

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001230-MR

MAURICE YOUNG,  
A/K/A TRICK DADDY  
AND KATRINA TAYLOR,  
A/K/A TRINA

APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS B. LEWIS, JUDGE  
ACTION NO. 00-CI-01510

TIMOTHY THOMAS

APPELLEE

### OPINION

### VACATING AND REMANDING

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BEFORE: GUIDUGLI AND PAISLEY, Judges; and JOHN D. MILLER,  
Senior Judge.<sup>1</sup>

GUIDUGLI, JUDGE. In this claim for breach of contract brought  
by Timothy Thomas (hereinafter "Thomas"), Maurice Young a/k/a  
Trick Daddy (hereinafter "Trick Daddy") and Katrina Taylor a/k/a  
Trina (hereinafter "Trina") have appealed from the Warren

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<sup>1</sup> Senior John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Circuit Court's May 13, 2002, Trial Order and Judgment awarding Thomas \$146,500 in damages and from the June 6, 2002, order denying their post-judgment motions. Having considered the parties' excellent briefs and oral arguments, the record and the applicable case law, we vacate and remand the matter to the circuit court for further proceedings.

The parties have disputed many of the underlying facts throughout the course of this proceeding, which we shall summarize as follows. In the summer of 2000, Thomas, then a student at Western Kentucky University, decided to organize and promote a concert for homecoming weekend. He had some prior experience promoting fraternity events, gospel shows, and parties at his club, Galaxy 2000. Thomas contacted musical booking agent Big Bloc Entertainment, and entered into an Artist Engagement Contract with both Trick Daddy and Trina (hereinafter "contracts") dated August 25, 2000, to perform a concert on October 13, 2000, at the National Corvette Museum amphitheater (hereinafter "the venue").<sup>2</sup> The contracts provided that Thomas pay a \$1000 binder by August 29, 2000, as well as deposits of \$4500 and \$3500 for Trick Daddy and Trina, respectively, by September 11, 2000, to Big Bloc Entertainment. Further, the contracts provided that the balances of \$5500 and \$4500 be paid to Trick Daddy and Trina in cash before the show. The contracts

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<sup>2</sup> Trick Daddy and Trina are rap artists from Miami, Florida.

also referred to other terms and conditions and provided that Thomas must meet all Rider requirements. The Rider, which Thomas received prior to the concert date, detailed the necessary technical requirements for the stage, food and beverages, hotel accommodations, and transportation. In Paragraph B, the Rider provided that the balance of money due "shall be paid in cash one hour prior to artist performance." Lastly, a Terms and Conditions Rider included an arbitration clause to the effect that any claim or dispute arising out of the agreement was to be governed by Pennsylvania law and settled by arbitration.<sup>3</sup>

Once the contracts were signed, Thomas, along with several friends and relatives, began promoting the upcoming concert by posting announcements and handing out flyers in the surrounding area. Several of these people were provided with pre-printed advance tickets for purposes of sale, and testimony at trial established that 640 advance tickets were sold.<sup>4</sup> In accordance with the terms of the contracts and Rider, Thomas prepared for the event by arranging for a sound and light crew through All Things Audio, security, air and ground transportation, and hotel rooms for the performers and their entourage.

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<sup>3</sup> Thomas claimed that he did not receive the Terms and Conditions Rider until after the day of the scheduled concert.

<sup>4</sup> The ticket price was \$25, or \$20 for students.

On the day of the concert, Thomas along with his friends, Carston Shanklin and Anthony Young, traveled in rented vans to the airport in Nashville, Tennessee, to pick up Trick Daddy, Trina, and their crew. During the trip back to Bowling Green, Thomas claimed that Trick Daddy and his crew were using drugs. Thomas also claimed that he, Trick Daddy and his manager, Tony Thompson (hereinafter "Thompson"), had agreed that the remainder of the money would be paid at the venue during the 5:00 p.m. sound check. Trick Daddy and Trina, through their manager, denied the conversation took place at all. Upon their arrival in Bowling Green, Trick Daddy, Trina and their crew checked into the hotel. Neither Trick Daddy nor Trina attended the 5:00 p.m. sound check, although testimony was elicited to the effect that neither normally attended sound checks; this was the responsibility of their crewmembers.

