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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001069-MR

GAYLA M. RIDDLE; GAYLA M. RIDDLE, AS MOTHER AND NATURAL GUARDIAN OF ELIZABETH RIDDLE; BRIAN RIDDLE; JENNA REJMAN; JENNA REJMAN, AS MOTHER AND NATURAL GUARDIAN OF HALEY MILLER REJMAN; MICHAEL REJMAN; JANICE STROJIN; JANICE STROJIN, AS MOTHER AND NATURAL GUARDIAN OF MEGAN STROJIN; JANICE STROJIN, AS MOTHER AND NATURAL GUARDIAN OF KAITLIN STROJIN; TONY STROJIN; EMILY GASKILL, A MINOR, BY AND THROUGH HER FATHER AND NATURAL GUARDIAN, RUSSELL GASKILL; BAILEY JO EDLER, A MINOR, BY AND THROUGH HER MOTHER AND NATURAL GUARDIAN, KIMBERLY EDLER; APRIL M. VERCOE; AND RANDALL HARVEY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 08-CI-006779

DAVIS & DAVIS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This appeal involves a carbon monoxide leak that occurred at a Comfort Inn Hotel. In addition to the hotel's owner, the appellants filed this action against Davis & Davis Plumbing, Inc., alleging that its employee, Robert Burt, negligently repaired a hot water heater causing carbon monoxide to leak into the hotel. Prior to trial, the appellants and the hotel entered into settlement agreement leaving Davis as the only defendant. After a jury found Davis was not negligent, the trial court entered its verdict and judgment dismissing all claims against Davis and, subsequently, denied the appellants' motion for a new trial.

The appellants present the following issues: (1) whether the defense verdict was palpably and flagrantly against the weight of the evidence as to be the result of passion and prejudice; (2) whether the jury instruction should have included the definition of substantial factor; and (3) whether Davis's counsel's statements during opening and closing arguments that the claims against the hotel had been resolved were improper and prejudicial. We affirm.

During the morning on January 20, 2008, the hotel was evacuated after its guests were overcome by carbon monoxide.[1] At trial, the evidence focused

[1] Because the jury did not find Davis negligent, the parties have not briefed this Court regarding the nature and extent of the appellants' injuries. We agree that those facts are not relevant to our discussion and, therefore, omit them from our opinion.

on the condition of the hotel's hot water heaters and repairs performed by Burt on the day prior to the carbon monoxide poisoning.

On January 19, 2008, Burt received notice of a service call placed by the hotel regarding a hot water heater that was not producing hot water. Burt arrived at the scene at approximately 3:30 p.m. and entered the mechanical room where the heater was located. His inspection revealed that the damper on the water heater was improperly functioning, preventing water from correctly cycling. He explained that the damper sits atop the heater and opens and closes permitting exhaust gases to pass through and into the exhaust fan and exhaust system. To remedy the problem, Burt testified that he bypassed the damper control by rewiring the damper hood's wiring harness and disconnecting the damper control from the electronic control unit. He testified that he had performed the bypass procedure on other water heaters without incident.

Burt allowed the heater to perform two cycles and performed a draw test to determine whether the exhaust was being drawn into the exhaust pipe. After determining that the heater was properly cycling, Burt shut down the system and was instructed by a front desk employee to contact Fred George, the hotel's maintenance person responsible for approval of the completed repairs. Burt testified that he informed George that the system was functioning but that the damper hood was bypassed and that the booster fan was not working. He also informed George that the he had performed a draw test and the ventilation was accepting smoke. Burt testified that he informed George that if it was his decision,

he would shut down the system because there was a danger of fumes in the mechanical room. George instructed him to leave the heater on because the smaller unit was unable to satisfy the hot water demand. Based on his conversation, Burt noted on the work order that the system was to remain on pursuant to George's authority. Burt testified that when he left the hotel, the water heater was functioning in a safe condition.

George confirmed that he received a phone call from Burt and was told that the water heater was functioning. However, he testified that Burt informed him that there might be fumes in the mechanical room, but that the water heater could be left running.

Police officer Sean Dreisbach testified that when he arrived at the hotel on January 20, 2008, guests were evacuating and some were being transported to local hospitals. His report of the incident showed that carbon monoxide readings on the hotel's second floor were 440+ parts per million.

Dr. Henry Spiller, the Kentucky regional poison control toxicologist, testified that the readings recorded were very high. He further opined that Burt should not have reactivated the water heater if the exhaust system was inoperative.

Kentucky State Senior Deputy Fire Marshall Goodwin investigated the incident and interviewed Burt. Burt explained that after he was unable to get the exhaust fan to work, he disconnected the damper control. Goodwin opined that bypassing the damper control to allow the damper to remain open enabled the heater to operate despite that the heater was not functioning safely and run

continuously if hot water was needed. In his opinion, Burt should not have left the water heater in operation without a working fan and placing the damper in a manual open position.

