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OPINION OF MARCH 1, 2019, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000049-MR

BELL HELICOPTER TEXTRON, INC.

APPELLANT

v.

APPEAL FROM CLAY COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 14-CI-00013

EMILEE DOBBS, ADMINISTRATRIX
OF THE ESTATE OF HERMAN LEE
DOBBS; EMILEE DOBBS, INDIVIDUALLY;
HAYDEN DOBBS, BY HIS MOTHER AND
NEXT FRIEND, EMILEE DOBBS; WALKER
DOBBS, BY HIS MOTHER AND NEXT
FRIEND, EMILEE DOBBS; STACEY COLE,
CO-ADMINISTRATOR OF THE ESTATE
OF EDDY SIZEMORE; JUSTIN SIZEMORE,
CO-ADMINISTRATOR OF THE ESTATE OF
EDDY SIZEMORE; TYSON JONES, BY HIS
MOTHER AND NEXT FRIEND, BRITTANY PARTIN

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, TAYLOR, AND L. THOMPSON, JUDGES.

TAYLOR, JUDGE: Bell Helicopter Textron, Inc., (Bell Helicopter) brings this appeal from an October 3, 2017, Judgment of the Clay Circuit Court upon a jury verdict in a products-liability action awarding Emilee Dobbs, Administratrix of the Estate of Herman Lee Dobbs; Emilee Dobbs, individually; Hayden Dobbs, by his mother and next friend, Emilee Dobbs; Walker Dobbs, by his mother and next friend, Emilee Dobbs; Stacey Cole, co-administrator of the Estate of Eddy Sizemore; Justin Sizemore, co-administrator of the Estate of Eddy Sizemore; and Tyson Jones, by his mother and next friend, Brittany Partin a total of \$21,730,135 in damages. For the reasons stated, we reverse and remand.

This case emanates from an air ambulance crash in Clay County, Kentucky, in 2013, that claimed the lives of a three-person flight crew – the pilot (Eddy Sizemore), the flight nurse (Jesse Jones), and the flight medic (Herman Lee Dobbs). The helicopter was manufactured by Bell Helicopter and was operated as an air ambulance for Air Evac EMS, Inc. (Air Evac). On the night of the accident (June 6, 2013), the helicopter was on a return flight from a hospital in London, Kentucky, to Air Evac’s base in Manchester, Kentucky. At approximately 11:15 p.m., the helicopter sustained a catastrophic series of events that ultimately led to the fatal crash. While the parties disagree upon the initial cause of the catastrophic

events leading to the crash, it is undisputed that the helicopter broke apart in midair.¹

On January 21, 2014, Emilee Dobbs, Administratrix of the Estate of Herman Lee Dobbs; Emilee Dobbs, individually; Hayden Dobbs, by his mother and next friend, Emilee Dobbs; Walker Dobbs, by his mother and next friend, Emilee Dobbs; Stacey Cole, co-administrator of the Estate of Eddy Sizemore; Justin Sizemore, co-administrator of the Estate of Eddy Sizemore; and Tyson Jones, by his mother and next friend, Brittany Partin (collectively referred to as appellees) filed a complaint in the Clay Circuit Court against, *inter alios*, Bell

¹ According to the National Transportation Safety Board's Factual Report:

The debris path began approximately 300 feet prior to the main wreckage and terminated approximately 90 feet past. The main rotor blades and upper deck of the helicopter came to rest approximately 300 feet prior and to and to the east of the impact site. The tailboom aft of the aft bulkhead and tailrotor with the gear box still attached came to rest about 300 feet to the northeast of the impact location. Both items came to rest in a tree line that ran perpendicular to the flight path and the main rotor and upper deck assembly came to rest immediately below a 3 phase power line. According to local authorities, the power line was not severed; however, a cross member located on a pole near the accident site had given way resulting in a power outage in the area. A tree, approximately 80 feet in height, located near the main rotor blade, exhibited limb damage towards the top, which was consistent with damage produced by rotor blades although due to the height it could not be confirmed. A fluid splatter, similar in appearance as an oil splatter, was located from about 100 feet prior to the wreckage up to the wreckage and was about 30 feet in width. The left side patient/crew door was located along the debris path and to the north of the path. . . .

