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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000045-MR

PRIMAL VANTAGE COMPANY, INC. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CI-006326

KEVIN O'BRYAN;
SANTÉ O'BRYAN; DICK'S
SPORTING GOODS, INC.;
DENNIS I. MARTIN; AND
MARGARET M. MARTIN APPELLEES

AND NO. 2018-CA-000063-MR

SANTÉ O'BRYAN CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CI-006326

PRIMAL VANTAGE COMPANY, INC.;
DENNIS I. MARTIN;
MARGARET M. MARTIN;
AND KEVIN O'BRYAN CROSS-APPELLEES

AND NO. 2018-CA-0000106-MR

KEVIN O'BRYAN CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CI-006326

PRIMAL VANTAGE COMPANY, INC.;
DENNIS I. MARTIN;
MARGARET M. MARTIN;
AND SANTÉ O'BRYAN CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SPALDING AND K. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Primal Vantage Company, Inc. appeals from a final order of the Jefferson Circuit Court after a jury returned a verdict of $18.4 million in this products liability case. The product at issue, a hunting ladderstand

manufactured by Primal Vantage, collapsed, causing severe injuries to Kevin O'Bryan. The jury found Primal Vantage liable for failure to warn and awarded Kevin damages for past and future medical and personal expenses, pain and suffering, and past lost wages. It also awarded loss of consortium damages to Kevin's former wife, Santé O'Bryan. The O'Bryans' claims against Dick's Sporting Goods, Inc., the retailer of the ladderstand, and the owners of the property on which the accident occurred, Dennis I. Martin and Margaret M. Martin, were dismissed by the trial court.

Primal Vantage argues that it was entitled to a directed verdict and also alleges numerous evidentiary errors, improper exclusion of the Martins from the apportionment of damages, and errors in the jury instructions. Kevin and Santé filed cross-appeals against Dick's Sporting Goods. Following oral argument, Kevin and Santé moved to dismiss Dick's Sporting Goods as a party. Their motions have been granted and consequently Dick's Sporting Goods is dismissed as a party by separate orders of this Court.

Background

In 2012, after Kevin's ten-year-old son expressed an interest in going hunting, Kevin's friend, Jimmy McCauley, obtained permission from Dennis Martin to hunt turkey on Martin's 65-acre tract of property in Jefferson County. Martin, his family, and friends frequently hunted on the property. In 2007, Martin

had purchased a ladderstand at Dick's Sporting Goods and installed it on the property. The ladderstand, which was manufactured by Primal Vantage, consisted of a two-person platform with an attached ladder. Five polypropylene straps were necessary to secure the ladderstand to a tree; it was not a freestanding device. The platform was approximately fifteen feet above the ground. The ladderstand was sold with instructions and warnings which included the following statements:

> 1. ALWAYS read all warnings and instructions before each use of ladderstand. Failure to read all warnings and instructions before each use of ladderstand may result in serious injury or death.
> . . .
>
> 6. ALWAYS use a full body safety harness when using this ladderstand. Failure to use a safety harness may result in serious injury or death.
> . . .
>
> 12. DO NOT leave your ladderstand outside all year round. It must be stored inside when not in use.

A warning label was also affixed to the back of the top rung of the ladder. It provided as follows:

> <u>!WARNING!</u>
>
> <u>DO NOT</u> use this ladderstand without reading and following all warnings and instructions before each use. Failure to do so may result in serious injury or death.
>
> <u>ALWAYS</u> inspect your ladderstand before each use.
>
> <u>DO NOT</u> use if parts are missing, worn, or damaged.

> ALWAYS wear a Full Body Harness while using this ladderstand. Failure to wear a full body harness while using this ladderstand may result in serious injury or death.

At the time of the hunting trip, the ladderstand had been left outside affixed to the tree for almost five years without inspection or maintenance. Because of exposure to the elements and six inches of tree growth, the polypropylene straps had deteriorated, and two of the five straps were actually broken. Kevin, his son, and McCauley all climbed up the ladder to the platform. None of the three was wearing a safety harness, nor had they read the instructions. They also did not read the warning label affixed to the ladderstand, nor did they inspect it. Shortly after they reached the platform, the three remaining intact straps broke. There was nothing left securing the stand to the tree and it fell to the ground. Kevin was seriously injured, resulting in paralysis from the waist down. He is unable to stand, walk, run or control his bladder and bowel functions, and is unable to engage in sexual relations. He continues to experience severe and unremitting pain.

