

RENDERED: JANUARY 6, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-001280-MR

HELEN OGATA MCGILL

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT  
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE  
ACTION NO. 09-CI-00123

ANTHONY CLAY AND SHELTER  
MUTUAL INSURANCE COMPANY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND WINE, JUDGES.

WINE, JUDGE: Helen Ogata McGill appeals from an order of the Clark Circuit Court which denied her motion for a new trial following an adverse jury verdict.

McGill argues that the instructions should have explained that it had directed a verdict of liability against the Appellee, Anthony Clay. She further argues that the jury's questions to the court clearly indicated that they were confused by the

instruction and believed that liability was still at issue. As a result, McGill maintains that the trial court should have advised the jury about the directed verdict in response to their questions.

We agree with McGill that the trial court had the discretion to advise the jury about the directed verdict and to clarify the instructions when asked by the jury. Under the circumstances, it may have been a better practice had the trial court directly informed the jury that it had granted a directed verdict on liability for McGill. However, the court sufficiently informed the jury that the only issue before it was to determine McGill's damages. Since there was substantial evidence to support the jury's conclusion that McGill's injuries were not caused by the automobile accident at issue, we conclude that the trial court did not clearly err or abuse its discretion by declining to elaborate further on the instructions. Hence, we affirm.

McGill brought this action against Clay for injuries caused by an automobile accident which occurred on February 13, 2007, in Winchester, Clark County, Kentucky. The matter proceeded to a jury trial on April 12-13, 2010. At the conclusion of McGill's case, the trial court granted Clay's motion for a directed verdict on McGill's claims for permanent impairment of earning capacity, future medical expenses, and lost wages.

At the conclusion of the evidence, the trial court granted a directed verdict for McGill on the issue of liability. The court then instructed the jury on

McGill's remaining claims for medical expenses and pain and suffering. The jury returned verdicts of "\$0" on each of these claims.

Thereafter, McGill moved for a new trial on damages pursuant to Kentucky Rules of Civil Procedure (CR) 59.01. McGill argued that the jury instructions were misleading because they suggested that Clay's liability was still at issue. McGill noted that the jury's questions to the court indicated that it was confused on this point and that the trial court should have explained that it had directed a verdict in her favor. McGill also argued the jury's award of no damages was inadequate as a matter of law.

The trial court denied McGill's motion for a new trial on June 3, 2010. The court found that McGill waived any objection to the wording of the instructions by failing to object before they were submitted to the jury. The court also found that, while Clay's liability was obvious, there was substantial evidence to support the jury's conclusion that McGill's injuries were not caused by the accident. McGill now appeals.

The primary issue in this case concerns the following interrogatory propounded to the jury:

If you find for the plaintiff, Helen Ogata McGill, you will determine from the evidence and award her a sum of money that will fairly and reasonably compensate her for the following damages that she sustained directly by reason of the accident.

Past medical bills           \$ \_\_\_\_\_  
(not to exceed \$15,404.11)

McGill again argues that the interrogatory's use of the conditional phrase "[i]f you find for the plaintiff . . ." misled the jury to believe that the issue of liability was still contested. We review alleged errors in jury instructions *de novo* to determine whether the instructions were based upon the evidence and whether they properly and intelligibly state the law. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006).

Clay correctly points out that a party must object to the wording of an instruction prior to its submission to the jury. CR 51(3). We agree that McGill did not raise a timely objection to the wording of the interrogatory by failing to object prior to the instructions being given to the jury. *Boon Edam, Inc. v. Saunders*, 324 S.W.3d 422 (Ky. App. 2010). However, the ambiguity in the interrogatory did not become fully apparent until after the jury returned with questions about the verdict form. Moreover, we conclude that the central issue in this case is not whether the instruction accurately states the law, but whether the trial court had the authority to clarify the jury's misperception concerning the issues submitted to them.

After the jury retired to deliberate, both counsel approached the bench to formally place their objections to the instructions into the record. McGill's counsel objected to the use of the word "if" in the interrogatory, arguing that it implied that liability was still at issue. The court recognized that counsel's concern was legitimate, but stated that the issue should have been raised prior to the submission of the instructions to the jury. The court also concluded that any

ambiguity was harmless because closing arguments clearly set out the scope of the issues before the jury. Video Record (VR) 04-13-2010 9:06:34 – 9:07:12.

Shortly thereafter, the jury returned to the courtroom with a question about how to fill out the verdict form. The court explained that Instruction No. 2 directed the jury to determine the amount which McGill was entitled to receive “for damages caused directly by any injuries received in this accident . . .” and that it could determine any appropriate amount of damages. The jury foreman asked whether it had to make that determination “regardless of which side we vote.” The court explained that “there is no side to vote on. Again, you’re just to determine the damages as it says in Instruction No. 2.” VR 10:25:33 – 10:25:46.

At a bench conference, the court and both counsel recognized that the jury’s questions concerned the issue of liability. McGill’s counsel asked the court to clarify that liability was no longer at issue. However, the court informed the jury that it could not say anything beyond what was contained in the instructions. McGill’s counsel then formally objected to the trial court’s failure to inform the jury that it had directed a verdict on liability. VR 10:26:57 – 10:30:22.

Based on its oral statements, the trial court seemed to believe that it could not inform the jury about the directed verdict after they had retired to deliberate. We disagree. The trial court has the discretion to advise the jury that it has entered a directed verdict against a party. *Hanson v. American National Bank & Trust Co.*, 865 S.W.2d 302, 307 (Ky. 1993), *overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002). The court

also has the discretion “to comment on the law when the jury so requests.”

*Thompson v. Walker*, 565 S.W.2d 172, 174 (Ky. App. 1978). The trial court should exercise caution when doing so to avoid unduly influencing the jury.

Furthermore, the court is not required to “explain or enlarge upon the instructions if it believes [them] to be clear and self-explanatory.” *Id.* However, the court errs if it makes a “decision on the issue without knowing it has discretion, and exercising that discretion.” *Bellamy v. Pathak*, 869 S.W.2d 45, 47 (Ky. App. 1993).

In this case, counsel for both parties agreed that the jury appeared to be confused as to whether liability was still at issue. The trial court acknowledged that the jury was likely misled because they had not been informed about the directed verdict. Under the circumstances, we conclude that the trial court had the authority to advise the jury that it had directed a verdict on liability.

Nevertheless, we conclude that the trial court’s failure to do so was harmless error. Although the court did not tell the jury that it had directed a verdict for McGill on the issue of liability, the court did explain that the only issue before the jury concerned the damages for injuries which McGill sustained directly by reason of the accident. The court could have made it clearer that the issue of fault for the accident had already been decided. But after viewing the record as a whole, the trial court adequately explained that the only issue before the jury concerned McGill’s damages.

We also note that, while Clay's liability for the accident was not in dispute, Clay vigorously contested McGill's claims that her injuries were caused by the accident. As the trial court noted, there was substantial evidence showing that McGill suffered from pre-existing injuries and that she refused medical assistance offered by the police officer on the scene. "[T]he fact that one party was at fault in causing the accident [did] not require the jury to award damages." *Rippetoe v. Feese*, 217 S.W.3d 887, 890 (Ky. App. 2007), citing *Carlson v. McElroy*, 584 S.W.2d 754, 756 (Ky. App. 1979). The jury could reasonably conclude that McGill had failed to meet her burden of proving the cause of her injuries. Under the circumstances, we cannot find that the jury's award of no damages was based on a misapprehension of the issue presented to it. Therefore, the trial court did not err by denying McGill's motion for a new trial.

Accordingly, the judgment of the Clark Circuit Court is affirmed.

ALL CONCUR.

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