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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002322-MR

DAVID POWERS, D/B/A BETTER HOME TECHNOLOGY; BILL HARDY D/B/A BILL HARDY STEREO — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 03-CI-01249

DERMOT HALPIN AND HILARY HALPIN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON, JUDGE; KNOPF AND ROSENBLUM,[1] SENIOR JUDGES.

ABRAMSON, JUDGE: In 2001, Appellees Dermot and Hilary Halpin were planning to remodel their basement and install a home theater and entertainment system including a 50" high definition television (HDTV) set. At some point, they mentioned their plans to David Powers, an electrician doing some work in their home. Powers referred them to Bill Hardy, a Lexington dealer specializing in high-end electronics.

[1] Senior Judges William L. Knopf and Paul W. Rosenblum sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

Upon being contacted by the Halpins about their plans, Hardy recommended that they consider a ReVox television. Hardy further informed the Halpins that Brian Tucker, the president of ReVox USA, had a store in Chicago that they could visit. The Halpins subsequently traveled to Chicago to view various HD television systems. While there, they visited with Tucker who told them that the ReVox sets were high definition, that they were the best in the market, and that they were "flying off the shelves." In fact, when the Halpins later purchased a ReVox television, they were among the first people in the United States to do so, and Tucker eventually admitted that he had never before sold an HD plasma television.

Upon their return from Chicago, the Halpins were invited to Hardy's shop to view a demonstration of a 42" ReVox television. Tucker, Hardy and Powers were all present at the demonstration and, according to the Halpins, all allegedly claimed that the ReVox system was "state of the art" and the "best system available." They also indicated that the high cost of the ReVox set the Halpins were interested in was reflective of the fact that it was of the highest quality.

The Halpins contend that Tucker, Hardy and Powers all made numerous assertions that the ReVox television sets were superior to all other brands. Based at least in part on these assertions, the Halpins decided to purchase a 50" ReVox television. Soon after delivery and installation of the system, they noticed problems with the quality of the picture displayed by their new television. Upon the advice of the Appellants, the Halpins invested several thousand dollars on various additional pieces of equipment in an

effort to improve the poor picture quality. After these efforts failed, Tucker admitted that although the ReVox set sold to the Halpins was able to receive an HDTV signal, it could not display it as an HDTV picture. Additionally, the Halpins subsequently received correspondence from ReVox USA's European parent corporation, ReVox GMBH, indicating that though it was in the process of developing HD products, the company did not yet sell a 50" HDTV set.

The Halpins brought suit against Powers, Hardy and ReVox USA (Defendants) alleging a violation of Kentucky's Consumer Protection Act (KCPA), KRS 367.110 *et seq.* In May 2005, the Halpins tried their case before a jury in the Fayette Circuit Court. On May 18, 2005, the jury returned a verdict against all Defendants except Powers. With the addition of attorney's fees and costs, the judgment totaled $141,117.02. Despite the jury's conclusion to the contrary, on June 24, 2005, the trial court rendered a judgment notwithstanding the verdict against Powers making him jointly and severally liable for the final judgment along with his co-defendants. Alleging numerous errors, Powers and Hardy (Appellants) have appealed the judgment to this Court.[2] Agreeing with them that the trial court committed various errors, we reverse and remand for a new trial.[3]

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[2] "Defendants" is used herein to refer to those defendants at trial (Powers, Hardy and ReVox USA) while "Appellants" is used to refer to Powers and Hardy, the only Defendants who appealed.

[3] Appellants have filed a motion to strike the Halpins' brief. The basis for this motion is the Halpins' reference in their brief to a complaint from a separate civil action that is not a part of the record on appeal. Though the brief states that the complaint is attached as an exhibit, no copy was appended to any of the copies of the brief provided to this Court. Regardless, because our

As we have noted, the Appellants have alleged that the trial court committed several errors before, during and after the trial. In order to facilitate our review, we will address them in the approximate order that they arose during the proceedings below. The first alleged error concerns the trial court's denial of Hardy's October 13, 2004 motion to substitute The Stereo Shoppe, Ltd. as a defendant in his stead. In a May 12, 2005 order, the court denied Hardy's motion yet added The Stereo Shoppe, Ltd. as a defendant *in addition to* Hardy. While the trial court's decision to add The Stereo Shoppe, Ltd. as a party is somewhat unusual, we are not persuaded by Hardy's objections that the decision was in error. Kentucky Rule of Civil Procedure (CR) 21 provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Given the fact that Hardy waited approximately seventeen months after the Halpins filed their complaint to raise any objection, we are not prepared to conclude that the court's decision to add The Stereo Shoppe, Ltd. but leave Hardy as an individual defendant was unjustified.