Kevin and Santé filed suit against the Martins, the owners of the property and the ladderstand; Dick's Sporting Goods, the retailer; and Primal Vantage, the manufacturer. The complaint alleged in part that Martin was grossly negligent for failing to maintain the ladderstand and for failing to correct or warn of the ladderstand's danger. These claims were dismissed by summary judgment

prior to trial based on Kentucky Revised Statutes (KRS) 150.645, the hunting landowner's immunity statute. All the claims against Dick's Sporting Goods were dismissed by directed verdict following the close of evidence at trial. Kevin's defective manufacturing, defective design, and punitive damages claims against Primal Vantage were also dismissed. The only remaining claims concerned Primal Vantage's liability for failure to warn. The jury found Primal Vantage liable for failing to provide a reasonable warning as to the risk attendant to the use of polypropylene straps to secure the ladderstand and awarded the following amounts in damages: $869,974.66 for past medical expenses; $291,270 for past personal care expenses; $3,120,564.06 for future medical and personal care expenses; $13,000,000 for pain and suffering and loss of enjoyment of life; and $1,204,772 for past lost wages, loss of ability to labor, and to earn money and to perform household services, and loss of pension benefits. The jury also awarded Santé $80,000 for loss of consortium.

After finding that Kevin failed to comply with his duty of ordinary care and that such failure was a substantial factor in causing the accident, the jury assigned fifty percent of the fault to Primal Vantage and fifty percent to Kevin. The trial court accordingly calculated Primal Vantage's liability to Kevin as $9,243,290.36 and to Santé as $40,000.

Analysis

I. Sufficiency of the evidence

Primal Vantage argues that it was entitled to a directed verdict on the failure to warn claim. The warning label affixed to the ladderstand informed users that they must inspect the ladderstand, must not use it if parts were damaged or missing, and must always use a safety harness. Primal Vantage contends that any alleged inadequacy of these warnings could not be a proximate cause of the accident because Kevin and his companions by their own admission never read them. The real cause of Kevin's injuries, it argues, was Martin's failure to inspect and maintain the ladderstand in accordance with the manufacturer's instructions.

In reviewing the evidence supporting a judgment entered upon a jury verdict, we must take as true "[a]ll evidence which favors the prevailing party[.]" *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (Ky. 1990). We are "not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence." *Id*. (citations omitted). We will reverse only if the verdict is "palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." *Id*. at 461-62 (citations and internal quotation marks omitted). *Id*. "[A] directed verdict is appropriate where there is no evidence of probative value

to support an opposite result because the jury may not be permitted to reach a verdict upon speculation or conjecture." *Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 285 (Ky. 2014), *as corrected* (Apr. 7, 2015) (citations and internal quotation marks omitted). "[A] trial court should only grant a directed verdict when 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." *Id.* (citations and internal quotation marks omitted).

Under a "failure to warn" theory, "liability for a manufacturer follows only if it knew or should have known of the inherent dangerousness of the product and failed to 'accompany [ ] it with the quantum of warning which would be calculated to adequately guard against the inherent danger.'" *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 79 (Ky. 2010) (quoting *Post v. American Cleaning Equipment Corp.*, 437 S.W.2d 516, 520 (Ky. 1968)).

The failure to warn adequately implicates not merely the content of the warning but also its placement and visibility on the product. The warning on the Primal Vantage ladderstand was affixed to the back of the ladder. Kevin testified that if the treestand had a visible warning, he would have read it and would never have climbed up the stand or allowed his son to do so. Similarly, McCauley testified that he would not have climbed the treestand if he had known the polypropylene straps would lose efficacy and strength after a certain period of

time. Kevin's testimony that he would have read and followed a visible warning constitutes sufficiently probative evidence to overcome a motion for a directed verdict on the failure to warn claim.

The argument that Martin's conduct in failing to inspect and maintain the ladderstand was a superseding cause relieving Primal Vantage of liability is resolved by *Montgomery Elevator Co. v. McCullough*, which holds that, except in extraordinary circumstances, the negligence of an intervening party does not relieve the manufacturer of the duty to warn adequately. It states: "[T]he manufacturer has a duty to warn the ultimate user of any dangers in its product (other than those that are open or obvious). *This duty is non-delegable*.... If the injury was the result of the manufacturer's breach, the liability for the injury will lie with the manufacturer." *Montgomery Elevator Co. v. McCullough by McCullough*, 676 S.W.2d 776, 782 (Ky. 1984) (citation and internal quotation marks omitted). A purchaser such as Martin "who has notice of the dangerous condition may be concurrently liable to the ultimate user for failure to provide adequate warning, for failure to remedy the defect or on some other basis, but the purchaser's failure to act is not an intervening cause except in extraordinary circumstances." *Id.* An example of an extraordinary circumstance occurs when the manufacturer claims the purchaser was notified of the defect and assumed

responsibility for correcting it. *Id*. No showing of such extraordinary circumstances has been made in this case.