It is undisputed that Thomas did not pay Trick Daddy or Trina the remainder of the \$10,000 due to them prior to the 7:30 p.m. concert pursuant to the contracts. Thomas claimed that he had the money at the venue ready to pay them, but that neither showed up to collect it. According to Thomas, he gave them \$3000 in cash at the hotel, told them he had the rest at the venue, and obtained their assurances, through Thompson, that they would appear at the venue. It is also undisputed that neither Trick Daddy nor Trina appeared at the venue that

evening. Trick Daddy and Trina claimed that they did not go to the venue because they had not been paid one hour prior to the 7:30 p.m. concert pursuant to the Rider; Thomas claimed that at least Trick Daddy was too incapacitated to perform and that neither wanted to perform outside in cold weather. Because they did not appear, Thomas and his friends who had sold advance tickets had to refund the money to disgruntled concert attendees.

On November 16, 2000, Thomas filed a complaint in Warren Circuit Court seeking damages for lost ticket sales, returned ticket sales, lost profits, and incidental expenses for breach of contract due to Trick Daddy and Trina's failure to appear at the October 13, 2000, concert. Thomas eventually served Trick Daddy and Trina through the Secretary of State, and moved for a default judgment when no answer was filed. On February 2, 2001, the trial court granted a default judgment of \$58,850 based upon Thomas's affidavit. However, the trial court set aside the default judgment on the motion of Trick Daddy and Trina's newly retained counsel. Trick Daddy and Trina immediately moved to dismiss the lawsuit, claiming that Thomas had not complied with the terms of the contracts by paying them the remainder of the money due prior to the concert and that the trial court lacked subject matter jurisdiction due to the arbitration clause. The trial court denied the motion without

making any findings in a bench ruling following a hearing, and never reduced his ruling to a written order. Trick Daddy and Trina filed their answer on September 4, 2001, and also filed a counterclaim, alleging that Thomas breached their agreement by failing to remit the final payment to them prior to the performance.

Prior to the trial scheduled for May 2, 2002, Trick Daddy and Trina identified entertainment lawyer David Bercuson (hereinafter "Bercuson") as an expert witness due to his familiarity with industry standards regarding concert promotions, entertainment contracts as well as an artist's duty to perform. Thomas moved to exclude Bercuson as an expert witness, arguing that he was Trick Daddy and Trina's attorney in Miami and had previously made appearances in the suit on their behalf. Thomas also filed a motion in limine to exclude the Terms and Conditions Rider, alleging that the document was not presented with the original contract. On the morning of trial, the trial court denied Thomas's motion in limine to exclude the terms and conditions document, and also granted his motion to exclude Bercuson's testimony.<sup>5</sup> The trial court stated that Bercuson was not an expert, and was unnecessary as a witness because the question to be presented was whether the money was

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<sup>5</sup> Counsel for Trick Daddy and Trina filed with the trial court the videotaped recording of Bercuson's deposition as well as written transcripts of the deposition.

tendered. Following this ruling, Trick Daddy and Trina moved for a continuance of the trial to afford them the opportunity to retain a new expert witness to testify as to whether the concert had been properly promoted and whether Thomas had carried out his obligations to industry standards. The trial court denied the motion to continue, but agreed that the information may be relevant later in the trial.

Also on the morning of trial, Trick Daddy and Trina objected to any reference to the use of illegal drugs as irrelevant and prejudicial. Thomas argued that the testimony would go to whether Trick Daddy was able to perform. The trial court denied the motion, reasoning that the evidence would go to Trick Daddy's integrity versus Thomas's competency. Lastly, Trick Daddy and Trina again raised the issue of the arbitration clause contained within the terms and conditions rider. The trial court again denied the motion, stating that there was a question as to whether the parties all agreed to arbitrate.

The matter proceeded to trial on May 2, 2002. Following Thomas's presentation of evidence as well as at the close of their presentation of evidence, Trick Daddy and Trina moved the trial court for directed verdicts on Thomas's failure to specifically comply with his contractual obligations regarding payment, on all claims for damages, and on the arbitration clause. The trial court denied the motions, and

specifically stated that it was up to the jury to determine whether the terms and conditions rider was a part of the contract. The trial court then instructed the jury, merely requiring the jury to determine whether each party had breached the contracts, and, if so, to decide upon a measure of damages. The jury returned a verdict in favor of Thomas on Instruction No. II, awarded him \$146,500 in damages, and returned a verdict in favor of Thomas on Trick Daddy and Trina's counterclaim. The trial court entered its written trial order and judgment on May 13, 2002.