Helicopter.² Appellees claimed that one of the two main rotor blades on the Air Evac helicopter was defectively manufactured by Bell Helicopter. Appellees asserted that the rotor blade was defectively manufactured with a four-inch void or disbond between the blade's aluminum skin and its honeycomb core.³ According to appellees, the four-inch void in the main rotor blade caused increased deflection in the blade over time, and on the night of the crash, the defective main rotor blade fractured and caused extreme vibration that tore the helicopter apart in midair. Appellees sought damages for lost wages, pain and suffering, loss of spousal consortium, and loss of parental consortium. Bell Helicopter answered and denied that a manufacturing defect caused the Air Evac helicopter to crash. The parties subsequently engaged in extensive discovery.

Eventually, the case was tried before a jury over a three-week period in September 2017. At trial, the parties put on extensive expert testimony and other evidence. Appellees' proof centered around their claims that a manufacturing defect consisting of a four-inch void existed in one of the main rotor blades and that this defect constituted the precipitating event that culminated in the

² Emilee Dobbs, Administratrix of the Estate of Herman Lee Dobbs; Emilee Dobbs, individually; Hayden Dobbs, by his mother and next friend, Emilee Dobbs; Walker Dobbs, by his mother and next friend, Emilee Dobbs; Stacey Cole, co-administrator of the Estate of Eddy Sizemore; Justin Sizemore, co-administrator of the Estate of Eddy Sizemore; and Tyson Jones, by his mother and next friend, Brittany Partin (collectively referred to as appellees) filed Amended Complaints in June 2017 and July 2017.

³ During the manufacturing process, the aluminum skin and honeycomb core of the rotor blade are bonded together with an adhesive film.

midair breakup of the helicopter. Conversely, Bell Helicopter introduced evidence that the crash of the Air Evac helicopter was caused by pilot error, that no manufacturing defect (void) existed in the helicopter's main rotor blade, and even if a four-inch void had existed in one of the main rotor blades, such void would not have compromised the structural integrity of the blade so as to cause the helicopter crash.

The jury ultimately found in favor of appellees. In particular, the jury found that an unreasonably dangerous manufacturing defect existed in one of the two main rotor blades that constituted a substantial factor in causing the Air Evac helicopter crash on June 6, 2013. The jury also found that the pilot, Sizemore, did not act negligently and that his actions were not a substantial factor in causing the June 6, 2013, crash. The jury awarded the Estate of Sizemore \$640,282 for past and future lost wages and \$1,000,000 for physical and emotional pain and suffering. The jury also awarded the Estate of Dobbs \$1,489,853 in past and future wages and \$1,000,000 in physical and emotional pain and suffering. In relation to Dobbs' wife and children, the jury awarded Emilee Dobbs \$100,000 for loss of spousal services and companionship and awarded his children, Hayden Dobbs and Walker Dobbs, each \$5,000,000 for loss of love and affection. The jury awarded Jones' child, Tyson Jones, \$7,500,000 for loss of love and affection.

Bell Helicopter filed a motion for judgment notwithstanding the verdict and a motion for new trial. These motions were denied by the circuit court by order entered December 27, 2017, thus precipitating this appeal.

Bell Helicopter's various contentions of error may be grouped into three main categories – 1) alleged erroneous admission or exclusion of evidence, 2) alleged insufficiency of appellees' evidence proving a manufacturing defect in one of the main rotor blades of the Air Evac helicopter, and 3) alleged excessive damage awards. We shall initially address the alleged erroneous rulings concerning the admission or exclusion of certain evidence at trial.

EVIDENTIARY RULINGS

(i) Dr. Dale Alexander

Bell Helicopter contends the trial court committed reversible error by determining that Dr. Dale Alexander was not qualified to testify as an expert witness. Bell Helicopter secured Alexander to give his expert opinion concerning whether a manufacturing void existed in the main rotor blade causing the Air Evac helicopter crash. Bell Helicopter concedes Alexander was not educated in the field of materials engineering but rather held a doctorate degree in nuclear engineering. Bell Helicopter alleges Alexander was qualified as he possessed “30 years of materials science experience, including a focus on radiation-induced changes attributable to the electromagnetic spectrum . . . and atomic principles.” Bell

Helicopter’s Brief at 12. Bell Helicopter additionally maintains that “materials engineering is an important specialty of nuclear engineering, and is critical to understanding the changes of microstructure and physical properties of materials exposed to radiation.” Bell Helicopter’s Brief at 13.