The appellants' expert witness, Kenneth Mitchell, agreed that Burt should not have bypassed a safety mechanism to make the heater operational. However, on cross-examination, he testified that the damper is not a safety mechanism and it would be safe to operate a water heater with the damper in full open position. He further testified that when left in open position, the damper allows heat to escape and only efficiency is lost.

John Lux, a licensed mechanical engineer, testified that the damper control Burt bypassed was a mechanism designed purely to increase efficiency of a water heater and is not a safety mechanism. He opined that although Burt did not completely repair the water heater, the partial repair performed did not leave the heater in an unsafe condition. He testified that when Burt inspected the water heater, the booster fan was not functioning but that Burt properly determined that the heater was safely functioning.

The appellants contend that the verdict was palpably and flagrantly against the weight of the evidence. The issue was properly preserved in its motion for a new trial.

The standard of review applicable to this Court's review of a denial of a motion for new trial is whether the trial court abused its discretion, and its decision will not be reversed unless it was "arbitrary, unreasonable, unfair, or

unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999). "An appellate court can only reverse the trial court's decision if it is sure that the decision is incorrect—any doubts must be resolved in favor of the trial court[.]" *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 73 (Ky. 2010).

When asked to determine whether a verdict was palpably or flagrantly against the weight of the evidence as to be the result of passion or prejudice, "[t]he prevailing party is entitled to all reasonable inferences which may be drawn from the evidence." *Lewis v. Bledsoe Surface Min. Co*., 798 S.W.2d 459, 461 (Ky. 1990).

Burt testified that he positioned the damper in an open position to make the water heater operational and it was properly functioning when he left the hotel. Lux testified that it was safe to operate the water heater with the damper in the open position. Although George, Goodwin, and Mitchell gave some contrary testimony, "[u]nder our system it is within the exclusive province of the jury to pass upon the credibility of the person testifying and to determine the weight to be given that person's testimony." *Arnett v. Arnett*, 293 S.W.2d 733, 735 (Ky. 1956). By choosing which evidence to believe, "the jury was dutifully performing one of the ancient functions assigned to it—weighing the probative value of evidence and choosing that particular testimony most convincing to it." *Commonwealth, Dept. of Highways v. Dehart,* 465 S.W.2d 720, 722 (Ky. 1971). We conclude that the

trial court did not abuse its discretion when it denied the appellants' motion for a new trial.

The appellants maintain that the trial court erred when it refused its proposed jury instructions that included a definition of the term "substantial factor." The contested instruction stated:

> Are you satisfied that Defendant, Davis & Davis Plumbing, Inc., failed to comply with its duty of ordinary care as set forth in Instruction 2 and that such failure was a substantial factor in causing injuries?

The appellants do not contest the appropriateness of the substantial factor language, and we believe it sufficient to state that identical language has been repeatedly used with acceptance in this Commonwealth. The error alleged is that the trial court erroneously rejected their proposed instruction that included a definition of substantial factor:

> A factor is a "substantial factor" if it contributed to the harm, that is, if reasonable minds can regard it as a cause of the harm. There may be more than one cause and there may be multiple "substantial factors" in causing any one injury.

It is well established in this Commonwealth that it is not the purpose of jury instructions to advise the jury on the law of the case, and the basic function of instructions is to inform the jury what it must believe from the evidence to resolve each dispositive factual issue in favor of the party bearing the burden of proof on that issue. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 228-229 (Ky. 2005). Kentucky does not favor instructing the jury regarding every nuance of the law. Under the

bare-bones approach, details are to be fleshed out by counsel in their closing arguments and are proper if the law is correctly stated. *Id*. at 230.

To prevail, the appellants must convince this Court that the trial court abused its discretion when it denied their requested instruction. *Id*. at 229. However, the appellants have not cited any authority that substantial factor must be defined in the instructions. Under the bare-bones approach, the law is to the contrary.

The trial court's instructions in this case mirrored existing case law. "KRS [Kentucky Revised Statutes] 29A.320 places no obligation on the trial court to explain its jury instructions." *St. Luke Hospital, Inc. v. Straub*, 354 S.W.3d 529, 539 (Ky. 2011). Substantial factor is a straightforward term that did not require definition in the instructions. *Id*. Counsel was correctly advised by the trial court that the definition of substantial factor could be addressed in closing argument. The words written by Justice Palmore in *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974), are applicable: "[I]f counsel felt that the jury was too thick to get the point all he had to do was to explain it in his summation."

The final issue presented concerns remarks made by Davis's counsel. During opening, counsel stated: "The claims against the hotel have been resolved. Obviously the claims against Davis and Davis have not." In closing, counsel stated: "You know, the claims that these people filed against the hotel were resolved and we chose to fight." Later in closing, counsel again stated the claims against the hotel had been resolved.