Trick Daddy and Trina filed post-judgment motions for a judgment notwithstanding the verdict pursuant to CR 50.02; to alter, amend or vacate the judgment pursuant to CR 59.05; and for a new jury trial as to liability and damages pursuant to CR 59.01. The trial court denied the motions by order entered June 6, 2002. This appeal followed.

On appeal, Trick Daddy and Trina argue that the trial court erred in not enforcing the arbitration clause, in excluding their expert witness the morning of trial, in not granting a summary judgment and/or a directed verdict to them on the issue of liability, in allowing Thomas to present speculative damage claims and to have an improper recovery of damages, by improperly instructing the jury, and in allowing Thomas to present testimony regarding drug use. Thomas has

thoroughly responded to each of Trick Daddy and Trina's arguments.

ENFORCEMENT OF THE ARBITRATION CLAUSE

Trick Daddy and Trina argue that the trial court erred when it failed to enforce the arbitration clause contained in the Terms and Conditions Rider. On the other hand, Thomas argues that he did not receive the Terms and Conditions Rider, which was the only document containing an arbitration clause, until after October 13, 2000, and should not be bound by its contents.

The contracts entered into between the parties provided that "THE PURCHASER hereby engages the ARTIST and the ARTIST hereby agrees to perform the engagement hereinafter provided, upon all of the terms and conditions herein set forth." (Emphasis added.) The contract itself contained "ADDITIONAL TERMS AND CONDITIONS." A separate form entitled "TERMS AND CONDITIONS" contained an arbitration clause in its last paragraph requiring that any dispute be governed by the laws of Pennsylvania and settled by arbitration.

The trial court held that it was up to the jury to determine whether the Terms and Conditions Rider was a part of the contracts,<sup>6</sup> and made no findings on the record. However, it is well settled that interpretation of a contract is a question

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<sup>6</sup> We note that the trial court did not instruct the jury in this regard.

for the trial court. Harlan Fuel Company v. Wiggington, 203 Ky. 546, 262 S.W. 957 (1924). Therefore, the trial court should have determined what document or documents constituted the entire agreement between the parties. Because this is not a question of fact reserved for the jury, but rather a question of law for the trial court to decide, the judgment must be vacated and this matter remanded for a determination by the trial court as to what exactly the agreement was between the parties. If the trial court determines that the terms and conditions document was a part of the agreement, then Thomas is bound by the arbitration clause within it. KRS 417.050.

Although our holding on this issue alone is determinative of the case as a whole, we shall review the remaining issues in the event a retrial is necessitated by the trial court's decision that the arbitration clause is inapplicable.

#### EXCLUSION OF DEFENSE'S EXPERT WITNESS

Trick Daddy and Trina argue that the trial court improperly excluded their expert witness, entertainment attorney David Bercuson, on the morning of trial. The trial court excluded his testimony both because it found the testimony was unnecessary and because Bercuson had been present at the depositions of Trick Daddy and Trina. Alternatively, Trick Daddy and Trina argue that the trial court substantially

prejudiced their defense by refusing to grant their motion for a continuance of the trial after excluding their expert witness. Thomas, on the other hand, argues that Bercuson would have presented no scientific, technical or other specialized knowledge to assist the trier of fact, and that the trial court did not err in refusing to grant another continuance.

KRE 702 provides that, "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." In Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000), the Kentucky Supreme Court adopted the reasoning of the United States Supreme Court in Kumho Tire Company v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.3d 238 (1999), and held that the decisions in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995), overruled on other grounds, Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999), also apply to technical or other specialized knowledge. Accordingly, "the trial judge must determine at the outset of trial, pursuant to KRE 104, 'whether the expert is proposing to testify to (1) scientific [, technical, or other specialized] knowledge that

(2) will assist the trier of fact to understand or determine a fact in issue.’ Daubert, 509 U.S. at 592.” Goodyear Tire, 11 S.W.3d at 578.

Furthermore, our Supreme Court in Goodyear Tire noted, “abuse of discretion is the proper standard of review of a trial court’s evidentiary rulings. . . . A trial court’s ruling on the admission of expert testimony is reviewed under the same standard as a trial court’s ruling on any other evidentiary matter.” Id. at 577-78. Goodyear Tire goes on to define the test for abuse of discretion as “whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” Id. at 581. Therefore, we must decide whether the trial court abused its discretion in excluding Bercuson’s testimony.

Bercuson, who has been a licensed and practicing attorney since 1971, specializes in the area of entertainment law in Miami, Florida, and has represented many performers and record labels during his career. He also had a business interest in Famous Artists Agency, a booking agency, and gained familiarity with entertainment industry contracts through his work with Famous Artists as well as through his representation of various artists. He admitted, however, that he did not have any experience in promoting a concert. Trick Daddy and Trina

argue that Bercuson's expert testimony would have aided the jury in understanding industry standards as to payment obligation.

