RENDERED: MAY 5, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001624-MR

SANDRA PARTIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 11-CI-001529

WALGREEN CO. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT AND MAZE, JUDGES.

DIXON, JUDGE: Appellant, Sandra Partin, appeals from a judgment of the Jefferson Circuit Court following a trial wherein a jury returned a unanimous verdict in favor of Appellee, Walgreen Company. Finding no error. We affirm.

On March 23, 2010, Partin was a patron at a Walgreens store in Louisville, Kentucky. Constance Pryor, a store employee, was pushing a cart filled with product that she intended to put on the shelves when she observed Partin

standing in the aisle some distance in front of her. As Pryor proceeded down the aisle, Partin squatted down to look at merchandise on a bottom shelf. As a result, Pryor could no longer see her and assumed the aisle was clear. Unfortunately, Pryor bumped into Partin with the cart causing Partin to fall over. It is disputed whether or not Partin hit her head when she was knocked over. An assistant store manager sat down with Partin to apologize and ask if she was ok. Partin indicated that she may have struck her knee, finger and cheek during the fall but did not require medical attention. A store video depicts her leaving shortly thereafter without any indication of injury.

Later that evening, a friend apparently took Partin to Saints Mary & Elizabeth Hospital where she was examined around 11:00 p.m. Partin stated to hospital personnel that she was hit in the head by the cart and that she lost consciousness. The hospital records from that evening reflected that (1) Partin was alert and in no distress; (2) her physical examination was normal; and (3) the ER physicians found no tenderness, swelling or knots on her head. Nevertheless, because of Partin's claim that she hit her head, hospital personnel obtained CT scans of her head and brain. No abnormalities were found and the diagnosis of "closed-head injury" was made based solely upon Partin's history of what occurred. In the following months, Partin sought treatment from several doctors for alleged worsening symptoms including headaches, mood and vision problems. Evidence produced at trial indicated that during the course of seeking treatment following the incident, Partin told health care providers that a tote fell off the cart

hitting her on the head, that she hit her head on the floor, that she was rendered unconscious for at least one minute, and that she felt nauseous immediately thereafter.

On March 1, 2011, Partin filed an action in the Jefferson Circuit Court against Walgreen Company seeking damages for negligent maintenance of store property, failure to make the premises safe and/or provide warnings, and failure to properly train and/or supervise their employees. The matter went to trial in July 2015, wherein both sides presented numerous medical experts who testified regarding the extent of Partin's claimed head injury. At the close of evidence, the jury deliberated less than thirty minutes before returning a unanimous verdict in Walgreen's favor. Partin thereafter appealed to this Court.

On appeal, Partin argues that the trial court erred by violating Kentucky's bare bone approach to jury instructions. Specifically, over Partin's objection, the jury was instructed, in relevant part, as follows:

INSTRUCTION NO. 5

> It was the duty of Walgreen Co., including its agents and employees, in performing its duties, to exercise ordinary care for the safety of customer upon its premises.
>
> If you believe from the evidence that Walgreen Co. failed in its duty to exercise ordinary care, and that such failure was the cause of Sandra Partin's head injury sustained on March 23, 2010, then you shall find for Sandra Partin against Walgreens. Otherwise you shall find for Walgreens.
>
> We, the jury, find Walgreens Co. at fault:

Yes _____ No _____

Partin argues that the proof at trial was that she had sustained multiple injuries when the cart struck her and that the trial court's use of the phrase "head injury" essentially prevented the jury from awarding damages for the full extent of such injuries. We disagree.

Recently, in *Sargent v. Shaffer*, 467 S.W.3d 198 (Ky. 2015), our Supreme Court clarified the standard of review for allegations of instructional error:

> When the question is whether a trial court erred by: (1) giving an instruction that was not supported by the evidence; or (2) not giving an instruction that was required by the evidence; the appropriate standard for appellate review is whether the trial court abused its discretion.
>
> Under the familiar standard prescribed in *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999), a trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. A decision to give or to decline to give a particular jury instruction inherently requires complete familiarity with the factual and evidentiary subtleties of the case that are best understood by the judge overseeing the trial from the bench in the courtroom. Because such decisions are necessarily based upon the evidence presented at the trial, the trial judge's superior view of that evidence warrants a measure of deference from appellate courts that is reflected in the abuse of discretion standard.
>
> However, when it comes to the second type of instructional error . . . whether the text of the instruction accurately presented the applicable legal theory . . . a different calculus applies. Once the trial judge is

> satisfied that it is proper to give a particular instruction, it is reasonable to expect that the instruction will be given properly. *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013). The trial court may enjoy some discretionary leeway in deciding what instructions are authorized by the evidence, but the trial court has no discretion to give an instruction that misrepresents the applicable law. The content of a jury instruction is an issue of law that must remain subject to *de novo* review by the appellate courts.

