

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001626-MR

LARRY ELLISON AND  
JOYCE ELLISON

APPELLANTS

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, SPECIAL JUDGE  
ACTION NO. 99-CI-00054

THE ENSIGN-BICKFORD COMPANY

APPELLEE

AND

NO. 2004-CA-001703-MR

STAR FIRE MINING, INC.

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, SPECIAL JUDGE  
ACTION NO. 99-CI-00054

THE ENSIGN-BICKFORD COMPANY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: A miner was injured because of an improperly designed "shot pattern." The employer's liability was acknowledged through workers' compensation payments. A personal injury action was filed against a number of defendants, including appellee, The Ensign-Bickford Company (hereinafter, EBCO), which manufactured/supplied major components of the detonation system. Summary judgment dismissed EBCO. Because there was no issue of fact or law concerning EBCO's role in designing the shot pattern for this particular job, summary judgment was properly granted. Hence, we affirm.

Larry Ellison, an employee of Star Fire Mining, Inc., was injured when his electrical shovel struck an undetonated and undetected blasting hole. The ensuing blast caused serious injuries to Ellison. The uncontroverted evidence revealed the cause of the undetonated blasting hole was an improperly designed shot pattern. Ellison began receiving workers' compensation benefits. Relevant to this appeal, an action was filed against EBCO, the manufacturer/supplier of the primers, down lines, caps, and detonators (and which also provided technical advice and instruction in the use of its products), and Nelson Brothers, Inc., which also supplied explosives products to Star Fire, and which also had an agreement with Star Fire to provide technical blast design services. Star Fire

intervened to recover workers' compensation paid to its injured employee.

Both EBCO and Nelson Brothers moved for summary judgment. The court granted summary judgment to EBCO, but denied the same to Nelson Brothers. The judgment was made final as to EBCO. Two appeals followed. Larry Ellison and Joyce Ellison appeal the dismissal of EBCO, in appeal no. 2004-CA-001626-MR. Star Fire also appeals the dismissal of EBCO in appeal no. 2004-CA-001703-MR. These two appeals were scheduled to be heard together and Star Fire adopted the Ellisons' brief for its appeal.

The appellants contend the trial court erred in granting EBCO summary judgment. It is undisputed that the cause of the accident was an improperly designed shot pattern. The issue presented is one of responsibility for the improperly designed shot pattern. Appellants present several theories on appeal under which they assert EBCO is at least partially liable.

The standard for summary judgment in the Commonwealth is governed by the case of Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991), which adopts the Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky. 1985), standard. Paintsville Hospital Co. mandates that summary judgment should only be used to terminate litigation when no

genuine issue of fact exists such that, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor against the movant. "We accept that 'impossible' is used in a practical sense, not in an absolute sense." Perkins v. Hausladen, 828 S.W.2d 652, 654 (Ky. 1992).

The cause of the accident was a flawed shot pattern design.<sup>1</sup> Although there is evidence in the record that EBCO, through its representatives: made numerous visits to job sites; provided detailed information on its products, including the recommendation of using double lines for an extra degree of safety; and frequently conferred with blasters and blasting supervisors, it was also undisputed that Star Fire had its own licensed blasters and that EBCO had no knowledge or role in developing this particular shot pattern. Star Fire admitted that it made the geological assessment and shot pattern for this particular blast, and that EBCO was not at the site when the subject shots were either laid or detonated.

We disagree with appellants' argument that it was improper for the trial court to grant summary judgment to EBCO,

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<sup>1</sup> Star Fire admitted that it had incorrectly assessed the geology and the shot pattern was flawed. Star Fire selected and set the blasting pattern. The faulty shot pattern caused a terrain shift which caused a down line to be severed before an explosive column was detonated. Star Fire made the decision to use single down lines. If a double-primed system had been used, the original detonation likely would not have failed.

while denying the same to Nelson Brothers. Nelson Brothers had a contract to provide technical blast design services. Further, while appellants' expert concluded that Nelson Brothers "designed, provided, and recommended" the faulty shot pattern, he did not opine that EBCO had any such role. Being in the same business as Nelson Brothers as suppliers does not make EBCO and Nelson Brothers "inextricably interlinked". It was not argued that the two companies worked together on, or even conferred about, this particular blast. Under Steelvest, the trial court was correct in assessing the facts.

Appellants' additional arguments can be summarized, that as the manufacturer/supplier of ultrahazardous products, EBCO had a duty to oversee the design and execution of shot patterns for mining companies using its products. Appellants assert that because EBCO's product and its use involved an ultrahazardous activity (which led to an exceptionally high duty of care), EBCO should have taken a more active role in the product use, specifically, by insisting on the holes being double-primed as a condition of continuing to supply its products to Star Fire.<sup>2</sup> We do not believe the law requires a manufacturer/supplier of a product used in ultrahazardous activity to police the product's use where the purchaser of the

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<sup>2</sup> Included in this argument is also that EBCO failed to provide the blasters with sufficient training to appreciate the danger in not double-priming.

product has government-certified blasters. In Hercules Powder Company v. Hicks, 453 S.W.2d 583 (Ky. 1970), a manufacturer of explosives and its related suppliers were sued on the same theory. The Court declined to impose liability against a manufacturer/supplier of a hazardous product, unless it "*knows or has reason to know* of the probable misuse by reason of the incompetence of the person to whom the chattel [explosive] is furnished." Id. at 587. There was no evidence in the present case of EBCO even suspecting the government-licensed blasters and the blasting supervisor were not proficient in their skills. The evidence in the record indicates that blasting must be conducted by individuals certified by both the state and federal governments, after special training and testing, and with experience. It is not argued that the blasters' certifications were deficient in any manner. Under Hicks, EBCO would have no liability as a matter of law.

For the foregoing reasons, we conclude the trial court did not err in granting summary judgment in favor of EBCO. Accordingly, the judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS LARRY AND  
JOYCE ELLISON:

William R. Garmer  
Lexington, Kentucky

Daniel F. Dotson  
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

John M. Famularo  
Daniel E. Danford  
Sasha Y. Wagers  
Lexington, Kentucky

BRIEF FOR APPELLANT STAR FIRE  
MINING, INC.:

Palmer G. Vance, II  
Lexington, Kentucky