

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LEROY RICE, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

v. :

2701 RED LION ROAD ASSOCIATES :
LIMITED PARTNERSHIP, 2701 RED :
LION ROAD, INC., RAYMOND :
GOLDBERG T/A R.G. REAL ESTATE :
MANAGEMENT, INTERLAKE MATERIAL :
HANDLING, INC., THE INTERLAKE :
CORPORATION, THE INTERLAKE :
COMPANIES, INC., INTERLAKE STEEL :
CORPORATION, WAREHOUSE :
TECHNOLOGY, INC., INTERLAKE INC., :
STOKES EQUIPMENT CO., INC., :
WALTER A. SCHMIDT, INC., W.A. :
SCHMIDT, INC., WALTER A. SCHMIDT :
D/B/A WALTER A. SCHMIDT COMPANY, :
ACME METALS, INC., ACME STEEL :
COMPANY, ACME STEEL :
CORPORATION, AND STOKES :
EQUIPMENT COMPANY :

APPEAL OF: INTERLAKE MATERIAL :
HANDLING, INC., THE INTERLAKE :
COMPANIES, INC., THE INTERLAKE :
CORPORATION A/K/A XIK :
CORPORATION AND INTERLAKE STEEL :
CORPORATION A/K/A XIK STEEL :
CORPORATION :

Appellants :

No. 1456 EDA 2010

Appeal from the Order entered on May 4, 2010
in the Court of Common Pleas of Philadelphia County,
Civil Division, No. 2328 April Term 2003

BEFORE: MUSMANNO, SHOGAN and FITZGERALD*, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED FEBRUARY 22, 2012

Interlake Material Handling, Inc., The Interlake Corporation a/k/a XIK Corporation, The Interlake Companies, Inc. and Interlake Steel Corporation a/k/a XIK Steel Corporation (collectively "Interlake") appeal from the trial court's Order denying Interlake's Motion for post-trial relief, granting Leroy Rice's ("Rice") Motion for delay damages, and entering a judgment molding the verdict to \$17,339,797.30. We affirm.

The trial court set forth the relevant underlying facts in its initial Opinion as follows:

[Rice] worked as an order picker in the refrigerated warehouse operated by his employer, Refrigerated Food Distributors ("RFD"), located at 2701 Red Lion Road in Philadelphia. [Rice] was a trained forklift operator and his job required him to drive and use a forklift to move pallets of frozen food in and around the warehouse in order to fill orders placed by customers of RFD. RFD used a warehouse racking system which was manufactured by Interlake and installed by another party in 1978.

On September 18, 2001, as [Rice] operated his standup forklift in the freezer section referred to as "C Box," one of the forks on his forklift bumped the subject racking at a column. When hit, the racking moved, scraped the floor and tilted on its edge but did not collapse. [Rice] testified that no bolts kept the racking in place as evidenced by a large scrape in the concrete after the racking moved. [Rice] was concerned that heavy boxes of frozen food stored on the shelves[,] which were now tilted[,] would fall on a worker who would unknowingly walk down the aisle. He decided to leave his forklift to warn a supervisor. The racking collapsed at that moment, causing several 90 pound boxes of frozen food to fall on him, injuring him and pinning him down until his coworkers freed him.

[Rice] was left partially paralyzed from this accident. After extensive hospital stays and rehabilitation, [Rice] is able to walk with the help of braces but continues to use a wheelchair. [Rice] is limited by numbness in his legs, chronic pain and the need to

take numerous medications. [Rice] testified to numerous other losses of life's pleasures related to his injuries from this accident.

[Rice] brought this products liability action against [Interlake] for the defective design of the racking system. [Rice] and Interlake introduced evidence showing [that] the racking and components which collapsed in this case were manufactured by Interlake. In 1979, Penn Maid Foods, the owner of RFD's building, purchased from Stokes Equipment Company ["Stokes"] the Interlake racking system which collapsed in Box C, causing [Rice's] injuries. ... This system included frames, beams, cross bars and column protectors.

[Rice] also sued, under different theories of liability, [various other defendants including] the owner of the warehouse[, 2701 Red Lion Road Associates ("2701 Red Lion")], the purchaser of the warehouse's shelving system[, Stokes], the installer of the shelving system[, Walter A. Schmidt Company ("Schmidt"),] and the party responsible for servicing the racking system[, Warehouse Technologies, Inc.]. [Interlake filed cross-claims against these other defendants for contribution and/or indemnity.] These defendants settled with [Rice] prior to the start of this trial [and] did not participate in this trial...^[1]

Trial Court Opinion, 7/9/07, at 2-3 (citations omitted, footnote added).

