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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001895-MR

CASWELL P. LANE, AS ADMINISTRATOR
OF THE ESTATE OF JIMMY D. DENNISTON,
AND JUDITH R. DENNISTON — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 97-CI-03705

DEERE AND COMPANY AND
KINGSLEY EQUIPMENT COMPANY — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Caswell P. Lane, as the administrator of the estate of Jimmy D. Denniston (Denniston), and Judith R. Denniston, the widow of Denniston, appeal from a jury verdict in favor of Deere and Company (Deere) in a products liability case involving the accidental death of Denniston while operating a bull dozer manufactured by Deere. The appellants also appeal from an order of the trial court granting, prior to trial, summary judgment to Kingsley Equipment Company (Kingsley), the

distributor of the dozer. The appellants contend that the trial court made various erroneous evidentiary rulings, improperly instructed the jury, and erroneously granted summary judgment to Kingsley under KRS[1] 411.340, the middleman statute. Having considered the arguments of the appellants and determining that there was no error, we affirm.

In 1986, Denniston purchased a 1985 John Deere 450E Crawler Dozer from Kingsley. Richard Little was the salesman in the transaction. The dozer was manufactured by Deere and Company. It appears from the record that Denniston operated the dozer for ten years without incident.

On October 27, 1996, Denniston was operating the dozer while attempting to alter the course of a creek bed on some recently acquired property he was developing. Along the creek bank was a tree with a limb five to six inches in diameter sawed to a length of five to six feet. As Denniston was backing the dozer out of the creek bank, the left rear upright of the dozer=s roll-over protection system made contact with the tree limb. As the dozer continued to move backwards, the branch was placed under increasing tension. Eventually, the dozer backed far enough against the limb that the limb swung into the operator space of the dozer, striking Denniston in the face. After the branch struck Denniston, the dozer continued to travel backward

[1]Kentucky Revised Statutes.

for over 1,000 feet. A passerby eventually discovered Denniston slumped in the dozer, and medical and law enforcement personnel were called to the scene. Following their arrival, the medical personnel determined that Denniston had been killed in the accident.

On October 22, 1997, Caswell P. Lane, acting as the administrator of the estate of Denniston, and Judith Denniston, Denniston=s widow, filed a complaint against Deere and Company and Kingsley in Fayette Circuit Court. The complaint sought damages for the accident under the theories of strict liability pursuant to the Restatement of Torts (Second) ' 402A (Restatement 402A), ordinary negligence, and breach of warranty. As the case proceeded, the plaintiffs developed as their primary allegations (1) that the dozer was defectively designed in that side screens, which would have prevented the intrusion of the tree branch into the operating compartment of the dozer, were offered as optional equipment which could be added rather than as standard equipment which could be rejected; (2) that the dozer=s Roll Over Protection System (ROPS) was designed so that the rear bars obstructed the operator’s view when backing up; and (3) that the defendants failed to provide Denniston with adequate warnings of the dangers inherent in operating the dozer in the vicinity of trees without side screens.

On October 19, 1999, Kingsley filed a motion for summary judgment. Deere also filed several motions for summary

judgment and/or partial summary judgment. On May 8, 2000, the trial court granted Kingsley=s motion for summary judgment pursuant to the middleman statute, KRS 411.340. The trial court ultimately denied Deere=s motions for summary judgment with respect to all issues.

The first trial in the case began on July 24, 2000. At the conclusion of the plaintiff=s case, the trial court granted Deere=s motion for a directed verdict on Judith Denniston=s claim for loss of consortium. Following nine hours of deliberation, the jury indicated that it was unable to reach a verdict, and the trial court granted Deere=s motion for a mistrial. Following the first trial, the trial court denied the appellants= motions to reconsider its rulings granting Kingsley summary judgment and granting a directed verdict on the loss of consortium claim.

In June 2001, the second trial began. At the conclusion of the evidence, the trial court submitted the case to the jury under a Restatement 402A strict liability instruction. Over the appellants= objection, the trial court refused to give separate instructions regarding negligent design, negligent failure to warn, and instructions providing various details regarding strict liability. After extensive deliberations, the jury returned a verdict in favor of Deere. Based upon the jury=s verdict, the trial court entered a judgment in favor of Deere. The appellants subsequently filed a motion for a new trial, which was denied. This appeal followed.

First,[2] the appellants contend that the trial court erred in giving a single products liability instruction Awhich was confusing, misleading, failed to specify the hazard in the product, failed to identify the correct legal standard, failed to identify any factors to consider in evaluating unreasonable danger, and failed to separately identify defective design and failure to warn.@

In their tendered instructions, the appellants proposed a multifaceted strict liability instruction. The tendered instruction stated as follows:

> You need not find a specific act of negligence, or a specific design defect, or defective warning, in order to find that the 450E crawler dozer was Ain a defective condition,@ . . . but you should find that the 450E crawler dozer was Ain a defective condition@ if:
>
> (a) the design of the 450E crawler dozer created such a risk of violent intrusion of foreign objects into the operator space that an ordinarily prudent company engaged in the manufacture of such equipment being fully aware of the risks would not have put it on the market, or
> (b) the design of the 450E crawler dozer created such a risk of violent intrusion of foreign objects into the operator space that it did not meet the reasonable expectations of the ordinary consumer as to its safety, or
> (c) warnings or instructions were necessary to avoid a danger to a person who is expected to use the 450E crawler dozer where the danger is not obvious or apprehended by such

[2]For purposes of continuity, we have reversed the order of the appellants= first and second arguments.