II. Admissibility of evidence of other incidents

Next, Primal Vantage argues that the trial court improperly admitted evidence of approximately 78 other incidents of treestands malfunctioning or collapsing. The incidents were admitted ostensibly to show that the ladderstand at issue in this case was dangerous and that Primal Vantage and Dick's Sporting Goods had been placed on notice of the danger. Primal Vantage filed numerous motions *in limine* and repeatedly objected at trial to the admission of the evidence on the grounds that the other incidents involved different models of hunting stands, different manufacturers, and different circumstances and causes. Many of them, for example, involved ladderstands that were improperly assembled or installed – not issues in this case. Primal Vantage argues that the trial court refused to perform its essential gatekeeping function in evaluating the evidence of other incidents and thus tainted the jury with improper proof.

The trial court did not make a threshold pretrial determination regarding the admissibility of the evidence, instead stating the plaintiff's expert and the defense expert would present differing opinions regarding the purported similarity of the other incidents and the jury would thereafter weigh the evidence. The trial court expressed concern that a pretrial hearing on admissibility would

take too much time and was also "a bad way to do it because the only way to do that is in context, and you can't artificially recreate the context of a jury trial because I need to know exactly what that person is going to say[.]" The trial court acknowledged that the evidence of other incidents was highly prejudicial and, if it turned out to be neither relevant nor probative, its admission would probably result in a mistrial.

At the close of trial, the trial court dismissed all claims pertaining to Dick's Sporting Goods on the grounds there was no evidence Dick's Sporting Goods knew or should have known the ladderstand had a design or manufacturing defect. The trial court characterized the evidence as consisting of "disparate, unrelated incidents" with no relevance beyond the fact they involved treestands. It commented that it would be a tremendous miscarriage of justice if a jury should find Dick's Sporting Goods liable and expressed regret for not granting summary judgment earlier. It also stated that a strong claim survived for inadequate warning and instructions which it described as "the heart" of the case.

"Evidence of the occurrence or nonoccurrence of other accidents or injuries under substantially similar circumstances is admissible when relevant to certain limited issues, such as the existence or causative role of a dangerous condition, or a party's notice of such a condition[.]" *Harris v. Thompson*, 497 S.W.2d 422, 429 (Ky. 1973). "A requirement of substantial similarity between the

earlier accidents and the one at issue is a matter of relevance to be decided in the discretion of the trial judge and will not be reversed unless there has been an abuse of discretion." *Montgomery Elevator Co.*, 676 S.W.2d at 783 (internal quotation marks omitted).

The other incidents evidence was admitted to show Primal Vantage had notice that the ladderstand was dangerous and also to support the plaintiffs' claims of design and manufacturing defects. Kevin argues that the trial court did not abuse its discretion in admitting the evidence of other ladderstand incidents because at the time the evidence was admitted, Kevin's claims of design and manufacturing defects had not yet been dismissed, and the other incidents involving metal collapse were still relevant to the case. He also contends that Primal Vantage used the other incidents evidence to its advantage through its examination of Kevin's expert witnesses and of Jared Krehel, the president of Primal Vantage. Counsel for Primal Vantage repeated the testimony he elicited from witnesses regarding the enormous number of products sold by Primal Vantage and then compared that to the relatively small number of other incidents. He points out that by the time closing statements were made, only Primal Vantage argued the other incidents in its favor.

We disagree with Kevin that Primal Vantage waived its objection to the admissibility of this evidence because it was able to use the other incidents to

its advantage by differentiating them factually from this case. Such a holding would penalize effective advocacy.

Although we agree with Primal Vantage that the litany of other incidents evidence was potentially prejudicial and may have confused the jury, the trial court did not abuse its discretion in allowing it to be introduced into evidence. The trial court was assured by plaintiff's counsel it contained probative material relating to the claims of design and manufacturing defects, as well as to Primal Vantage's and Dick's Sporting Goods' notice of such defects. Ultimately, the trial court dismissed the claims of design and manufacturing defects, and the jury found only that Primal Vantage failed to provide adequate warnings on its product. These other incidents simply did not relate sufficiently to the failure to warn claim to necessitate a mistrial.

III. Other alleged evidentiary errors

a. Discussion of insurance during *voir dire*

Primal Vantage argues that a discussion of insurance which occurred during *voir dire* was grounds for a mistrial because it tainted the entire jury pool. A question was asked regarding any artificial limits the members of the pool would place on recovery. A potential juror responded that the funds "should be, or maybe all of it would be insurance payout."

