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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000841-MR

JAMES A. DENNIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 08-CI-003453

CSX TRANSPORTATION, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: James A. Dennis appeals from a judgment and order of the Jefferson Circuit Court following a jury verdict in favor of CSX Transportation, Inc., on his Federal Employers' Liability Act (FELA) claim. On appeal, he argues that the trial court abused its discretion when it excluded his newly discovered witness and when it refused to allow him to inquire as to CSX's current methods of

bridge construction. Upon review of the record, we affirm the Jefferson Circuit Court.

History

Dennis was injured on June 27, 2005, while working for CSX. On that date, CSX was replacing a bridge supporting railroad tracks near Cloverport, Kentucky. Dennis had been assigned to work inside a cage approximately five feet tall consisting of reinforced bars or “rebar.” This cage was built atop a platform, on top of pilings above the ground. He was tying these rebar pieces together from inside, to form the “cage,” when he sustained an injury to his back.

On March 27, 2008, Dennis filed suit under FELA, alleging that his back injury was caused by CSX’s failure to provide him with a reasonably safe workplace. Dennis claimed that the rebar cages could have been constructed on the ground, as opposed to from an elevated position underneath the bridge structure. He claimed that this would have prevented him from having to enter the rebar cage to construct it, which he described as being “too small” and “cramped” of a place for the heavy lifting he was supposed to do inside it. Dennis argues that if the rebar cage had been built on the ground, workers would not have been required to stoop inside of it, but could have assembled it from the outside while standing upright.

After discovery was conducted, CSX moved for summary judgment on the grounds that there was no feasible alternative to the method of bridge construction used in Cloverport. The trial court denied the motion and set the trial

for September 21, 2010. The parties disclosed witnesses in late August 2010, and the trial was ultimately rescheduled for March 29, 2011.

On March 24, 2011, just five days before trial, Dennis served a witness disclosure list which identified, for the first time, Bob Hogge as a fact witness. Hogge was prepared to testify that CSX was currently building bridges using the method suggested by Dennis, and was building rebar cages on the ground. CSX moved to exclude Hogge as a witness on the grounds that the late disclosure violated the pretrial agreement, which required the parties to disclose their witnesses at least thirty days before trial. CSX argued that four days' notice left it with insufficient time to prepare for Hogge's inclusion as a witness at trial.

Dennis claimed that he had been diligently searching for a witness to refute CSX's position that rebar cages couldn't be built on the ground. He maintained that he first discovered and made contact with Hogge on March 23, 2011, and that he immediately notified CSX of his intent to call Hogge as a witness on the following day. Nonetheless, the trial court granted the motion to exclude Hogge as a witness.

The jury trial began on March 29, 2011, as scheduled. After opening arguments, the trial court heard argument on CSX's motion in limine to preclude Dennis from entering evidence concerning subsequent remedial measures. Dennis explained that he intended to ask current CSX employees if they were "now" building bridges the way that Dennis had suggested (i.e., on the ground). Dennis maintained that such testimony should be admissible because it related to

“feasibility,” and could be used to impeach CSX’s argument that there was no feasible alternative. The trial court disagreed and excluded the testimony under Kentucky Rules of Evidence (KRE) 403.

Presentation of the evidence began on the following day. Relevant to the purposes of today’s decision were several witnesses called by Dennis who testified that there was a feasible alternative method for building the Cloverport Bridge; namely, the “on the ground” method, which would have prevented him from having to work inside the rebar cages. In addition, George Shackelford, a mechanic in CSX’s bridge department, also testified that rebar cages could feasibly be built on the ground. In contrast, Jeffrey Carnes, a witness for CSX, testified that “clearance restrictions” under the Cloverport bridge would have prevented the use of a crane to move pre-built rebar cages into place. On cross-examination, Carnes acknowledged that he was aware of one saddle-cap bridge (like the Cloverport bridge) that had been built using the “on the ground” method. When Dennis asked whether CSX now builds all of its bridges using the “on the ground” approach, CSX objected, invoking the trial court’s prior Rule 403 ruling which excluded testimony concerning subsequent remedial measures. The court sustained the objection.

