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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001574-MR

MARK LEBLANC — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR. , JUDGE
ACTION NO. 07-CI-04919

JOSEPH M. DORTEN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND LAMBERT, JUDGES; HARRIS,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Mark LeBlanc appeals from a jury verdict in favor of Joseph Dorten. He specifically contends that the trial court erred in excluding witnesses and evidence submitted after a court ordered deadline, and he argues that the trial court improperly denied his motion for a new trial. After careful review, we affirm.

[1] Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On June 15, 2006, LeBlanc was driving his sno-cone trolley down Armstrong Mill Road in Lexington, Kentucky. Joseph Dorten turned in front of LeBlanc. Dorten picked up speed and created distance between himself and LeBlanc. Then Dorten began to slow down, and LeBlanc testified he got closer to Dorten's car. Dorten came to a complete stop, and LeBlanc rear-ended him.

On October 15, 2007, LeBlanc filed a complaint against Dorten, alleging that Dorten recklessly, negligently, wantonly, and without warning applied his brakes in such a forceful manner as to come to a complete stop. He contended that Dorten's reckless conduct caused him to strike Dorten in the rear.

On February 25, 2008, the parties attended a pretrial conference. At that conference, the Court entered a pretrial scheduling order. The order set discovery deadlines for each party and required LeBlanc to identify his witnesses on or before April 18, 2008, and required Dorten to identify his witnesses by May 19, 2008. The order further required that all exhibits be identified at least forty-five days prior to trial. On May 15, 2008, Dorten filed his witness and exhibit list. On June 13, 2008, LeBlanc filed his list of exhibits and witnesses.

A final pretrial conference took place on June 23, 2008, ten days prior to trial. At the conference, the court noticed that LeBlanc had failed to file his witness and exhibit lists as required by the pre-trial order. As a consequence of the failure to obey the court order, the court limited LeBlanc to calling as witnesses the parties and any witnesses identified by Dorten. Furthermore, the court limited LeBlanc to the exhibits timely identified by Dorten.

After the jury had been selected for the trial, Dorten realized that LeBlanc had the trolley parked in front of the courthouse. The location of the trolley was brought to the court's attention, and LeBlanc asked the court to allow the jury to view the trolley. The court found that due to his failure to timely disclose his exhibits, including the trolley, the jury would not be permitted to view the trolley, and it was moved.

At the start of LeBlanc's case in chief, LeBlanc called Dorten as his first witness. Dorten testified that, at the time of the accident, he turned onto Armstrong Mill, while the trolley was approximately 250 feet away. Dorten testified that the trolley came up behind his vehicle, sounding its horn. At that time, the trolley impacted the rear of Dorten's vehicle. After this testimony, LeBlanc moved the court to allow him to call the untimely-disclosed witnesses as rebuttal witnesses. The court determined that the testimony would be evidence in chief disguised as rebuttal evidence but stated that if the defense put on evidence, his motion to allow rebuttal testimony would be re-evaluated.

LeBlanc then called James Hellard, a witness listed by Dorten, to testify about the value of the trolley. Hellard performed an appraisal on the trolley following the motor vehicle accident. Hellard testified the value of the trolley to be between $1,000.00 to $1,200.00. Hellard testified the value was based on the price LeBlanc paid for it in 1998, which was $9,500.00, plus factoring in 10% yearly depreciation.

LeBlanc then testified as his final witness in his case-in-chief. He admitted that he hit the rear of Dorten's vehicle, but he argued it was due to Dorten's reckless driving and abrupt stop. Dorten closed his case without presenting new evidence or testimony. LeBlanc renewed his motion to allow rebuttal testimony, but the court denied the motion, finding that since Dorten presented no evidence, there was nothing to rebut.

After both parties gave their closing arguments, the jury left to deliberate. The jury returned a verdict unanimously finding that Dorten was not liable for the accident. The jury was completely discharged following the verdict. After the jury left the courtroom, Dorten proceeded to take the avowal testimony of the two untimely-disclosed witnesses. LeBlanc filed a motion for new trial, which was overruled. This appeal followed.

LeBlanc argues that the court erred in limiting witness testimony based on his failure to submit a timely witness list. He specifically contends that there was no threat of prejudice to Dorten because he had provided a witness list to Dorten two months before the pretrial order was entered. We disagree.

