RENDERED: JULY 17, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000986-MR

BRANDON HALL — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 10-CI-007933

GOSS AVENUE ANTIQUES AND
INTERIORS AND JAMES SULLIVAN — APPELLEES

AND 2013-CA-001051-MR

GOSS AVENUE ANTIQUES AND
INTERIORS — CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 10-CI-007933

BRANDON HALL — CROSS-APPELLEE

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, J. AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This appeal (2013-CA-000986-MR) and cross-appeal (2013-CA-001051-MR) result from a jury trial and a denial of a summary judgment motion in an action in the Jefferson Circuit Court. After a review of the record and considerations of the arguments of counsel, we affirm the decision of the trial court.

Factual Background

Brandon Hall, the Appellant, was attacked by James Sullivan on November 13, 2009, at the Goss Avenue Antiques and Interiors Mall (Goss Avenue Antiques) located in the Booker-Price Building in Louisville, Kentucky. Goss Avenue Antiques is owned by John Booker and his brother Steve. Sullivan did maintenance work at Goss Avenue Antiques. Sullivan's brother, Kenneth, managed the Goss Avenue Antiques and was property manager for Booker-Price. It was disputed whether Kenneth actually hired his brother to work at Goss Avenue Antiques or whether Sullivan was an independent contractor.

Olivia's Restaurant was also located on the premises. Hall worked at Olivia's Restaurant which was operated by Hall's brother Greg. Sullivan also owned a business, Sullivan and Sons. Sullivan and Sons delivered produce to Olivia's Restaurant. There was an altercation between Sullivan and Hall. Subsequently, Sullivan was convicted of second-degree assault, and was ordered to pay restitution. He also served time for the assault in the penitentiary. Hall brought a lawsuit against Sullivan for the assault and an action against Goss Avenue Antiques for negligent hiring and retention.

Procedural History

Goss Avenue Antiques filed a motion for summary judgment on the claim of negligent hiring and supervision. It argued that James Sullivan was not their employee; that Sullivan's actions were not foreseeable; and that the work that Sullivan was doing for Booker-Price was not one in which either members of the public or other employees would be placed in jeopardy.

The trial court entered an order on August 22, 2012, denying the motion after finding that a genuine issue of material fact existed as to whether Goss Avenue Antiques should have foreseen that Sullivan would have attacked someone while working there. The case was scheduled for trial. Goss Avenue Antiques filed a motion to bifurcate the trial. The first phase of the trial was to address whether Sullivan was an employee of Goss Avenue Antiques. If the jury found that he was, the case would proceed to the second phase to determine what liability, if any, Goss Avenue Antiques had for the injuries caused by Sullivan.

Hall objected to the bifurcation and to the exclusion of evidence of Sullivan's violent past and criminal history. Sullivan's deposition was taken, but Sullivan effectively thwarted any attempt to be examined by Hall's counsel. Sullivan, who was incarcerated at the time of his deposition, declined to fully cooperate since he did not have counsel. He did speak off the record with counsel for Goss Avenue Antiques. For reasons not explained by the parties to this Court, Sullivan did not appear at trial.

During the trial, both parties made motions for directed verdicts which were denied. The jury determined that Sullivan was not an employee, agent or instrumentality of Goss Avenue Antiques and thereby found in its favor.

Hall then filed this appeal, arguing that: the unsigned jury verdict was void and no judgment can be supported by it; placing a deposition transcript or any portion of one into the jury room is clearly reversible error; reading the deposition of James Sullivan was also reversible error; the excerpt from Sullivan's answer was also inadmissible; it was error to deny Hall's motion for directed verdict; and the bifurcation order, as well as the court's application of it, was an abuse of discretion.

Goss Avenue Antiques filed a cross-appeal arguing that: the trial court erred in denying Appellees' motion for summary judgment on the negligent hiring/retention claim; and the trial court erred in its interrogatory to the jury by including "agent" and "instrumentality" in addition to "employee."

As a preliminary matter, we address Hall's motion to strike the reply brief of Goss Avenue Antiques or alternatively to file a sur-reply. We deny the motion and we will now address each substantive argument in turn, applying the appropriate standard of review.