At the conclusion of the trial, the jury found in favor of CSX. Dennis now appeals.

Analysis

On appeal, Dennis argues (1) that the trial court abused its discretion when it granted CSX's motion to exclude Hogge, and (2) that the trial court abused its discretion when it sustained an objection on cross-examination regarding subsequent remedial measures.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* An abuse of discretion only exists where we are "firmly convinced that a mistake has been made." *Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky. App. 2003) (Footnote omitted). "Even then, [a] reversal is unwarranted unless the error is not harmless; that is, unless corrected, the error would prejudice the substantial rights of a party." *Rossi v. CSX Transp., Inc.*, 357 S.W.3d 510, 515 (Ky. App. 2010).

We first address the issue of whether the trial court abused its discretion when it granted CSX's motion to exclude the witness Hogge. Dennis concedes that the disclosure of the witness Hogge came outside the time specified in the pretrial order. However, he maintains that he diligently sought witnesses to rebut CSX's position that there was "no feasible alternative," and that he was unsuccessful in finding such a witness until he came into contact with Hogge. Dennis states that he disclosed Hogge the day immediately after he discovered him.

CSX argues that Dennis has not preserved this issue for appeal because Hogge's testimony was not made known to the court by avowal. *Caldwell v. Commonwealth*, 133 S.W.3d 445, 450 (Ky. 2004)(Holding that a "court ruling excluding evidence must be preserved for appellate review by an avowal of the witness"). We disagree. Subsequent to the amendment of KRE 103 in 2007, an attorney may now summarize a witness's excluded testimony through a "proffer." KRE 103(a)(2)(Commentary, note 2). Dennis's counsel did, in fact, summarize Hogge's proposed testimony before the court.

Counsel stated that Hogge planned to testify CSX currently uses the "on the ground" method to construct rebar cages when building bridges. Upon reviewing the record, we do not find that the trial court abused its discretion. To begin, Dennis failed to comply with the pretrial order on the disclosure of witnesses. Instead, Dennis disclosed the witness mere days before trial. The exclusion of witness may be an appropriate consequence for failure to comply with pretrial orders. *Peyton v. Commonwealth*, 253 S.W.3d 504, 512 (Ky. 2008)(Whether to allow "a surprise or unannounced witness [to] testify is within the sound discretion of the trial [court]"); *Clark v. Johnston*, 492 S.W.2d 447, 450 (Ky. 1973); *Pinkston v. Griffith*, 730 S.W.2d 948, 951 (Ky. App. 1987).

Further, even if the exclusion of the witness was in error, there is no prejudice here. The testimony which would have been given through Hogge, according to counsel's proffer, was essentially identical to information that came in through other witnesses at trial. As previously stated, other witnesses testified that

CSX had, in fact, used “on the ground” construction of rebar cages on other projects.

Thus, we now turn to the next issue presented for review: whether the trial court abused its discretion when it sustained an objection on cross-examination, preventing Dennis from inquiring as to subsequent remedial measures.

We first note that although Dennis attacks the court’s exclusion of the testimony under KRE 407, the trial court actually ruled under KRE 403. KRE 403 states that “relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury[.]” Thus, the trial court impliedly found that the evidence was *relevant*, but found that it should be excluded because its probative value was outweighed by the danger of unfair prejudice or confusion.

As all of Dennis’s arguments on appeal deal with the evidence’s admissibility under KRE 407, we are left with no argument as to why the court should not have excluded the evidence as unduly prejudicial or otherwise. As Dennis provides no argument in this respect, we will not make the argument for him. Accordingly, we affirm the court’s ruling excluding subsequent remedial evidence of “on the ground” rebar cage construction under KRE 403.

ALL CONCUR.

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