Kentucky Rules of Evidence (KRE) 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

The Kentucky Supreme Court has clarified that expert opinion testimony is admissible provided:

- (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

Stringer v. Commonwealth, 956 S.W.2d 883, 891 (Ky. 1997); *see also Brosnan v. Brosnan*, 359 S.W.3d 480, 484 (Ky. App. 2012). And, an appellate court reviews the trial court's ruling upon whether a witness is qualified to give expert testimony for an abuse of discretion. *Harrod Concrete and Stone Co. v. Crutcher*, 458 S.W.3d 290, 299 (Ky. 2015); *Airrich, LLC v. Fortener Aviation, Inc.*, 489 S.W.3d 254, 257 (Ky. App. 2016).

The record indicates that appellees filed a motion *in limine* seeking to exclude the expert testimony of Alexander. The trial court held a hearing upon the motion. At the hearing, Alexander testified extensively regarding his expert qualifications and the substance of his expert opinion. Alexander opined that the main rotor blade of the Air Evac helicopter did not break apart in midair; on the contrary, Alexander maintained that the blade only separated upon hitting the ground. In fact, Alexander stated that the pilot lost control of the aircraft causing the main rotor blade to suffer damage. It was his opinion that no manufacturing void existed in the helicopter's main rotor blade. Additionally, Alexander stated that any void present in the blade was caused by exposure to the elements during its storage after the crash.

After hearing Alexander's testimony, the trial court concluded that Alexander was not qualified to give expert opinion upon whether the Air Evac

helicopter's main rotor blade contained a manufacturing void that caused the crash.

In its September 8, 2017, order, the trial court particularly determined:

- a. Plaintiffs challenged Mr. Alexander's qualifications to present opinions in the field of materials engineering also known as the field of metallurgy;
- b. The Court finds that the field of expertise called for to analyze a helicopter main rotor blade for a void or disbond would be materials engineering or metallurgy;
- c. Materials engineering, metallurgy and, particularly, materials engineering for purposes of air crash failure analysis are complex and highly specialized disciplines requiring many years of formal education and study;
- d. Mr. Alexander has no degree on any level in the field of materials engineering or metallurgy;
- e. Mr. Alexander has a bachelor's of science degree, masters of science degree, and a doctorate degree all in the field of nuclear engineering;
- f. There is no issue or dispute in the case which would require or involve opinions from the field of nuclear engineering;
- g. Mr. Alexander has never worked full time in the aviation industry, has never consulted in any non-litigation capacity with any company that makes any kind of aircraft or aircraft components and has never worked with any governmental agency or any branch of the United States military to perform any failure analysis of any air craft;

- h. From the standpoint of experience, this would be the first time that this witness has had occasion to determine from any materials engineering analysis whether there would be a void or disbond in a helicopter main rotor blade;
- i. The witness has no experience with the requisite tools for use in materials engineering of an air crash of a helicopter in the he has never performed any TIR analysis on a main rotor blade and has never utilized the CT scan for assessing the presence of a void or disbond in a main rotor blade;
- j. The witness is not familiar with many of the well-known materials engineering or metallurgy textbooks; and
- k. It was established that the witness was a licensed professional engineer only as a nuclear engineer and that there is a provision for licensure as a professional engineer in the field of materials engineering.

September 8, 2017, Order at 2-3.

It is uncontroverted that Alexander's education was in the area of nuclear engineering. Moreover, the trial court found that "this would be the first time . . . [Alexander] had occasion to determine from any materials engineering analysis whether there would be a void or disbond in a helicopter main rotor blade." Equally important, the trial court determined that Alexander had "no experience with the requisite tools for use in materials engineering of an air crash of a helicopter" as he "never performed a TIR analysis on a main rotor blade and

has never utilized the CT scan for assessing the presence of a void . . . in the main rotor blade.” September 8, 2017, Order at 3. Considering the trial court’s well-reasoned order, we do not believe that the trial court abused its discretion by concluding that Alexander was not qualified to render an expert opinion upon whether a void existed in the Air Evac helicopter’s main rotor blade.