Id. at 203-204. Accordingly, a trial court's decision on whether to instruct on a specific claim will be reviewed for abuse of discretion; the substantive content of the jury instructions will be reviewed *de novo*. The parties disagree as to the standard that should be applied herein. Partin argues that because she takes issue with the substantive content of the instruction, our review is *de novo*. Conversely, Walgreens contends that Partin's claim of instructional error is that the trial court failed to give an instruction required by the evidence and, thus, our standard of review is whether the trial court abused its discretion in so doing. We conclude that Partin's claim of error falls within the first category of instructional errors explained in *Sargent* since she is not alleging that the trial court misapplied the applicable law, but rather that it failed to give an instruction that was required by the evidence. As such, our review is whether the trial court abused its discretion.

The trial court must instruct the jury upon every theory reasonably supported by the evidence. "Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it." *McAlpin v. Davis Construction, Inc.*, 332 S.W.3d 741, 744 (Ky. App. 2011) (quoting *Farrington*

Motors, Inc. v. Fidelity & Casualty Co. of N.Y., 303 S.W.2d 319, 321 (Ky. 1957)). However, it is well-settled that Kentucky law mandates the use of "bare bones" jury instructions in all civil cases. *See Lumpkins v. City of Louisville*, 157 S.W.3d 601 (Ky. 2005). In *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974), Kentucky's then-highest court first announced the "bare bones" jury instruction method, described by Justice Palmore as follows:

> It may sometimes be appropriate for instructions to define the rights of a litigant, as for example in the instance of a peace officer sued for assault incident to an arrest, but as a general proposition [instructions] should be couched in terms of duties only. Recovery hinges not on the question of who was within his rights, but who breached a duty. If the duty is simple enough to be stated without defining it in terms of the rights of one party or the other, that is all that is necessary, desirable, or proper . . . . Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire.

Since *Cox*, numerous decisions from the Kentucky Supreme Court and this Court have reaffirmed Kentucky's adherence to the use of bare bones instructions. *See Olfice, Inc. v. Wilkey,* 173 S.W.3d 226 (Ky. 2005); Kurt A. Philips, Jr., 7 *Kentucky Practice: Rules of Civil Procedure Annotated*, § 51 (5th ed. 1995) ("[T]he function of instructions 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. . . . They should not contain an abundance of detail, but should provide only the 'bare bones' of the question for jury determination."). However, "bare bones" jury instructions must be given with the understanding that they are merely a

framework for the applicable legal principles. It then becomes the role of counsel to flesh out during closing argument the legal nuances that are not included within the language of the instruction. *Olfice*, 173 S.W.3d at 230.

Partin argues that Instruction No. 5 violates Kentucky's mandate for bare bones instructions because it specifically listed her claim injury as a head injury. We disagree. We find Partin's reliance on *A.L. Dodd v. Ramey*, 302 Ky. 116, 194 S.W.2d 84 (Ky. 1946), and the cases cited therein misplaced. The instruction therein included the elements of expenses, loss of time, and physical and mental suffering, but also "authority to find damages for permanent injury 'if any to [plaintiff's] head or his hearing, or his sense of smell.'" *Id.* at 87. On appeal, the Court held,

> It is clear that the instruction is erroneous in failing to state the criterion of recovery for a permanent injury, namely, the reduction in the plaintiff's power to earn money or the impairment of earning capacity, and in specifying that damages could be awarded for injuries to the plaintiff's head, hearing and sense of smell. . . . We have held it fatal error to make similar specifications or segregation of particular elements or items in connection with the general measures of damages for pain and suffering and the impairment of earning power. *South Covington & C. St. Ry. Co. v. Nelson*, 89 S.W. 200, 28 Ky.Law Rep. 287. As said in *Lexington R. Co. v. Herring*, 96 S.W. 558, 29 Ky.Law Rep. 794, Id., 97 S.W. 1127, 30 Ky.Law Rep. 269, holding that it was error to authorize an allowance of compensation for the loss of a foot:
>
> > 'Different people might have very different ideas as to the amount of money that would compensate a woman for the loss of a foot. Such an instruction would be in effect to

> give the jury no criterion of damages, and is equivalent to an instruction to them to find for the plaintiff such a sum as they deemed right, considering the injury she had received.'

