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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-001063-MR

DREAM FURNITURE, INC. AND
SKIP COOPER — APPELLANTS

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RUSSELL D. ALRED, JUDGE
ACTION NO. 08-CI-00064

REBECCA BROW (NOW ADCOCK) — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING

** ** ** ** **

BEFORE: MOORE, STUMBO AND VANMETER, JUDGES.

VANMETER, JUDGE: Dream Furniture, Inc. and Skip Cooper (hereinafter collectively referred to as "Appellants") appeal from the Harlan Circuit Court judgment awarding Rebecca Brow (now Adcock) $143,861.95 in damages on her

personal injury claim. For the following reasons, we affirm in part, reverse in part, and remand this matter to the trial court for further proceedings.

On January 28, 2008, Adcock filed the underlying complaint alleging that she was injured by a Dream Furniture employee, later identified as Cooper, when making an appliance delivery to Dream Furniture. Adcock claimed that while assisting Cooper unload her trailer, Cooper dropped a carton containing an electric stove on her which resulted in injury to her head and neck. Dream Furniture denied that an injury occurred on its premises, arguing that if an injury did occur it occurred in Pikeville, Kentucky, another stop on Adcock's delivery route.

Following the close of evidence at trial, Appellants tendered a set of jury instructions to the trial court which included an instruction stating: "Do you find from the evidence that the plaintiff, Rebecca Brow Adcock, was injured at the Dream Furniture store in Harlan, Kentucky on February 1, 2007?" The trial court rejected Appellants' tendered jury instructions. Rather, in regards to the liability of Appellants, the trial court instructed the jury, in part:

> Instruction No. 2
> It was the duty of the Defendants to exercise ordinary care in their loading/unloading operations so as not to endanger the safety of their invitees, including the Plaintiff, Rebecca Brow Adcock. "Ordinary care" as used in this instruction means such care as an ordinarily prudent person engaged in the same type of business as Defendants would exercise under similar circumstances.
>
> Interrogatory No. 1
> Do you believe from the evidence that the Defendants violated their duty under Instruction No. 2, and that such

failure was a substantial factor in causing the alleged accident?

The jury answered in the affirmative, finding Appellants at fault. The jury also found Adcock to have been negligent, and assigned her 50% liability. The trial court entered a judgment, apportioning 50% of the total cost of damages to Appellants, which the jury determined to be $143,861.95. Appellants moved for a new trial, on the basis that the trial court did not present to the jury the issue of whether an injury occurred at Dream Furniture. Appellants also requested the trial court reduce the amount of the jury award by the amount Adcock received in workers' compensation benefits ("WCB") and basic reparations benefits ("BRB"). The trial court denied the motions, and this appeal followed.

First, Appellants argue the instructions tendered to the jury presumed an essential fact in the case, and were therefore misleading and biased in favor of Adcock. Specifically, Appellants maintain the trial court should have instructed the jury that if they did not find an injury to have occurred, they should find in favor of the Appellants. We disagree.

Our review of alleged errors regarding the instructions tendered to the jury is *de novo*. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (citation omitted).

In all civil cases, Kentucky requires the use of "bare bones" jury instructions. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005) (citation omitted). Jury instructions are appropriate if they advise the jury as to what it must

determine as true from the evidence in order to return a verdict in favor of the party with the burden of proof on that issue. *Id*. (citation omitted). To succeed on a claim of negligence, one must prove: "(1) a duty on the part of the defendant; (2) a breach of that duty; (3) a consequent injury, which consists of actual injury or harm; and (4) legal causation linking the defendant's breach with the plaintiff's injury." *West v. KKI, LLC*, 300 S.W.3d 184, 190 (Ky. App. 2008) (citing *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88-89 (Ky. 2003)).

Here, the instructions given by the trial court adequately state the law. The instructions require the jury to determine whether Appellants violated their duty and if such failure caused the *alleged* accident for which Adcock seeks damages. The instruction does not presume Adcock was injured; if the jury did not believe Adcock was injured at the worksite of Dream Furniture, it would have answered the interrogatory in the negative. Appellants sufficiently argued before the jury its theory that Adcock was injured in Pikeville, rather than Dream Furniture's worksite in Harlan, Kentucky. The jury instructions did not contradict Appellant's defense theory. Accordingly, the trial court did not err in this regard.

Next, Appellants argue the trial court erred by not reducing the amount of the jury award to the extent that BRB or WCB were payable to Adcock. We disagree that any credit should be applied for WCB, but agree that the jury award should have been reduced by $10,000 of "payable" BRB.

