RENDERED: May 23, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001931-MR

FORD MOTOR COMPANY — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NOS. 2001-SC-801-D, 2001-SC-809-D,
2001-SC-810-D & 2001-SC-811-D

APPEAL FROM SCOTT CIRCUIT COURT
v. HONORABLE ROBERT OVERSTREET, JUDGE
ACTION NO. 96-CI-00232

IAN PETER COULSON AND JEAN IRENE COULSON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF PAUL M. COULSON; HENRY PITTS AND JENNIFER H. PITTS, INDIVIDUALLY; HENRY PITTS, AS ADMINISTRATOR OF THE ESTATE OF FRANCES E. PITTS; IAN GODDEN AND CHRISTINE ANN GODDEN, NEXT FRIEND OF TRACY GODDEN, A MINOR; TRACY GODDEN; AND MARGARET SCHULTZ — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND GUIDUGLI, Judges; and JOHN D. MILLER, Special Judge.[1]

[1] Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

GUIDUGLI, JUDGE. This matter is before this Court on remand from the Kentucky Supreme Court pursuant to an opinion and order entered January 15, 2003. Said opinion and order set forth the following:

> The motions for review are granted, the decision of the Court of Appeals is vacated, and the cases are remanded to the Court of Appeals for further consideration in light of Sand Hill Energy, Inc. v. Ford Motor Company, Ky., 83 S.W.3d 483 (2002).

Following remand, this Court entered an order returning the case to the Court's active docket and requiring the parties to file simultaneous briefs addressing the impact of the Supreme Court's opinion in Sand Hill Energy, on the present appeal. The parties have complied with this Court's order and filed briefs addressing this issue. Having reviewed these briefs, the entire record before us, and the facts of the case in light of Sand Hill Energy, we affirm.

We set forth the facts as previously presented in the original opinion rendered July 13, 2001.

Ford Motor Company (hereinafter "Ford") appeals from a judgment of the Scott Circuit Court reflecting a jury verdict in favor of Ian Peter Coulson, et al., in their products liability action against Ford.

This action arose as a result of a tragic automobile accident which occurred on the morning of August 6, 1995, in Scott County, Kentucky. A Ford E350 passenger van was being operated by Peggy Schultz ("Schultz") in a southbound lane of

Interstate 75. Schultz, who was a volunteer with the United States Pony Clubs, Inc. ("Pony Club"), was part of a group of approximately 28 people traveling on a multi-state tour. The van contained 15 passengers including Schultz. Only two of the van's 15 occupants were wearing seatbelts.

It is uncontroverted that as the van was traveling southbound in the right lane, a vehicle in the left lane passed the van and struck it at least once. The impact, or Schultz's reaction, or both, caused the van to move onto the right shoulder. The rear of the van then slid to the right, such that the vehicle was approximately perpendicular to the roadway and to the direction of the van's travel. Lay and expert testimony would later reveal that the van's rear tires were in the grass to the right of the roadway, with the front tires sliding across a "rumble strip" of raised serrations on the shoulder. At some point during this process, when the van was turned between 10 and 90 degrees relative to the roadway[2] it began to roll. The van "barrel rolled" approximately three and one-half times.

While the van was rolling, passengers Paul Coulson ("Coulson"), Frances Pitts ("Pitts"), and Tracy Godden ("Godden") were ejected from the vehicle. Coulson and Pitts died as a result of head injuries, and Godden sustained a severed limb and other serious injuries. Schultz broke bones in her left hand and arm, and injured her neck or back. The parties are not in

[2]The testimony is conflicting on this issue.

agreement as to whether Coulson, Pitts, and Godden were partially or fully ejected when their injuries were sustained.

The following year, the families of Coulson, Pitts, and Godden initiated the instant action. They asserted causes of action against Ford, as maker of the van; Schultz as driver; the Pony Club as the organization for which Schultz was acting; and Ralph Keaton ("Keaton"), the driver of the vehicle that struck the van. Ford cross-claimed seeking indemnification against Schultz, the Pony Club, and Keaton. Schultz filed a cross-claim against Ford and Keaton.

In the following months, the Coulson, Pitts, and Godden families (hereinafter referred to collectively as "Coulson et al.") settled with Schultz, the Pony Club, and Keaton, and those claims were dismissed. Schultz settled with Keaton, and that claim was dismissed. And lastly, Ford dismissed its cross-claims against Schultz, the Pony Club, and Keaton. The sole surviving claims at trial were those of Coulson et al. against Ford, and Schultz's cross-claim against Ford.

A jury trial commenced on April 12, 1999. As the proceedings got underway, the circuit judge determined that four (4) peremptory jury challenges would be given to each of the following: a) Coulson et al.; b) Schultz; and, c) Ford. Ford objected, both on and off the record, to Schultz receiving four (4) peremptory challenges. In support of the objection, Ford argued that Schultz was a plaintiff and, as such, was not

entitled to peremptory challenges in addition to those received by Coulson et al. The objection was raised and denied on the record. Each of the parties (a, b, and c above) received and used four (4) peremptory challenges during voir dire.