> a person, but were not provided or affixed so that in the ordinary course of events they would reach and be understood by that person, or
> (d) the warnings or instructions actually given, if any, were not reasonably adequate to warn an ordinarily prudent person that he might be injured by the violent intrusion of a tree branch into the operator space of the 450E crawler dozer or instruct an ordinarily prudent person on how he might avoid such risk of injury.
>
> A warning or instruction given to persons other than Jimmy D. Denniston does not constitute a warning or instruction to Jimmy D. Denniston. In order for a warning to be adequate under this Instruction, the warning must give the ultimate user fair and adequate notice of the possible consequences of use or even misuse of the product.
>
> The Aduty to warn@ of the manufacturer or seller is non-delegable. That is, if warnings or other safety instructions are required in order to make a product safe for its use, then the manufacturer or seller cannot depend on any other person to communicate this warning.
>
> You may find that the product is in a defective condition although the manufacturer and/or seller has exercised all possible care in the preparation and sale of the product.

The trial court rejected the appellants= strict liability instruction and, instead, presented an instruction consisting of a single instruction and two associated interrogatories. The instruction stated:

> It was the duty of the Defendant, Deere & Company to place the dozer on the market so that it was not defective and unreasonably dangerous to the extent that an ordinarily prudent manufacturer of dozers, being fully aware of the risk, would not have put it on the market.

Interrogatory No. 1 inquired:

> Do you believe from the evidence that the dozer was defective and unreasonably dangerous to the extent that an ordinarily prudent manufacturer of dozers, being fully aware of the risk, would not have put it on the market?

Nine jurors answered "no" to this interrogatory, thereby exonerating Deere of liability in the manufacture and sale of the dozer.[3]

The detailed instruction proposed by the appellants is inconsistent with case authority, and the trial court properly instructed the jury on the issue of strict liability. The Supreme Court has specifically cautioned against Ainstructions getting into evidentiary matters, subquestions which better practice suggests should be omitted from the instructions and left to the lawyers to flesh out in closing arguments.@ Ford Motor Co. v. Fulkerson, Ky., 812 S.W.2d 119, 123 (1991). "Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing

[3]Interrogatory No. 2, which in light of the answer to Interrogatory No. 1 was not considered, inquired: ADo you believe from the evidence that the defective and unreasonably dangerous condition was a substantial factor in causing the plaintiff=s injuries and death?@

arguments if they so desire." Cox v. Cooper, Ky., 510 S.W.2d 530, 535 (1974).

> Since the time Kentucky adopted the doctrine of "strict liability" in products cases as stated in the Restatement, Second, Torts, ' 402A, in the case of Dealer's Transport Company v. Battery Distributing Company, Ky., 402 S.W.2d 441 (1966), the Kentucky practice has been to state the liability issue in the terms of [the] Restatement: Did the defendant manufacture, sell or distribute the product "in a defective condition unreasonably dangerous to the user . . . ?"

Fulkerson at 122.

> Considerations such as feasibility of making a safer product, patency of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the products' inherently unsafe characteristics, while they have a bearing on the question as to whether the product was manufactured 'in a defective condition unreasonably dangerous,' are all factors bearing on the principal question rather than separate legal questions.

Montgomery Elevator Co. v. McCullough, Ky., 676 S.W.2d 776, 780-81 (1984). "A trial court is well advised to leave consideration of these evidentiary factors to the arguments of counsel rather than attempting to frame them up in the instructions on the ultimate questions.@ Fulkerson at 124.

The instruction given in this case was explicitly approved in Nichols v. Union Underwear Co., Ky., 602 S.W.2d 429, 433 (1980), and substantially follows the instruction approved in Fulkerson. Fulkerson, 812 S.W.2d at 121-22. The instruction also follows the model instruction as set forth in 2 Palmore,

Kentucky Instructions to Juries, ' 49.01 (4th ed. 1989 & 2001 Supp.). The appellants were free to flesh out in their closing argument the various points raised in their proposed instruction. In summary, the trial court did not give an erroneous Restatement § 402A strict liability instruction, and properly rejected the appellants= tendered strict liability instruction.

Next, the appellants contend that the trial court erred by failing to present their proposed negligence instructions, thereby permitting the jury to find for the plaintiffs only under a theory of strict liability under Restatement 402A. We disagree.

In their original complaint, the appellants specified negligent design and negligent failure to warn, along with strict liability, as theories under which Deere and Kingsley were liable for Denniston=s dozer accident. The appellants developed evidence in support of their negligence theory at trial, and in their proposed jury instructions, included two instructions concerning negligence. The first concerned negligent design:

> In this case, plaintiffs claim damages for personal injuries and death alleged to have been suffered as a result of negligence on the part of the defendants. Specifically, plaintiffs allege that the defendants negligently designed, and/or manufactured, and/or sold, the 450E crawler dozer and that such negligence was a substantial factor in causing the injuries suffered by Jimmy D. Denniston.
>
> You will find for plaintiffs under this Instruction if you believe from the evidence:

> (a) that the defendants failed to exercise ordinary care in designing, manufacturing and/or selling the 450E crawler dozer, and
> (b) that such failure to exercise ordinary care was a substantial factor in causing the injuries suffered by Jimmy D. Denniston.