(ii) Richard Wartman and Donald Sommer

Bell Helicopter next argues that the trial court committed reversible error by admitting into evidence the expert opinions of Richard Wartman and Donald Sommer, two of appellees’ experts. In its appellate brief, Bell Helicopter’s argument merely comprises one paragraph with four sentences:

The opinions offered by Plaintiffs’ consultants, Richard Wartman and Donald Sommer, provided the same string of untested speculation that was rejected in *Siegel [v. Fisher & Paykel Appliances Holding, LTD]*, 746 F. Supp. 2d 845 (W.D. 2010). Both witnesses admitted that they failed to perform testing or calculations to confirm their theories in this case. Without any testing or calculations, however, their theories could not be replicated or peer-reviewed as required by *Daubert [v. Merrell Dow Pharmaceuticals, Inc.]*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)] and could not establish the requisite degree of reliability for their opinions. A new trial is therefore required.

Bell Helicopter’s Brief at 15 (footnotes omitted). Bell Helicopter’s above argument plainly lacks supportive factual detail and sufficient legal analysis. Bell Helicopter failed to specify the alleged speculative aspects of Sommer’s or

Wartman's opinions and failed to set forth what type of testing or calculations should have been performed by these experts. Stated simply, Bell Helicopter's argument is cursory and perfunctory. It is not the function of this Court to research, construct, or articulate a party's arguments on appeal.⁴ *Harris v. Commonwealth*, 384 S.W.3d 117, 131 (Ky. 2012) (citing *Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996)). We, thus, perceive no error on this evidence.

(iii) Prior Bell Helicopter Crashes

Bell Helicopter also maintains that the trial court committed reversible error by admitting into evidence two previous crashes of Bell Helicopters. Bell Helicopter asserts that the two previous helicopter crashes were not substantially similar to the Air Evac helicopter crash and thus should have been excluded. In particular, Bell Helicopter points out that the two previous helicopter crashes were caused by voids in the main rotor blade's spar and involved a manufacturing defect originating from a supplier. Additionally, Bell Helicopter argues that “[o]ther conditions and circumstances also differed between this crash and the other incidents, such as number of hours flown by the helicopter, weather conditions, potential pilot errors, and repair and maintenance issues.” Bell Helicopter's Brief at 19. If the two previous crashes were substantially similar, Bell Helicopter

⁴ For these reasons, we also will not address Bell Helicopter Textron, Inc.'s (Bell Helicopter) cursory allegations of error contained in footnotes in its brief on appeal.

alternatively argues that the probative value of the evidence was substantially outweighed by undue prejudice, therefore requiring exclusion.

Relevant evidence is defined in 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 a products-liability action, evidence of substantially similar accidents may be relevant to demonstrate the existence of a dangerous manufacturing defect. *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 783 (Ky. 1984); *CSX Transp., Inc. v. Moody*, 313 S.W.3d 72, 79-80 (Ky. 2010); *see also* Thomas L. Osborne, *Trial Handbook for Kentucky Lawyers* § 34:1 (2019); 32A C.J.S. Evidence § 1036 (2019).⁵ However, the evidence of substantially similar accidents may be excluded under KRE 403 “if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” We review the trial court’s decision for an abuse of discretion. *Montgomery Elevator Co.*, 676 S.W.2d at 783; *Fulcher v. Commonwealth*, 149 S.W.3d 363 (Ky. 2004).

⁵ Upon this issue, federal law and Kentucky law are in accord. We cite the following federal cases as illustrative: *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992); *Wheeler v. John Deere Co.*, 862 F.2d 1404 (10th Cir. 1988); *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549 (D.C. Cir. 1993).

Upon concluding that the two crashes were substantially similar to the crash of the Air Evac helicopter, the trial court admitted into evidence a chart (Exhibit 102) depicting the similarity of those crashes with the Air Evac crash. The helicopters involved in the two previous crashes were both Bell Helicopter Model 206L-1, and the Air Evac helicopter in this case was also a Bell Helicopter Model 206L-1. In the two previous crashes, the cause was identified as a void in one of the main rotor blades of the helicopter. With the Air Evac helicopter, appellees maintained that a void in one of the two main rotor blades caused the crash. Additionally, in all three helicopter crashes, evidence indicated that the helicopters experienced severe vibration, midair rotor blade fractures, and eventually midair break ups. Hence, there was evidence demonstrating that the earlier helicopter crashes occurred in a substantially similar manner and were caused by substantially similar manufacturing defects as alleged by appellees in the Air Evac crash. The rule for admission is that past incidents must be substantially similar, not exactly identical. *Montgomery Elevator Co.*, 676 S.W.2d at 783; Thomas L. Osborne, *Trial Handbook for Kentucky Lawyers* § 34.1 (2018); 32 C.J.S. *Evidence* § 1036 (2019). Accordingly, we cannot conclude that the trial court abused its discretion by determining that the two previous helicopter crashes were substantially similar to the Air Evac helicopter crash. And, the trial court did

not abuse its discretion by concluding that the prejudicial effect of this evidence did not substantially outweigh its probative value.