Id. at 87-88.

The error in *A.L. Dodd* and the cases cited therein was not that the instruction listed a specific injury, but rather that the jury was permitted to award double damages for the personal injury and also for "permanent impairment" based on a specific injury. *See Spencer v. Webster*, 305 Ky. 10, 202 S.W.2d 752, 753 (1947) ("The objection to this instruction is that it permits the Jury to award independent compensation for the disfigurement of appellee's countenance. It violates the rule well established in this jurisdiction that in an action for personal injuries, compensation may not be authorized by the instructions for elements other than expense of cure, value of time lost, physical and mental suffering, and permanent reduction in the power to earn money. *Colonial Coal & Coke Company v. Hobson, By, etc.,* 208 Ky. 612, 271 S.W. 680 [1925].")

We find the decision in *V.T.C. Lines v. Taylor*, 281 Ky. 83 134, S.W.2d 991 (1939), more analogous to the instant matter. The instruction given by the trial court therein instructed the jury that if the appellant failed to perform any of the duties enumerated in the prior instructions and that as a result of such failure "the plaintiff was thereby hurt or injured in his chest, lungs or other parts of his limbs or body" they should find for the plaintiff. *Id.* at 993. The appellant argued that the instruction resulted in a magnification of appellee's injuries. Disagreeing,

Kentucky's then-highest Court stated, "We do not think the instruction has this effect or that it is open to the condemnation pointed out in *City of Harlan, Kentucky v. Howard*, 211 Ky. 516, 277 S.W. 847 [1925]. We see in this language no undue prominence or magnification of the appellee's injuries, or of his pain and suffering, certainly not such as to warrant a reversal as being prejudicial error." *Id.* at 993.

Similar to the instruction in *Taylor*, the instruction herein provided that if the jury believed that Walgreens failed in its duty to exercise ordinary care, and that such failure was the cause of Partin's head injury, then it was to find for her. Significantly, other than her comment to the Walgreens' manager immediately following the incident, Partin neither complained of nor sought treatment for any injuries other than her alleged head injury. There was no evidence presented either through medical records or testimony to support any other physical injury. As such, the only issue for the jury to decide was whether Partin in fact sustained a head injury. As previously noted, "[a] decision to give or to decline to give a particular jury instruction inherently requires complete familiarity with the factual and evidentiary subtleties of the case that are best understood by the judge overseeing the trial from the bench in the courtroom." *Sargent*, 467 S.W.3d at 203. Accordingly, we conclude that the trial court neither abused its discretion nor violated Kentucky's requirement of "bare bones" instructions in utilizing the phrase "head injury" in Instruction No. 5, because such conformed to the evidence

presented at trial and properly advised the jury what it must believe from the evidence to resolve the factual dispute.

Partin also contends that Instruction No. 5 was erroneous because the failure to define "head injury" confused and mislead the jury. Specifically, Partin contends that "head injury" is a "medical term of art" and the jury likely did not understand whether such term included traumatic brain injury and psychological and neurological deficits, or whether they were simply limited to determining whether Partin actually hit her head.

First and foremost, we agree with Walgreens that Partin failed to preserve this issue for review. It is well-settled in Kentucky that the trial court's failure to define a term used in civil instructions, without a request to do so, is not error. *Codell Construction Co. v. Steele*, 247 Ky. 173, 56 S.W.2d 955, 957 (1933). It was Partin's duty to request that the trial court define the term "head injury" if she believed such was necessary.

Notwithstanding the procedural deficiency, we are of the opinion that the term "head injury," as used in this matter, is commonly understood and did not require further definition. Certainly, counsel could have fleshed out the meaning during closing statements. *Cox,* 510 S.W.2d 535. However, there was no question that all of Partin's complaints which she related to the incident at Walgreens, *i.e.,* the knot on her head, traumatic brain injury, vision issues, and psychological and neurological deficits all related to her alleged "head injury." Furthermore, Partin was allowed to present testimony that her symptoms could have occurred without

an actual blow to the head. Accordingly, we find no error in the trial court's failure to define "head injury."

For the reasons set forth herein, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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