Appeal 2013-CA-000986-MR

Bifurcation Order

Hall first argues that the trial court erred in granting the motion to bifurcate the trial. He contends that although the trial court considered that it "may

be prejudicial" to allow information about Sullivan's criminal acts or other bad acts when deciding the employment issue, it did not consider the prejudice to Hall or make any findings on judicial economy or convenience. We apply an abuse of discretion standard when considering an evidentiary issue.

In *Calhoun v. Provence,* 395 S.W.3d 476 (Ky. App. 2012), we held that:

> …a trial court has broad discretion in ruling on a motion to bifurcate. *Island Creek Coal Company v. Rodgers,* 644 S.W.2d 339 (Ky. App. 1982). Such a decision will be overturned only if it constitutes an abuse of discretion, which is found where the decision is arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941,945 (Ky. 1999).

Id. at 481. Additionally, Kentucky Rules of Civil Procedure (CR) 42.02 states that:

> If the court determines that separate trials will be in furtherance of convenience or will avoid prejudice, or will be conducive to expedition and economy, it shall order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues.

In making its decision, the trial court also considered the case of *Calhoun,* in which our Court held that:

> …separate trials *shall* be conducted if the court determines that they will be in furtherance of convenience or will avoid prejudice, *or* will be conducive to expedition and economy.

Id. at 480.

Hall argues that the trial court made no findings on judicial economy or convenience; however, the trial court was not required to make those findings. CR 42.02 allows the court to make a determination based upon alternate grounds and not on all of the grounds listed in CR 42.02. The trial court made a finding of prejudice to Goss Avenue Antiques if the information about Sullivan's criminal or other bad acts was heard prior to making a determination of whether he was an employee of Goss Avenue Antiques. Hall argues that he was prejudiced because the jury did not get to hear about the attack as the underlying event to this action. However, whether Sullivan was an employee was the first decision to be made. We agree with the trial court that the information about the attack should be made in a separate proceeding.

We conclude that the decision to bifurcate the proceeding does not constitute an abuse of discretion and accordingly find no error on this issue.

Motion for Directed Verdict

Hall argues that the trial judge erred in denying his motion for directed verdict because "[t]he evidence was overwhelming that James Sullivan was Goss Avenue's 'employee, agent or instrumentality' as verified by the unrefuted testimony of six witnesses[.]" Appellant's brief at page 31. We disagree. The evidence was conflicting and the trial judge properly denied the motion.

In *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 215 (Ky. App. 2009), this Court held that:

> When a directed verdict is appealed, the standard of review on appeal consists of two prongs. The prongs are: "…a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ."

Citing *Bierman v. Klapheke,* 967 S.W.2d 16, 18–19 (Ky.1998). "A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung,* 754 S.W.2d 855, 860 (Ky. 1988), citing *Kentucky & Indiana Terminal R. Co. v. Cantrell,* 298 Ky. 743, 184 S.W.2d 111 (1944).

If there is conflicting evidence, it is the responsibility of the trier of fact, in this case the jury, to resolve such conflicts. Therefore, when a directed verdict motion is made, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *National,* 754 S.W.2d at 860 (citing *Cochran v. Downing,* 247 S.W.2d 228 (Ky. 1952).

In order to review the trial court's actions in the case at hand, we must first determine whether the trial court favored the party against whom the motion was made, including all inferences reasonably drawn from the evidence. Next, "the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" *Id.* If the answer to this inquiry is in

the affirmative, we must affirm the trial court's granting of the motion for directed verdict. Moreover, "[i]t is well argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict." *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968). "[A] reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman,* 967 S.W.2d at 18. We affirm the trial court's denial of Hall's motion for directed verdict.

Jury Instructions

Hall next argues that the trial court committed error when it allowed the verdict to stand when the jurors had failed to sign the interrogatory form. Interrogatory Number One read:

> Do you believe from the evidence that James Sullivan was an employee, agent or instrumentality of Goss Avenue Antiques & Interiors on November 13, 2009?

The jurors marked "no," but did not sign the form. Nine jurors did sign Verdict Form A which found in favor of Goss Avenue Antiques. Hall argues that the verdict violates the mandatory signature requirements of Kentucky Revised Statutes (KRS) 29A.320 as well as the requirements of CR 49.02 and, thus, the verdict is void.