We next turn to the letter sent to the Halpins in November 2002 by a representative of ReVox GMBH, ReVox USA's parent company and manufacturer of the Halpins' television. This letter stated:

> Permit me to introduce myself as Markus Halbing, product manager for ReVox GMBH in Villingen, Germany. Our representative in the U.S., Brian Tucker, has informed me of the initial problem and your current dissatisfaction with the E-

decision does not rely on the challenged complaint, we deny the Appellants' motion by separate order entered on the same date as this Opinion.

> 650 plasma. It is my understanding that we solved one problem but has [sic] left the performance level not to your expectations as compared to the High Definition products from other manufacturers.
>
> As you may know, Europe does not have a High Definition program from their TV broadcast network and therefore have not put high priority marketing a HD plasma product. Recently ReVox has addressed the needs of the High Definition markets and will have a "state-of-the-art" 50" HD product, which we expect to deliver not later than 2 weeks after your confirmation.
>
> We at ReVox hope that you will give us the opportunity to serve you and help realize your expectations of our fine products by accepting our new High Definition model in exchange for the E-650 that you presently have.
>
> Please don't hesitate to call me at the factory (until 11 am your time) or correspond by e-mail if you have any further questions.

Prior to trial, the trial court ruled that the letter's third paragraph—ReVox's offer of a replacement HD television—was to be redacted before the letter could be presented to the jury. Appellants argue that this redaction deprived them of the opportunity to show that the Halpins were offered an opportunity to mitigate their damages and chose not to do so. Whether or not the Halpins may have been justified in rejecting this offer, we believe that the jury should have seen the letter in its entirety. The trial court erred in redacting the letter and disallowing all references to the replacement offer.

On the day of trial, the trial judge insisted that she would not change her prior decision to redact the third "offer" paragraph from the letter because what was at issue was what happened early in the parties' dealings and not what happened toward the

end of the dispute. While there can be no doubt that what was said between the parties prior to the Halpins' decision to purchase their ReVox television is important, the Halpins' damages claim rendered what happened later in the process—an offer of mitigation through replacement of their television with a new HDTV model—equally relevant.

Appellees argue that because ReVox's offer was made in an attempt to settle the parties' dispute, it is not admissible pursuant to Kentucky Rule of Evidence (KRE) 408. This rule states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

While there is little doubt that ReVox's offer of a replacement television would not have been admissible to prove liability, KRE 408 does not require exclusion of such evidence when it is offered "for another purpose." Federal courts interpreting the Federal Rule of Evidence identical to our own KRE 408 have consistently held that "another purpose" includes the issue of mitigation of damages. *See, e.g., Bhandari v. First Nat'l Bank of Commerce,* 808 F.2d 1082 (5th Cir. 1987); *Urico v. Parnell Oil Co.,* 708 F.2d 852 (1st Cir.

1983). We agree that the question of damage mitigation is likewise a valid exception to the general inadmissibility rule in KRE 408.

Moreover, we do not agree with the Halpins that ReVox's replacement offer constituted an offer of compromise for the purpose of settling a claim. When they received the ReVox letter in November, 2002, the Halpins had not yet filed a lawsuit and would not do so until the following year. Under these circumstances, the Halpins' assertion that the letter was an inadmissible offer of compromise, if taken to its logical conclusion, necessarily leads to the unreasonable result that *any* effort to address a customer's complaints, regardless of when made or the circumstances surrounding it, would always fall within the purview of KRE 408 and would rarely, if ever, be admissible.