"It is well-recognized that evidence of a defendant's insurance is inadmissible to imply liability. As provided in [Kentucky Rules of Evidence] KRE 411, 'Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.'" *Woolum v. Hillman*, 329 S.W.3d 283, 287 (Ky. 2010). "The very existence of KRE 411 demonstrates a concern that proof of a defendant's liability insurance inherently creates the danger of undue prejudice. There is always the danger that a jury will show less sympathy to an insured defendant, inappropriately resulting in a verdict for the plaintiff." *Id.*

In response to the potential juror's remarks, the judge told the venire that insurance had nothing to do with what they were doing because "the number doesn't change depending on who pays." The trial court explained that "if someone's liable you should find them liable, regardless of who is going to pay that." The potential juror then asked whether they would be told how much the insurance company was going to pay. The trial court told him no, "because it does not affect the amount of the loss. If I'm out $5, it doesn't matter who pays me back – my brother, my friend etc. It does not affect your loss who pays the damages, so insurance doesn't matter at all. Insurance does not matter at all when you're assessing damages. Insurance does not change how you do the math. You're still damaged. You decide on the number based on the evidence." This

clear and candid explanation by the trial court served to counteract any prejudice caused by the remarks about insurance. The members of the venire indicated they understood the judge's remarks. The potential juror who had asked the questions about insurance was not selected to serve on the jury. Under these circumstances, the discussion of insurance did not warrant a mistrial.

b. Admission of evidence of the diagonal support installation instruction

The jury heard that Primal Vantage installation instructions for diagonal support sleeves had allegedly been recalled due to an error, but later testimony from Jared Krehel indicated there was no actual recall of any instructions. The trial court cautioned the jury that the placement of the sleeve "has nothing to do with why this fell. It has nothing to do with that. I'll bet half of you thought that it might have something to do with it. It doesn't."

The jury was plainly informed that the instructions were not recalled, and the placement of the support sleeve was not what caused the ladderstand to fall. Any prejudice stemming from the jury hearing of the alleged installation instructions recall was not sufficient to warrant a new trial.

c. The admission of alleged steel defects

Similarly, evidence in the form of testimony and commentary suggesting that the steel used in the ladderstand was defective does not warrant a

new trial. Substantial evidence was introduced that the deteriorated polypropylene straps, not the steel, was the cause of the ladderstand's collapse.

d. Alleged efforts to invoke bias with references to China and out-of-state corporations

The Primal Vantage ladderstand was manufactured in China. Primal Vantage argues that it was unfairly prejudiced by plaintiffs' counsel's repeated references to China and Chinese locations and names. The trial court cautioned plaintiffs' counsel about the cumulative effect of repeated references to China and about implying that something was wrong because the product was manufactured in China. Primal Vantage claims that the plaintiffs also made improper attempts to induce bias against out-of-state corporations by referring to Primal Vantage's footprint and storage facilities in New Jersey. Primal Vantage further claims that Santé's counsel's theme, which was projected on large screens on the courtroom walls during closing arguments, that "corporate decisions have human consequences" fostered improper prejudice against it for being a corporation.

The Kentucky Supreme Court has set forth the following examples of "flagrantly improper references to excluded evidence and express characterizations of foreign corporations as wolves preying upon humble Kentuckians" which have been deemed intolerable:

> In *Clement Brothers*, plaintiff's counsel characterized the corporate defendant in a negligence case involving blasting damages as a "rich, grasping, foreign corporation running

> ruthlessly roughshod over the poor, honest, long-suffering citizens of Barren County; its attorney as a rich man who would be upset if it were his 'mansion' that suffered the blasting damage" and the whole scenario as akin to "a wolf devouring a lamb." 414 S.W.2d at 577. In *Rockwell*, plaintiff's counsel referred repeatedly to the corporation's California base "where everybody has got a tan and a $60 haircut and life is good." Counsel also implored the jury to consider the difference between men (which God made with a soul) and corporations (which men made to make money), and the champagne corks that would pop in Seal Beach, California if the jury did not impose punitive damages. 143 S.W.3d at 627-28.

Baston v. County of Kenton ex rel. Kenton County Airport Bd., 319 S.W.3d 401, 412, n.2 (Ky. 2010).

Although the references by plaintiffs' counsel to China, New Jersey, and corporations were prejudicial, they are not sufficiently inexcusable to rise to the level of these examples and do not require a new trial.

IV. Jury instructions

a. Exclusion of Martin from apportionment

The jury awarded $18.4 million in damages and apportioned fifty percent of the fault to Kevin. Primal Vantage argues that Martin should have been included in the apportionment instruction because his undisputed failure to maintain and inspect the ladderstand, in clear violation of the warnings and instructions, was the proximate cause of Kevin's injury. Instead, Primal Vantage argues, it was left to assume Martin's share of the fault.