The trial proceeded with Coulson et al., and Schultz, asserting a product liability claim centering on the argument that Ford was negligent in the manufacture and sale of the E350 passenger van because of the van's alleged propensity to tip over and/or roll when loaded with passengers. Ford asserted a general denial. After an extensive trial, the matter was submitted to the jury, which returned a verdict in favor of Coulson et al. and Schultz. Coulson et al. collectively were awarded damages of almost $20,000,000, and Schultz was awarded approximately $572,000. This appeal followed.

Ford's first argument is that the trial court committed reversible error per se by giving four peremptory challenges to Schultz in addition to the four challenges given to Coulson et al. Specifically, Ford points to CR 47.03 for the proposition that each opposing side in civil litigation is entitled to the same number of peremptory challenges. It maintains that under CR 47.03, co-parties are each entitled to four peremptory challenges only where their interests are antagonistic. Ford argues that since Schultz interests were not antagonistic to those of Coulson et al., Schultz was not entitled to four challenges in addition to those received by Coulson et al. Finally, Ford

argues that the failure to properly allocate peremptory challenges is error per se entitling it to a new trial.

In response, Coulson et al. maintain that its interests and those of Schultz were antagonistic, and that Schultz was not a co-party. They note that they initially sought damages from Schultz, and that Schultz was at all times referenced as a defendant and cross-claimant in court documents. As such, they argue that the circuit court acted properly in allocating four (4) peremptory challenges to Schultz.

CR 47.03(1) states that, "[I]n civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each." Section (2) goes on to provide that, "[I]f one or two additional jurors are called, the number of peremptory challenges for each side and antagonistic co-party shall be increased by one." In the matter at bar, it is uncontroverted that additional jurors were called, resulting in the allocation of four rather than three peremptory challenges to the respective parties.

The dispositive question, then, is whether Coulson et al., Schultz and Ford were each an "opposing side" in the litigation under CR 47.03(1), and if not, whether Schultz's interests were antagonistic to those of Coulson et al.

In the original opinion, this Court, relying upon Bowling Green Municipal Utilities v. Atmos Energy Corp., Ky., 989

S.W.2d 577 (1999), concluded that Coulson, et al. and Schultz were not on "opposing side[s]" of the litigation and that their interests were not antagonistic. However, upon further review and in light of the Kentucky Supreme Court's decision in Sand Hill Energy, supra, we now believe Coulson, et al and Schultz should be considered as "opposing side[s]" and that their interests were, in fact, antagonistic requiring this Court to affirm the trial court's ruling on this matter.

In Sand Hill Energy, our Supreme Court addressed the issue of CR 43.01 and peremptory challenges as follows:

> The Court of Appeals reversed the trial court upon its allocation of peremptory challenges and we will first address this issue. To properly analyze this issue it is necessary to examine the structure of the litigation.
>
> Initially, the Smith Estate and two Smith individual parties brought a products liability claim against Ford and Mideast Ford Mercury, Inc. Ford then filed a third party complaint against Sand Hill Energy, Inc., the decedent's employer, because prevailing case law required active assertion of a claim to entitle Ford to an apportionment instruction. (Floyd v. Carlisle Construction Co., Ky., 759 S.W.2d 430 (1988)). In response to the third party complaint, Sand Hill brought a counterclaim against Ford alleging its liability for some $200,000 in regulatory fines and increased workers compensation costs it had incurred as a result of the accident. Thereafter, Ford dismissed its third party claim against Sand Hill. Thus, the basic structure of the litigation was that Smith sued Ford and Ford brought in Sand Hill by means of a third party complaint. (Footnote omitted).

At trial, however, the court restructured the case and designated the Smith Estate and Sand Hill as plaintiffs against Ford as the defendant. Ford then asserted that the Estate and Sand Hill should share peremptory challenges, but the trial court ruled otherwise and allowed the Estate and Sand Hill separate peremptory challenges.

The Court of Appeals adopted Ford's argument that at the time of trial the interests of the Smith Estate and Sand Hill were not antagonistic. The Court quoted but did not entirely observe CR 7.03(1), (footnote omitted), giving little or no attention to the fact that despite restructuring at trial, the Estate and Sand Hill were opposing sides. Instead the court focused exclusively on whether they had antagonistic interests, the portion of the rule that allows separate peremptory challenges to co-parties with antagonistic interests.