(iv) Deposition Testimony of Glenn Rodriguez

Bell Helicopter next maintains that the trial court committed reversible error by excluding portions of Glenn Rodriguez's video-taped depositions testimony. Bell Helicopter points out that Rodriguez was a quality manager at Bell Helicopter and was designated as a Kentucky Rules of Civil Procedure (CR) 30.02 witness by Bell Helicopter. Bell Helicopter asserts that the trial court erroneously allowed appellees "to repeatedly play for the jury a question [appellees] had asked during the [video-taped] deposition of Glenn Rodriguez about the cause of this crash and other incidents, but refused to allow *any* of Bell [Helicopter's] questioning of Rodriguez on the same topic." Bell Helicopter's Brief at 20. In fact, Bell Helicopter asserts that the trial court erroneously excluded Rodriguez's testimony clarifying his answer concerning whether he believed a void existed in the main rotor blade causing the Air Evac helicopter crash. Bell Helicopter maintains that by only allowing part of Rodriguez's testimony into evidence, the jury was misled to believe that Bell Helicopter knew and otherwise admitted that the Air Evac helicopter crash in Kentucky was caused by a void in the main rotor blade. Bell Helicopter argues that CR 32.01(d) requires the trial

court to play other parts of the video-taped deposition that in fairness should be considered by the jury.

CR 32.01 reads, in pertinent part:

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

....

(d) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

However, the admission of any part of a video-taped deposition under CR 32.01 is subject to the Kentucky Rules of Evidence, including those admitted under subsection (d). *Long v. Scheffer*, 316 S.W.2d 375, 378 (Ky. 1958).

At trial, appellees repeatedly played the following excerpt of Rodriguez's video-taped deposition:

Robb:⁶ Do you know whether there are any reports of crashes or incidents or mishaps that involve a void or a disbond in a Bell main rotor blade, sir? Do you know?

Rodriguez: I know of some incidents.

⁶ Attorney Gary C. Robb represented appellees at trial.

Robb: Which incidents are you familiar with, sir?

Rodriguez: And, I'm not sure what the cause if it was void and disbond but there was umm Canadian crash...

Robb: Yep, we have heard about that one. What else?

Rodriguez: Umm, its hard to recall them but I think there were Indiana, or ...

Robb: Yes, one in Greensburg, Indiana, right?

Rodriguez: Yep.

Robb: Involving an air ambulance?

Rodriguez: Yep.

Robb: Medivac Helicopter, correct?

Rodriguez: As I can recall.

Robb: Ok, good. What else?

Rodriguez: Just Kentucky, of course.

Before playing the above excerpt at trial, appellees emphasized to the jury that Bell Helicopter knew the Air Evac helicopter crash in Kentucky was caused by a manufacturing void in the main rotor blade as evidenced by Rodriguez's video-taped testimony. This video-taped testimony by Rodriguez seemingly demonstrated to the jury that Bell Helicopter was fully aware that the Air Evac helicopter crash was caused by a void in the main rotor blade. This "admission" went to the heart of the case – whether a manufacturing defect (void) caused the

Air Evac helicopter crash. So, there is little doubt that the above excerpt of Rodriguez's testimony constituted pivotal evidence at trial.

The portion of Rodriguez's video-taped deposition excluded from evidence but sought to be introduced by Bell Helicopter clarified Rodriguez's testimony about the Air Evac crash in Kentucky. In fact, it is clear from this portion of the deposition that Rodriguez stated he did not believe a void caused the Air Evac crash:

Deener:⁷ Mr. Rodriguez, you were asked ques -- the final question that was asked by Mr. Robb dealt with incidents in which you were aware had occurred involving Bell helicopters.

Rodriguez: Yes.

