

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002539-MR

DONNA TAYLOR (RANSOM)

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, JUDGE  
ACTION NO. 98-CI-00278

TYCO INTERNATIONAL (US) INC.

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, EMBERTON, and TACKETT, Judges.

COMBS, JUDGE: Donna Taylor appeals from a judgment of the Simpson Circuit Court entered on August 25, 2000, in accordance with a jury verdict and directed verdict. We affirm after having concluded: (1) that the trial court did not err by refusing to grant Taylor a new trial; (2) that the trial court did not err by denying relief from the judgment based upon a post-trial allegation of perjury; and (3) that the trial court did not err by granting a directed verdict in favor of Taylor's former employer.

On September 3, 1998, Taylor filed this action against Tyco, International (US) Inc. ("Tyco"), her former employer.

Taylor alleged that Tyco had unfairly discriminated against her on the basis of gender. She alleged that she had been sexually assaulted by her direct supervisor, Jeff High, on August 3, 1997. As a result of her failure subsequently "to express any interest in engaging in sexual relations with [High]," she claimed that she was given a more difficult job and that she was eventually terminated from her position. Complaint at 3. In an amended complaint filed in May 1999, Taylor alleged that Tyco's agents had stalked and intimidated her in a pattern of behavior amounting to outrageous conduct. Tyco denied these allegations.

In mid-August 2000, the matter was tried to a jury. Following Taylor's case-in-chief, the trial court granted Tyco's motion for a directed verdict with respect to Taylor's claim of outrage. The civil rights claim was submitted to the jury. A verdict was returned in Tyco's favor, and a judgment was entered accordingly.

Taylor filed post-trial motions - including a motion for new trial and a motion to alter, amend, or vacate the judgment. Taylor contended that Tyco's counsel made several improper statements during closing arguments and had improperly impeached her witness; that the court had abused its discretion by admitting the testimony of Diane Herrington, a former co-worker; that she had been denied a fair trial since a potential witness had refused to testify on her behalf; and that certain records provided to her by the BellSouth custodian of records were incomplete. The trial court rejected these arguments and denied the motion.

However, the court did grant Taylor's motion requesting authority to conduct a post-judgment deposition. On October 6, 2000, the director of BellSouth's Subpoena Compliance Center was deposed. Based upon information gathered during this proceeding, Taylor filed a motion requesting relief from the judgment based upon the alleged perjury of Jeff High. The motion was denied.

On appeal, Taylor contends that the trial court erred: by failing to grant her motion for a new trial; by failing to grant her relief from the judgment based upon High's perjured testimony; and by granting Tyco's motion for a directed verdict with respect to the claim of outrage. We disagree.

Taylor first addresses the failure of the trial court to grant her motion for a new trial. She contends that the trial court abused its discretion by admitting the testimony of her co-worker, Diane Herrington. At trial, Herrington testified that she had observed Taylor flirting with High at work both before and after Taylor's allegation that High had raped her. Taylor argues that this evidence violated a pre-trial ruling which prohibited evidence of Taylor's sexual behavior. Alternatively, Taylor argues that the trial court should have applied an analysis required by Rule 412 of the Federal Rules of Evidence or that it misapplied the balancing test required by KRE 403.

At trial, Herrington testified that she worked with Taylor in 1997 and was able to observe Taylor's interaction with High. Tyco's counsel asked Herrington to describe what she observed in 1997. Taylor's counsel objected when Herrington began by stating, "well, she was very flirtatious. . . ."

Herrington testified that Taylor was "pushy" and that she made frequent visits to Jeff High's office. She did not observe a change in Taylor's attitude toward High at any time during 1997. This evidence was relevant and was not outweighed by undue prejudice.

Moreover, the evidence did not offend the pre-trial ruling excluding "any claim by any witness delving into [Taylor's] prior sexual behavior or predisposition." The trial court correctly reasoned that the mere characterization of Taylor's conduct as *flirtatious* was – in and of itself – simply not sufficient to rise to the level of evidence of sexual behavior. The trial court did not err by denying Taylor's motion for a new trial on this ground. Additionally, as Tyco points out in its brief, Taylor's objection at trial as to this question was based solely on relevancy. She cannot now offer a different basis for attacking this testimony. Miller v. Watts, Ky., 436 S.W.2d 515 (1969).

Next, Taylor argues that the trial court erred by failing to grant her a new trial based on defense counsel's improper impeachment of her witness, Anna Mitchell. We disagree.

Anna Mitchell testified on direct-examination that she had heard High make vulgar comments to Taylor. On cross-examination, Tyco's counsel asked Mitchell whether she had been arrested for possession of cocaine. Taylor's counsel objected and asked that the jury be properly admonished. The trial court sustained the objection and cautioned the jury not to consider the question. Since Taylor's counsel did not request a mistrial,

the question of the prejudicial effect of the improper question has not been preserved for appellate review. Lewis v. Charolais Corp., Ky. App., 19 S.W.3d 671 (1999). Thus, we are precluded from considering this allegation of error.

Taylor also contends that the trial court erred by failing to grant her motion for a new trial based on improper comments made by Tyco's counsel during closing arguments. Once again, no objection was raised, and, therefore, that issue has not been properly preserved for review.

