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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001826-MR

CARL SINKHORN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 08-CI-000668

THE OXFORD APARTMENT CLUB RESORT, LLC., D/B/A THE PARK AT HURSTBOURNE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The appellant, Carl Sinkhorn, appeals from the Jefferson Circuit Court judgment entered on September 7, 2010, in favor of the Appellees (hereinafter "Oxford") and the court's ruling to exclude evidence at trial of Oxford's subsequent remedial measures when said evidence was offered to

impeach the testimony of Oxford's witness. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

In the underlying action to this appeal, Sinkhorn filed suit against Oxford alleging that he fell on wooden steps at Oxford's apartment complex and sustained injury. Sinkhorn, a Corrections Officer, alleged that while working in the Home Incarceration Program ("HIP") on January 18, 2007, he and his partner visited Oxford's apartment complex to check on an inmate's HIP equipment. As the two officers were leaving, they both lost their footing on an unstable step and fell. Sinkhorn suffered three fractures in his right ankle and a complete dislocation of the ankle joint.

Shortly after being retained by Sinkhorn and prior to filing suit, Sinkhorn's counsel retained the services of private investigator Richard Hessig for the purposes of procuring photographs of the wooden stairs. Hessig took photographs of the wooden stairs in October and November 2007, some nine to ten months after Sinkhorn's injury. According to Sinkhorn, these photographs revealed numerous cracks, deterioration and disrepair since the stairs were over thirty years old. After the Hessig photographs were taken, Oxford replaced all wooden staircases on its property, beginning in October 2008 and completing in January 2009. Defense counsel also took photographs of the staircase in April 2008.

Prior to trial, Oxford filed a motion *in limine* seeking exclusion of evidence that Oxford had replaced all of the wooden staircases in the apartment

complex on the grounds that such evidence was inadmissible as subsequent remedial measures under Kentucky Rules of Evidence (KRE) 407. Sinkhorn stated that he had no intention of attempting to introduce subsequent remedial measures to prove the defective condition of the steps. The trial court sustained the motion. The matter proceeded to trial, with the parties contesting the condition of the staircase on the day Sinkhorn fell.

On the first day of trial, Hessig testified that he took photographs of the steps in question at the direction of Sinkhorn's counsel; however, he could not recall when he took the photographs. Over defense counsel's objection, the photographs were admitted into evidence. Thereafter, Correctional Officer Charles Oblisk testified that he inspected the staircase the day after Sinkhorn's fall and the steps were in substantially the same condition as those depicted in Hessig's photographs.

Sinkhorn then called Michelle Lemons, the former property manager of Oxford's apartments, to testify as an adverse witness. Lemons was the property manager at the time of Sinkhorn's fall. During Oxford's questioning, Lemons testified that the photographs introduced by defense counsel were taken on or about April 10, 2008. She further testified that the color of the stairs in those photographs was gray and the color of the stairs in 2007 would have been gray. Defense counsel then handed Lemons one of Hessig's photographs. She testified that the stairs in the Hessig photograph appeared to be tan and that the apartment complex had switched from gray paint to tan paint in 2009. Lemons asserted that

the Hessig photographs would have been taken later than defense counsel's photographs.

Sinkhorn objected to the testimony of Lemons. During the ensuing bench conference, Sinkhorn argued to the trial court that Lemons, in her deposition, stated that all of the wooden staircases had been removed and replaced by January 2009 and, thus, her testimony that the Hessig photographs had to have been taken in 2009 was false and counsel should be allowed to impeach her testimony with all available impeachment evidence. The trial court did not allow Lemons to be questioned about her deposition testimony concerning the replacement of the stairs.

The next day, Oxford's counsel asked Lemons if she could be wrong about the paint color in the two pictures, since both pictures showed the same steps with the same scuff marks and, thereafter, she agreed that the pictures showed the same steps with the same scuff marks and that she could be wrong about the paint color. Counsel for Sinkhorn again questioned Lemons. While Lemons could not testify as to when the Hessig photographs were taken, she agreed that the photographs, in print form rather than the computer projected image as they had been presented to her the proceeding day, were gray in color and could not have been taken in late 2008 or 2009.[1] Sinkhorn also recalled Hessig and presented him with an invoice for the photographs to refresh his recollection. Hessig was then

[1] Oxford states that Sinkhorn's expert witness walked off with the printed copies of the Hessig photographs and the confusion over the color occurred when the photographs were projected from the computer. Once Sinkhorn's expert returned the printed copies of the photographs, Lemons agreed that the steps in question in either photograph had not been repainted.

able to testify that he took the pictures in approximately October or November 2007. After hearing the evidence, the jury found in favor of Oxford. It is from this judgment that Sinkhorn now appeals.