Additionally, under the particular facts of this case, the trial court's redaction of the offer from ReVox's letter clearly had an unjust and unfairly prejudicial result. That is, the Halpins were allowed to testify before the jury that the Defendants never offered to resolve the dispute by providing a true HDTV set. While it is true that ReVox GMBH, ReVox USA's parent corporation, extended the replacement offer, that offer clearly stated that it was made after consultation with Brian Tucker, president of ReVox USA, a defendant in the Halpins' action and ReVox GMBH's United States representative. Further, the Halpins admitted that the offer was delivered by the Defendants and that they believed it to be from them. Under these circumstances, the ReVox letter in its entirety was admissible and the trial court erred by excluding it.

Appellants also argue that the trial court erred by taking judicial notice of certain definitions found on an Internet site maintained by the Consumer Electronic Association (CEA). The Appellants contend that the CEA information is "opinionated" and contains no indication of who prepared the information or when it was written. Without a proper foundation as to the identity of the CEA and the date of the information, it is difficult, if not impossible, to determine whether this information complies with KRE 201(b), which provides in relevant part:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
>
> (1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or
>
> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

On the record before us, it appears, at a minimum, the CEA website was a source whose accuracy *could* reasonably be questioned. The trial court erred in taking judicial notice of facts which did not comport with KRE 201(b). *See also Polley v. Allen,* 132 S.W.3d 223 (Ky. App. 2004) (error to judicially notice statistics from Internet site where the source, accuracy and reliability were disputed).

Moreover, the trial court should not have included the CEA definitions in the jury instructions. This court has previously held that the trial court should define words or expressions *used in the instructions* that are not commonly used or understood by the general public. *See Island Creek Coal Co. v. Rodgers,* 644 S.W.2d 339 (Ky. App.

1982). *See also* 2 J. Palmore, *Instructions to Juries,* § 13.11(m) (2006) (when words or expressions not commonly understood by the general public are used in instructions they must be defined). A review of the trial court's instructions reveals that aside from the CEA definitions included as Instruction No. 1, the terms defined therein are found nowhere else in the instructions. Because of this, while the parties were free to debate the definitions of the terms in question and offer relevant evidence concerning them, their inclusion in the instructions served no purpose and was prohibited by Kentucky law.

We turn next to the "amendment" of the jury instructions by the trial court in response to questions posed by the jury during deliberations. Interrogatory No. 1 of the written instructions stated:

> Are you satisfied from the evidence that plaintiffs purchased the ReVox TV and related entertainment system primarily for personal, family, or household purposes; that defendants used unfair, deceptive, misleading, or unfair business practices in their dealings with plaintiffs regarding the ReVox TV and related entertainment system; and, as a result, plaintiffs suffered an ascertainable loss of money?

The interrogatory provided only for a single "yes" or "no" answer.

Following the commencement of deliberations, the jury sent the following written questions to the trial judge:

> Do we have to find that each defendant individually was unfair, deceptive or misleading?
>
> If the jury finds that the Halpins are to get their money back do the Halpins get to keep the equipment?
>
> Can Powers be excluded?

> If we excuse 1 person not guilty, will that dismiss all 3 defendants?

Upon receipt of these questions, the trial court addressed the issues raised therein with counsel. While the counsel quickly agreed upon a stipulated answer to the question of who would have possession of the ReVox television if the Halpins were awarded a judgment, they did not agree on how the remaining questions should be answered. As a result of both counsels'[4] admitted failure to anticipate the possibility of the jury finding some, but not all, of the Defendants liable, the instructions tendered by both sides and ultimately adopted by the trial court included only the single joint and several liability interrogatory set forth above. However, when faced with the jury's question concerning the liability of individual Defendants, the Halpins argued that a joint and several verdict would be unfair and the jury should be allowed to decide the individual liability of each party. Conversely, the Defendants objected on the basis that the Halpins had asserted in their complaint only a single claim for joint and several liability[5] and therefore the jury must find either all of the Defendants liable or none of them. The trial court ultimately ruled in the Halpins' favor and provided the following answers to the jury's questions.

> Do we have to find that each defendant individually was unfair, deceptive or misleading?
>
> *You may find one, two, or all three defendants was or were unfair, deceptive or misleading.*
>
> Can Powers be excluded?

[4] Powers, Hardy and ReVox USA, Inc. were all represented by the same attorney.

[5] In fact, this was admitted by the Halpins during the discussion with the court about the jury questions.

Yes, see explanation of question.