With respect to the WCB, the record is clear that following a settlement with Adcock, the workers' compensation insurance carrier assigned its subrogation

rights to Adcock. Appellants point to a letter sent by the workers' compensation insurance carrier dated May 7, 2009, in which a claim representative informed Adcock's counsel that they had settled the workers' compensation claim, and would not pursue any third party action to collect. Appellants argue the letter was sent after the statute of limitations had run for any subrogation claims, and thus, is a nullity in regards to assigning any subrogation rights. In doing so, Appellants overlook a prior assignment of subrogation rights, in which the insurance carrier assigned all subrogation rights to Adcock. KRS[1] 342.700(1) permits the employer or carrier to recover benefits paid on behalf of an injured employee from a third party tortfeasor responsible for the damages. Under Kentucky law, if the employer or insurance carrier assigns the right of subrogation, as it did here, and has a right to recover against the third-party tortfeasor, the recovery by the employee does not constitute a double recovery. *Weinberg v. Crenshaw*, 896 S.W.2d 22, 24 (Ky. App. 1995). Here, Adcock sought nothing more than what her employer or employer's insurance carrier would have been entitled to recover. Accordingly, the trial court did not err by declining to offset Adcock's jury award by the workers' compensation benefits she received in her settlement.

In regards to the BRB in the amount of $10,000, Appellants claim these benefits should offset the jury award. BRB provide compensation "for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle[.]" KRS 304.39-020(2). Up to $10,000 is recoverable for "accrued

[1] Kentucky Revised Statutes.

economic loss consisting only of medical expense, work loss, replacement services loss, and, if injury causes death, survivor's economic loss and survivor's replacement services loss." KRS 304.39-020(5). To prevent double recovery, "an injured person can assert a claim [against a third party tortfeasor] only for those damages which exceeded the amounts payable as [BRB]." *Bohl v. Consol. Freightways Corp.*, 777 S.W.2d 613, 615 (Ky. App. 1989) (citation omitted). The injured party is only entitled to the maximum $10,000 allotted for BRB if the accrued medical expense and/or lost wages surpass that amount. *Henson v. Fletcher*, 957 S.W.2d 281, 282 (Ky. App. 1997).

The trial court denied any credit against the jury award on the basis that no evidence was presented to show that Adcock had not rejected the provisions of the Motor Vehicle Reparations Act ("MVRA") pursuant to KRS 304.39-060(4). This court has previously interpreted the application of MVRA as follows:

> Pursuant to KRS 304.39-060(1) any person who operates a motor vehicle on the public roadways of this state is deemed to have accepted the provisions of the [MVRA], KRS Chapter 304, Subtitle 39. Appellant makes no claim to having rejected the provisions of this act. Having, therefore, accepted the provisions of the act, appellant was entitled, despite being a non-resident, to recover $10,000 in basic reparation benefits. KRS 304.39-030(1).

*Bohl*, 777 S.W.2d at 614-15. Furthermore, "the law does not require these benefits actually be paid." *Id*. at 615. Indeed, in *Thompson v. Piasta*, 662 S.W.2d 223, 226 (Ky. App. 1983), we stated, "it is immaterial whether basic reparations benefits have been or have not been paid to an injured party . . . such party is not entitled to

an award from the defendant in a trial on liability for any item of damages for which such benefits are payable[.]" Here, no evidence was presented to show Adcock rejected the provisions of the MVRA; instead, the evidence supported a finding that she used a motor vehicle on Kentucky roadways, and thus accepted such provisions.

The trial court further reasoned that even if BRB were available, Adcock would not have been eligible for those benefits because she was not "using" the motor vehicle. KRS 304.39-020(6) states that the "use of a motor vehicle" includes "any utilization of the motor vehicle as a vehicle including occupying, entering into, and alighting from it." The record reveals that Adcock was standing in the trailer of her parked semi-truck when injured by Cooper. Based on KRS 304.39-020(6)(b), which provides that unloading or loading a vehicle does not constitute use of a vehicle unless it occurs while occupying, entering into or alighting from it, the trial court reasoned that Adcock was not unloading *and* occupying the trailer so as to constitute use of the vehicle. Such reasoning overlooks the fact that whether Adcock was unloading the vehicle or not, she was occupying the vehicle at the time of her injury. Because the jury compensated Adcock for losses exceeding $10,000, the trial court erred by denying Appellants credit against the jury award in the amount of $10,000 in payable BRB.

The order of the Harlan Circuit Court is affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William G. Crabtree
London, Kentucky

BRIEF FOR APPELLEE:

Brien G. Freeman
Corbin, Kentucky