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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000595-MR

LILLY SULLIVAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 14-CI-005762

LIBERTY MUTUAL FIRE INSURANCE COMPANY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SPALDING AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Lilly Sullivan appeals from a judgment of the Jefferson Circuit Court reflecting a jury verdict in favor Liberty Mutual Fire Insurance Company, Sullivan's auto insurance company. The central issue is whether the trial court erred by *sua sponte* including an interrogatory in the jury

instructions asking if Liberty met its contractual obligations to Sullivan. After careful review, we conclude the interrogatory was improper and vacate and remand.

The basic facts are simple and largely uncontested. Sullivan's pickup truck was damaged in a one-vehicle wreck in June 2014. Liberty declared the pickup to be a total loss because the estimate to repair it exceeded 75% of its $7,950 value under the National Automobile Dealer's Association Price Guide (the Blue Book).[1] However, Liberty valued the pickup at a little more than $6,000 based on three reports it obtained from AudaExplore (sometimes referred to as AudaTex or AudaSource), an entity which values vehicles for insurers.

Dissatisfied with Liberty's valuation(s), Sullivan filed this action in November 2014. Her complaint alleged Liberty had not offered her fair market value for the pickup and had not reimbursed her for loss of its use. She also raised bad faith claims, which the trial court bifurcated. In January 2015, Liberty sent Sullivan a check for $6,355, which Sullivan cashed. But the lawsuit continued.

The failure to pay fair market value and loss of use claims proceeded to a jury trial. The court admitted the policy into evidence and permitted Liberty's

[1] Under Kentucky Revised Statutes (KRS) 186A.520(1)(a), a vehicle is defined in relevant part as a "salvage vehicle" if it has been "wrecked, destroyed, or damaged" and "the total estimated or actual cost of parts and labor to rebuild or reconstruct the vehicle to its preaccident condition . . . exceeds seventy-five percent (75%) of the retail value of the vehicle, as set forth in a current edition of the National Automobile Dealer's Association price guide."

representative to read excerpts therefrom but did not allow subjective interpretations of its provisions, or any other evidence of bad faith. Even though the only issues were two factual disputes (valuation of the pickup and the amount of compensation owed Sullivan for the loss of use thereof), the trial court *sua sponte* gave a preemptive interrogatory to the jury, over Sullivan's objection, which asked if Liberty had "complied with its obligations to Plaintiff Lilly Sullivan pursuant to its contract of insurance with her." The jury answered yes and ceased its deliberations without squarely addressing either factual dispute which necessitated the trial. The trial court entered a judgment in accordance with the jury's verdict and dismissed Sullivan's bad faith claims. After the trial court denied Sullivan's motion for a new trial, she filed this appeal.

Sullivan's main argument is that the interrogatory is confusing, overly broad and addresses issues not presented by the pleadings and proof. Sullivan also argues the trial court erred by admitting the AudaExplore valuation reports. Finally, she argues the court erred by ordering her to pay for some of Liberty's non-compensable expenses, such as expert witness fees.

As to the interrogatory, "[w]hen 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."

Sargent v. Shaffer, 467 S.W.3d 198, 203 (Ky. 2015). However, "the trial court has no discretion to give an instruction that misrepresents the applicable law" so "[t]he content of a jury instruction is an issue of law that must remain subject to *de novo* review by the appellate courts." *Id.* at 204. Because "[c]orrect instructions are absolutely essential to an accurate jury verdict[,]" erroneous instructions "are presumed prejudicial" and require reversal unless "it cannot be affirmatively shown that no prejudice resulted from the erroneous instruction . . . ." *Insight Kentucky Partners II, L.P. v. Preferred Automotive Services, Inc.*, 514 S.W.3d 537, 549 (Ky.App. 2016).

The parties have not cited, nor have we independently located, a case involving a similar interrogatory. Trial courts generally may include interrogatories in instructions asking the jury to make a "finding upon each issue of fact." Kentucky Rules of Civil Procedure (CR) 49.01. However, "[a] primary rule of law is that the instructions must be based upon or cover the issues raised by the pleadings and proof." *Stephens v. Broyles*, 311 Ky. 717, 225 S.W.2d 319, 321 (1949). That ancient rule is sound because a jury's "only function is to decide disputed issues of fact . . . ." Palmore and Cetrulo, *Kentucky Instructions to Juries*, Civil § 13.01 (6th Ed. 2017). Or, as our Supreme Court similarly expressed it, "[i]n Anglo-American jurisprudence the function of the jury is to decide contested

issues of fact." *Robinson v. Murlin Phillips & MFA Ins. Co.*, 557 S.W.2d 202, 204 (Ky. 1977).