Following the settlement, Interlake filed a Motion seeking to list the defendants that had settled on the verdict slip for the purposes of determining their joint tortfeasor status. Interlake also amended its pre-trial statement to add references to witnesses and exhibits that had previously been listed by Rice and/or the settled co-defendants to preserve its right to call the witnesses. After jury selection, Rice objected to Interlake's attempt to introduce the witnesses and evidence listed in its pre-trial memorandum.

¹ We note that Stokes was a party to the dispute at the time of the first trial. **See** N.T., 9/29/06, at 4 (listing Stokes as a party at the time of the jury's

The trial court asked the parties to compromise on the matter. While Interlake reduced the number of witnesses it sought to introduce, the trial court did not allow Interlake to present the witnesses or evidence concerning its cross-claims against the other defendants at trial. The case proceeded to a jury trial, after which the jury entered a verdict in favor of Rice, finding that the racking system was defective and that the defect was the cause of Rice's injuries. The jury awarded Rice \$10.6 million. Interlake filed post-trial Motions seeking judgment notwithstanding the verdict (JNOV) and a new trial, and alleging various errors at trial. Rice filed a Motion for the award of delay damages. The trial court denied Interlake's Motions. The trial court also granted Rice's Motion for delay damages and molded the verdict to \$12,271,874.40. Interlake filed a timely appeal to this Court.

On June 26, 2009, in an unpublished Memorandum, this Court concluded that the trial court erred in precluding Interlake from introducing evidence, witnesses, and documents relating to the negligence of the settling co-defendants. **See Rice**, 981 A.2d 331 (unpublished memorandum at 1-3, 15). This Court vacated the judgment entered against Interlake, remanded for a new trial on damages, and ordered the trial court to include the settled defendants on the verdict form to determine the allocation of responsibility between all of the defendants. **See id.** (unpublished memorandum at 10, 13-14). This Court further held that the trial court

verdict); **see also Rice v. 2701 Red Lion Rd.**, 981 A.2d 331 (Pa. Super.

properly denied Interlake's Motions for compulsory nonsuit, directed verdict and JNOV as the evidence was sufficient to support a finding against Interlake due to a design defect. ***See id.*** (unpublished memorandum at 14-15). Neither party filed a petition for re-argument/reconsideration or an appeal to the Supreme Court of Pennsylvania.

Following protracted proceedings regarding whether this Court had provided for a new trial on all of Interlake's claims or a new trial solely for damages, a new jury trial limited to damages commenced on February 19, 2010. After the parties introduced their evidence, Rice filed a Motion for non-suit on Interlake's cross-claims against the other defendants, including Stokes.² The trial court granted Rice's Motion on the basis that Interlake did not provide sufficient evidence to support its claims. The trial court allowed the matter to go to the jury to render a verdict solely on the question of damages against Interlake. The jury returned a verdict in favor of Rice and against Interlake in the amount of \$12,400,000. Rice filed a Motion seeking delay damages and Interlake filed a Motion for post-trial relief. The trial court denied Interlake's Motion and granted Rice's Motion. The trial court molded the verdict to \$17,339,797.30. Interlake filed a timely Notice of appeal.

On appeal, Interlake raises the following questions for our review:

2009) (unpublished memorandum at 4).

² We note that Interlake presented cross-claims against Stokes during the second trial.

J. A28008/11

- A. Did the trial court err in refusing Interlake the complete new trial that this Court ordered?
- B. Did the trial court err in dismissing Interlake's cross-claims instead of submitting those cross-claims to the jury?

Brief for Appellants at 4 (capitalization omitted).