Thomas relies upon the decision of Farmland Mut. Ins. Co. v. Johnson, Ky., 36 S.W.3d 368 (2001), in which our Supreme Court affirmed the trial court's decision to exclude attorney Mike Breen as an expert witness due to his lack of experience in working in the insurance industry, adjusting claims or supervising the adjustment of claims. Because Bercuson lacked experience in promoting concerts, Thomas argues, he should not be permitted to testify as an expert in that regard.

We agree with Thomas that Bercuson should not have been permitted to testify as to the promotion of concerts because he did not the requisite experience in that particular field. However, concert promotion is not the only topic upon which Bercuson would have testified. He testified at length in his trial deposition about the contractual obligations between the artist and the promoter, specifically in regard to payment. This testimony would have gone directly to the heart of the dispute, which was the issue of payment and Trick Daddy and Trina's obligation to perform. Bercuson's testimony would have aided the jury because it would have provided pertinent information about the music industry that would not necessarily have been within the knowledge of the jury members. Bercuson had the requisite training and experience in the industry to

provide assistance to the jury in understanding the evidence and in determining an issue of fact. The trial court abused its discretion in completely excluding Bercuson as an expert witness.

Furthermore, we agree with Trick Daddy and Trina's contention that Bercuson's appearance at their depositions would not prevent his appearance at trial as an expert witness.

Finally, upon the exclusion of Trick Daddy and Trina's expert witness on the morning of trial, the trial court abused its discretion in not granting a continuance of the trial. Although it appears that there was no unreasonable delay in the rulings as to whether Bercuson should be permitted to testify, it was nevertheless prejudicial to Trick Daddy and Trina to be forced to proceed without an expert witness.

#### DIRECTED VERDICT ON LIABILITY

Trick Daddy and Trina argue that the trial court should have granted either a summary judgment or a directed verdict in their favor on the issue of liability. They argue that because Thomas failed to pay them the remaining money due one hour before the concert, they were not required to perform. Further, Thomas's partial payment at the hotel and his mere offer to pay them the remainder at the venue could not have been considered "payment" under the terms of the contract. On the other hand, Thomas argues that the trial court properly denied

the motion for a directed verdict because Trick Daddy and Trina first breached the contract by not appearing at the 5:00 p.m. sound check, and that they and their managers refused to accept the offered money.

The standard of review for an appellate court in reviewing a decision of a trial court on a motion for directed verdict made pursuant to CR 50.01 is well settled in the Commonwealth:

In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, Ky.App., 700 S.W.2d 415, 416 (1985).

We have reviewed the record, and have determined that the trial court properly allowed this issue to go to the jury, although the result would have been just as proper had the trial court made the opposite ruling. The jury could just as properly have found in favor of Trick Daddy and Trina and determined that

they were under no obligation to perform because they had not been paid in cash prior to the concert.

#### DAMAGES

First, Trick Daddy and Trina argue that the trial court improperly allowed Thomas to present evidence of speculative damages. Although he was only able to specifically establish that 640 advance tickets were sold, Thomas was permitted to request damages in the amount of \$125,000 for lost ticket sales.<sup>7</sup> Furthermore, the trial court allowed Thomas to present evidence of the expenses he incurred in promoting the concert without, for the most part, providing receipts. Trick Daddy and Trina rely upon the line of cases holding that damages must be shown with reasonable certainty and that lost profits from breach of contract cannot be based on sheer speculation and guesswork. In particular, they rely upon the Supreme Court of North Carolina's decision in Arnold v. Ray Charles Enterprises, Inc., 141 S.E.2d 14 (N.C. 1965), for the holding that sufficient proof of lost profit would be the gross receipts from ticket sales. In this case, Thomas did not present any such evidence, and relied upon estimations of the size of the crowd at the venue.

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<sup>7</sup> Thomas calculated this amount as 5000 (the amount of people he anticipated would be attending the concert) times \$25 (the price of the ticket). We note that Thomas was charging \$20 per ticket for students.