The second proposed negligence instruction concerned Deere=s alleged failure to provide adequate warnings of the dangers of operating the dozer in the vicinity of trees without the side-guard screens:

> Plaintiffs also allege that the defendants were negligent in failing to warn that the 450E crawler dozer was dangerous and that such failure to warn was a substantial factor in causing the injuries suffered by Jimmy D. Denniston.
>
> You will find for plaintiffs under this Instruction if you believe from the evidence:
> (a) that Jimmy D. Denniston was a person whom defendants should have expected to use the product or to be endangered by its probable use,
> (b) that defendants knew or had reason to know that the 450E crawler dozer was likely to be dangerous for the use for which it was supplied,
> (c) that defendants had reason to believe that those using the product would not realize its dangerous condition,
> (d) that defendants failed to exercise ordinary care to warn Jimmy D. Denniston of the product=s dangerous condition or of the facts which make the product likely to be dangerous, and
> (e) that such failure to exercise ordinary care was a substantial factor in causing the injuries suffered by Jimmy D. Denniston.
>
> A warning or instruction given to persons other than Jimmy D. Denniston does not constitute a warning or instruction to Jimmy D. Denniston. In order for a warning to be adequate under this Instruction, the warning must give the ultimate user fair and adequate

notice of the possible consequences of use or even misuse of the product.

The trial court rejected the appellants= proposed negligence instructions and, as previously noted, the jury instructions concerning Deere=s liability consisted of a single instruction and two associated interrogatories based upon Restatement 402A. In support of its negligent design instruction, the appellants cited two sections of the Restatement, Section 395[4] and Section 398.[5]

As evidence in support of the negligent design instruction, the appellants cite the testimony of mechanical engineering expert Ottfried Johannes Hahn, Ph.D, who testified to the effect that Deere did not comply with good engineering principles or its own safety manual in designing and manufacturing the dozer, and to the testimony of Robert Cunitz, Ph.D, a licensed and board certified human factors psychologist,

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[4]Restatement ' 395 provides as follows: AA manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.@

[5]Restatement ' 398 provides as follows: AA manufacturer of chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.@

who testified that Deere did not act appropriately from a human factors standpoint in making the decision to offer side screens as optional equipment rather than as standard equipment which could be removed with the informed consent of the buyer.

A party plaintiff is entitled to have his theory of the case submitted to the jury if there is any evidence to sustain it. Clark v. Hauck Manufacturing Co., Ky., 910 S.W.2d 247, 250 (1995). If the evidence presented at trial supported both a Restatement 402A strict liability instruction and the proposed negligence instructions, an instruction under both theories should be given. Id. Under the circumstances of this case, however, we are persuaded that an instruction for negligent design would be redundant with the 402A strict liability instruction. It is unnecessary to give a redundant instruction. Reynolds v. Commonwealth, Ky., 257 S.W.2d 514, 516 (1953).

In order to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of the duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. Lewis v. B & R Corporation, Ky. App., 56 S.W.3d 432, 436-37 (2001). The issues of causation and injury would clearly be the same under either a negligence or a strict liability standard. Further, we are persuaded that the issue of duty is the same under either theory. Under either a negligence or strict liability theory, Deere's fundamental duty was not to place a dozer on the market in a defective and unreasonably dangerous condition. In fact, the

appellants= burden of proof was simplified under the strict liability theory, in which case full knowledge of the condition and dangers of a product is presumed, as opposed to its burden under a negligence theory, in which case the manufacturer must have known or reasonably should have known of the condition and dangers of the product. Thus, the proposed negligent design instruction is subsumed within the strict liability instruction.

The foregoing has previously been stated as follows:

> It [is] 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 Manufacturing, Inc., Ky., 502 S.W.2d 66, 69-70 (1973). AThus, the fact finder in a design defect case must decide whether the manufacturer that placed in commerce the product made according to an intended design acted prudently, i.e., was the design a defective condition which was unreasonably dangerous.@ Nichols v. Union Underwear Co., 602 S.W.2d at 433. In light of this, we are persuaded that the strict liability instruction under Restatement 402A adequately took into consideration any evidence presented by the appellants with respect to negligent design of the dozer.

In the same vein, under the circumstances of this case, we are persuaded that the appellants= proposed negligent failure to warn instruction was redundant with the strict liability

instruction actually given. In considering whether the dozer was in a defective condition unreasonably dangerous, the jury was obligated to consider as one of the factors in reaching its determination whether warnings were required and, if so, whether those warnings were properly given. While the strict liability instruction did not explicitly identify this duty to warn, the warning issue was exhaustively addressed by the appellants= expert witnesses, and the consequences of the duty were driven home by counsel in closing arguments. Under the circumstances of this case, a separate negligent instruction regarding failure to warn would have been redundant with the strict liability instruction.

In his treatise, Palmore suggests that a negligence instruction for failure to warn need never be given in conjunction with a strict liability instruction, stating:

> In [Clark v. Hauck Mfg. Co., Ky., 910 S.W.2d 247 (1995)] the Court concluded also that the manufacturer may be liable if (a) the product was unreasonably dangerous or (b) he did not provide adequate warning. This, of course, leads to a possible conclusion that even if the jury does not find that the product was unreasonably dangerous, it may still find the manufacturer liable for not providing a warning. However, if the product was not unreasonably dangerous in the first place, how can the manufacturer have been under a duty to provide a warning?

2 Palmore Kentucky Instructions to Juries, ' 49.01 (4th ed. 2002 Supp.).

In Clark v. Hauck Manufacturing, the negligence instruction was given in relation to the manufacturer=s duty to notify customers of information requiring a warning which came to light subsequent to the sale, an issue not relevant in this case. However, we note that Palmore=s suggestion that a negligence instruction regarding failure to warn is unnecessary in all cases where a strict liability instruction is given is overbroad. In some instances, both a strict liability instruction and a negligent failure to warn instruction may be necessary. See, e.g., Byrd v. Procter and Gamble, 629 F.Supp. 602 (E.D. Ky. 1986). In summary, in cases wherein the negligence issue is not subsumed by the strict liability instruction, the jury should be instructed under both theories.