Deener: And you mentioned the Canadian accident and you mentioned that there was an Indianapolis acci -- Indiana accident, which Mr. Robb I believe indicated the town involved, and then you also mentioned the Manchester, Kentucky accident, the subject of this case. In any of those uh cases -- well, let's go back. In the -- in your testimony today I want to make clear, are you offering any testimony that there were voids that were present in the Manchester accident that were a cause or related to this accident?

Robb: Let me object to the form of the question. I think his testimony was what his testimony was and any attempt to revise or alter that would be objectionable and improper, but you may answer it to the extent that you can.

⁷ Attorney Larry C. Deener represented Bell Helicopter at trial.

Deener: Well, I -- I think it's very interesting how you posed the question and what was --

Rodriguez: Right.

Deener: -- asked with respect to it. So I want to make sure we clarify what your testimony is.

Rodriguez: Right.

Deener: With respect to the Manchester, Kentucky acci -
- accident, are you offering testimony that there were voids in the rotary wings of the helicopter in that was causally related to this accident?

Robb: Same objection as before, and I think this is an effort to ask the witness to revise or alter his prior testimony. He's already said that it was truthful --

Deener: He --

Robb: -- truthful and knowledge to the best of his ability and you're asking him to revise it, which would be improper, but you may answer if you have an answer.

Deener: See, that -- that is what he's really doing here is that he thinks he's got an answer.

Rodriguez: Right.

Robb: Well --

Deener: I want you to tell what your testimony is.
(Emphasis added.)

Rodriguez: Okay. From -- from the -- from what I saw in the Manchester accident, I did not see any voids or any um disbands attributing to that accident. Umm. That's it. (Emphasis added.)

Robb: And I move to strike his answer as being without foundation. There is no indication that he would have had any opportunity to investigate personally the crash. This calls for expert opinion. He's not been identified as an expert. And finally, for the third and final reason it is inconsistent and adverse to his prior testimony. So for all those reasons I move to strike and exclude his answer.

Deener: So I'm clear here, you believe that his testimony is acceptable if you interpret it to say that he thinks voids were present; it's unacceptable for him to testify that he has not seen anything or is not testifying that they were present. Is that what your position is?

Robb: I think I made my position clear. Do you have any further questions?

Deener: The uh, Mr. Rodriguez, with respect to the Manchester, Kentucky accident, in what you have inspected and looked at or any photographs or anything respecting it, are you aware of any voids that were present in the rotary wings of that aircraft causally related to the crash?

Robb: Objection, lack of foundation as to personal knowledge of any investigatory activity on behalf of this witness. Secondly, the witness has not been qualified to give an expert opinion. Thirdly, he's not been timely identified as an expert to give an expert opinion. And last, it is inconsistent, adverse to his prior testimony and with that you may answer.

Rodriguez: So let me start from build. Build of this blade went back and looked at the history There were two NCRs. They were -- one of them was for a mod tag that was removed and replaced. Had nothing to do with disbonding. Blade passed ultrasonics, everything was good. Both blades. I want to make sure that it's clear from the pictures that I saw of the -- of the failure of that blade and the break that I did not see any disbonds or

separations in the area of the -- of the fracture. And, that's -- I -- did not state that that ever -- that there ever was any disbonds or there were any voids with respect to the Manchester [Kentucky] aircraft.

Deener: Right.

Robb: Move to strike as improper expert opinion that lacks personal foundation, that lacks qualifications, and untimely identified as an expert witness.

Deener: I don't have any other questions.

Robb: Nothing further.

It must be emphasized that the jury never heard Rodriguez clarify that he did not believe a void caused the Air Evac helicopter crash. The trial court concluded that Bell Helicopter's above examination of Rodriguez was inadmissible because the questions were leading and because Rodriguez's testimony elicited by Bell Helicopter was contradictory to his testimony elicited by appellees in the same video-taped deposition.⁸

Generally, leading questions are not permitted on direct examination of a witness but are permitted on cross-examination of a witness. KRE 611(c). In this instance at trial, Rodriguez's video-taped deposition testimony was presented by appellees as if on cross-examination. Bell Helicopter then examined Rodriguez on direct examination. The definition of a leading question is problematic but a

⁸ We have not been cited to and are unaware of any rule of law requiring exclusion of a witness's testimony simply because it is contradictory.