On the other hand, Thomas relies upon a non-final decision of this Court<sup>8</sup>, which cites to the Supreme Court's opinion in Roadway Express, Inc. v. Don Stohlman & Assocs., Inc., Ky., 436 S.W.2d 63 (1968). Roadway Express stands for the proposition that uncertainty as to the amount of damages will not preclude recovery if it is reasonably certain that damages resulted from a breach of duty. Here, Thomas's damages could be attributed to Trick Daddy and Trina's breach of the contract with reasonable certainty, and therefore he is entitled to recover damages. Furthermore, Thomas argues that he actually presented evidence that 5000 people were present and that tickets were selling for \$25 each. Lastly, Thomas argues that the Arnold decision does not preclude any other methods to prove damages; the court merely held that evidence of gross receipts was sufficient.

We are more persuaded to follow the line of cases cited by Trick Daddy and Trina, and therefore hold that the trial court should not have permitted Thomas to present such speculative claims as to ticket sales. It has long been held that damages for breach of contract "is compensation for the loss which naturally results or follows the breach, limited, however, to such losses as the parties might have reasonably

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<sup>8</sup> Belo Kentucky, Inc. v. Kentucky Kingdom Amusement Co., Appeal No. 1998-CA-001983-MR, currently on motions for discretionary review before the Supreme Court, 2002-SC-000693-D and 2002-SC-000697-D.

contemplated as a probable consequence and which are capable of being estimated with the reasonable accuracy." Bugg & Franks v. Jones, 183 Ky. 500, 503-4, 209 S.W. 514, 515 (1919). Moreover, "facts must be shown which afford a basis for measuring or computing damages with reasonable certainty." Kentucky West Virginia Gas Co. v. Frazier, 302 Ky. 642, 646, 195 S.W.2d 271, 273 (1946). See also Pauline's Chicken Villa, Inc. v. KFC Corp., Ky. 701 S.W.2d 399 (1985).

Other than the testimony to the effect that 640 advance tickets were sold, there is no other evidence establishing the amount of other tickets, if any, sold prior to or on the day of the concert. Thomas did not present any documentation as to gross receipts or as to the number of tickets that were refunded. Furthermore, the face prices of the tickets were either \$25 or \$20 with student identification. Thomas was permitted to claim lost profits at the rate of \$25 per ticket even though testimony established that some of the advance tickets were sold to students for \$20. Thomas's claim as to ticket sales was too speculative, and the trial court abused its discretion in allowing him to request damages in the amount of \$125,000 for lost ticket sales.

Next, Trick Daddy and Trina argue that the trial court should not have permitted Thomas to present testimony regarding lost revenue for an after-concert party at his nightclub.

Thomas did not have a contract with Trick Daddy or Trina for them to appear or perform at his nightclub following the concert. Thomas argues that the trial court properly allowed him to present this evidence, but that the issue is moot because the jury did not award damages for lost revenue at the after-concert party.

Although we agree with Thomas that it appears the jury did not award damages for lost revenue at the after-concert party, this is pure speculation because the jury did not indicate, nor was it required to indicate, how it arrived at the amount of damages awarded. Just as it disallowed his attempts to claim nightclub revenue for the night following the concert, the trial court should also have disallowed Thomas's claims for lost revenue at the nightclub on the night of the concert. Neither Trick Daddy nor Trina was contractually obligated to appear at Thomas's nightclub, and the amount of people who might have attended the after-concert party is purely speculative.

Finally, Trick Daddy and Trina argue that the trial court should not have permitted Thomas to offer evidence at trial regarding the expenses he incurred in promoting and putting on the concert. Because the expenses should have been subtracted from the ticket sales, this allowed Thomas to possibly receive a double recovery. Thomas counters with the argument that evidence of expenses was only introduced to

establish that he properly promoted the concert, that he did not request payment for his expenses, and that the jury did not provide him with a double recovery.

Again, although we agree with Thomas that it appears that he did not receive a double recovery, it is impossible to determine from the verdict what the jury awarded damages for. We note that prior to closing argument, counsel for Thomas indicated that he was not requesting a reimbursement of the expenses for the concert. However, counsel presented a large-sized list entitled "Expenses" that looked very similar to the list entitled "Damages". Additionally, the trial court did not instruct the jury that Thomas could not receive a double recovery for both lost ticket sales and expenses if it determined Trick Daddy and Trina breached the contract.

#### JURY INSTRUCTIONS

Trick Daddy and Trina argue that the trial court's instructions were insufficient for at least two reasons -- the trial court did not instruct the jury as to the damages available for breach of contract or as to what was required to prove breach of contract. In particular, the trial court did not include the definition of "payment" as it pertained to liability, which Trick Daddy and Trina specifically requested the trial court include. Thomas counters this argument, pointing out that there were no significant differences between

the instructions Trick Daddy and Trina tendered and the trial court's final instructions. Furthermore, Thomas argues that the word "payment" is commonly used in everyday life, so that a definition in the instructions would not be necessary.