The only disputed facts were the proper valuation of Sullivan's truck and whether she was entitled to funds for its loss of use. Indeed, the trial court even remarked to counsel outside the jury's presence that the case was "simple" since it was only concerned with vehicle valuation and loss of use. Fair market value determinations have been made by juries for decades, with the general rule being that "[w]here personal property is destroyed the measure of damages is its fair market value at the time and place of injury, and where it is damaged but not destroyed the measure of damages is the difference between its fair market value immediately before and after the injury." *Louisville & N.R. Co. v. Lankford*, 304 Ky. 192, 200 S.W.2d 297, 299 (1947). Nonetheless, the court gave an interrogatory which resulted in a jury verdict that addressed neither "simple" issue.

Instead of resolving the two factual disputes, the interrogatory functionally asked the jury to interpret Sullivan's facially unambiguous insurance policy, which is a legal question reserved for determination by the court. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky.App. 2002). The policy, admitted as Defendant's Exhibit 2, is almost fifty pages long and is replete with the technical jargon endemic to such documents. Though not raised directly as an issue by Sullivan, admitting the entirety of the policy likely was a major

contributing factor to the erroneous interrogatory. Admitting the whole policy was improper for two reasons. First, the vast majority of the policy's provisions are wholly irrelevant to the two narrow factual issues underlying the trial. Second, the tens of pages of specialized jargon in the policy were far more likely to confuse than illuminate the jury given the incontrovertible fact that comprehending several dozen pages of insurance "legalese" is extremely difficult for conscientious lay jurors. Yet, the trial court inexplicably asked the jury to determine whether Liberty met *all* of its duties under the lengthy policy without narrowing the issues by explaining, for example, what relevant "obligations" (i.e., duties) Liberty owed Sullivan.

A jury should not be asked or expected to understand and interpret the entirety of lengthy, specialized documents--especially when it does not need to do so to resolve the parties' "simple" factual disputes. Indeed, we have held a trial court erred by giving jury instructions which "did not inform the jury as to the duties of the parties" and instead "only asked the jurors to determine whether the contract was breached by either side." *Young v. Thomas*, 2003 WL 22064104 at 9 (Ky.App. 2003) (unpublished) (cited only for illustrative purposes).

In short, the challenged instruction failed to accomplish the core instructional purpose of "fairly submitting the proper issue[s] to the jury." *Cobb v. Hoskins*, 554 S.W.2d 886, 887 (Ky.App. 1977). And because the interrogatory

deprived Sullivan of a determination of the only contested factual issues, the error was not harmless. We therefore vacate the judgment and remand the matter for a new trial. Concomitantly, Sullivan's bad faith claims are reinstated, though they remain bifurcated. Assuming the proof is similar on remand, the court should give jury instructions which require findings on only the pickup's fair market value and the amount, if any, owed Sullivan for her loss of use thereof.

We will next address Sullivan's contention that the AudaExplore reports are inadmissible since that issue is highly likely to recur on remand. Of course, our discussion is based upon the extant proof, so additional analysis would be required if the parties present materially new or different proof on remand.

Sullivan argues the reports are inadmissible because they are inadmissible hearsay; Liberty admits the reports contain hearsay but are nonetheless admissible under Kentucky Rules of Evidence (KRE) 803(6) as records of regularly conducted business activities. This Court "may disturb a trial court's decision to admit evidence only if that decision is an abuse of discretion." *Harp v. Commonwealth*, 266 S.W.3d 813, 821 (Ky. 2008).