“widely accepted definition is that a leading question suggests to the witness the answer sought by the questioner.” Victor J. Gold, 28 *Federal Practice and Procedure Evidence* § 6168 (2nd ed. 2018). Instead of emphasizing the form of a question, a court should consider myriad factors to determine if a question is leading. *Id.* Those factors include “the form of the question, the inclusion of facts in controversy, the questioner’s tone of voice, [and] whether the question in fact suggested an answer.” *Id.* (footnotes omitted). Moreover, the determination of whether a question qualifies as leading is reviewed for abuse of discretion. *Id.*

Upon review of Bell Helicopter’s examination of Rodriguez, it is evident that appellees repeatedly objected to Bell Helicopter’s questions, and the exchanges that ensued between counsel for the parties are certainly irrelevant and inadmissible. So, our inquiry shall focus upon the substantive questions to Rodriguez by Bell Helicopter and his corresponding answers.

Bell Helicopter initially questioned Rodriguez as to whether he intended to testify that a void existed in the Air Evac helicopter causing the crash in Kentucky. After appellees’ objections, Bell Helicopter simply asked Rodriguez: “I want you to tell what your testimony is.” At this point, Rodriguez answered and clarified that he “did not see any voids or any . . . disbands attributing to that [Kentucky] accident.”

The above question was not a leading question. The question neither suggested an answer nor included facts in controversy. On the contrary, the question was open-ended – “I want you to tell what your testimony is.” The question gave Rodriguez wide latitude in answering. It was error to exclude it, and such exclusion by the trial court unfairly prejudiced Bell Helicopter.

By excluding Rodriguez’s above testimony elicited by Bell Helicopter, appellees were allowed to repeatedly claim to the jury that Rodriguez admitted that Bell Helicopter had “actual knowledge” that a void caused the Air Evac helicopter crash in Kentucky. The following testimony of appellees’ expert, Dr. Richard McSwain, serves as an example of appellees’ repetitive utilization of Rodriguez’s testimony during trial:

Robb: Dr. McSwain did you review the deposition of Mr. Glenn Rodriguez?

McSwain: Yes.

Robb: Did you find a certain portion of Mr. Rodriguez’s testimony particularly relevant to what we are talking about?

McSwain: I did.

Robb: Do... and to this day, and did the Bell executives and highest managers including Mr. Rodriguez, the manager of the manufacturing process at the Bell Helicopter, have actual knowledge that the Kentucky helicopter crash like Indiana and like Canada was indeed caused by a void or disbond in the main rotor blade. Did they know it Doctor?

Deener: Object. Object to the question your honor. It assumes facts not in evidence, it is leading, it is an improper argument...

Robb: From the deposition, your honor.

Judge: Overruled.

Robb: Did they know it Doctor?

McSwain: Yes.

Robb: Your honor ... and did you have a particular page and line number from Mr. Rodriguez that you would like to play to this jury.

McSwain: I don't have his deposition.

Robb: That's fine. Your honor, this is uh, a part that has been previously admitted. Dr. McSwain, would you like to show that video to the jury that you found significant.

McSwain: Yes.

Robb: Permission to do so your honor.

Judge: Proceed.

[Rodriguez's Video-Recorded Deposition Played.]

Robb: Any reports of crashes or incidents or mishaps that involve a void or a disbond in a Bell main rotor blade sir.

Rodriguez: I know of some incidents.

Robb: Which incidents are you familiar with sir?

Rodriguez: And, I'm not sure what the cause . . . if it was void or disbond but there was some... Canadian crash...

Robb: Yep. We've heard about that one. What else?

Rodriguez: Um, its hard to recall... I think Indiana or...

Robb: Yes. One is Greensburg, Indiana. Right?

Rodriguez: Yeah.

Robb: Involving an air ambulance, Med Evac helicopter, correct?

Rodriguez: As I can recall.

Robb: Ok good. What else:

Rodriguez: Well, just Kentucky, of course.

[Rodriguez's Video-Recorded Deposition Ended.]

Robb: Just – Kentucky – of course. Is that what Mr. Rodriguez said.

McSwain: It is.

Robb: Thank you Dr. McSwain. Nothing further your honor.