The trial court held the Martins to be immune from suit under the terms of KRS 150.645(1), which provides as follows:

> An owner, lessee or occupant of premises who gives permission to another person to hunt, fish, trap, camp or hike upon the premises shall owe no duty to keep the premises safe for entry or use by the person or to give warning of any hazardous conditions on the premises, and the owner, lessee, or occupant, by giving his permission, does not thereby extend any assurance that the premises are safe for such purpose, or constitute the person to whom permission is granted an invitee to whom a duty of care is owed. The owner, lessee, or occupant giving permission for any of the purposes stated above shall not be liable for any injury to any person or property caused by the negligent acts of any person to whom permission is granted. This section shall not limit the liability which would otherwise exist for willful and malicious failure to guard or to warn against a dangerous condition, use, structure, or activity; or for injury suffered in any case where permission to hunt, fish, trap, camp, or hike was granted for a consideration other than the consideration, if any, as set forth in KRS 411.190(1)(d), paid to said owner, lessee, or occupant by the state. The word "premises" as used in this section includes lands, private ways, and any buildings and structures thereon. Nothing in this section limits in any way any liability which otherwise exists.

KRS 150.645(1).

Primal Vantage contends that the statute may preclude recovery but not apportionment.

"Whether fault can be apportioned against someone with absolute liability is determined by construing the statute." *Jefferson County Commonwealth*

Attorney's Office v. Kaplan, 65 S.W.3d 916, 922 (Ky. 2001), *as modified on denial of reh'g* (Feb. 21, 2002).

Comparative fault is codified in KRS 411.182, which provides as follows:

> (1) In all tort actions, including products liability actions, involving fault of more than one (1) 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:
>
> > (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
> >
> > (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.
>
> (2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
>
> (3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
>
> (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, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.

KRS 411.182.

Due to the operation of KRS 150.645(1), the Martins do not fall within any of the categories specified in the apportionment statute – they are not parties, third-party defendants or persons released under subsection (4). "When the statute states that the trier-of-fact shall consider the conduct of each party at fault, such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large." *Kaplan*, 65 S.W.3d at 922 (citation and internal quotation marks omitted). Fault cannot be apportioned against the Martins "because they do not fall within the scope of those to whom fault can be apportioned against under KRS 411.182." *Id.*

Although the result may appear unjust, the underlying rationale for this approach has been set forth by the Kentucky Supreme Court:

> "Absolute immunity refers to the right to be free, not only from the consequences of the litigation's results, but from the burden of defending oneself altogether." *Fralin & Waldron, Inc. v. Henrico County, Va.*, 474 F.Supp. 1315, 1320 (D.C.V a. 1979); 63C Am.Jur.2d, *Public Officers and Employees*, § 308 (1997). As stated by the U.S. Supreme Court, the "essence of absolute immunity is its possessor's entitlement not to have to answer for his

> conduct in a civil damages action." *Mitchell v. Forsyth,* 472 U.S. 511, 525, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411, 424 (1985). It allows the possessor the right to avoid being "subjected to the cost and inconvenience and distractions of a trial." *Tenney v. Brandhove,* 341 U.S. 367, 377, 71 S. Ct. 783, 788, 95 L. Ed. 1019, 1027 (1951) (legislators).
>
> . . .
>
> Allowing apportionment against a possessor of immunity from suit defeats the above policy concerns. Even though free from financial liability, the possessor still would be subject to process; to the burdens of discovery, including the giving of depositions; and to testifying at trial even if he or she chose not to actively defend his or her actions at trial. The possessor would not be free from the burdens of litigation, the specter of intimidation, or the threat of harassment. In other words, possessing absolute immunity from suit is incompatible with being "a party to the action" in any sense and construing the statute otherwise would result in a partial abrogation of the absolute immunity defense.

Lexington-Fayette Urban County Government v. Smolcic, 142 S.W.3d 128, 135-36 (Ky. 2004). In light of the plain language of the apportionment statute and our case law, the trial court did not err in excluding the Martins from apportionment of damages.

The case relied upon by Primal Vantage, *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467, 481 (Ky. 2001), *as modified* (Nov. 7, 2001), is distinguishable because it involved the comparative fault of an employer who was a settling nonparty and met the qualifications of KRS 411.182(4). "[I]f supported

by the evidence, proper instructions may allow the jury to apportion fault against a settling nonparty, and a settlement, between an employer and employee, of a claim under the Workers' Compensation Act constitutes a settlement under KRS 411.182(4)." *Id*.

b. Jury instructions erroneous regarding failure to warn claim

Next, Primal Vantage argues that the jury instructions misstated Kentucky law and improperly included four separate instructions on a single failure to warn claim, in violation of the "bare bones" doctrine. It further argues that the instructions did not distinguish between negligence and strict liability, instead instructing on strict liability only.