The appellants contend that the remarks violated the rule stated in *Orr v. Coleman*, 455 S.W.2d 59, 61 (Ky. 1970), where the Court stated:

> Knowledge by the jury that one of the claimed tortfeasors had paid off certainly could serve no legitimate purpose and could easily give rise to inferences prejudicial to either side. The amount of the settlement might well tend to suggest the value of the claim and a yardstick for measuring what the nonsettling tortfeasor ought to pay. We see much possible evil and no positive good to be attained through introducing such information to the jurors.

In *Orr*, the Court held a jury instruction that specifically informed the jury of a settlement with an alleged joint tortfeasor and the specific amount was reversible error. *Id*.

The appellants maintain that counsel's remarks were improper references to settlement with a joint tortfeasor but admit that there was no contemporaneous objection as required by CR 46. The rule is well established and applicable to improper argument in opening and closing. As our Supreme Court stated in *Gray v. Commonwealth*, 979 S.W.2d 454, 457 (Ky. 1998)(*overruled on other grounds*, *Morrow v. Commonwealth*, 77 S.W.3d 558 (Ky. 2002)):

> Appellant's final argument is that the prosecutor made improper comments during his closing arguments in both the guilt and penalty phases of the trial which amounted to prosecutorial misconduct. As there were no objections made, the trial court was not given the opportunity to pass upon the merits of these allegations which are not properly preserved for review. We must therefore decline to consider this challenge.

The rule is equally applicable to civil cases. *Charash v. Johnson*, 43 S.W.3d 274, 278 (Ky. App. 2000).

Although the issue was presented in the appellant's motion for a new trial, the rule requires a contemporaneous objection. *Kentucky Trust Co. v. Commonwealth, Dept. of Highways,* 413 S.W.2d 350, 351 (Ky. 1967). "Indeed, the purpose of the contemporaneous-objection rule is to afford the trial court an opportunity to prevent or cure any error in a timely fashion." *Polk v. Greer*, 222 S.W.3d 263, 265 (Ky.App. 2007). Therefore, review must be based on CR 61.02, the palpable error rule.

CR 61.02, the civil rule counterpart to RCr 10.26, provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice resulted from the error.

The rule is applicable in limited situations and not hastily applied when a trial has been completed and resolved by the fact finder. As a result, the appellants' threshold burden is to persuade this Court that the alleged is error is subject to our review. This burden is not easily met.

An error is palpable only when it is "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level,* 957 S.W.2d 218, 222 (Ky. 1997). It is an error so serious that it would seriously affect the fairness to a party if left uncorrected. *Brewer v. Commonwealth,* 206 S.W.3d 343, 349 (Ky. 2006).

Fundamentally, a palpable error determination turns on whether the court believes there is a "substantial possibility" that the result would have been different without the error. *Id.* In *Childers Oil Co., Inc. v. Adkins,* 256 S.W.3d 19, 26-27 (Ky. 2008), our Supreme Court emphasized the limitations of CR 61.02. It applies only if: "(1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken by the court." *Id*. at 27.

There was no palpable error because there is not a substantial possibility that absent counsel's remarks, the jury would have found Davis liable. The trial lasted six weeks during which the jury heard from numerous witnesses and evidence, including that the hotel was solely responsible for the carbon monoxide poisoning. In light of the substantial evidence supporting the jury's verdict, we cannot say that counsel's remarks, which did not specifically mention settlement or that compensation was received, were prejudicial. As a practical matter, counsel only informed the jury of what it already knew. The jury heard evidence regarding the hotel's negligence, counsel for the hotel was present in numerous video depositions and, in conformity with KRS 411.182, the jury was asked to apportion fault against the hotel. There is no substantial probability that without counsel's brief references to resolution of the appellants' claims against the hotel, the outcome would have been different. *Brewer*, 206 S.W.3d at 349.

Further, Davis's counsel's remarks cannot be attributed to any act or omission by the trial court as required by CR 61.02. *Charash*, 43 S.W.3d at 278.

Counsel's remarks made in the context of opening and closing arguments were not evidence and counsel was entitled to great latitude in both. *Stopher v. Commonwealth*, 57 S.W.3d 787, 805-806 (Ky. 2001), *cert denied*, 535 U.S. 1059, 122 S.Ct. 1921, 152 L.Ed.2d 829 (2002). Although "[t]he public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice," that duty exists only in extreme circumstances when counsel has abused the latitude given. *Goff v. Commonwealth*, 241 Ky. 428, 44 S.W.2d 306, 309 (1931). This is far from such an extreme circumstance. Even if we were to consider counsel's remarks to have violated the rule stated in *Orr*, we cannot say that the court's intervention was necessary to prevent a manifest injustice.

Before concluding, we note that the parties have skillfully briefed whether *Orr* has been modified by the adoption of Kentucky Rules of Evidence 408 and KRS 411.182. We leave that issue to be addressed in a case where the issue was properly preserved and the jury's knowledge of a settlement prejudicial.

Based on the foregoing, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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