As a prefatory matter, Sullivan cursorily argues the three AudaExplore evaluations were also inadmissible because they do not comply with Kentucky law. Sullivan cites to nothing directly supporting her self-serving argument. Briefly, 806 Kentucky Administrative Regulations (KAR) 12:095 §7

governs how insurers must value total loss vehicles. Notably, unlike 186A.520 and contrary to Sullivan's persistent argument, that regulation does not require use of the Blue Book. Instead, 806 KAR 12:095 §7(b) states that an insurance company may determine the fair cash value of a total loss vehicle based upon things like quotations from local auto dealers and a statistically valid fair market value analysis. Liberty presented an AudaExplore report containing two quotes from local dealers (referred to at trial as the third report) and a statistical fair market value analysis report from AudaExplore (referred to at trial as the first report). Sullivan has not shown how either report fails to comply with the core requirements of 806 KAR 12:095 §7.

KRE 803(6) provides in relevant part that the hearsay rules do not exclude:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

We have interpreted KRE 803(6) as meaning that "records kept in the ordinary course of business may be admitted, despite the fact that they are hearsay, as long

as a custodian or other qualified witness testifies that the records were made in the ordinary course of business." *Lukjan v. Commonwealth*, 358 S.W.3d 33, 46 (Ky. App. 2012). Or, as our Supreme Court succinctly held, "KRE 803(6) requires foundation testimony from a custodian or other qualified witness." *Prater v. Cabinet for Human Resources, Commonwealth of Ky.*, 954 S.W.2d 954, 958 (Ky. 1997) (quotation marks omitted). Notably, though it exempts one level of hearsay from being inadmissible, KRE 803(6) does not make hearsay within hearsay, a/k/a double hearsay, admissible "unless each part of the combined statements conforms with a recognized exception to the hearsay rule." *Id.* at 958-59.

Here, the main dispute is whether Liberty presented sufficient foundational testimony of "a person with knowledge."[2] Such testimony is crucial because "[a] record is not admissible under KRE 803(6) unless its maker or someone reporting to the maker under a business duty to do so, had personal knowledge of the event recorded." *Prater*, 954 S.W.2d at 958 (citation omitted). Quoting favorably from Professor Robert Lawson's treatise on the evidentiary rules, however, our Supreme Court has explained that:

> the foundation witness need not be the custodian of the records nor the person who made them. Anyone who can testify from personal knowledge about the circumstances surrounding the making and keeping of the records can qualify as a foundation witness. As stated by one authority, in the end the requirement may be satisfied by

[2] Liberty does not argue that the reports at issue are self-authenticating.

> the testimony of anyone who is familiar with the manner in which the record was prepared, and even if he did not himself either prepare the record or even observe its preparation.

Hunt v. Commonwealth, 304 S.W.3d 15, 39-40 (Ky. 2009) (quoting *The Kentucky Evidence Law Handbook* §8.65 at 463 (3d ed. 1993)) (quotation marks omitted).

A more recent edition of Professor Lawson's treatise further explains that "[a] foundation witness is not required to know of the event recorded in an offered record or the specific identity of the maker of that record." *The Kentucky Evidence Law Handbook* §8.65[3][b] at 685 (5th ed. 2013). Indeed, the personal knowledge requirement of KRE 803(6) has been expansively interpreted by courts to mean that a party may establish a proper foundation by offering "proof that there existed a regular business practice of obtaining the kind of information contained in the record from persons within the business (though unidentified) who would have knowledge of the matters contained in the records." *Id.* at §8.65[4] at 686.

At trial, Liberty's representative, Curtis Robinson, testified that he had reviewed Liberty's claim file, which included three valuations of Sullivan's vehicle from AudaExplore. According to Robinson, it is Liberty's regular practice to keep vehicle valuations in its claim file. Robinson stated he had seen thousands of other similar valuations in instances when vehicles were total losses. Robinson explained the first valuation was performed by looking for similar vehicles in the same zip code as Sullivan's, with the search then expanding geographically

outward. That valuation lists ten similar vehicles listed for sale by both dealers and individuals within 150 miles of Sullivan's zip code. After Sullivan declined Liberty's offer based on that valuation, Liberty obtained two additional valuations from AudaExplore. The second valuation contained only a comparison of Sullivan's vehicle from a similar one in Massachusetts. Liberty did not amend its offer to Sullivan based on that valuation. The third, undated valuation consists of quotes from two dealers in the Louisville area purporting to show what price each would ask for Sullivan's vehicle. Robinson admitted he did not know who called the two dealers or what those conversations entailed.