On appeal Sinkhorn presents two arguments, namely: (1) the trial court abused its discretion when it failed to allow Sinkhorn to introduce evidence of impeachment under KRE 407 and such error was not harmless; and (2) defense counsel's misstatements during closing argument constitute palpable error. Initially we would like to address Sinkhorn's second argument.

Foremost, we are a court of review. Sinkhorn's second argument is not preserved for our review. The issue was not raised at trial nor was the issue raised in either the prehearing statement nor by timely motion seeking permission to submit the issue for "good cause shown." Thus, the issue isn't properly before our Court. *See* Kentucky Rules of Civil Procedure (CR) 76.03(8), *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky.App. 2004), *and Springer v. Commonwealth,* 998 S.W.2d 439, 446 (Ky. 1999). We now turn to Sinkhorn's first and only remaining argument, that the trial court abused its discretion when it failed to allow Sinkhorn to introduce evidence of impeachment under KRE 407, and such was not harmless error.

Our standard of review of evidentiary rulings is for abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000), citing

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). Further, no evidentiary error shall be grounds for reversal unless it affects the substantial rights of the parties. CR 61.01. We now focus our analysis on KRE 407.

KRE 407 states:

> When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

KRE 407.

By the very language of the rule, evidence of subsequent remedial repairs for impeachment purposes is permitted in limited circumstances. KRE 407. *See also Noe v. O'Neil,* 314 Ky. 641, 646, 236 S.W.2d 893, 896 (1951). Also, allowing evidence of remedial measures is contrary to the public policy underlying the disallowance of such evidence. The rationale behind the public policy is that by disallowing evidence of remedial measures at trial, parties will perform remediation without concern for adverse consequences if a court action is the ultimate result. *Commonwealth, Cabinet for Health and Family Services v. Chauvin*, 316 S.W.3d 279, 303 (Ky. 2010) (citing to Robert G. Lawson, *Modifying the Kentucky Rules of Evidence—A Separation of Powers Issue,* 88 Ky. L.J. 581–585 (2000).

Care must be taken so that the general rule barring admission of subsequent remedial measures is not swallowed by the exception of permitting evidence to be used for impeachment and, thereby, preventing the exception from "being used as a subterfuge to prove negligence." Robert G. Lawson, *The Kentucky Evidence Law Handbook* (4th ed.2003) § 2.45[4][b]. As noted by Professor Lawson, *Petree v. Victor Fluid Power, Inc.,* 887 F.2d 34 (3d Cir. 1989), provides a "superb analysis of the impeachment exception and a fairly full review of federal cases." Lawson at § 2.45[4][b].

We find particularly elucidating the *Petree* court's citation in *Probus v. K-Mart, Inc*., 794 F.2d 1207, 1209 (7th Cir.1986), which noted, "it was insufficient that evidence of the subsequent remedial measure would impeach defendants' testimony since, if that were the sole requirement, the exception would be elevated to the rule." *Petree* at 39. In light of such learned jurisprudence, we conclude that the trial court did not abuse its discretion in not allowing Sinkhorn to introduce evidence of subsequent remedial measures offered in the guise of impeachment.

Our review of the photographs introduced into evidence and published to the jury certainly demonstrates the confusion surrounding the color of the staircase. This lends credence to our jurisprudence that this Court is not a fact-finder and it is for the jury to determine the veracity of the testimony presented. *See Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky.App. 2001) (it has long been the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence).

The jury was presented with the photographs, the testimony of Lemons and Hessig, and the redirect of each of them explaining the possible variations in coloring and the timing of the photographs. Moreover, based on the record, we disagree with Sinkhorn that Lemons's testimony opened the door to impeachment testimony concerning the color of the staircase and the timing of the photographs.

Specifically, counsel for Sinkhorn complains of the answers given by Lemons to his questions of her concerning change in coloration of the steps. The line of questioning appears to be designed to elicit testimony that remedial measures were performed subsequent to the accident. In light of the trial court's ruling that evidence of remedial measures was not to be introduced, counsel can hardly expect remedial measures to be admitted into evidence when he asks questions designed to elicit testimony that remedial measures were performed, and then uses the less than satisfactory answers thereto as grounds to introduce the very evidence the trial court has ruled inadmissible. Finding no error, we affirm.

Based on the aforementioned, we affirm the judgment entered by the Jefferson Circuit Court.

ALL CONCUR.

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