Because alleged errors regarding jury instructions are considered questions of law, we examine them under a *de novo* standard of review. *Reece v. Dixie Warehouse and Cartage Co.,* 188 S.W.3d 440, 449 (Ky. App. 2006). Additionally, "[i]nstructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth,* 618 S.W.2d 177, 178 (Ky. 1981). The instructions are reviewed "as a whole to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision." *Gibson v. City of Louisville,* 336 F.3d 511, 512 (6th Cir.2003), quoting *Vance v. Spencer County Public Sch. Dist.,* 231 F.3d 253, 263 (6th Cir.2000). *Mendez v. University of Kentucky Board of Trustees*, 357 S.W. 3d 534, 538 (Ky. App. 2011).

The relevant portion of KRS 29A.320 states:

> (3) The procedure for rendering the verdict shall be:
>
> > (a) When the jury have agreed on their verdict, the verdict shall be written and signed by the foreman.
> > (b) When a verdict is rendered by less than the whole jury, it shall be signed by all the jurors who agree to it.
> > (c) The foreman shall hand the verdict to the judge who shall read the verdict and then make inquiry of the jury as to whether it is their verdict.
> > (d) When the verdict is announced either party may require that the jury be polled, which is done by the judge asking each juror if it is his verdict.
> > (e) If more than the number of jurors required by KRS 29A.280, as appropriate to the type of case being tried, answers in the negative, the jury must be sent out for further deliberation.
> > (f) If no disagreement is expressed or, in an appropriate case, an insufficient number disagree,

> the verdict is complete and the jury shall be discharged from the case.

The requirements of CR 49.02 read in part:

> The court shall give such written instructions as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers.

Hall cites *Berry v. Pusey*, 3 Ky.L.Rptr. 656, 80 Ky. 166 (Ky. 1882), and *Pugh v. Jackson*, 154 Ky. 772, 159 S.W. 600 (Ky. App. 1913). *Pugh* held that the mark and not the signature of the juror on the verdict form was sufficient. In *Berry,* the Court considered the effect of an unsigned interrogatories and verdict form and held:

> It is also urged as a ground for a reversal that neither the general or special verdict was signed by the foreman of the jury… The jury, when the verdict in this case was returned into court, heard the special interrogatories read by the foreman, and the verdict was then handed to the clerk and again read by him, and the jury asked if it was their verdict, and an affirmative response was made. The verdict was then entered of record and made the judgment of the court, and is binding on the parties to it. We perceive no error to the prejudice of the party complaining in this case.

Id. at 169.

In Hall's case, the jury properly signed the verdict form and their verdict was confirmed when the jury was polled. The interrogatory, though unsigned, conformed to both the verdict and the verbal response by the jurors when

they were polled. There was no prejudice to Hall and there is no reversible error by the trial court.

Testimony of James Sullivan

We review the admission of evidence under an abuse of discretion standard. Whether a particular statement is admissible under a hearsay exception depends on the circumstances of each case and is a preliminary question of fact to be determined under Kentucky Rules of Evidence (KRE) 104(a). *Noel v. Commonwealth,* 76 S.W.3d 923, 926 (Ky. 2002). The trial court's findings of fact under KRE 104(a) will not be disturbed unless clearly erroneous. *Ernst v. Commonwealth*, 160 S.W.3d 744,752 (Ky. 2005). We review the trial court's decision to admit hearsay, *de novo. U.S. v. Branham*, 97 F. 3d 835, 851,45 Fed. R. Evid. Serv. 649 (6th Cir. 1996).

Hall raises three arguments regarding the testimony of James Sullivan. Those arguments are: reading the deposition of James Sullivan was reversible error; the excerpt from Sullivan's answer was inadmissible; and placing a deposition transcript or any portion of one into the jury room is reversible error.

In its case in chief, Goss Avenue Antiques read an excerpt of the deposition testimony of Sullivan to the jury. This was the only testimony presented by Goss Avenue Antiques. In his testimony, which was not in response to a question, Sullivan said:

> How can Goss Avenue be liable for a lawsuit when I wasn't working for them, for one? For two, I was working for your client. Your client stated that in Court.

