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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000531-MR

NORVILLE SHANE WHITE — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILIAM B. MAINS, JUDGE
ACTION NO. 08-CI-90432

ROGER HARVEY AND THE WALKER COMPANY OF KENTUCKY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND NICKELL, JUDGES.

CAPERTON, JUDGE: The Appellant, Norville Shane White, was injured in a motor vehicle collision with Appellee Roger Harvey, who was driving a dump truck belonging to Co-Appellee, Walker Company of Kentucky, Inc. On appeal, White argues that the instructions given to the jury were prejudicial, and that counsel for Walker Company engaged in attorney misconduct by misleading the

trial court as to the circumstances surrounding a photograph introduced into evidence by White. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

On September 15, 2008, White was driving his 2005 Toyota Solara in Mount Sterling, Kentucky, when he was struck on the passenger side by a dump truck owned by the Walker Company, and operated by Roger Harvey. White was injured in the collision after his shoulder struck the driver's side door and his body twisted during the collision. White drove to the emergency room at Mary Chiles Hospital (now St. Joseph Mt. Sterling). White was later treated at Clark Regional Medical Center on September 18, 2008, upon complaints of worsening pain.

White eventually came under the care of Dr. Thomas McCormick and Drayer Physical Therapy for his complaints of pain which were on the right side of his body, in his lower back, and into his right leg. Dr. McCormick testified about White's earlier treatment before the accident, specifically stating that a previous report of back pain was not related to White's current physical condition. Following several weeks of physical therapy, Dr. McCormick referred White for an MRI to investigate the source of his lower back pain.

The October 10, 2008, MRI revealed that White had a disc herniation at the L5-S1 location. Dr. Thomas Menke testified that he felt that White needed a discectomy, which he performed in November of 2008. White returned for another MRI in March of 2009. Because White's pain was not improving, Dr. Menke performed a "revision" discectomy in November of 2009. White continued to

participate in physical therapy throughout his treatment but continued to have pain in his lower back which prevented him from standing for long periods of time. Prior to the motor vehicle accident of September 15, 2008, White was a factory worker at Nestle Corporation in Mount Sterling. White was unable to perform the same type of work after the accident, which ultimately caused him to lose his job.

Throughout the course of litigation below, counsel for both parties exchanged discovery, participated in court-ordered mediation, retained various experts, and arranged for examination of the Walker Company dump truck involved in the accident on September 15, 2008. The examination was scheduled for 3:00 p.m. on September 21, 2010, in Lexington, at Cliff's Truck Service, LLC. On that date, White's counsel was late and defense counsel had already left by the time he arrived. There was one Walker Company truck on site, which was photographed by White's counsel and used at mediation with White's expert witnesses, and at trial.

The case was presented to the jury from January 31 through February 2, 2011. During the course of the trial, counsel for the Appellees called Harvey to testify and questioned him using White's photograph of the dump truck which had previously been entered into evidence as Plaintiff's Exhibit 2, without objection from the defense. Harvey was asked whether the dump truck that White had represented to the jury as being involved in the accident was in fact the correct dump truck, and Harvey replied that it was not. Harvey stated that he knew it was the wrong truck because he was driving a "small truck," or a "single axle dump

truck." He also stated that it was the wrong color, and that his truck "had a black bed on it." White now asserts that this was the first time in the months following the day the photographs were taken that anyone questioned the veracity of the photograph.

Upon hearing the revelation that the exhibit was a picture of the wrong truck, White's counsel attempted to cross-examine Harvey as to whether he was aware that his attorney had scheduled a time for counsel to examine the truck, and whether he was aware that counsel had been led to believe that the vehicle in the picture was the correct truck. Defense counsel asked to approach the bench, and during the course of a bench conference defense counsel stated that he had provided White's counsel with a date and a time and that he "waited for an hour and a half" before counsel showed up. White's counsel disagreed with this assertion. Defense counsel then advised the court that there were at least three or four Walker Company trucks present on the day of the scheduled inspection, and that he had provided White's counsel with the number of the truck. White's counsel disagrees with this assertion as well, stating that there were not multiple trucks and that only one dump truck was present on that day. White was given the option of withdrawing the exhibit from the jury's consideration, but no other recourse was taken.

In subsequent pleadings, defense counsel stated that the photograph had been a mutual mistake and that he only realized that the picture was not correct when Harvey pointed it out to him on the opening day of trial when it was

introduced into evidence by White. White asserts that defense counsel never presented this assertion of mutual mistake to the judge during the bench conference.

Following the close of evidence, the jury was given the instructions and after deliberation a verdict was returned in favor of Harvey and Walker Company. White moved for a new trial on February 18, 2011, based upon what he alleged was the misconduct associated with the photograph of the truck in question. The trial court denied that motion on March 11, 2011. It is from that order that White now appeals to this Court.