There can be no doubt that the Smith Estate and Sand Hill were not co-parties but were opposing sides. While the Smith Estate did not bring an action against Sand Hill, presumably due to the exclusive remedy provision of the Workers Compensation Act,(footnote omitted), Ford did bring Sand Hill before the court as a third party defendant. Its purpose may be presumed to have been to obtain an instruction allowing apportionment of all or part of the liability against Sand Hill thereby relieving Ford of any part so apportioned. As such, Ford placed the Smith Estate and Sand Hill on opposing sides, and there was no error in allowing them separate peremptory challenges.

While a strict application of the rule would be sufficient, we make additional observations that bear upon the question of proper allocation of peremptory challenges. The gist of Ford's argument is that by bringing in a third party defendant for purposes of its own and the trial court's determination, for simplicity at trial, that the third party defendant should be required

> to share peremptory challenges. This argument borders on an assertion that the defendant should be able to adopt a strategy for its own benefit that simultaneously diminishes the plaintiff's ability to pursue its own strategy. At the least, this argument appears at odds with notion of fair play. A party should not be able to create a community of common interests between other parties and then assert that interest to their detriment. But for Ford's decision to bring Sand Hill before this court so that it could reduce its own exposure, there would be no question about the plaintiff's entitlement to separate peremptory challenges as Sand Hill would not be a party to the litigation.
>
> Moreover, under these circumstances, it would be extraordinary to find reversible error. While it may appear in retrospect that the Smith Estate and Sand Hill lacked any substantial antagonistic interest, such could not have been known by the trial court at the time the jury was selected.[3] (Footnote in original opinion). It has been suggested that the positions parties take at trial should determine whether they have antagonistic interests, but such a rule is utterly unworkable. At the time a trial judge must make the allocation of peremptory challenges, there can be no certainty as to what the evidence will show or precisely what the claims or defenses will be. Moreover, the instant trial court, after having determined that by virtue of their being on different sides, entitling all parties to separate peremptory challenges, nevertheless physically separated the three parties and directed that they have no contact with one another in exercise of their peremptory challenges. We have carefully reviewed Bowling Green Mun. Utils. v. Atmos Energy Corp., [Ky., 989 S.W.2d 577 (1999)] and determine that it is factually

[3] Mackey v. Greenview Hospital, Inc., Ky.App., 587 S.W.2d 249, 259 (1979), makes it clear that the time for determining the allocation of peremptory challenges is when the jury is selected. Despite subsequent dismissal of physician cross-claims, the Mackey Court relied on the existence of cross-claims at the time the trial commenced as a factor establishing antagonism of interests.

> distinguishably from this case in that the parties to whom were awarded the excessive number of peremptory challenges were all plaintiffs, most of whom were represented by the same counsel. Accordingly, we reverse the Court of Appeals on the peremptory challenges issue and affirm the actions of the trial court in this respect.

In that we believe the case before us to be more in line factually with Sand Hill Energy, supra, than Bowling Green Mun. Utils., supra, and in that we are bound to follow precedent set forth by our Supreme Court [SCR 1.030(8)], we now find no error in the trial court's ruling allocating both Coulson, et al. and Schultz four (4) peremptory challenges.

Ford next argues that the trial court erroneously refused to submit the comparative fault of the Pony Club to the jury, and that it thwarted Ford's efforts to submit proof showing that fault. It notes that the Pony Club was a settling tort-feasor, and maintains that as such it was entitled by statute to an apportionment instruction. In response, Coulson et al.[4] maintain that the trial court properly excluded the Pony Club from apportionment because Ford only plead that the Pony Club was vicariously liable for Schultz's alleged negligent operation of the van.

In our first opinion, we determined that this claim of error was moot in light of our reversal of the judgment on the issue of peremptory challenges. However, since we have now

[4]Schultz offers no response to this argument, stating her belief that it does not affect the judgment in her favor.

affirmed the judgment on that issue, we must proceed to address Ford's argument relative to the comparative fault of the Pony Club.

KRS 411.182(1) requires apportionment in "...all tort actions, including products liability actions..." involving the fault of more than one party. The instructions shall include the fault of persons who have been previously released from liability. Id. Ford contends apportionment is mandatory, not discretionary, and thus, the trial court was obligated to include the Pony Club in any apportionment instructions. Citing Stratton v. Parker, Ky., 793 S.W.2d 817 (1990) and Floyd v. Carlisle Construction Co., Ky., 758 S.W.2d 430 (1988), Ford maintains that the Pony Club, a named defendant and a settling party, must be included in an apportionment instruction pursuant to KRS 411.182(1).