Next, the appellants contend that the trial court erred by granting summary judgment to Kingsley Equipment Company under KRS 411.340. As previously noted, Kingsley is a John Deere distributor and sold the dozer to Denniston in 1986. The trial court granted summary judgment to Kingsley by order dated May 8, 2000.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. CR 56.03. AThe record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be

resolved in his favor.@ Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment "is only proper where the movant shows that the adverse party could not prevail under any circumstances.@ Id. (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)). Consequently, summary judgment must be granted A[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor[.]@ Steelvest at 482.

Summary judgment in favor of Kingsley was premised upon KRS 411.340, the middleman statute. KRS 411.340 provides as follows:

> In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer, breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user or consumer.

The appellants contend that summary judgment was improper under the middleman statute because Kingsley=s liability in this case was not based solely on its distribution or sale of the product but, rather, was also based upon (1) its

participation in the design of the dozer; (2) its failure to provide an adequate warning concerning the hazard of using the dozer without screens despite its awareness of the danger to the user; and (3) Kingsley knew or should have known that the product was in a defective condition unreasonably dangerous to the consumer.

The first requirement for the defense to apply is that the manufacturer must be "identified and subject to the jurisdiction of the court." KRS 411.340. There is not a factual dispute regarding this issue as it is uncontested that Deere manufactured the dozer and is subject to the jurisdiction of the trial court. The second requirement is that the product was sold in its "original" condition. KRS 411.340 Again, though Kingsley rented out the dozer for a period of time, it is undisputed that Kingsley sold the dozer to Denniston in what amounts to the dozer=s original condition. Regarding the third requirement, there is no allegation that Kingsley breached an express warranty.

The final requirement for the statute to apply is that Kingsley must not have known, nor should it have known, Aat the time of distribution or sale that the dozer was in a defective condition, unreasonably dangerous to the user or consumer.@ KRS 411.340.

According to the discovery testimony, Kingsley generally orders its stock of dozers from Deere equipped without

the side screens, and the screens are offered as an option to buyers based upon their intended use of the dozer. Company owner Weir Kingsley testified that only about 10 percent of the buyers ultimately choose to purchase the screens. Richard Little testified that in his twenty-five-year career he had sold hundreds of the dozers, and only a few had chosen to equip the dozers with the side screens.

It is undisputed that the John Deere 450E Crawler dozer is a utility dozer which buyers adapt to many uses. Many options are available depending upon the use to which the buyer intends to put the dozer. The testimony disclosed that the option system used by Deere and Kingsley is also used by other dozer manufacturers and distributors, and that there are no governmental regulations requiring the dozer to be sold with side screens. OSHA regulations require only that dozers be equipped with the side screens when being used in forestry operations.

Salesman Richard Little testified in his deposition testimony that he had notified Denniston regarding the availability of the side screens and the dangers of using the dozer around trees and brush. He further testified that he was sure that Denniston understood the issue, and represented that he would not be using the dozer in such an environment but, rather, would be using the dozer primarily for property development purposes. Further, it is undisputed that Denniston was a sophisticated dozer operator, and would have advanced personal knowledge of basic safety considerations in operating heavy

equipment. Moreover, the risk at issue here, particularly to a sophisticated user such as Denniston, is in the nature of an open and obvious danger requiring no warning.

Under the circumstances of this case, we are persuaded that Kingsley neither knew nor should have known that the dozer was in a defective condition unreasonably dangerous at the time it sold the dozer to Denniston, and that Kingsley has satisfied all requirements for protection under the middleman statute.

Finally, the appellants= allegation that the statute should not apply on the basis that Kingsley participated in the design of the product, see Worldwide Equipment v. Mullins, Ky. App., 11 S.W.3d 50 (1999), is not supported by the record. What the appellants represent as Kingsley=s Aparticipation in the design@ is, upon further examination, merely a selection of the various option packages to be added to the basic dozer. In contrast, the defendant in Worldwide Equipment played an active role in the final stage manufacturing modification of a cab-chassis manufactured by Mack Trucks, an unfinished product, into a coal truck. The coal truck, as manufactured and designed with Worldwide=s participation, violated federal and state laws. On the other hand, Kingsley merely specified an option package for the dozer, one that excluded the seldom requested side screens, and the dozer as ordered was in compliance with governmental regulations. Based upon the foregoing factors, Worldwide Equipment is distinguishable from the present case.

In summary, we are persuaded that the trial court properly applied the middleman statute in granting summary judgment to Kingsley.

Next, the appellants contend that the trial court erred by admitting testimony that Kingsley salesman Richard Little presented side screens as a purchase option to Denniston and all of his customers while at the same time excluding evidence relating to Little=s credibility and bias. Specifically, the appellants allege that it was improper to permit the testimony of Little to the effect that he discussed the availability of side screens with all of his dozer customers, including Denniston, and at the same time, exclude testimony of two former customers that they did not recall Little telling them about the availability of side screens. The appellants also claim that it was erroneous to permit Little=s testimony that he was fond of Denniston and to exclude testimony that he had met with Kingsley=s trial counsel prior to giving his deposition testimony.

Little died shortly after his June 17, 1999, deposition. The parties filed designations of portions of Little=s testimony to be read at trial, and objections seeking to exclude portions of his testimony. Among the portions of Little=s deposition testimony that Deere and Company designated to be read at trial were answers in which Little indicated that he had made Denniston aware that side screens were necessary for the protection of his safety; that Denniston didn=t seem to

believe he needed the side screens; and that Little=s discussions with Denniston regarding the screens were substantially the same as those he had with other customers.