The instructions stated as follows:

> **Instruction No. 1**
> **Defective Product: Warning**
>
> You will find for Plaintiff **Kevin O'Bryan** under this instruction if you are satisfied from the evidence as to all of the following:
>
> (a) That as manufactured and put on the market by **Primal Vantage**, the treestand at issue was unreasonably dangerous* for use by a person whom **Primal Vantage** should have expected to use it, without reasonable warning as to risk attendant to the use of polypropylene straps to secure the treestand;
>
> -and-
>
> (b) That the warning label on the treestand was not reasonably adequate to warn an

ordinarily prudent person as to risk attendant to the use of polypropylene straps to secure the treestand;

-and-

(c) That **Primal Vantage's** failure to provide an adequate warning as to risk attendant to the use of polypropylene straps to secure the treestand was a substantial cause of the incident and injury to **Mr. O'Bryan** on May 3, 2012.

* **"Unreasonably dangerous"** - A product is unreasonably dangerous if it creates such a risk of accidental injury to a prospective user that an ordinarily prudent company engaged in the manufacture of similar products, being fully aware of the risk, would not have put it on the market.

Instruction No. 2
Defective Product: Instructions

You will find for Mr. O'Bryan under this Instruction if you are satisfied from the evidence as to all of the following:

(a) That as manufactured and put on the market by Primal Vantage, the treestand at issue was unreasonably dangerous for use by a person whom Primal Vantage should have expected to use it, without reasonable instructions as to when or under what circumstances the polypropylene straps used to secure the treestand should be replaced;

-and-

(b) That the instructions accompanying the treestand was not reasonably adequate to instruct an ordinarily prudent person as to when or under what circumstances the

polypropylene straps used to secure the treestand should be replaced;

-and-

(c) That Primal Vantage's failure to provide adequate instructions as to when or under what circumstances the polypropylene straps used to secure the treestand should be replaced was a substantial cause of the incident and injury to Mr. O'Bryan on May 3, 2012.

* **"Unreasonably dangerous"** - A product is unreasonably dangerous if it creates such a risk of accidental injury to a prospective user that an ordinarily prudent company engaged in the manufacture of similar products, being fully aware of the risk, would not have put it on the market.

Instruction No. 3
Negligence: Warning

It was the duty of **Primal Vantage** to exercise ordinary care***** in the design of the treestand at issue in this case. You will find for **Mr. O'Bryan** under this Instruction if you are satisfied from the evidence as to all of the following:

(a) That as manufactured and put on the market by **Primal Vantage**, the treestand at issue was unreasonably dangerous* for use by a person whom **Primal Vantage** should have expected to use it, without reasonable warning as to risk attendant to the use of polypropylene straps to secure the treestand;

-and-

(b) That the warning label on the treestand was not reasonably adequate to warn an ordinarily prudent person as to risk attendant

on the use of polypropylene straps to secure the treestand;

-and-

(c) That as a consequence of (a) and (b), **Primal Vantage**, in the exercise of ordinary care***** should have been aware that the treestand was unreasonably dangerous*****;

-and-

(d) That Primal Vantage's failure to provide an adequate warning as to risk attendant to the use of polypropylene straps to secure the treestand was a substantial factor in causing the incident and injury to **Mr. O'Bryan** on May 3, 2012.

*** "Ordinary Care"** – Ordinary care means such care as the jury would expect a reasonably prudent company to exercise under the same or similar circumstances.

* **"Unreasonably dangerous"** - A product is unreasonably dangerous if it creates such a risk of accidental injury to a prospective user that an ordinarily prudent company engaged in the manufacture of similar products, being fully aware of the risk, would not have put it on the market.

Instruction No. 4
Negligence: Instructions

It was the duty of Primal Vantage to exercise ordinary care* in the design of the treestand at issue in this case. You will find for **Mr. O'Bryan** under this Instruction if you are satisfied from the evidence as to all of the following:

(a) that as manufactured and put on the market by **Primal Vantage**, the treestand at issue was unreasonably dangerous***** for use by a person whom **Primal Vantage** should have expected to use it, without reasonable instructions as to when or under what circumstances the polypropylene straps used to secure the treestand should be replaced;

-and-

(b) That the instructions accompanying the treestand was not reasonably adequate to instruct an ordinarily prudent person as to when or under what circumstances the polypropylene straps used to secure the treestand should be replaced;

-and-

(c) That as a consequence of (a) and (b), **Primal Vantage**, in the exercise of ordinary care***** should have been aware that the treestand was unreasonably dangerous*;

-and-

(d) That **Primal Vantage's** failure to provide reasonably adequate instructions as to when or under what circumstances the user should replace the polypropylene straps used to secure the treestand was a substantial factor in causing the incident and injury to **Mr. O'Bryan** on May 3, 2012.

*** "Ordinary Care"** – Ordinary care means such care as the jury would expect a reasonably prudent company to exercise under the same or similar circumstances.

