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(FILE NO. 2008-SC-0331-D)

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001931-MR

MICHAEL E. COOKE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 02-CI-009889

CSX TRANSPORTATION, INC. — APPELLEE

OPINION AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: HOWARD,[1] NICKELL, AND TAYLOR, JUDGES.

HOWARD, JUDGE: This is an appeal from a judgment entered pursuant to a jury verdict dismissing the claims of the appellant, Michael E. Cooke, (hereinafter Cooke) against the appellee, CSX Transportation, Inc. (hereinafter CSX). Cooke sought damages pursuant to the Federal Employers' Liability Act (hereinafter FELA), 45 U.S.C. § 51 et

[1] Judge Howard authored this opinion prior to Judge Michael Caperton being sworn in on December 7, 2007 as Judge of the Third Appellate District, Division 1. Release of this opinion was delayed by administrative handling.

seq., for injuries allegedly sustained in the course of his employment with CSX. On appeal, Cooke contends that the trial court erred in its jury instructions as to liability and causation, in excluding the testimony of one witness, and in granting a directed verdict on one issue. We affirm in part, reverse in part and remand for a new trial.

Cooke worked for CSX periodically since 1981. In 1999 he started to work in CSX's paint shop in Raceland, Kentucky. In his complaint Cooke asserted that he was injured both on July 25, 2000, when he was knocked to the ground by a sudden, unexpected movement of a rail car and on August 24, 2000, when he fell while painting a rail car. Cooke alleged that CSX failed to provide him a reasonably safe place to work by providing inadequate lighting and by assigning him to do a job by himself that safely required two employees. The jury found in favor of CSX and this appeal followed.

Cooke first contends that the trial court erred in giving the following jury instruction: "Do you believe from the evidence that CSX failed to exercise that care required of it, and that failure, no matter how slight, was a substantial factor in causing injury to the Plaintiff?" Cooke cites us to *Hamilton v. CSX Transportation, Inc.,* 208 S.W.3d 272 (Ky. 2006), which disapproved the use of a similar term, "substantial cause," in the causation instruction in a FELA case. CSX argues that the instructions, taken as a whole, were substantially correct.

In *Hamilton,* we discussed this issue and stated that the term, "substantial cause" should not be included in the liability instruction in a FELA case. Rather, we held as follows:

> It is well-established that FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases. . . . A key difference between a statutory FELA action and a common law negligence action is that in order to satisfy the

> causation element in a FELA action, a plaintiff need only show that the employer "in whole or in part" caused his or her injury. . . . The United States Supreme Court has specifically described the FELA plaintiff's burden as follows: "Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Hamilton, 208 S.W.3d at 275, quoting *Rogers v. Missouri Pacific Rail Co.,* 352 U.S.500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) (internal citations omitted).

The instruction given by the trial court in this case was therefore erroneous, both for including the term, "substantial factor," which we find indistinguishable from the "substantial cause" language disapproved in *Hamilton,* and for the failure to include the causation language required by *Hamilton* and *Rogers,* either "caused, in whole or in part," or "played any part, even the slightest." We note that while a similar phrase, "no matter how slight" was used in the trial court's instruction, it was used to modify the negligence of CSX, not the causation of Cooke's alleged injuries, as required by *Hamilton*.

CSX also argues that Cooke failed to preserve this error for appellate review and that any error was harmless. CSX points out that the court asked the parties if they had any objections to the instructions, and Cooke's counsel responded, "None to the instructions you have given, Your Honor." Cooke acknowledges this statement, but argues that he had previously tendered his own instruction on this issue,[2] and that the

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[2] The instructions tendered by Cooke read, in relevant part, ". . . whether an injury to the plaintiff resulted in whole or part from the negligence of the railroad or its employees or agents. In other words, did such negligence play any part, even the slightest, in bringing about an injury to the plaintiff. . . . The involvement of any other cause does not prevent a finding for the plaintiff, as long as you find that the employer's negligence play any part, no matter how slight, in causing an injury to the plaintiff."

court later indicated that it would, for the sake of time, preserve objections for the record to the extent that the given instructions differed from those tendered.

Cooke maintains that his tendered instruction preserved his objection, despite his subsequently informing the court that he had no objections to its instructions. CR 51(3) provides as follows:

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Thus, an allegation of error in a jury instruction may be preserved by an objection to the instruction in question, by an appropriate motion raising the issue, or by tendering a proposed instruction avoiding the alleged error. While we do not endorse the instructions tendered by Cooke,[3] those instructions did avoid the specific error complained of in the instructions which were given by the court, and thus preserved the issue, unless that objection was waived by counsel's later statement.