Later, Liberty called Timothy Rice, a longtime employee of AudaExplore, as a witness. Rice stated that he had written or approved thousands of valuations during his tenure at AudaExplore, but he had not performed the three valuations of Sullivan's vehicle and neither he nor anyone at AudaExplore had seen Sullivan's pickup in person. When Rice was asked who performed the first valuation, he said it "likely was not prepared by a person." As Robinson had already testified, Rice stated the first valuation is a statistical analysis performed by beginning at the zip code where the subject vehicle is located and searching for vehicles of that make and model listed for sale, increasing the search in twenty-five-mile increments until enough are found to make a valid statistical model. The

ten comparable vehicles in that first valuation are drawn from what Rice opined was the largest database of its kind containing vehicles advertised for sale.

The second valuation was a direct comparison of Sullivan's vehicle to one in Massachusetts. As to the third valuation, Rice testified that he did not know who at AudaExplore talked to anyone at either Louisville car dealer listed therein, nor did he know what those conversations entailed since AudaExplore had no written documentation of them other than the report itself. Rice also did not know if other dealers were contacted but not discussed in the report.

The trial court did not abuse its discretion in admitting the first report, the statistical model comparing Sullivan's pickup to ten similar vehicles. Robinson and Rice testified as to why the report was generated, when it was generated, how AudaExplore prepares those types of reports and that the report was contained in Liberty's files (as all similar valuations are). The same conclusion applies to the second report, which only compares Sullivan's vehicle to one in Massachusetts.[3]

The third report is different. It purports to contain oral valuation statements made by Louisville car dealers to an unknown person at AudaExplore.[4]

[3] Sullivan does not argue that second report is excludable on relevancy grounds, even though Liberty took no discernible action in reliance upon it.

[4] The first two reports, as the Court understands them, contain sales price information directly gleaned by AudaExplore from internet sites and/or periodicals whereas the third report contains

Thus, it contains double hearsay. And it was offered for the truth of the matter asserted (i.e., the proper value of Sullivan's vehicle). Also, Liberty has not shown that the dealers were acting under a business duty when they discussed Sullivan's vehicle with an AudaExplore representative. As Professor Lawson's treatise states, "[w]here both parts of a business record (the *maker said* that the *reporter said* that event X occurred) are attributable to persons acting under a business duty, the hearsay exception of KRE 803(6) extends coverage to both layers of hearsay . . . ." *Kentucky Evidence Law Handbook* at §8.65[7][a] at 691-92. Liberty cites to no similar case in which a report containing such double hearsay was admitted. On remand, the third report is inadmissible unless Liberty submits sufficient proof to satisfy an exception for all layers of hearsay.

Finally, the supplemental judgment in favor of Liberty regarding costs is automatically vacated due to our having vacated the underlying judgment. Thus, we need not discuss in depth Sullivan's argument that the supplemental judgment ordered her to pay costs to Liberty which are not compensable under CR 54.04 and instead merely remind the parties and trial court that expert witness fees are

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information obtained by AudaExplore from oral statements made by third parties. Thus, for hearsay purposes, the third report is qualitatively distinct.

generally not recoverable, absent statutory authorization. *Brookshire v. Lavigne*, 713 S.W.2d 481 (Ky.App. 1986).[5]

For the foregoing reasons, the judgment of the Jefferson Circuit Court dismissing Lilly Sullivan's claims pursuant to the jury's verdict is vacated, as is the supplemental judgment awarding costs to Liberty Mutual Fire Insurance Company. This case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Kevin C. Burke Jamie K. Neal Louisville, Kentucky	Douglas W. Langdon Christopher G. Johnson Liam E. Felsen Louisville, Kentucky
ORAL ARGUMENT FOR APPELLANT:	ORAL ARGUMENT FOR APPELLEE:
Jamie K. Neal Louisville, Kentucky	Liam E. Felsen Louisville, Kentucky

[5] We have held, however, that witnesses for a prevailing party may be entitled to a "subsistence allowance" under KRS 453.050. *Bryan v. CorrectCare-Integrated Health, Inc.*, 420 S.W.3d 520, 526 (Ky.App. 2013). We need not determine the parameters of a proper subsistence allowance here because the more than $3,000 in fees awarded to Liberty for Rice's testimony unquestionably exceed that meager level.