If we excuse 1 person not guilty, will that dismiss all 3 defendants?

No!

On review, alleged errors regarding jury instructions are considered questions of law that this Court examines under the *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.,* 208 S.W.3d 272 (Ky. App. 2006). Further, unless the record demonstrates that the verdict was not influenced by an improper instruction, for purposes of review we must assume that it was. *Barrett v. Stephany,* 510 S.W.2d 524 (Ky. 1974). In general, we acknowledge that if, during deliberations, a trial judge corrects an obvious mistake or oversight in jury instructions, any error is harmless. *Foley v. Commonwealth,* 942 S.W.2d 876 (Ky. 1996) (any error in initially failing to set forth intent element in instructions on murder charge was harmless given obvious nature of intent requirement); *Garner v. Commonwealth,* 645 S.W.2d 705 (Ky. 1983) (no error after court discovered that erroneous instruction was given to jury, the jury was brought out of jury room to be given amended instructions, and the court ordered the jury not to disclose verdict already reached and to return to jury room to deliberate with the amended instructions). In the present matter, however, the trial court's answers to the jury's questions did not merely address a simple error in the instructions, nor did they supply an obvious omission. Rather, by redefining the manner in which the jury was to decide and ascribe liability, the trial court fundamentally altered the very nature of the instructions.

We are unable to find any authority in Kentucky law permitting such wholesale rewriting of jury instructions after deliberations have begun. Because of this, and also because of the likelihood of resulting confusion to the jury, we find reversible error in the trial court's handling of the jury instructions.

The record clearly establishes that because the Halpins sought from the outset of their lawsuit a joint and several verdict, the Defendants tried the case in an "all or nothing" fashion. It is not unreasonable to assume, therefore, that if the Defendants had been informed before the jury retired to deliberate that the question of liability would be addressed separately as to each Defendant, the strategy employed by them in defense of the lawsuit may have been substantially different. At a minimum, if the trial court had included in the written instructions a separate liability interrogatory for each Defendant, counsel at least would have had the opportunity to address the strength of the Halpins' claim against each Defendant in closing argument.

Once the trial court decided to fundamentally alter the jury instructions, arguably error might still have been avoided if counsel had been afforded the opportunity to reargue the matter to the jury. *See, e.g., Joseph v. Commonwealth,* 262 S.W.2d 673 (Ky. 1953) (in prosecution for voluntary manslaughter, where attorneys for both parties were given the opportunity to reargue, an additional instruction not given until after argument on right of defendant to defend self and uncle was not improper); *Druggist Mut. Ins. Co. v. Baker,* 254 S.W.2d 691 (Ky. 1952) (correction of instructions after argument of case was not prejudicial error, where counsel was afforded an opportunity to

reargue the case after correction). Because no such opportunity was given, the trial court's amended instructions clearly prejudiced the Appellants and warrant a new trial.

Moreover, any retrial should include separate liability instructions for each of the Defendants. As the jury's split verdict in this matter suggests, the alleged liability of each Defendant did not arise from a single event or course of conduct. Each Defendant is legally responsible for his, or its, own individual acts. Once the jury determines which, if any, of the Defendants are liable for violations of the KCPA, the jury should then determine what damages, if any, proven by the Halpins were caused by each of the Defendants found to have violated the KCPA.

Finally, because this case is being remanded for a new trial, we need not address the trial court's subsequent order rendered June 24, 2005, entering a judgment notwithstanding the verdict against Powers. However, it bears mention that a judgment notwithstanding a verdict should never be entered without careful attention to the controlling legal standard. "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." *Taylor v. Kennedy,* 700 S.W.2d 415 (Ky. App. 1985). The trial court must give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. *Id.* The trial court may not enter a directed verdict or judgment notwithstanding the verdict "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." *Id.*

In sum, our review of the record reveals numerous errors. The cumulative result of these errors is that a verdict was rendered by an improperly instructed jury. This verdict may well have been the result of jury confusion and was certainly rendered without the jury hearing all of the evidence the parties were entitled to present. Consequently, we vacate both the judgment of the Fayette Circuit Court entered on July 12, 2005, and the June 24, 2005 judgment against Powers notwithstanding the verdict and remand this matter for a new trial in accordance with this opinion.

ALL CONCUR.

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