* **"Unreasonably dangerous"** - A product is unreasonably dangerous if it creates such a risk of accidental injury to a prospective user that an ordinarily

> prudent company engaged in the manufacture of similar products, being fully aware of the risk, would not have put it on the market.

Under Instruction No. 1, the jury found 12-0 in favor of Kevin; under Instruction No. 2, the jury found 9-3 in favor of Primal Vantage; under Instruction No. 3, the jury found 12-0 in favor of Kevin; and under Instruction No. 4, the jury found 9-3 in favor of Primal Vantage. Instructions Nos. 1 and 3 are identical except for the additional paragraph in Instruction No. 3 which requires the jury to find that Primal Vantage, in the exercise of ordinary care should have been aware that the treestand was unreasonably dangerous.

The distinction between strict liability and negligence in the context of products liability lies in the need to make a finding regarding what the manufacturer should have known or actually knew:

> In 1966, our Supreme Court subscribed to the principle of strict liability as stated in section 402A of the Restatement (Second) of Torts . . . [which] . . . describes a product as defective for purposes of the application of strict liability as one "in a defective condition unreasonably dangerous to the user or consumer or to his property." *Restatement (Second) of Torts* § 402A (1965).
>
> > This terminology may perhaps leave something to be desired, since it is clear that the "defect" need not be a matter of errors in manufacture, and that a product is "defective" when it is properly made according to an unreasonably dangerous design, or when it is not accompanied by adequate

> instructions and warning of the dangers attending its use.
>
> The prevailing interpretation of "defective" is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety. It has been said that this amounts to saying that if the seller knew of the condition he would be negligent in marketing the product.

Strict liability does not depend on negligence, although there is a close likeness between the two when considered in the context of the term "unreasonably dangerous." Under such an analysis, both principles employ the concept of "reasonable foreseeability."

> The difference is that negligence depends on what a prudent manufacturer, engaged in a business similar to that of the defendant, by the exercise of ordinary care actually should have discovered and foreseen, whereas strict liability depends on what he would have anticipated had he been (but regardless of whether he actually was or should have been) aware of the condition of and potentialities inhering in the product when he put it on the market. Where the one is actual, the other is postulated.

Worldwide Equipment, Inc. v. Mullins, 11 S.W.3d 50, 55 (Ky. App. 1999) (citations omitted).

"With respect to failure to warn, the character of warnings that accompany the product is generally an evidentiary consideration in deciding whether a product is unreasonably unsafe." *Morales v. American Honda Motor Co., Inc.*, 71 F.3d 531, 536 (6th Cir. 1995) (internal citations omitted). A product

"may be unreasonably dangerous in design, unless accompanied by a warning that it should not be put to a certain use[.]" *Id*. at 536-37. "[A] product [is] unreasonably unsafe if there was a failure to provide adequate warnings to the ultimate user. *Id*. (citing *Post v. American Cleaning Equipment Corp.*, 437 S.W.2d 516, 520 (Ky. 1968)).

Thus, under a negligence theory, the plaintiffs would have to show Primal Vantage had or should have had actual knowledge the ladderstand was unreasonably dangerous when unaccompanied by an adequate warning, whereas under a strict liability theory, a showing that the ladderstand was unreasonably dangerous was sufficient to find liability. Negligence claims focus on the conduct of the actor, and strict liability claims focus on the condition of the product. *Montgomery Elevator Co.*, 676 S.W.2d at 780. Instruction No. 1 provided a strict liability instruction in that the jury was asked to find only that the treestand was dangerous if unaccompanied by a reasonable warning; whereas Instruction No. 3 required a finding that Primal Vantage in the exercise of ordinary care should have been aware that the treestand was unreasonably dangerous and failed to provide an adequate warning. Thus, the instructions adequately covered both negligence and strict liability theories. They did not violate the bare bones doctrine because separate negligence and strict liability instructions were required for both of the inadequate warning and inadequate instruction claims.

Primal Vantage further argues that a strict liability instruction was not appropriate at all because the trial court directed a verdict on the manufacturing and design defect claims. But *Mullins* plainly states that in addition to errors in design and manufacture, a product may also be defective "when it is not accompanied by adequate instructions and warning of the dangers attending its use." *Mullins*, 11 S.W.3d at 55.

c. Damages for post-divorce loss of consortium and personal care services

Primal Vantage argues that the trial court erroneously allowed the jury to award post-divorce damages for Santé's loss of consortium claim. Santé and Kevin had been married for almost twenty years at the time the accident occurred. Kevin was the primary breadwinner, with Santé working part-time. Their two children were thirteen and ten years of age. Conflicting evidence was presented regarding the state of the marriage before the accident, with Santé's testimony suggesting it was happy and testimony from Kevin's mother suggesting it was not and that Santé had spoken frequently of divorce. Both Kevin and Santé testified that they would still be together but for the injuries sustained by Kevin in the ladderstand collapse which placed such an intolerable strain on their marriage.