Appellees, on the other hand, argue that Ford's only theory of liability in its pleadings against the Pony Club was a vicarious liability theory. This theory was based upon the undisputed fact that Schultz, as the driver of the van, was acting as the Pony Club's agent. Ford argued at trial that Schultz failed to ensure that the children passengers wore seat belts and that she was unaware of the Pony Club's policy to enforce the wearing of seatbelts, were substantial factors in causing the deaths and serious injuries of the children. Ford, thus, argues that these failures create a separate, independent

cause of action against the Pony Club as opposed to the mere negligence of Schultz as an agent of the Pony Club. We disagree. First, we believe the fault for any damages sustained is inseparable as between Schultz, the agent the Pony Club, and her principal. See Baldwin v. Wiggins, Ky., 289 S.W.2d 729 (1956); cf. Kevin Tacker & Assocs. v. Scott & Ritte, Ky.App., 842 S.W.2d 873 (1992). In fact, Ford's cross-claim against the Pony Club contained only the following specific allegations:

> Ford alleges, on information and belief, that Schultz and Keaton were each negligent in the operation of their respective vehicles at the time and upon the occasion mentioned in the Complaint, and that their negligence caused or contributed to the injuries and damages claimed by the Plaintiffs.
>
> Ford further alleges, on information and belief, that Schultz was acting as the agent, servant or employee of the U.S. Pony Clubs at the time of the accident, and therefore that U.S. Pony Clubs is vicariously liable for her negligence in the operation of her vehicle.

Thus, Ford's failure to plead a separate, distinctive cause of action, if any existed, as to the Pony Club limits the relief sought by Ford. However, even if Ford can get past its pleadings, the fact remains that the Pony Club could only be liable through its agent, Schultz. In this case, the court did instruct the jury as to apportionment for Schultz's action. For whatever reason, the jury apportioned all liability against Ford despite being properly instructed as to other potentially negligent parties. The Pony Club, according to Ford's own pleadings, could only be vicariously liable for the actions of

its agent, Schultz. Thus, even if the trial court erred in this matter, which we do not believe it did, any error would be harmless. CR 61.01. Thus, despite our dicta in the original opinion as to a possible apportionment instruction relative to the Pony Club's liability, upon further review, we believe the court properly instructed the jury in this matter and no error occurred as alleged by Ford.

Lastly, Ford argues that a test run of a sample Ford van conducted by Robert Hooker (hereinafter "Hooker") was improperly admitted into evidence at trial because the test failed to replicate the conditions of the accident. It maintains that such out-of-court experiments are admissible only if they are conducted under conditions substantially similar to those of the event at issue. It also argues that a computer simulation created by Dr. Thomas Wielenga (hereinafter "Wielenga") should have been excluded as well for the same reason. Coulson et al. and Schultz reply that the Hooker test and Wielenga computer model were not offered to replicate the accident, but rather to indicate to the jury how the vehicle would perform from a rollover/stability standpoint in various known and accepted driving maneuvers. As such, they maintain that both were properly admitted.

The Kentucky Supreme Court examined the issue of out-of-court experiments in Stevens v. Commonwealth, Ky., 462 S.W.2d 182 (1970), and stated as follows:

> Generally speaking, the results of out-of-court experiments are admissible in evidence if such evidence tends to enlighten the jury and enable them to more intelligently consider the issues or if they provide evidence more satisfactory or reliable than oral testimony. Lincoln Taxi Co. v. Rice, Ky., 251 S.W.2d 867 (1952). Such evidence is never admissible, however, unless the conditions under which the experiment was performed were substantially similar to the case under consideration. Ohio County Drug Co. v. Howard, 201 Ky. 346, 256 S.W. 705 (1923). The trial judge is vested with a broad discretion in determining both the question of substantial similarity of conditions and, if substantial similarity exists, the admissibility of the evidence. 29 Am.Jur.2d, Evidence-Experiments-Admissibility, Sections 818-824.

Id. at 186.

Coulson et al. and Schultz stipulate that the Hooker test was not offered for the purpose of re-creating the accident. They point to Kentucky case law supportive of the notion that such evidence is admissible even though the out-of-court experiment and the accident were dissimilar. In Current v. Columbia Gas of Kentucky, Ky., 383 S.W.2d 139 (1964), for example, the former Court of Appeals affirmed the admission of dissimilar out-of-court experiments where the dissimilarity was made clear to the jury. In Current, experiments conducted on a space heater and water heater were properly admitted even though neither was in the same condition as when the injury occurred. Since the Current jury was apprised of the differences between the experiment and the accident, the experiment was found to be

properly admitted. Coulson et al. and Schultz also direct our attention to federal case law supportive of the same result.

In examining this issue, we are persuaded by the following: 1) KRE 401 provides that all relevant evidence is admissible, subject to limited exclusions; 2) the former Court of Appeals has affirmed the introduction of dissimilar out-of-court experiments; and 3) the trial judge is vested with a broad discretion in determining the admissibility of the evidence. Ford was availed of the opportunity to highlight the dissimilarities before the jury, and we must rely upon the jury to digest these arguments and reach a proper conclusion. Accordingly, we cannot find that the trial judge committed reversible error on this issue.

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

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