As his first basis for appeal, White argues that the trial court erred by using prejudicial jury instructions. The instruction submitted to the jury with which White now takes issue provided that:

> If you believe from the evidence that all or part of the complaints by the Plaintiff in this lawsuit were a result of the accident on September 15, 2008, you shall find for the Plaintiff for such damages that you may believe he sustained as a direct result of the September 15, 2008 accident. If you believe from the evidence that the complaints by the Plaintiff in this lawsuit are not the result of the accident of September 15, 2008, you will find for the Defendants.

White asserts that he submitted his proposed jury instructions to the Court, as did Walker Company, both of which varied from the instruction actually given to the jury, which is set forth above.[1] White asserts that the jury should have had the

[1] Specifically, White's proposed instruction stated that,

> If you determine that the Plaintiff, Norville Shane White, is entitled to recover damages for his injuries, your award shall include compensation

benefit of using an instruction specifically addressing any pre-existing physical condition. Instead, the jury received an instruction which limited the description to "all or part" of the complaints made by White being caused by the accident in question, without any mention of aggravation of a pre-existing condition.

During two bench conferences, counsel argued their objections to the instructions given by the court, including whether increased risk of future harm and future medical expenses were appropriate elements of damage for the jury to consider, and whether the jury should be instructed on punitive damages. Following the rulings on those issues, the trial court provided counsel with revised jury instructions. At trial, White's counsel did not object to the exclusion of the tendered pre-existing condition instruction but White now argues that the use of

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> for losses attributable or related to his pre-existing physical condition, if any, which was aroused or aggravated by the accident in question.

The instruction proposed by Walker Company provided that,

> If you believe from the evidence that all, or any part, of the complaints by the Plaintiff in this lawsuit were not the result of the accident on September 15, 2008, but were caused at some other time, or occurred from some other cause, you will not find for the Plaintiff on account of any of the injuries which you may believe from the evidence were caused at some other time or occurred from some other cause. You will only find such damages you may believe Plaintiff sustained on account of the injuries he suffered as a result of the incident about which you have heard evidence.

Walker Company also provided an "Alternative Instruction No. 2," which stated that,

> In order to award any amounts of damages to hereinafter to the Plaintiff, you must first find that he received injuries as a direct result of this automobile accident. We, the Jury, find that the Plaintiff did __ did not ___ receive injuries as a result of the accident. If you have found that the Plaintiff did not receive injuries as a result of this automobile accident, you shall proceed no further and return to the courtroom with your verdict. Otherwise, please proceed to Instruction No. 3.

White did not tender a competing causation instruction.

the instruction ultimately provided by the court was erroneous and prejudicial to him.

White asserts that although he established through Dr. Menke's testimony that his injuries were a direct result of the accident in question, the Appellees argued that his injuries could not have been caused by the accident and must have either been exaggerated or caused elsewhere. White asserts that though the jury could have concluded that he had a pre-existing medical condition that was not caused by the accident, it was not permitted to take testimony into account concerning whether the accident aggravated or aroused any pre-existing condition.

In response, Harvey and Walker Company assert that White's claims should be rejected because he failed to comply with Kentucky Rules of Civil Procedure (CR) 76 because the causation instruction given by the court was substantially correct and because White did not preserve these issues for appeal. Thus, Harvey reasons that the court did not abuse its discretion in rejecting the pre-existing instruction tendered by White.

Specifically, Harvey and Walker Company argue that White's brief does not contain a statement on how he preserved the jury instruction issue for appeal, and that there are no references to the trial record showing where he objected to the instruction. Accordingly, it urges this Court to dismiss this part of the appeal without reaching its merits. In a similar vein, the Appellees assert that White failed to preserve this issue for our review. The Appellees argue that in this case, White failed to preserve his objection to the causation instruction because he

did not tender a competing causation instruction nor submit a written objection or state an oral objection specifying to the court either why the Walker Company's proposed causation instructions were improper or why the trial court's instruction was in error. The Appellees argue that White, in making his argument that the court should have given a "pre-existing" instruction instead of a "causation" instruction, confuses the issues of causation and damages. They assert that White's pre-existing instruction did not contain the word "cause" or "causation," and that the trial court had no way to know that White intended it to be his alternative on the issue of causation.