In its first claim, Interlake contends that this Court's 2009 decision granted it a new trial on all of its claims and did not limit the new trial to Rice's damages, as found by the trial court. ***Id.*** at 24. Interlake argues that the trial court's limitation of the new trial to damages was inconsistent with this Court's findings relating to the trial court's errors as Interlake's responsibility for Rice's injuries had to be determined and allocated. ***Id.*** at 24-27. Interlake points to the exclusion of witnesses testifying about the settled co-defendants' negligence, the exclusion of evidence related to the conditions of "C Box", the failure to list the co-defendants on the verdict slip, and the failure to give various jury instructions. ***Id.*** Interlake asserts that this Court's ruling that the new trial was limited to "damages" applied only to the trial court's error in excluding witnesses related to the negligence of the settled co-defendants. ***Id.*** at 25-26. Interlake also argues that this Court's conclusion that Interlake's Motion seeking JNOV was properly denied did not constitute an affirmance of the liability verdict against it, but instead merely demonstrated that the evidence was sufficient to go to the jury. ***Id.*** at 25, 27-28. Interlake asserts that there is a difference between a motion for JNOV and a motion seeking a new trial and this Court's decision awarded it a completely new trial. ***Id.*** at 28-30. Interlake points to this Court's language that the case was remanded for a "new trial" and that delay damages may be reconsidered by the trial court after the "new trial." ***Id.***

Interlake additionally contends that courts generally grant new trials to all parties on all issues and that new trials for solely damages are granted in very limited situations. ***Id.*** at 30-37, 39. Interlake argues that a new trial may be limited to damages if there was no issue of liability and the issues of liability and damages are separable. ***Id.*** at 34. Interlake asserts that it raised numerous claims on the liability determination and that this Court's decision does not explicitly state that its liability had been determined. ***Id.*** at 37. Interlake claims that the limitation of the new trial to damages resulted in the failure of the trial court to correct any of the errors identified by this Court. ***Id.*** at 37-39. Interlake further contends that the trial court's decision violated the "law of the case" doctrine and its right to due process. ***Id.*** at 40-44.

Here, the trial court has correctly addressed Interlake's claims and found that this Court's Memorandum decision limited the new trial strictly to damages. ***See*** Trial Court Opinion, 7/8/10, at 5-8. We adopt the trial court's sound reasoning for the purpose of this appeal. ***See id.***

We note the following as an addendum. In the Memorandum, this Court ordered that the matter be "remanded for a new trial in accordance with this decision." ***Rice***, 981 A.2d 331 (unpublished memorandum at 15). In its only reference to the parameters of the new trial, this Court held that Interlake was entitled to a "new trial on damages." ***Id.*** at 10. This holding was made in the context of this Court's conclusion that the trial court erred

in preventing Interlake from presenting evidence arising out of its cross-claims regarding the negligence of the settled co-defendants as Interlake was seeking to allocate responsibility among the defendants. **See Rice**, 981 A.2d 331 (unpublished memorandum at 5-10). However, this Court addressed Interlake's remaining claims in the context of the holding regarding a new trial on damages. **See id.** at 12 (stating that the issue of delay damages could be revisited after the new trial); **id.** at 12-13 (concluding that the trial court's preclusion of Interlake's expert from testifying regarding subjects related to the negligence of the settled co-defendants was improper based upon its prior holding that the evidence was relevant to Interlake's defense in allocating responsibility between the defendants); **id.** at 13-14 (stating that the settled co-defendants should be listed on the verdict form based upon the prior holding that allows the introduction of evidence regarding Interlake's cross-claims); **id.** at 14 (concluding that new jury instructions are required to the extent they touch upon the "now-allowed evidence"); **id.** (stating that it was within the trial court's discretion to compel the settled co-defendants to attend the new trial). As this Court had explicitly stated that the new trial was limited to damages, and had not stated that the new trial was to consider all of the claims, we are constrained to conclude that the trial court properly limited the new trial. **See SmithKline Beecham Corp. v. Stop Huntingdon Animal Cruelty USA**, 959 A.2d 352, 357 (Pa. Super. 2008) (stating that

under the law of the case doctrine, “upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court.”); **see also *Regis Ins. Co. v. All American Rathskeller, Inc.***, 976 A.2d 1157, 1161 n.6 (Pa. Super. 2009) (stating that “[i]t is beyond the power of a Superior Court panel to overrule a prior decision of the Superior Court.”) (citation omitted).³ Furthermore, Interlake’s due process claims are without merit as Interlake fully defended itself against Rice’s strict liability claim. Based upon the foregoing and the sound reasoning of the trial court, we conclude that Interlake’s first claim is without merit.