Following the accident, the family experienced severe financial difficulties and Santé became Kevin's primary caregiver as well as the sole earner in the household. According to Santé, Kevin's chronic pain and disability led him

to suffer from deep depression and undergo a dramatic personality change. Consequently, she sought a divorce approximately three years after the accident. The dissolution of the marriage became final on July 20, 2015. The jury was instructed to award her "the sum or sums of money, if any, that will fairly and reasonably compensate her for the loss of consortium (*i.e.* services, assistance, aid, society, companionship and conjugal relationship of Mr. O'Bryan) that you are satisfied from the evidence she has sustained or is reasonably certain to sustain in the future directly as a result of the treestand incident on May 3, 2012." The jury awarded Santé $80,000, which the trial court reduced to $40,000 to reflect the apportionment of fifty percent of the fault to Kevin.

Primal Vantage argues that any damages for loss of consortium must be expressly limited to the period before the divorce. There is no Kentucky authority directly on point and Primal Vantage relies on opinions from other jurisdictions. Generally, "[c]ourts throughout the country have uniformly held that damages stemming from loss of consortium are limited to the period during which the spouses were married, regardless of the reasons behind their divorce." *See Bynum v. Magno*, 125 F. Supp. 2d 1249, 1257 (D. Hawai'i 2000) (collecting cases); *Richardson v. Volkswagenwerk, A.G.*, 552 F. Supp. 73, 87 (W.D. Mo. 1982) (holding future consortium damages are simply not recoverable following a divorce).

Santé contends that because damages can be recovered for loss of spousal consortium following death, they should also be recoverable following a divorce. She relies on the following characterization of loss of consortium claims in *Martin v. Ohio County Hosp. Corp.*, which held that loss of consortium claims survive death:

> [A] loss of consortium claim is grounded on compensation for a third party's wrong-doing which intervenes in the marital relationship so as to deny spousal consortium. It provides liability for wrongfully depriving or cutting short the marital relationship. This claim is not about whether a marriage has ended, but rather about whether the marital relationship could have continued but for the wrong-doing of the third party. The loss that comes from wrongly depriving a spouse of her relationship with her husband, or vice versa, is definable and measurable. It has little to do with the legal construct of marriage at death, but everything to do with the relationship that was wrongly taken away from the surviving spouse.

Martin v. Ohio County Hosp. Corp., 295 S.W.3d 104, 111 (Ky. 2009).

In this case, the jury was instructed to award only loss of consortium damages stemming directly from the ladderstand accident. Thus, the damages were properly limited to those suffered by Santé as a result of being wrongly deprived of her relationship with her husband which could have continued but for the accident. As Santé has pointed out, the jury's compliance with this limitation is reflected in the fact that it awarded her the relatively low sum of $80,000 whereas Kevin was awarded over $18 million.

Primal Vantage additionally argues that the award for $291,270 to Kevin for personal care services was improper because the services were performed by his parents, unpaid non-parties. This award was permissible under the collateral source rule, which provides that "if an injured party received some compensation for injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." *Combs v. Stortz*, 276 S.W.3d 282, 295 (Ky. App. 2009).

SANTÉ 'S CROSS-APPEAL

Santé's first argument on cross-appeal, that trial court did not err in instructing the jury on loss of consortium damages, has already been addressed in this opinion. She further argues that the trial court erred in reducing her loss of consortium damages by fifty percent, the amount the jury assigned to Kevin's comparative fault. She contends that this reduction is in direct contravention of the principle that loss of consortium is a separate and distinct personal right, with its own elements, damages, proof, and applicable statute of limitations. She points out that loss of consortium is an independent cause of action in Kentucky which can continue even if the injured spouse or his estate settles. She claims her argument is supported by *Martin*, which states that "[a] loss of consortium action can continue even when the injured spouse or the estate has settled or otherwise

been excluded from an action, because there is not a 'common and undivided interest' in the spouse's claim for loss of consortium and the underlying tort claim." *Martin*, 295 S.W.3d at 109.

But even if Kevin had settled or was otherwise excluded from the action, a percentage of the fault could still be apportioned to him under KRS 411.182 (unlike the Martins). Santé's cause of action is separate and distinct from Kevin's, but that does not negate the fact that he was found to be comparatively at fault. Primal Vantage should only be responsible for the portion of her damages attributable to the percentage of its fault, which is fifty percent. The trial court did not err in reducing her damages by that amount.

Conclusion

For the foregoing reasons, the final order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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