Sullivan then said that he did not want to be asked a question about that statement because he did not have an attorney. The deposition did continue for a short time thereafter, but without any further exploration of the topic of Sullivan's employer, if any. After some limited questioning by both the attorney for Hall and for Goss Avenue Antiques, the deposition concluded. The entire deposition lasted approximately 55 minutes.

Hall objected to the reading of this excerpt and objected to its entry as an exhibit. As stated previously, Sullivan was not present at trial. Goss Avenue Antiques argued that Sullivan was an adverse party as defined by CR 32.01(b) and the statement was also admissible pursuant to KRE 801, as a statement of a party.

Hall disagreed with both of these arguments. Hall also declined the trial court's offer to read any other part of the deposition into the record. He argued that he had not had an opportunity to cross-examine Sullivan because Sullivan refused to answer most of the questions presented to him. The trial judge overruled Hall's objection and allowed Goss Avenue Antiques to read Sullivan's deposition testimony to the jury and also admitted an excerpt of the deposition containing only that statement as Defense Exhibit 23. We hold that it was error to read the statement to the jury and that it was error to allow Sullivan's statement as an exhibit.

Goss Avenue Antiques argued to the trial court and to this Court, that CR 32.01(b) allowed the admission of Sullivan's statement. CR 32.01(b) reads:

> The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30.02(6) or 31.01(2) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

Sullivan was neither an officer, director, or managing agent of any entity described in CR 32.01(b), nor was he testifying on behalf of any entity. Therefore, the statement was not admissible under this rule.

There was no indication as to why Sullivan was not present on the day of trial. His deposition could be used pursuant to CR 32.01(c), but the trial court should have made findings as to the basis for reading his deposition to the jury. CR 32.01(c) outlines when a deposition may be read. Those factors are:

> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness: (i) is at a greater distance than 100 miles from the place where the court sits in which the action is pending or out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or (ii) is the Governor, Secretary, Auditor or Treasurer of the State; or (iii) is a judge or clerk of a court; or (iv) is a postmaster; or (v) is a president, cashier, teller or clerk of a bank; or (vi) is a practicing physician, dentist, chiropractor, osteopath, podiatrist or lawyer; or (vii) is a keeper, officer or guard of a penitentiary; or (viii) is dead; or (ix) is of unsound mind, having been of sound mind when his deposition was taken; or (x) is prevented from attending the trial by illness, infirmity, or imprisonment; or (xi) is in the military service of the United States or of this State; or (xii) if the court finds that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of

> presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

CR 32.01(c).

The parties have not designated any place in the record wherein the trial court made these findings. Our review of the arguments regarding the admissibility of the statement does not reflect any such finding by the trial court.

Goss Avenue Antiques also argues that the statement was admissible pursuant to KRE 801A as an admission by a party. The relevant section of KRE 801A states:

> (b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:
>
> > (1) The party's own statement, in either an individual or a representative capacity;
> > (2) A statement of which the party has manifested an adoption or belief in its truth;
> > (3) A statement by a person authorized by the party to make a statement concerning the subject;
> > (4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
> > (5) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

However, Sullivan's statement is not admissible under this rule because his statement was not offered against him, but offered in favor of Goss Avenue Antiques. The U. S. District Court held in *Stalbosky v. Belew*, 205 F.3d 890, 894 (6th Cir. 1999), that Belew's statement was not offered against him as a

party-opponent, but offered to establish another party's knowledge of Belew's criminal history. Therefore, it was proper to exclude the statement because under Federal Rules of Evidence Rule 801(d)(2)(A), a party's statement is admissible as non-hearsay only if it is offered against that party. KRE 801A mirrors the federal rule. In the case at bar, Sullivan's statement should not have been admitted as an admission of a party.

Even if there was no error in reading Sullivan's statement, it was error to allow the written statements to be given to the jury. Generally, jurors are not to have access to depositions and testimonial evidence during deliberations because of the additional emphasis that jurors may place on this type of written testimony. *Berrier v. Bizer*, 57 S.W.3d 271,277 (Ky. 2001), and *Wright v. Premier Elkhorn Coal Co.*, 16 S.W.3d 570,572 (Ky. App. 1999). Therefore, that access may be prejudicial.