A review of the video record does not clearly show such a waiver. After Cooke's attorney told the court he had no objection to the instructions, counsel for CSX began specifying its objections to the court's proposed instructions. The trial court then informed the parties that it would note for the record objections to the given instructions in accordance with all tendered instructions. The court did not specify if this statement was made to both parties or only to CSX. However, we cannot say, under these circumstances, that the statement clearly applied only to CSX, or that Cooke was unreasonable in believing that his objections to the failure to give his tendered

[3] The tendered instructions appear to run afoul of Kentucky's stated goal of "bare bones" instructions. *Cox v. Cooper,* 510 S.W.2d 530 (Ky. 1974).

instructions were not preserved as well. We cannot say that Cooke, having previously preserved the issue by his tendered instructions, clearly waived his objection in the conference with the court.

CSX also argues that any error in this instruction was harmless. This argument is also answered by our holding in *Hamilton:*

> "In this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial; that an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error." *McKinney v. Heisel,* 947 S.W.2d 32, 35 (Ky. 1997). . . . We also note that when we "cannot determine from the record that the verdict was not influenced by the erroneous instruction, the judgment will be reversed." *Prichard v. Kitchen,* 242 S.W.2d 988, 992 (Ky. 1951).

Hamilton, 208 S.W.3d at 276-277.

Even though CSX did not attempt to explain the "substantial factor" term to the jury on its closing argument or otherwise highlight that aspect of the instruction, we cannot say "that the verdict was not influenced by the erroneous instruction." Therefore, we must reverse the judgment entered in this case and remand the matter for a new trial.

We note that the circuit court trial preceded by four months our opinion in *Hamilton,* so that the court did not have the advantage of that opinion when drafting its instructions. On retrial, the instruction on liability and causation should not include the term, "substantial factor," but should "more closely reflect the U. S. Supreme Court's language in *Rogers." Hamilton,* 208 S.W.3d at 278. We believe that a proper instruction should include, as to the question of causation, either the language, "caused, in whole or in part," or "played any part, even the slightest, [in causing]."

Next, Cooke asserts that the trial court erred in excluding the testimony of Jimmy Hughes (hereinafter Hughes) as a rebuttal witness.[4] We review a trial court's decision on evidentiary questions on an abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). Hughes was a former employee of CSX who worked in the paint shop, beginning in October, 2000, a couple months after Cooke's August 24, 2000, injury. On avowal, Cooke questioned Hughes about the accuracy of a videotape of the paint shop, taken on June 5, 2001, and introduced by CSX. CSX's witness had testified that the video "fairly and accurately" represented the lighting and other conditions in the paint shop in July and August of 2000, when Cooke was injured. Hughes was shown in the videotape, working in the same location where Cooke was allegedly injured. Cooke contends on appeal that the trial court erred in not allowing Hughes to rebut the testimony that the videotape accurately depicted the lighting of the paint shop in 2000.

The trial court refused to allow the evidence, noting that Hughes had no knowledge of the lighting or condition of the paint shop at the time of Cooke's alleged injuries in July or August of 2000, only beginning in October of that year. However, Hughes' avowal testimony was that he felt the lighting in the paint room was insufficient when he started working there in October, and he complained about it. CSX then put in additional lighting, making the room brighter before the video was taken in June of 2001. It would seem to be a reasonable inference from this testimony that the lighting in July or August of 2000, was also less than the lighting in June of 2001. While it is doubtful that we would find this to be an abuse of discretion or order a new trial on this ground alone,

[4] Cooke attempted to call Mr. Hughes as a witness twice, first on his case in chief and then on rebuttal. His testimony was disallowed by the trial court on both occasions. Cooke argues on this appeal only that it was error not to allow his testimony on rebuttal.

if the evidence on this issue is substantially the same on retrial, Hughes' testimony should be admitted, as to the limited issue of whether or not the video fairly and accurately represented the lighting conditions at the time of Cooke's alleged injuries.

Cooke's final contention on appeal is that the trial court erred in directing a verdict on his claim that CSX failed to provide adequate assistance for his job duties. The Kentucky Supreme Court restated the standard of review of a directed verdict in *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998), as follows:

> On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, Ky., 840 S.W.2d 814 (1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984).

Before the trial court, Cooke claimed that his injuries were attributable to CSX's placing him by himself in a job that required two persons and that he consequently had to move from side to side to paint the rail cars. Cooke contends that "if this had been a two-man job as it was previous to [his] injuries, he would not have been so rushed going back and forth underneath the tracks during his eight-hour shift to perform his job."

Cooke offered no expert testimony to support this theory. Furthermore, his argument here ignores the undisputed evidence that at the time of his alleged injuries, the number of cars painted per shift was only approximately one-half the number painted when two persons worked the job. The undisputed evidence was that CSX had slowed the speed of the cars on the line at the same time they cut back from a crew of two

painters to one. Cooke failed to offer any evidence to link his argument of inadequate assistance to his injuries. The directed verdict on this issue is affirmed.

Based on the foregoing, the judgment of the Jefferson Circuit Court is affirmed in part and reversed in part and this matter is remanded for a new trial, consistent with this opinion.

ALL CONCUR.

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