In rebuttal to Little=s testimony that it was his practice to inform buyers of the availability of side screens and the dangers of operating the dozer around brush and trees without them, the appellants proffered the testimony of two former customers to testify that they did not recall Little informing them about the side screens. The proposed purpose of the testimony was to impeach Little=s testimony that he had discussed the side screens with Denniston. The trial court excluded the testimony as impeachment on a collateral issue.

"It is generally recognized that a witness may not be impeached with respect to a matter which is irrelevant and collateral to the issues in the action." Simmons v. Small, Ky. App., 986 S.W.2d 452, 455 (1998) (quoting Commonwealth v. Jackson, Ky., 281 S.W.2d 891, 894 (1955), overruled in part by Jett v. Commonwealth, 436 S.W.2d 788 (1969)). See also Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 705 (1994), cert. denied, 516 U.S. 1154, 116 S. Ct. 1034, 134 L. Ed. 2d 111 (1996). AA matter is considered collateral if >the matter itself is not relevant in the litigation to establish a fact of consequence, i.e., not relevant for a purpose other than mere contradiction of the in-court testimony of the witness.=@ Id. (quoting United States v. Beauchamp, 986 F.2d 1, 4 (1st Cir. 1993) and 1 McCormack on

Evidence ' 45 at 169). The purpose for this rule is "to minimize confusion for the triers of fact by avoiding an unwarranted and endless proliferation of side issues." Id. (quoting Lawson, The Kentucky Evidence Law Handbook, ' 4.10, p. 177 (3d ed. Michie 1993)).

According to Little=s deposition testimony, he worked for Kingsley for 25 years and sold hundreds of dozers. Of the two witnesses proffered by the appellants, one testified that he knew about side screens but could not recall his discussion with Little. The other testified that he could not remember one way or the other if there was a discussion of the brush screens. Because of the witnesses= inability to recall their discussions with Little, the impeachment value of the proffered testimony was minimal.

The proffered testimony was clearly attempted impeachment on a collateral issue. The trial court has broad discretion regarding the decision as to whether to admit evidence that contradicts a witness's testimony at trial. Jett v. Commonwealth, Ky., 436 S.W.2d 788, 792 (1969). The value of the evidence for a legitimate purpose was slight, and there was a potential that the jury could misuse the information for an improper purpose. The trial court did not abuse its discretion by excluding the proposed impeachment. Baker Pool Co. v. Bennett, Ky., 411 S.W.2d 335, 338 (1967).

In his deposition testimony, Little stated that he met with Vier Kingsley, the owner of Kingsley Equipment Company, and Kingsley=s attorney on two occasions prior to his deposition. The appellants contend that the trial court erred by ruling this testimony inadmissible as evidence of Little=s bias, especially because the trial court permitted Little=s testimony that he was fond of Denniston, which the appellants allege suggests that Little was not biased.

Evidence that may suggest bias or prejudice on the part of a witness is not collateral and is relevant to impeach the credibility of that witness at trial. Motorists Mut. Ins. Co. v. Glass, Ky., 996 S.W.2d 437, 447 (1997). "Any proof that tends to expose a motivation to slant testimony one way or another satisfies the requirement of relevancy. The range of possibilities is unlimited . . . ." Id. (citing R. Lawson, The Kentucky Evidence Law Handbook, ' 4.15, p. 183 (3rd ed. Michie 1993)).

Contrary to the appellants' allegation, evidence concerning Little=s meetings with Vier Kingsley and Kingsley=s attorney was permitted. The Little deposition tape played to the jury included references to the meetings, and even included testimony regarding the content of the meetings. Further, a review of Little=s deposition testimony discloses that his description of the meetings does not suggest bias, but rather that the purpose of the meetings was for Little to explain to

Kingsley=s attorney his knowledge regarding the circumstances surrounding Denniston=s purchase of the dozer.

In support of their position that testimony regarding the meetings was admissible to prove bias, the appellants cite us to Humana of Kentucky, Inc. v. McKee, Ky. App., 834 S.W.2d 711 (1992), in which Humana=s corporate witness was called by the plaintiff and was evasive regarding her meetings with Humana=s attorney. Examination regarding the meetings was held proper in that case because the corporate witness had presented herself as an unbiased witness by indicating that she had not discussed her testimony with Humana=s attorneys since the trial had begun. In fact, she had discussed her testimony many times prior to trial, and had been the principal Humana contact with the hospital=s attorneys. In this respect, McKee is distinguishable from the present case. Little did not dissemble regarding his meetings with Kingsley=s trial counsel and, further, the content of those discussions was limited to factual discussions regarding the case.

Further, we are not persuaded that Little=s testimony regarding his fondness for Denniston has any relevance to the admissibility of the attorney meetings. The statement was made in the context of the number of times Little had met with Denniston and how he had learned of Denniston=s death. In summary, the trial court did not abuse its discretion by

excluding as impeachment evidence the predeposition meetings between Little and Kingsley=s trial counsel.

Next, the appellants contend that the trial court erred by admitting speculative testimony regarding Denniston=s understanding of the purpose and use of side screens. At Little=s June 17, 1999, deposition testimony, the following exchange occurred between counsel for Deere and Little:

> Q. Is there any doubt in your mind, as you sit here today, that you told Mr. Denniston about the availability of limb risers and brush guards and - -
>
> A. (Interrupting) No, no.
>
> Q. - - what they were used for?
>
> A. There=s no doubt in my mind that I . . .
>
> Q. And based upon your conversations with you . . . with him, is there any doubt in your mind but that he understood the purpose of that equipment and what it was used for, and chose not to buy them?
>
> A. That - - that=s my understanding, yes, sir.

