negligent failure to adequately warn, or the sale of a defective product that is unreasonably dangerous because of an inherent defect or inadequate warning, in every instance, the product must be a legal cause of the harm"). Under a claim of negligence, a plaintiff must prove a defendant's duty, breach of that duty, and a causal connection between the breach and injury to plaintiff. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436-37 (Ky.App. 2001) (citations omitted). Strict liability may be imposed on a manufacturer of a product if that product is in a defective condition to make it unreasonably dangerous to its user. *Worldwide Equip., Inc*, 11 S.W.3d at 55 (citing *Restatement (Second) of Torts* § 402A (1965)). The fact remains that, under certain circumstances, distinct causes of action may arise under either a negligence

theory or strict liability theory of recovery since negligence claims focus on the conduct of the actor, and strict liability claims focus on the condition of the product. *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 780 (Ky. 1984).

With respect to the negligent design instruction, the foregoing has previously been stated:

> We think it apparent that when the claim asserted is against a manufacturer for deficient design of its product the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned. In either event the standard required is reasonable care.

Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 60, 69-70 (Ky. 1973)). The conclusion follows that if a manufacturer has placed a defective product that is unreasonably dangerous in the market, it has violated its duty under a negligence standard and may be found strictly liable. *See Nichols v. Union Underwear Co.*, 602 S.W.2d 429, 433 (Ky. 1980) (holding the fact finder in a design defect case must decide whether the manufacturer acted prudently, *i.e.*, whether the design was defective condition). In light of this, the strict liability instruction took into consideration any evidence presented with respect to the negligent design of the ATV.

In the same vein, we are also persuaded that Shea's claim of negligent failure to warn was adequately represented in the strict liability instruction. The instruction clearly stated that Bombardier had a duty to provide an adequate warning regarding the ATV and provided for Bombardier's liability if the ATV

was unreasonably dangerous and Bombardier failed to provide reasonable notice or warning of that danger which was a substantial factor in Shea's injuries. Since the instruction took into account the elements of negligence, a separate negligence instruction regarding a failure to warn would have been redundant with the strict liability instruction.

The order of the Boone Circuit Court is affirmed.

ALL CONCUR.

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