Alternatively, Harvey and Walker Company argue that the causation instruction given by the court was substantially correct. The Appellees argue that the instruction comported with Kentucky law. They assert that the defense theory which they put forth was that the nominal impact of the accident simply did not generate sufficient force to cause injury to White and that, accordingly, two separate causation instructions were proposed which were essentially taken verbatim from three opinions previously rendered by this Court.[2]

The Appellees assert that in reliance upon the aforementioned cases, the trial court correctly instructed the jury that if it believed the complaints were caused by the accident, then they were to find for White; otherwise, they were to find for the Walker Company. The Appellees argue that White never introduced evidence that there was arousal of a pre-existing condition and that, accordingly,

[2] Specifically, the holdings of this Court in *Carlson v. McElroy,* 584 S.W.2d 754 (Ky. App. 1979); and *Rippetoe v. Feese,* 217 S.W.3d 887 (Ky. App. 2007).

the trial court properly rejected the tendered "pre-existing condition" instruction. Thus, Walker Company asserts that as the trial court's statements of law were substantially correct, White was not prejudiced and the trial court did not abuse its discretion.

In addressing this issue, we note that appellate review of jury instructions is a matter of law and, thus, *de novo.* Instructions must be based upon the evidence and they must properly and intelligibly state the law, and an instruction's function is, "'only to state what the jury must believe from the evidence ... in order to return a verdict in favor of the party who bears the burden of proof.'" *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006), citing *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). Further, we note that it is within a trial court's discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of that discretion. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). An abuse of discretion occurs when the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We review this matter with these standards in mind.

Having reviewed the record, we are compelled to agree with Appellees that White failed to properly preserve this issue for our review. Our review of White's brief reveals that he failed to indicate where this issue was preserved in the record by his objection, as is required by CR 76.12(4)(c)(v). Certainly, our courts have held that a tendered instruction may suffice as an

objection if it fairly calls the court's attention to the fact that the party is entitled to an instruction in that respect. *Edwards v. Johnson*, 306 S.W.2d 845, 848 (Ky. App. 1957). However, our courts have been equally clear that a party must make reasonably clear, with the presentation of its instruction, what it has in mind. *Rainbo Baking Co. v. S & S Trucking Co.*, 459 S.W.2d 155, 161 (Ky. App. 1970). White does not cite, and we do not find, evidence that such was the case below.

Alternatively, our review of the instruction and applicable law reveals that the court's instruction was not in error in any event. *Sub judice*, as in the case of the plaintiff in *Carlson v. McElroy*, 584 S.W.2d 754 (Ky. App. 1979), evidence was submitted that White had a pre-existing injury. In *Carlson*, the court instructed the jury as follows:

> The Court instructs the Jury that if they believe from the evidence that all, or any part, of the injuries of which the Plaintiff complains were not caused by her automobile being struck by Defendant's automobile, but were caused at some other time, or occurred from some other cause, you will not find for Plaintiff on account of any of the injuries which you may believe from the evidence were caused at some other time or occurred from some other cause, but will only find such damages as you may believe Plaintiff sustained on account of the injuries which she suffered by being struck by Defendant's automobile.

Carlson at 755-56. Likewise, in *Rippetoe v. Feese*, 217 S.W.3d 887 (Ky. App. 2007), the plaintiff had been diagnosed with pre-existing degenerative disc disease, which defense argued was a potential cause of her symptoms as opposed to the accident at issue. Therein, the court instructed the jury that:

> The Court instructs the jury that if you believe from the evidence that all or part of the complaints by the plaintiff, Edith Rippetoe, in this lawsuit are not the result of the accident on April 21, 2003, but were caused at some other time or occurred from some other cause, then you will not find for the plaintiff, Edith Rippetoe, for any injuries or damages which occurred at some other time or occurred from some other cause and you will only find for the plaintiff, Edith Rippetoe, such damages, if any, as you may believe she sustained as a direct result of the accident of April 21, 2003.

Rippetoe at 892.

Upon review of these instructions, we find no significant difference between them and the instruction provided by the court to the jury below. In the opinion of this Court, and in light of the aforementioned precedent, we believe that the instructions provided by the court below comport with Kentucky law and find that the court made no error in denying the alternative instructions tendered by the parties. In Kentucky, jury instructions must be based upon the evidence. *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). Our review of the record and applicable law reveals that the court's instruction was in accordance with the evidence, and was not in error. Accordingly, we affirm, and turn to the second issue raised for appeal.

As his second basis for appeal, White argues that he is entitled to a new trial on the basis of attorney misconduct. These arguments center around the aforementioned photograph of the dump truck which White represented to the jury as being involved in the accident, and which Harvey testified was not actually the dump truck involved. White now argues that defense counsel should have been

forthcoming in the bench conference that followed White's questioning of Harvey concerning the truck.

He also argues that had it been revealed to the court that all parties were operating under the same misinformation then other remedial measures could have been taken, including issuing an instruction to the jury regarding the use of the exhibit and holding all parties equally accountable for the mistake. White argues that in this manner, the situation would have been remedied without doing harm to his counsel's credibility with the jury. White now asserts that defense counsel was also mistaken about whether the vehicle which was photographed was the correct vehicle, and believed it to be the correct vehicle at the time that it was photographed. White argues that had counsel made the court aware that everyone mistakenly believed the truck to be the correct vehicle, then some mitigating action could have been taken. Further, White now argues that the spirit of the rules of the Kentucky Supreme Court mandate that attorneys conduct themselves in such a manner as to uphold and honor the profession, and that counsel for Harvey and The Walker Company did not adhere to these standards and that he should be granted a new trial on the grounds of attorney misconduct. He argues that the trial court erred in refusing to grant his motions on these ground, and urges this Court to reverse.