The appellants contend that Little=s answers required him to speculate regarding Denniston=s understanding regarding side screens, that Little could not have any personal knowledge regarding Denniston=s mental processes, and that the testimony should have been excluded pursuant to KRE 602, which prohibits a witness from testifying to any matter about which the witness lacks personal knowledge. We disagree.

KRE 701 provides that if the witness is not testifying as an expert, the witness may testify in the form of opinions or inferences if limited to those opinions or inferences which are (a) rationally based on the perception of the witness; and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Mills v. Commonwealth, Ky., 996 S.W.2d 473, 488 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1182, 145 L. Ed. 2d 1088 (2000); Young v. Commonwealth, Ky., 50 S.W.3d 148, 170 (2001). A corollary to this rule is the concept known as the "collective facts rule," which permits a lay witness to resort to a conclusion or an opinion to describe an observed phenomenon where there exists no other feasible alternative by which to communicate that observation to the trier of fact. Clifford v. Commonwealth, Ky., 7 S.W.3d 371, 374 (1999) (citing R. Lawson, The Kentucky Evidence Law Handbook ' 6.05, pp. 275-76 (3d ed. Michie 1993)). Under this rule, among other things, lay witnesses have been permitted to testify regarding the degree of physical suffering endured by another, Zogg v. O'Bryan, 314 Ky. 821, 237 S.W.2d 511 (1951); and the mental and emotional state of another, Commonwealth v. Sego, Ky., 872 S.W.2d 441, 444 (1994); Emerine v. Ford, Ky., 254 S.W.2d 938 (1953). See Clifford at 374. However, KRE 701 and the collective facts rule must be applied in conjunction with KRE 602, which limits a lay witness's testimony to matters to which he has personal knowledge. Mills at 488.

In his deposition testimony, Little set forth in detail his discussions with Denniston regarding the availability of side screens, Denniston=s intended use of the dozer, Denniston=s statements that he would not be using the dozer in wooded areas, and Denniston=s ultimate rejection of the side screens. Little=s conclusion was based upon his rational perception of his discussions with Denniston, the testimony was helpful to a clear understanding of whether Denniston was informed of the side screens and understood their purpose, and there existed no other feasible alternative by which to communicate his observations to the trier of fact. Under these circumstances, the trial court did not abuse its discretion by permitting Little=s testimony regarding Denniston=s understanding of their discussions regarding the side screens.

Next, the appellants contend that the trial court erred by admitting evidence which suggested that Deere delegated its non-delegable duty to provide a reasonably safe product and to warn to either Kingsley or Denniston. Specifically, the appellants allege that Deere improperly suggested this when (1) it elicited testimony from Kingsley=s president that Kingsley was responsible for making all of the decisions regarding what equipment to place on the machine; and (2) when Kingsley=s president read into the record portions of the dealer contract suggesting that Kingsley was responsible for instructing the user in the proper use of the dozer.

In support of their argument, the appellants cite to the holding in Montgomery Elevator Co. v. McCullough, Ky., 676 S.W.2d 776, 782 (1984), that A[t]he manufacturer has a non-delegable duty to provide a product reasonably safe for its foreseeable uses, a duty not abrogated by warning to the immediate purchaser.@ Montgomery Elevator, however, is distinguishable from the present case. In Montgomery Elevator, the plaintiff, a child, was injured when his tennis shoe became caught in an escalator at a department store. After Montgomery Elevator sold the escalator to the department store, it became aware of a defect in the escalator that resulted in a propensity for catching up tennis shoes between the escalator steps and the escalator skirt panel. In response, Montgomery Elevator sent a letter to the department store informing the store of the problem and suggesting that the store take the remedial measure of purchasing a kit which would correct the problem. Montgomery Elevator contended that its warning to the department store relieved it of any liability, which lead to the Supreme Court=s aforementioned ruling regarding a manufacturer=s non-delegable duty.

The evidence concerning Kingsley=s participation in equipping the machine and the contractual provisions requiring Kingsley to instruct the user in the proper use of the machine does not violate the holding of Montgomery Elevator as an impermissible delegation of duty. Unlike the manufacturer in

Montgomery Elevator, Deere did not become aware of a design defect following the sale of the dozer to Kingsley, notify Kingsley of the defect, and disclaim any liability as a result of its informing Kingsley of the defect.

The appellants also allege that there was no purpose for the testimony other than to suggest that the legal responsibility for any failure to equip the dozer with side screens or to warn Denniston was borne by Kingsley and not Deere. However, the decision-making process regarding the equipping of the machine was relevant to the issue of whether it was reasonable to offer the side screens as an option rather than as standard equipment, and the dealer contract provisions regarding Kingsley=s obligation to instruct the user regarding the proper use of the machine was a relevant consideration in whether adequate warnings and instructions were given, a consideration in whether the product was manufactured in a defective condition unreasonably dangerous. Montgomery Elevator at 780.

The appellants further allege that the trial court erred by admitting a purchase form completed by Denniston which indicated that he intended to use the machine for farm use only. The appellants assert that this evidence suggested that Deere may limit its liability only to the actual use of the product as indicated on the form rather than any foreseeable use or misuse of the product. However, this evidence was relevant to the issue of whether Denniston deliberately rejected the side screens

because he would be using the dozer in an environment which would not necessitate the use of them.