In Cox v. Cooper, Ky., 510 S.W.2d 530, 535 (1974), the former Court of Appeals thoroughly addressed the issue of jury instructions:

It may be sometimes appropriate for instructions to define the rights of a litigant, as for example in the instance of a peace officer sued for assault incident to an arrest, but as a general proposition they should be couched in terms of duties only. Recovery hinges not on the question of who was within his rights, but who breached a duty. If the duty is simple enough to be stated without defining it in terms of the rights of one party or the other, that is all that is necessary, desirable, or proper. . . . Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire.

Furthermore, in McKinney v. Heisel, Ky., 947 S.W.2d 32, 33-34 (1997), the Supreme Court of Kentucky addressed the need to include definitions of terms as follows:

In numerous cases this Court has held that words or expressions which are commonly understood and are generally simple and well-known should not be defined. Such a rule is consistent with our preference for bare-bones instructions which may be fleshed out during summation. Moreover, our cases caution against instructions which over-emphasize an aspect of the evidence or amount to a comment on the evidence. On the

other hand, we have found error in the failure to define terms when the law ascribes a particular meaning or when a common term is used as a term of art.

It is also well settled 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." Id. at 35.

In the present matter, the trial court provided the jury with admittedly "bare-bones" instructions. The trial court's instructions consisted of three instructions, the first indicating that nine or more of the jurors must agree on a verdict. Instruction No. II, which addressed Thomas's claim against Trick Daddy and Trina, contained only the question, "Are you satisfied from the evidence that Maurice Young and Katrina Taylor breached their contract with Timothy Thomas?" and the follow-up statement, "If you have answered YES to the above instruction you shall state the amount of damages which you find from the evidence should be awarded to Timothy Thomas as a result of the defendants' breach of contract." Instruction No. III contained the same language regarding Trick Daddy and Trina's counterclaim against Thomas.

We agree with Trick Daddy and Trina that the trial court's "bare-bones" instructions were insufficient to provide the jury with enough information to return a proper verdict.

The instructions did not inform the jury as to the duties of the parties as the trial court only asked the jurors to determine whether the contract was breached by either side. Furthermore, although we agree with Thomas that the term "payment" is a commonly used and understood word, in the context of this suit its proper definition was important. Thomas argued that his offer to pay Trick Daddy and Trina at the venue was sufficient to allow him to comply with the terms of the contract, while Trick Daddy and Trina argued that Thomas actually had to place the money in their possession to comply with the contract terms. We conclude that the jury instructions were erroneous and therefore prejudicial, and that Thomas has not established that this error was harmless.

#### TESTIMONY REGARDING DRUG USE

Trick Daddy and Trina argue that Thomas's allegations of marijuana use by Trick Daddy and members of his crew were both irrelevant and prejudicial, and that the trial court erred in allowing Thomas to present testimony to that effect. They argue that this is especially true as Thomas failed to present any evidence that either of them was incapacitated or unable to perform on the evening of the concert. Thomas argues that his introduction of the evidence was proper because he only elicited testimony concerning drug use that day rather than any prior use, and that the testimony was highly relevant because it

established a reason Trick Daddy and Trina did not perform that evening other than lack of payment.

KRE 401 defines "relevant evidence" 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." However, KRE 403 provides, "[a]llthough 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, or by considerations of undue delay, or needless presentation of cumulative evidence."

We agree with Trick Daddy and Trina that even if evidence of drug use were relevant, any probative value it might have would be outweighed by its prejudicial nature. There is no evidence in the record, in the form of drug test results, medical reports, or expert testimony, that either Trick Daddy or Trina was incapacitated due to alleged drug use. Additionally, the testimony only applied to Trick Daddy, not to Trina. Because of this lack of evidence, the only use the testimony had was to portray Trick Daddy and Trina in a bad light in order to gain the sympathy of the jury. The trial court erred in not granting Trick Daddy and Trina's motion in limine to exclude all testimony regarding any alleged drug use.

CONCLUSION

For the foregoing reasons, the judgment of the Warren Circuit Court is vacated and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANTS:

Matthew P. Cook  
Bowling Green, KY

BRIEF AND ORAL ARGUMENT FOR  
APPELLEE:

Benjamin D. Crocker  
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