Considering that the primary and ultimate factual issue at trial was whether a manufacturing void caused the Air Evac helicopter crash, it was unfair and prejudicial to only admit selective parts of Rodriguez's examination by appellees and to completely exclude Bell Helicopter's direct examination of

Rodriguez. See CR 32.01(d); see also *Armstrong v. McGuire*, 283 S.W.2d 366 (Ky. 1955). By so doing, the jury was only presented with part of Rodriguez’s video-taped deposition testimony, and there exists a reasonable probability that the jury was swayed to believe appellees’ repetitive assertion throughout the trial that Bell Helicopter possessed “actual knowledge” and admitted that a void caused the Air Evac helicopter crash. As hereinbefore stated, this issue went to the heart of the case – whether a manufacturing defect (void) caused the Air Evac helicopter crash. The error in not admitting Bell Helicopter’s examination of Rodriguez was not harmless. Accordingly, we are of the opinion that the exclusion of Rodriguez’s video-taped deposition testimony elicited by Bell Helicopter as set forth above was unfairly prejudicial and constitutes reversible error. KRE 103; CR 61.01; *Tetric v. Frashure*, 119 S.W.3d 89 (Ky. App. 2003). We, thus, reverse upon this issue.⁹

(v) Other Evidentiary Issues

As to the remaining unsettled evidentiary issues, we believe the trial court also abused its discretion by admitting into evidence an answer filed by Bell Helicopter in litigation involving the Indiana crash of a Bell Helicopter, Model 206L-1. The pleading looked to a defense of pilot error in the Indiana crash and

⁹ Appellees correctly note that Glenn Rodriguez could have been called as a live witness at trial. In fact, he was called by Bell Helicopter as its last witness on Friday, September 25, 2017, at approximately 5:07 PM. However, the trial court concluded that his testimony would not be completed until 7:00 PM, which was too late. The trial was thus continued to the following Monday, and Rodriguez was not called to testify. The exclusion of Rodriguez’s deposition testimony was made by order of the trial court prior to trial.

was presented by appellees as an admission at trial, presumably that Bell Helicopter routinely blamed pilots for crashes. The Indiana pleading was not verified and on its face was prejudicial without any probative value in this case. Therefore, it should have been excluded. KRE 401; KRE 402.¹⁰

Additionally, we must also conclude that the trial court abused its discretion by admitting into evidence a chart of past “service difficulty reports” involving voids or disbands found in main rotor blades of various Bell Helicopters.¹¹ The parties agree that the chart would be admissible if the defects identified therein were substantially similar to the alleged defect (void) that caused the Air Evac helicopter crash in this case. The service difficulty reports contained in the chart were generated by helicopter operators or mechanics in the field, and the reports were compiled by Bell Helicopter. A review of the chart reveals that the dates of the reports spanned from 1995 to 2013 and included about a dozen different Bell Helicopter models, including Model 206L-1. However, it is unclear

¹⁰ In their petition for rehearing, appellees claim that the Indiana answer was not admitted into evidence. Rather, appellees assert that the answer was merely used to refresh the memory of Dr. Richard McSwain. This assertion is disingenuous. There was no showing that Dr. McSwain “once had personal knowledge of the event about which testimony is sought and . . . [his] memory of that event needs to be revived.” *Martin v. Commonwealth*, 456 S.W.3d 1, 15 (Ky. 2015) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 3.20(6)(a) (5th ed. 2013)). The record reflects that Dr. McSwain read directly from the answer and also fielded questions concerning the content of the answer by reading directly from it. The answer was admitted by the trial court into evidence on September 14, 2017.

¹¹ This chart was compiled from Bell Helicopter records and was introduced at trial as Exhibit 140.

from the chart the actual cause of the reported voids or disbands in the main rotor blades. Considering the eighteen-year span of the service difficulty reports, the imprecise cause of the voids, and the myriad models of Bell helicopters involved, we do not believe the substantial similarity requirement was satisfied for this evidence to be relevant and admissible. *Montgomery Elevator Co.*, 676 S.W.2d at 783; KRE 401.

Therefore, we are of the opinion that the trial court abused its discretion by admitting into evidence both the answer filed in the Indiana litigation and the chart listing Bell Helicopter service difficulty reports (Exhibit 140).

REMAINING ISSUES

As we are reversing the October 3, 2017, Judgment for a new trial, we do not reach Bell Helicopter's remaining allegations of error regarding the sufficiency of appellees' evidence demonstrating a manufacturing defect and the excessiveness of the damage awards.

For the foregoing reasons, the Judgment of the Clay Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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