Next, the appellants contend that the trial court erred in failing to instruct the jury on the legal effect of offering side screens only as an optional safety feature. We have previously discussed at length the issue of instructions. The issue of offering side screens as an option rather than standard equipment was but one consideration in the jury=s determination of whether the dozer was in a defective condition unreasonably dangerous. Under the applicable Kentucky authorities, as previously cited, it was not erroneous for the trial court to submit the instructions to the jury without a specific instruction regarding the legal effect of offering side screens as an optional safety feature. See Ford Motor Company v. Fulkerson, 812 S.W.2d 119; Nichols v. Union Underwear Co., 602 S.W.2d 429; and 2 Palmore, Kentucky Instructions to Juries, ' 49.01 (4th ed. 1989 & 2001 Supp.) This was an issue for closing arguments, not for the jury instructions.

Next, the appellants contend that the trial court erred in excluding evidence of other substantially similar occurrences. Specifically, the appellants offered the testimony of Lindsey Hunt, the current owner of the dozer that Denniston was operating at the time of the accident. In his avowal testimony, Hunt testified that he was struck by a tree branch which intruded into the operator space of the dozer while he was operating the dozer

in reverse, and that the branch struck him in the head with sufficient force to knock off his glasses and leave him Aaddled.@ The testimony of the similar occurrence was properly excluded on relevancy grounds. Deere did not contest that Denniston had been struck by a tree limb while operating the dozer in reverse and stipulated that it was on notice that objects, such as tree limbs, could enter the operator=s compartment. Hunt=s testimony did not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. KRE 401.

The appellants also contend that Hunt=s testimony should have been admitted to impeach the credibility of Deere=s expert witness, Ron Brass. Brass testified that Deere had not received Aany reports of injuries that are associated with the operation of these machines around tree branches.@ Hunt testified that he had informed Brass of his injury when Brass came to inspect the dozer. The trial court excluded Hunt=s testimony for impeachment purposes as impeachment on a collateral issue.

As previously noted, "It is generally recognized that a witness may not be impeached with respect to a matter which is irrelevant and collateral to the issues in the action." Simmons v. Small, 986 S.W.2d at 455. "Rulings upon admissibility of evidence are within the discretion of the trial judge [and] . . .

should not be reversed on appeal in the absence of a clear abuse of discretion." Simpson v. Commonwealth, Ky., 889 S.W.2d 781, 783 (1994). Hunt=s testimony was not admissible for the mere purpose of contradicting Brass=s in-court testimony, and the trial court did not abuse its discretion by excluding the testimony as impeachment on a collateral issue.

Next, the appellants contend that the trial court erred in excluding the plaintiffs= videotape depicting the dozer in operation at the scene of the occurrence. The videotape was made several years after the accident, and the appellants do not claim that the accident scene did not change in the time between the time of the accident and the filming of the dozer at the scene. The trial court excluded the videotape on the basis that the conditions of the accident scene had changed such that the videotape could not properly be admitted as a reconstruction of the accident. The trial court also excluded the videotape on the basis that because the tape depicted the dozer at the accident scene, the tape was not admissible as a demonstration because the jury may be confused and mislead into believing that the tape, in fact, depicted a reconstruction of the accident.

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. Stevens v. Commonwealth, Ky., 462

S.W.2d 182, 185 (1970) (citing 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. Id. (citing Ohio County Drug Co. v. Howard, 201 Ky. 346, 256 S.W. 705 (1923)). However, the substantially similar standard is a flexible one which, even when construed strictly, does not require that all variables be controlled. United States v. Metzger, 778 F.2d 1195, 1204 (6th Cir. 1985), cert. denied, 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568 (1986). Admissibility does not depend on perfect identity between actual and experimental conditions. AIndeed, most 'dissimilarities between experimental and actual conditions affect the weight of the evidence, not its admissibility.'@ Id. (quoting Szeliga v. General Motors Corp., 728 F.2d 566, 567 (1st Cir. 1984)).

Here, the trial court noted the proper standard for a reconstruction experiment and advised the plaintiffs that the videotape could be admitted if the proper foundation was laid. In the trial court=s judgment, however, the plaintiffs were unable to lay the proper foundation. The plaintiffs= own expert, Dr. O. J. Hahn, admitted that the scene was different. Further, the tree limb had been cut off. 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. Stevens at 185. In light of

the changes which had occurred at the accident scene between the time of the accident and the time the videotape was filmed, the trial court did not abuse its discretion by ruling that the tape was inadmissible as a reconstruction.

The appellants argue that if the videotape was not admissible as a reconstruction experiment, then the trial court erred by not admitting the tape as a demonstration. They contend that the demonstration of the dozer in operation was relevant to the visibility of objects behind the dozer while the dozer was in operation and the way in which the branch intruded into the operator space.

"Relevant evidence" is defined in Kentucky Rules of Evidence (KRE) 401 as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. In general, all relevant evidence is admissible. KRE 402. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading to the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. KRE 403. The decision to admit or to exclude evidence is a matter committed to the discretion of the trial court, and a trial court's ruling on such matters will not be disturbed upon appellate review absent an abuse of discretion. Transit Authority of River City v. Vinson, Ky. App., 703 S.W.2d 482, 484 (1985).

In this case, the trial court excluded the videotape as a demonstration because it involved the dozer backing out of the creek bed at the accident scene, leading to the concern that the jury may become confused or mislead into believing that the videotape was intended not as a mere demonstration of the dozer in operation but, rather, as a reconstruction experiment depicting the actual conditions under which the accident occurred. The trial court did not abuse its discretion by excluding the video tape on this basis. We note that the trial court held that the appellants were free to present a demonstration of the dozer in operation at a location other than the accident scene, but that the danger of confusion to the jury compelled exclusion of the accident scene demonstration. The trial court did not abuse its discretion by excluding the videotape of the dozer as a demonstration.