In its second claim, Interlake contends that the trial court erred in granting non-suits on its cross-claims against the settled co-defendants. Brief for Appellants at 44. Interlake argues that its presentation of the testimony of Rice’s expert, Dr. Jeffrey Ketchman, and the owner of Stokes, Charles Daniel Willis (“Willis”), was sufficient to demonstrate the liability of Schmidt, the installer of the racking system. ***Id.*** at 45-49. To support its argument, Interlake points to Dr. Ketchman’s testimony that the installation of the deflector portion of the racking system was defective and Willis’s testimony that he had not inspected the installation and did not know whether the system had been properly installed. ***Id.*** at 45-48. Interlake

³ As noted above, Interlake did not seek reconsideration in this Court or file an appeal with the Supreme Court of Pennsylvania.

further asserts that the doctrine of judicial estoppel barred Rice from seeking the dismissal of the claim against Schmidt because Rice had previously opposed Schmidt's summary judgment motion on the basis that the evidence presented a jury question. ***Id.*** at 49-52.

Interlake also contends that the trial court erred in granting a non-suit on Interlake's cross-claim against 2701 Red Lion, the owner of the warehouse. ***Id.*** at 52. Interlake argues that it presented various witnesses, including Rice, demonstrating 2701 Red Lion's ownership and possession of the warehouse and its negligence. ***Id.*** at 54-59. Interlake asserts that the racking was in "terrible" shape and that 2701 Red Lion had responsibility for the property, including "C Box." ***Id.*** Interlake further asserts that the warehouse's poor condition constituted a nuisance *per se*. ***Id.*** at 59.

Interlake alternatively argues that even if 2701 Red Lion is not considered the owner of the warehouse, it is still liable to Rice under its general duty of care to protect an invitee from known or obvious dangerous conditions. ***Id.*** at 60-61. Interlake asserts that 2701 Red Lion had a duty to make repairs to the dangerous conditions. ***Id.*** at 63. Interlake claims that the issue of 2701 Red Lion's possession and/or control of the warehouse was a jury question. ***Id.*** at 62-63. Interlake finally argues that the doctrine of judicial estoppel barred Rice from seeking the dismissal of the claim against 2701 Red Lion because Rice had previously opposed 2701 Red Lion's

summary judgment motion on the basis that the evidence presented a jury question. ***Id.*** at 63-66.

Interlake additionally contends that the trial court erred in granting Rice's non-suit on its cross-claims against Stokes, the installer of the racking system. ***Id.*** at 67. Interlake references its arguments relating to Schmidt and 2701 Red Lion and claims that testimony presented at the second trial was sufficient to present a jury question regarding Stokes's liability. ***Id.***

Initially, we note that Interlake's claims regarding Stokes are waived as it merely incorporates, by reference, its prior arguments against Schmidt and 2701 Red Lion. ***See Moses Taylor Hosp. v. White***, 799 A.2d 802, 805 (Pa. Super. 2002) (finding waiver where the argument section of the appellate brief merely incorporated prior arguments by reference, resulting in inadequate explanation of the issues).

With regard to Interlake's claims related to Schmidt and 2701 Red Lion, the trial court has thoroughly addressed these claims and found them

to be without merit.⁴ **See** Trial Court Opinion, 7/8/10, at 10-14.⁵ We adopt the trial court's sound reasoning for the purpose of this appeal. **See id.**

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambett", written over a horizontal line.

Date: 2/22/2012

⁴ We note that Interlake does not explicitly dispute the trial court's finding that Dr. Ketchman was not an expert on industrial racking installation. Instead, Interlake merely argues that Dr. Ketchman is an expert in mechanical engineering, product design and safety, without demonstrating that he was qualified to provide expert testimony on installing the racking system. **See** Brief for Appellants at 45-46.

⁵ The trial court appears to address Interlake's claims related to Stokes in combination with the claims related to Schmidt. Even if we addressed Interlake's claims related to Stokes, we would conclude that Interlake failed to provide sufficient evidence of Stokes's negligence based upon our review of the evidence presented at the second trial. Indeed, Interlake has not provided any competent evidence that the racking system was improperly installed according to the relevant standards at the time of installation and has not provided the manner in which the system should have been installed. Further, Willis testified that the deflector was an accessory sold by Interlake and was not utilized as a supplement to the anchoring system. N.T., 2/23/10, at 54-55. Thus, the trial court did not err in granting Rice's Motion for non-suit.