AFFIRMED and Opinion Filed December 16, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01301-CV

KELLY DEZOETE, Appellant
V.
THE RAYMOND CORPORATION, Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-16186

MEMORANDUM OPINION

Before Chief Justice Burns, Justice Molberg, and Justice Browning
Opinion by Justice Browning

Kelly Dezoete appeals the trial court's take-nothing judgment in favor of the Raymond Corporation on Dezoete's claims arising out of an accident with a forklift. In two issues, Dezoete argues the trial court erred when it refused to exclude evidence regarding "off dock" and "tip over" recreation "experiments" concerning forklifts, and that the error was harmful. We affirm the trial court's judgment.

In November 2017, Dezoete filed her original petition alleging she was injured in October 2017 in an accident involving a forklift manufactured by Raymond. Specifically, Dezoete alleged she was injured when she parked the

forklift, stepped left to exit the forklift, caught her vest on the gear selector of the forklift, and crushed her leg between a wall and the forklift when the gear selector caused the forklift to move in reverse. As a result of the accident, Dezoete was seriously injured, and her lower left foot was amputated. Among other things, Dezoete asserted claims of strict liability, breach of implied warranty, and negligence against Raymond.

At trial, Dezoete's first witness was Jonathan Colton, a professor of mechanical engineering at Georgia Tech. Colton testified he evaluated the Raymond forklift for operator safety and "also how its design relates to the incident that Ms. Dezoete had in October of 2017." Colton identified two "engineering rules" that he used in his evaluation: (1) a manufacturer must design out every foreseeable danger that can be economically and technologically eliminated and (2) if a product has a danger that cannot be designed out without hurting its usability, then the manufacturer design must include a guard against the danger.

Based on his evaluation, Colton testified he reached three conclusions: (1) the Raymond forklift is unreasonably dangerous because it exposes the operator to unnecessary risk of injury in collision events; (2) there are reasonable alternative designs that will eliminate or greatly reduce the risks without negativity affecting the utility of the forklift; and (3) if Raymond had included these reasonable alternative designs, Dezoete would not have been injured.

When asked to identify specific risks that rendered the Raymond forklift unreasonably dangerous, Colton stated a "main risk" was "your left foot coming out and getting hit by a collision." When asked to enumerate "ways that somebody could get hurt in a factory," Colson described "off-dock" incidents where an operator might drive a forklift off the loading dock and "tip-over" incidents in which an operator might lift a load up too high and change the forklift's center of balance, causing it to tip over.

Colton noted Dezoete's forklift had a warning sticker that read, "Keep all portions of the body inside the operator's compartment." Colton testified this warning indicated Raymond knew "it's dangerous if you [sic] looking outside the forklift." Colton also quoted the following warning from the Raymond forklift operator's manual indicating Raymond had knowledge that if the leg gets out it could be injured:

> Warning. Stay inside the operator compartment to operate this lift truck. Never place any part of your body between the mast uprights or outside the operator compartment while operating the lift truck. Stop the lift truck and shut the power off, zero, before getting off the lift truck.

Colton further testified he was aware of another incident in which an operator of a Raymond forklift was injured when the operator's left leg came out and was crushed. To assist the operator in preventing such an injury, Colton proposed an alternative design that would combine the current Raymond design that requires only a right-foot pedal to operate with a design that would add a left-foot pedal which would also have to be activated in order for the forklift to operate.

Colton testified he thought it was important that the forklift have "a door that is interlocked with the brakes." Colton clarified that the door would not be latched shut and locked but would be "connected to the brakes so when you open the door the brakes go on." Dezoete's counsel stated "nobody has doors as standard equipment" but asked Colson whether that meant "it must be a safety engineering decision as to what is necessary." Colton disagreed and, when asked whether an "entire industry" could be wrong, Colton replied, "They can be." When asked about the "B56.1 standard" that talked about "easy ingress and egress," Colton described it as a "voluntary industry standard" and testified the door he suggested did not offend that standard. Colton testified "when it's open it's open, and that's easy to get in and out of it when the door's open." When asked about "a note in the B56.1 for standards at 7.41," Colton quoted the following:

> Note: Standups, rear entry end control narrow aisle and reach trucks shall be designed with open operator compartments to permit easy ingress and egress.

During Colton's testimony, Dezoete played two videos for the jury. The first video showed an empty forklift being pulled off a loading dock. The second video showed a forklift with a door and a "test dummy" inside falling off a loading dock. Colton testified, "there seems to be no effect one way or the other of having a door, so there's no reason not to have a door."

Raymond called Kathleen Rodowicz, who testified she has a Ph.D. in mechanical engineering with a focus on biomechanics. During Rodowicz'

testimony, Raymond's counsel played the same videos counsel for Dezoete played during Colton's testimony. When asked whether there should be "any type of interlock or latch on the door of the subject truck," Rodowicz testified that "[t]here should not be any door, anything that would impede or prevent an operator from getting out of the lift truck during an off-dock event."