In determining whether the trial court's sanctions were appropriate, we must ask whether the trial court's determination was an abuse of discretion. *See, e.g., Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 2000). The test for abuse of discretion is whether the trial judge's decision was arbitrary, capricious, or unsupported by sound legal principles. *See, e.g., Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006).

First, LeBlanc was aware of the consequence of failing to meet the deadlines imposed by the court. Moreover, the court's decision to limit LeBlanc's witnesses and exhibits was directly related to his failure to comply with the court's order setting discovery deadlines. A "sanction imposed should bear some reasonable relationship to the seriousness of the defect." *See Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986); *see also Crossley v. Anheuser-Busch, Inc.*, 747 S.W.2d 600 (Ky. 1988). In the instant case, the sanction clearly bore a direct relationship to the defect and was not unreasonable or capricious.

LeBlanc cites several cases to support his contention that the court should have allowed the testimony of the witnesses not disclosed to the court. *See Equitania Ins. Co. v. Slone & Garrett, PSC*, 191 S.W.3d 552 (Ky. 2006); *Rippetoe v. Feese*, 217 S.W.3d 887 (Ky. App. 2007); *Collins v. Galbraith*, 494 S.W.2d 527 (Ky. 1973). However, none of these cases involved the violation of a court order. In a case more on point to the case at hand, *LaFleur v. Shoney's Inc*, 83 S.W.3d 474 (Ky. App. 2002), the court entered an order requiring that all claims for damages be exchanged and filed with the court. The plaintiff failed to comply with the order, and this Court found that the appropriate sanction for that failure was to limit damages to those provided prior to the delayed supplementation. CR 37.02(2)(b) gives discretion to the court to refuse "to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence" as an appropriate sanction for the

violation of a discovery order. Therefore, we find that the court's sanction was supported by sound legal principles.

As to LeBlanc's claim that his answer to interrogatories was sufficient disclosure of his witnesses, we again disagree. First, in Fayette Circuit Court, discovery responses are not filed with the court. Therefore, even if Dorten had notice, the court did not. Furthermore,

> [p]retrial discovery simplifies and clarifies the issues in a case; eliminates or significantly reduces the element of surprise; helps to achieve a balanced search for the truth, which in turn helps to ensure that trials are fair; and it encourages the settlement of cases. And, of course, the settlement of cases serves the dual and valuable purposes of reducing the strain on scarce judicial resources and preventing the parties from incurring significant litigation costs.

See LaFleur, 83 S.W.3d at 478 (internal citations omitted). The court ordered deadlines to further this purpose, specifically ordering staggered deadlines to allow Dorten to prepare his defense or seek settlement according to the strength of LeBlanc's case. We therefore find that the trial court's sanctions were not an abuse of discretion.

LeBlanc next argues that the trial court's denial of rebuttal evidence was in error. He specifically contends that rebuttal testimony embraces all testimony which tends to contradict or overcome the legal effect of the adverse party's evidence. We find no error.

31 C.J.S., Evidence, § 2 states in pertinent part that: "[r]ebutting evidence is that which is given to explain, repel, counteract, or disprove facts *given*

in evidence by the adverse party. It is that evidence which has become relevant or important *only as an effect of some evidence introduced by the other side*." (Emphasis added). Dorten presented no evidence at trial. The only evidence presented was LeBlanc's case-in-chief. Therefore, we find no error in the court's determination that the proposed rebuttal testimony was inadmissible as there was nothing to rebut.

LeBlanc finally argues that it was an error for the trial court to deny his motion for a new trial. He specifically alleges that his motion contained sufficient corroborative evidence of Dorten's perjury. We disagree.

LeBlanc's claim against Dorten of perjury is nothing more than an attempt to refute Dorten's version of the accident. LeBlanc presents avowal testimony taken without an oath in the presence of a judge to support the claim of perjury, and then he claims that the motion is un-contradicted and thus should have been granted. There is simply no evidence to support a claim of perjury, and the motion for a new trial was properly dismissed.

We accordingly affirm the judgment and verdict of the Fayette Circuit Court.

ALL CONCUR.

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