Next, Taylor argues that she was denied a fair trial when a potential witness, Judge Wakefield, refused to testify on her behalf. We cannot find where or how this issue was preserved for review on appeal. While Taylor described telephone conversations between Judge Wakefield and her counsel, there is no evidence to suggest that Wakefield was ever properly subpoenaed to testify in this matter nor did Taylor support her post-trial motion with any offer of proof. The trial court did not err by failing to grant Taylor's motion for a new trial on this ground.

Taylor also complains that certain telephone records provided by the BellSouth Subpoena Compliance Center were incomplete. She intimates that collusion between Tyco's counsel and BellSouth agents prevented her counsel from being properly prepared for trial – thus denying her the opportunity for a fair trial. This complaint was waived, however, when counsel failed to request a continuance, announcing instead that she was ready to proceed.

We may not interfere with a decision of the trial court as to a motion for a new trial absent a showing of an abuse of discretion. Williams v. Shepherd, Ky., 452 S.W.2d 406 (1970). After reviewing the facts and the law with respect to each of Taylor's arguments, we have found no error in the trial court's refusal to grant Taylor's motion for a new trial.

Next, Taylor contends that the trial court erred by failing to grant relief from the judgment based upon her allegation that the judgment was procured through perjury or falsified evidence. We disagree.

Records produced during Taylor's post-judgment deposition of the BellSouth records custodian indicated that two telephone calls had been placed from the residence of Jeff High's parents in Portland, Tennessee, to High's residence on the morning of August 3, 1997.<sup>1</sup> Taylor claimed that this evidence conclusively demonstrated that High was at his home on this date – and in the midst of kidnapping and raping her – rather than at his parents' Tennessee home as he had indicated at trial.

To obtain relief due to perjury or falsified evidence, an unsuccessful litigant bears the burden of demonstrating a series of contingencies and

must offer to show and must clearly and convincingly show (a) that such evidence was false; (b) that the result was produced thereby; (c) that the successful party participated therein; (d) that its

---

<sup>1</sup>BellSouth's representative indicated during her deposition that the length of a telephone call is always rounded up to the next minute. The representative indicated that telephone calls as brief as the two at issue here may have been placed to an automatic telephone answering machine.

nonexposure then was not due to negligence of the unsuccessful party; (e) that ordinary diligence would not have anticipated it; (f) that diligence was exercised to expose it then; (g) that he can expose it now; and (h) that the means by which it is proposed to expose it now were not available to him then. (Emphasis added.)

Benberry v. Cole, Ky., 246 S.W.2d 1020 (1952). Following a hearing, the trial court concluded that the newly procured evidence failed to demonstrate "clearly and convincingly" that High's trial testimony was false. Moreover, even if this evidence had been presented to the jury and High's testimony had been successfully impeached, the trial court was not convinced that a different finding with respect to the employer's liability would have been likely.

We agree with the trial court's assessment of Taylor's new evidence. It does not clearly and convincingly show that High's trial testimony was perjurious. While Tyco argues that the evidence also fails to meet other criteria established by Benberry, our analysis need go no farther. The trial court did not abuse its discretion by denying Taylor the relief she sought.

Finally, Taylor argues that the trial court erred by directing a verdict in favor of Tyco on her claim of outrage. Taylor reasons that since the trial court initially denied Tyco's motion for summary judgment, it could not have later granted the motion for directed verdict. This reasoning is fatally flawed since the standards for granting each of these motions are distinctive. Payne v. Chenault, Ky., 343 S.W.2d 129 (1960). A motion for summary judgment essentially tests the allegations against the law itself where there is no dispute as to a material

fact. CR<sup>2</sup> 56.03. On the other hand, a motion for a directed verdict tests the sufficiency of the evidence presented. CR 50.01. The trial court had alerted Taylor during the pretrial conference that if her proof at trial were no stronger than what she was forecasting, the court might indeed be persuaded that a directed verdict would be appropriate.

At trial, Taylor presented evidence that Tyco employed individuals to track her activities. She alleged that her husband had followed a vehicle that had "stalked" her to Tyco's plant. She claimed that the stalking had caused her severe emotional distress.

Under the tort of outrage, liability may be imposed on "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. . . ." Craft v. Rice, Ky., 671 S.W.2d 247 (1984). Conduct may be reprehensible in fact without rising to the level of outrageousness as a matter of law. Whittington v. Whittington, Ky. App., 766 S.W.2d 73 (1989). To be actionable, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. . . ." Wilhoite v. Cobb, Ky. App., 761 S.W.2d 625 (1988). It is a formidable legal standard.

The trial court did not err by concluding that the allegedly offensive conduct in this case did not amount to outrageous conduct. Nor did it err by concluding that the conduct could not reasonably be linked to Tyco. At best,

---

<sup>2</sup>Kentucky Rules of Civil Procedure.



Taylor's evidence showed little more than a "plain view" surveillance of her. The evidence did not indicate that any individual ever trespassed upon her property or made physical contact, approached, or engaged in conversation with her. She presented no evidence to suggest that any surveillance of her was characterized by malice or tortious intent. As presented, the facts were insufficient for Taylor to recover on this basis. We find no error in the decision of the trial court to enter a directed verdict in favor of Tyco.

The judgment of the Simpson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Nancy Oliver Roberts  
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Mary E. Sharp  
Atlanta, Georgia

George A. Harper  
Greenville, South Carolina

D. Gaines Penn  
Bowling Green, Kentucky