Regarding the design defect issue, the jury was asked the following question:

QUESTION NO. 1

> Was there a design defect in the forklift at the time it left the possession of Defendant that was a producing cause of the injury in question?
>
> A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. For a design defect to exist there must have been a safer alternative design.
>
> "Safer alternative design" means a product design other than the one actually used that in reasonable probability—
>
> (a) would have prevented or significantly reduced the risk of the injury in question without substantially impairing the product's utility and
>
> (b) was economically and technologically feasible at the time the product left the control of Defendant by the application of existing or reasonably achievable scientific knowledge.
>
> "Producing cause" means a cause that was a substantial factor in bringing about the injury, and without which the injury would not have occurred. There may be more than one producing cause.
>
> Answer "Yes" or "No."

The jury answered this question "No." On August 14, 2019, the trial court entered a take-nothing judgment against Dezoete, and this appeal followed.

In her first issue, Dezoete argues the trial court erred when it refused to exclude evidence and expert testimony of Raymond's out-of-court "experiments." In her second issue, Dezoete argues the trial court's error in admitting this evidence was harmful. Assuming without deciding the trial court erred in admitting the complained-of evidence, we turn to the issue of whether the error was harmful.

We may reverse a trial court's judgment based on an error in the admission or exclusion of evidence only if we conclude that the trial court made an error of law that probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1); *Oscar Luis Lopez v. La Madeleine of Texas, Inc.*, 200 S.W.3d 854, 863 (Tex. App.—Dallas 2006, no pet.). Whether the erroneous admission or exclusion of evidence probably caused the rendition of an improper judgment is "a judgment call entrusted to the sound discretion and good sense of the reviewing court from an evaluation of the whole case." *First Employees Ins. Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983); *Lopez*, 200 S.W.3d at 864. Whether the erroneous admission of evidence was harmful "is often more a matter of judgment than precise measurement." *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). "[S]uch a judgment call must be determined from an evaluation of the whole case." *Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 821 (Tex. 1980). We must review the entire record to determine whether the judgment was controlled by the evidence that should have been excluded. *Lopez*, 200 S.W.3d at 864.

In her brief, Dezoete addresses evidence only relevant to the issue of whether the forklift was unreasonably dangerous because it did not have a door enclosing the operator's compartment. The record shows that Robert Kerila, a Raymond forklift design engineer, testified the forklift at issue was designed in compliance with the ANSI B56.1 standard. Kerila testified the 1969 version of that standard provided as follows: "Operator enclosures are not recommended because rapid and unobstructed ingress or egress for the operator is considered more desirable." Kerila testified this standard was altered "every four or five years." Kerila testified the 2012 standard, applicable to the forklift in this case, provided in pertinent part as follows:

> These trucks are designed with open operator compartments to permit easy ingress and egress. Although there is no sure way in all circumstances to avoid injury, where possible, in the event of an imminent tipover or off-the-dock-type accident, the operator should step off and away from the truck. These actions are intended to reduce the risk of serious injury or death.

Kerila testified this standard also appears in Raymond's operator handbook for the forklift at issue.

Kerila testified Raymond also takes into account governmental regulations in designing forklift model at issue. Specifically, the OSHA 1910-178 standard requires Raymond's customers to only buy forklifts that were built in conformance with the ANSI B56 standard. Kerila quoted the relevant provision of the OSHA 1910-178 standard as follows:

> All new powered industrial trucks acquired and used by an employer shall meet the design and construction requirements for powered industrial trucks established in the American National Standard for

> Power Industrial Trucks Part II ANSI B56.1, 1969, which is incorporated by reference as Specification 1910.6, except for vehicles intended primarily for earth moving or over-the-road hauling.

Thus, Kerila testified, "[a]s far as Raymond and our customers are concerned, they cannot legally use a truck unless it's been designed to the ANSI B56 Standard." Finally, Kerila testified that none of Raymond's competitors offer a rear door as a standard feature on forklifts that are competitive with the Raymond forklift at issue.

Thus, the jury heard evidence, apart from the videos and testimony of Rodowicz, that the ANSI B56.1 standard specified "open operator compartments to permit easy ingress and egress," the OSHA 1910-178 standard required compliance with the ANSI B56.1 design and construction requirements, and none of Raymond's competitors put doors on forklifts comparable to the Raymond forklift at issue. In light of this evidence concerning the reasons Raymond did not put a door on the forklift at issue, we conclude the judgment was not controlled by the evidence that arguably should have been excluded. *See Lopez*, 200 S.W.3d at 864. Accordingly, we conclude Dezoete was not harmed by the admission of the videos and Rodowicz' testimony. We overrule Dezoete's issues.

We affirm the trial court's judgment.

/John G. Browning/
JOHN G. BROWNING
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KELLY DEZOETE, Appellant	On Appeal from the 298th Judicial District Court, Dallas County, Texas
No. 05-19-01301-CV V.	Trial Court Cause No. DC-17-16186. Opinion delivered by Justice Browning. Chief Justice Burns and Justice Molberg participating.
THE RAYMOND CORPORATION, Appellee	

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee THE RAYMOND CORPORATION recover its costs of this appeal from appellant KELLY DEZOETE.

Judgment entered December 16, 2020.