In response, Harvey and the Walker Company argue that this case presents, at best, a mutual mistake by counsel in the identification of the truck involved in the accident. They assert that it is clear when comparing the

photographs taken by defense counsel with those taken by White that a mutual mistake was made in the identification of the truck. The Appellees argue that there was simply a mistake in the identification of the truck, which was neither intentional nor devious and that counsel in no way meant to mislead White's attorney or the court. Conversely, Appellees argue that the same mistake was made by defense counsel as he also took pictures of the incorrect truck. Counsel asserts that he did not discover the mistake until the direct examination of White on the second day of trial, and that at that time Harvey advised that the picture admitted into evidence did not accurately depict the truck he was operating at the time of the accident.

Appellees argue that at no point during discovery or trial preparation did the Walker Company or defense counsel have knowledge that the picture taken by White's attorney was the wrong truck. They assert that defense counsel never showed the photograph to his clients as liability was stipulated, and that counsel intended only to admit the three photographs taken at the scene of the accident. The Appellees argue that because their theory of the case was that the impact was minor, they focused on pictures taken at the scene and that the issue of which specific truck caused the accident did not weigh into their defense. They thus assert that although White's attorney provided the picture of the dump truck he intended to introduce, the authenticity of that photograph never became an issue until trial when it was discovered that it was the wrong truck. The Appellees also assert that White's counsel did no ground work prior to trial to have the

photograph authenticated, noting that he did not conduct any discovery to authenticate the truck, did not show the photograph to any fact witness during deposition, did not serve a request for admission as to the photograph's authenticity, and did not request a stipulation from the defense. The Appellees assert that had he done so, he would have discovered the mutual mistake, or, at the very least, would have been able to obtain a judicial admission as to the photograph's authenticity.

Secondly, the Appellees argue that White's counsel had sufficient information to know that the truck he photographed was not the correct truck since the Walker Company had provided a description of the truck during discovery. The Walker Company asserts that it provided White's counsel with the make and model of the truck, as well as its VIN number, DOT registration number, and the company's equipment number for the truck. The Walker Company asserts that this information did not match the identifying information clearly marked on the truck in the photograph and that, accordingly, White's counsel had all necessary information to recognize that the photograph he took was not of the correct vehicle. Thus, the Appellees assert that in this case, there was no misconduct, but simply a mutual mistake which could have been discovered with reasonable diligence on the part of White's attorney. They also argue that in any event, the mistake was nonmaterial because the defense theory went to the severity of the impact and to White's symptoms, and not to the issue of liability. They note that when discussing the photograph, Harvey merely stated that the truck involved in

the accident that day was smaller, which does not relate to the severity of the impact itself. Accordingly, the Appellees urge this Court to affirm.

In reviewing the arguments of the parties on these issues, we note that our Commonwealth has clear standards pertaining to and establishing the parameters of attorney misconduct, which are set forth in Rule 3.130(3.4) of the

Kentucky Supreme Court.[3] Further, SCR 3.130(3.3)[4] addresses candor toward the tribunal, and SCR 3.130(8.4)[5] addresses instances of misconduct.

Having reviewed the applicable law concerning attorney misconduct, we simply cannot find that the actions of counsel *sub judice* fall within these parameters. Our review of the record reveals no intentional misconduct on the part

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[3] A lawyer shall not:

> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
> (b) knowingly falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
> (d) in pretrial procedure, make a frivolous discovery request or deliberately fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
> (f) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter; or
> (g) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
> (1) the person is a relative or agent who supervises, directs or regularly consults with the client concerning the matter or has authority to obligate the client with respect to the matter;
> (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

[4] (a) A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to be directly adverse

of counsel, and we find it of particular importance to note that White's counsel had previously been provided with all of the information necessary to verify the identity of the vehicle, and chose not to do so. Certainly, reasonable diligence to authenticate the photograph of the truck in question would have revealed the mistake at issue and we find no evidence of deliberate falsehood, concealment, fraud, or intention to mislead. Accordingly, we believe that the trial court correctly

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> to the position of the client and not disclosed by opposing counsel; or
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
> (b) [sic] A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[5] It is professional misconduct for a lawyer to:

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
> (e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law.

denied White's motion, and we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the February 8, 2011, judgment of the Montgomery Circuit Court, as well as the court's March 11, 2011, order denying the motion for a new trial, the Honorable Bill Mains, presiding.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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