Next, the appellants contend that the trial court compounded its error in excluding the videotape by allowing defense counsel to misstate the evidence in closing arguments. Specifically, the appellants contend that defense counsel improperly stated in closing arguments that the dozer moved smoothly out of the creek bed and that:

> Because if he looks, he can see the tree, he can see the cut branch, and their whole case has to depend on a couple of things: One, he never saw it. He didn=t know it was there. He was backing up blindly. . . .
>
> . . .

> Now, if the tree is here and he's backing up this slope and he looks back, he should be able to see it.

The appellants objected to defense counsel's arguments and requested a curative instruction from the trial court indicating that there was no evidence from which the jury could conclude that as the dozer backed up the slope, the sight lines were such than an operator could see the tree branch that entered the operator space and injured Denniston. The trial court declined to give the curative instruction proposed by the appellants and, instead, instructed the jury only that it was improper to speculate as to any angle from which Denniston could have seen the tree limb.

In support of their argument, the appellants rely heavily on the decision of Risen v. Pierce, Ky., 807 S.W.2d 945 (1991). However, the Risen Court, citing Mason v. Stengell, Ky., 441 S.W.2d 412, 416 (1969), noted that reversal is proper if the argument is so prejudicial that an admonishment would not cure it. Risen, 807 S.W.2d at 949. In Risen, counsel made numerous references to evidence not in the record and blatantly disregarded the admonitions of the court. The improper argument addressed in that decision is readily distinguishable from that presented here.

In general, great latitude is allowed counsel in closing arguments. Commonwealth, Department of Highways v. Reppert, Ky., 421 S.W.2d 575, 576 (1967). Each advocate is free

to draw reasonable conclusions from the facts before the court. Id. However, trial counsel may not present arguments to the jury in closing statements unsupported by the record.

> The rule is that where an attorney makes a prejudicial statement of fact unsupported by the evidence, and the improper argument is brought to the court's attention, the court should promptly reprimand him and instruct the jury to disregard the statement and, if it be so prejudicial that it may improperly influence the jury, should set aside the verdict obtained by such attorney[.]

Horton v. Herndon, 254 Ky. 86, 70 S.W.2d 975, 977 (1934).

Pictures of the dozer and the accident scene were introduced as evidence, and there was a basis upon which defense counsel could present an argument regarding Denniston=s ability to see the tree as he backed up the creek bank. Further, the trial court gave an admonition to the jury Anot to speculate as to any angle from which Denniston could have seen the tree limb.@ Juries are presumed to follow the admonitions of the court. Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 863 (2002).

Because there was evidence in the record upon which defense counsel could draw the inferences presented in the closing statement, and because the trial court gave a curative instruction regarding how the jury was to treat the statement of defense counsel, we are persuaded that the comments were not so prejudicial that they improperly influenced the jury.

Finally, the appellants claim that the trial court erred in granting a directed verdict on the plaintiff=s claim for

loss of consortium. Because we have otherwise affirmed the jury verdict finding Deere and Company not liable and the summary judgment in favor of Kingsley, this damage issue is now moot. However, we will briefly address the matter.

The evidence presented at trial suggested that following being struck by the tree limb, Denniston lived any where from a few seconds up to four minutes, but most likely for about one minute.

When a motion for directed verdict is made, "the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991). The trial court cannot grant a motion for directed verdict "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985). "On appeal, the appellate court considers the evidence in the same light." Lovins, 814 S.W.2d at 922.

The loss of consortium claim is personal to the surviving spouse. The purpose is to compensate for that period of time while the injured spouse was still alive but incapable of fully participating with the other spouse in conjugal relations attendant to the marital status. Clark v. Hauck Mfg. Co., Ky., 910 S.W.2d 247, 252 (1995). As between spouses, Kentucky law

does not recognize a claim for loss of consortium extending beyond the date of death. Brooks v. Burkeen, Ky., 549 S.W.2d 91 (1977), overruled on other grounds by Giuliani v. Guiler, Ky., 951 S.W.2d 318 (1997). A claim for loss of consortium is viable only for the period of time between the date of injury and the date of death. It does not reach beyond. Clark, 910 S.W.2d at 252.

The trial court properly granted summary judgment on Judith Denniston=s claim for loss of consortium. The case is on point with Brooks, 549 S.W.2d 91. In Brooks, the husband of the plaintiff died of asphyxiation while he was at work and in the process of cleaning out a furnace. The Supreme Court upheld the dismissal of her loss of consortium claim, stating:

> This claim fails because it is well-settled law that her recovery would be limited to damages which she sustained before her husband's death. Prosser on Torts, 4th Ed., 899. His death occurred instantaneously while at work. Consequently, she lost no services, society, fellowship or affectionate relations prior to death. Rogers v. Fancy Farm Telephone Co., 160 Ky. 841, 170 S.W. 178 (1914); Loew v. Allen, Ky., 419 S.W.2d 734 (1967).

Id. at 92.

We are persuaded that Denniston=s death was Ainstantaneous@ in the same respect as the asphyxiation death suffered by the decedent in Brooks. Further, as in Brooks, Denniston was also at work. Judith Denniston did not learn of Denniston=s death until after the fact, and she lost no services,

society, fellowship, or affectionate relations prior to his death. There was no appreciable length of time following the accident and the death of Denniston, and the trial court properly granted summary judgment on Judith Denniston=s claim for loss of consortium.

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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