However, the question remains whether the admission of the statement as well as the jury's access to it was prejudicial. We believe it was not. There was sufficient evidence for the jury to determine that Sullivan was not an employee of Goss Avenue Antiques even without his statement. Plaintiff's Exhibit 10 was the Metro Corrections records of Sullivan. Hall submitted this exhibit. Those records listed Booker-Price as Sullivan's employer. Booker-Price is a separate entity from Goss Avenue Antiques. The tax records of Booker-Price reflected that Sullivan worked as an independent contractor for them. John

Booker, President of Goss Avenue Antiques, also testified that Sullivan did not work for the Appellees.

Hall also presented witnesses who testified that they were paid by Goss Avenue Antiques. Sullivan's statement that he worked for Hall was denied by Hall in his rebuttal testimony. The jury was allowed to consider all of the testimony and exhibits. There was sufficient evidence which convinced the jury that Sullivan did not work for Goss Avenue Antiques. Thus, we affirm the trial court on this issue.

Cross-Appeal No. 2013-CA-001051-MR

Although we have affirmed the decision of the trial court, and we do not need to consider the cross-appeal, we will nevertheless address the Appellees' arguments. In its cross-appeal, Goss Avenue Antiques argues that the trial court erred in denying its motion for summary judgment on the negligent hiring/retention claim; and that it erred by including the words "agent" and "instrumentality" in the jury instructions.

Denial of Summary Judgment

"We adhere to the principle that summary judgment is to be cautiously applied and should not be used as a substitute for trial. As declared in *Paintsville Hospital,* it should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.' It is vital that we not sever litigants from their right of trial, if they do in fact have

valid issues to try, just for the sake of efficiency and expediency." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476,483 (Ky. 1991). Further, "…a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699,705 (Ky. App. 2004).

Goss Avenue Antiques argues that Hall's negligent hiring/retention claim should have been dismissed as a matter of law because Sullivan's altercation with Hall was not foreseeable. Goss Avenue Antiques relies primarily on *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705 (Ky. 2009), and *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438 (Ky. App. 1998).

This Court in *Oakley* determined that "… under the standard articulated in *Steelvest, Inc. v. Scansteel Service Center, Inc.,* Ky., 807 S.W.2d 476 (1991), we have examined the record to determine whether there is a genuine issue of material fact as to whether Flor–Shin knew, or reasonably should have known, that (1) Bayes was unfit for the job for which he was employed, and (2) whether his placement or retention in that job created an unreasonable risk of harm to Oakley. We believe such an issue of fact exists in this case. Thus, the issue of Flor–Shin's liability is for a jury to decide." *Oakley* at 442.

In *Ten Broeck Dupont*, the Kentucky Supreme Court stated, "[i]n any case in which [an employer] faces liability for the criminal actions of a third party, the focus [must necessarily be] on whether the criminal activity was foreseeable. *Ex parte South Baldwin Regional Medical Center,* 785 So.2d 368, 370 (Ala. 2000). Thus, absent foreseeability, no duty, the breach of which entails liability, could arise." *Ten Broeck Dupont, Inc.*, at 732.

In *Shelton v. Kentucky Easter Seals Soc., Inc*, 413 S.W.3d 901,914 (Ky. 2013) the Kentucky Supreme Court held that "the foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis. In doing so, the foreseeability of harm becomes a factor for the jury to determine what was required by the defendant in fulfilling the applicable standard of care." We believe that the trial court was correct in denying the motion for summary judgment. Whether Sullivan was an employee of Goss Avenue Antiques was disputed as well as whether the altercation was foreseeable. Thus, we affirm the trial court on this issue.

Addition of "Agent" and "Instrumentality" to Instructions

Goss Avenue Antiques agrees that the trial court correctly applied *Oakley* as its initial basis for the instruction, but argues that it placed unfounded emphasis on the comments to the Restatement of Agency set forth in the *Oakley* opinion. Other than its disagreement with the words "agent" and "instrumentality," and certain parts of the *Oakley* decision, Goss Avenue Antiques has not identified any basis for its argument. We do not believe that the trial court committed any

error in the instructions by adding these words. Therefore, we affirm the trial court on this issue.

Conclusion

Based upon the foregoing, we affirm the decision of the trial court. We deny the motion to strike the Appellees' reply brief.

ENTERED: _____

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JUDGE, COURT OF APPEALS

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