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Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-002209-MR

JOHN T. BYRD; JOHN T. BYRD & ASSOCIATES, INC. — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 00-CI-007964

PACKAGING UNLIMITED, INC.; PETER HANEKAMP; ROBERT HANEKAMP — APPELLEES

OPINION

REVERSING AND REMANDING

** ** ** ** ** ** ** **

BEFORE: DYCHE, COMBS, AND JOHNSON, JUDGES.

DYCHE, JUDGE: John T. Byrd, III, and John T. Byrd & Associates, Inc., appeal from a jury verdict in favor of appellees Packaging Unlimited, Inc., Robert Hanekamp, and Peter Hanekamp determining that appellees did not wrongfully discharge Byrd from his managerial position with Packing Unlimited as a result of Byrd's refusal to permit false entries to be made into the business records of Packaging Unlimited. Appellants contend that the

trial court erred by denying their motion pursuant to Kentucky Rules of Civil Procedure (CR) 15.02 to amend their complaint to conform to the evidence; by requiring appellants to prove an intent to defraud in association with their claim that Byrd was discharged for refusing to permit the alteration of business records; and by submitting an erroneous instruction to the jury. Appellants also appeal the trial court's award of summary judgment to appellees on their claim of breach of contract and/or promissory estoppel. Because the trial court, over appellants' objection, submitted an erroneous jury instruction which required appellants to prove that business records had been falsified subsequent to Byrd's discharge, an element which is not required to be proven in a wrongful discharge case, we reverse and remand for a new trial.

In 1979 Byrd was hired as a full-time professor at the Rubel School of Business at Bellarmine University. Beginning in 1985, Byrd also worked as a business consultant through his company John T. Byrd & Associates, Inc., of which Byrd is the sole shareholder and employee. During the late 1980s and the 1990s Byrd did consulting work for Packaging Unlimited and one of its associated companies, Promotional Packaging, Inc.

Appellee Packaging Unlimited is a closely-held corporation which, among other things, produces retail display boxes for manufacturing clients. During the period involved in

this case, one of Packaging Unlimited's most important customers was Colgate-Palmolive. During the relevant time period Packaging Unlimited produced and packaged retail display boxes for Colgate for its consumer product Total Toothpaste.

Appellee Robert Hanekamp is the Chief Executive Officer of Packaging Unlimited. He is also the majority stockholder of Hanekamp Family Limited Partnership which, in turn, is the majority stockholder in Packaging Unlimited. Robert Hanekamp likewise holds a controlling interest, either individually or through his Family Limited Partnership, in multiple companies associated with Packaging Unlimited. Appellee Peter Hanekamp is the son of Robert Hanekamp and is the Assistant Chief Executive Officer of Packaging Unlimited.

In 1998 the president of Promotional Packaging sold his minority interest in the company and retired. Robert Hanekamp subsequently decided to merge Promotional Packaging with Packaging Unlimited. In September 1998 Robert Hanekamp began discussions with Byrd concerning his accepting a full-time position with Promotional Packaging to replace the departing president.

Beginning in December 1998 Byrd was hired to a full-time position with Promotional Packaging. Though Byrd functioned as the general manager of Promotional Packaging, for various reasons, including tax reasons, Byrd was not placed on

the payroll as a regular employee; rather, he was paid salary and benefits via Byrd & Associates. In or about March 1999, the merger of Promotional Packaging and Packaging Unlimited was completed. Byrd thereafter functioned as an employee of Packaging Unlimited in charge of the Promotional Packaging Division.

In order to preserve his retirement benefits with Bellarmine, Byrd took a sabbatical leave from his position with the University. Byrd commenced his sabbatical leave in August 1999. According to appellees, Byrd was supposed to have been working exclusively and full-time for them following his hiring in December 1998, and Byrd deceived them by continuing to work full-time for Bellarmine between December 1998 and August 1999.

According to Byrd, the parties had an agreement that he was to be paid $8,800.00 per month until he reached the age of fifty-eight on April 25, 2001, approximately two years and four months after his initial employment. Byrd contends that he was also to be paid annual bonuses consistent with those paid to the departing president, plus a reimbursement of expenses. Byrd summarized these terms in a memorandum to Packaging Unlimited President Bob Faller dated November 12, 1999. Byrd alleges that the memorandum is misdated and that the actual date of the memorandum was November 12, 1998.

According to Byrd, during the initial months of his employment he began to investigate shipping irregularities taking place at Packaging Unlimited. Byrd claims that in December 1999 he was twice instructed by Peter and/or Robert Hanekamp to allow the inputting of data which would falsely report Colgate display products as being ready to be shipped. During the trial evidence was presented by appellants that several bills of lading contained forged signatures and that actual shipment dates did not match the shipment dates entered on the bills of lading. The Hanekamps deny Byrd's allegation that he was instructed to permit the falsification of business records or that they or any of their companies engaged in fraudulent or improper business practices.

On December 27, 1999, Byrd was terminated from his position with Packaging Unlimited. Byrd contends that he was discharged because he refused to permit the falsification of business records as instructed by Robert and/or Peter Hanekamp. The Hanekamps contend that Byrd was fired for managerial incompetence and excessive absenteeism.

On December 14, 2000, Byrd and Byrd & Associates filed a complaint in Jefferson Circuit Court relating to the discharge. As subsequently amended appellants' complaint asserted claims for fraud; breach of contract and/or promissory estoppel; the tort of outrage; and wrongful discharge.

On May 15, 2002, the trial court entered an order granting appellees summary judgment on appellants' claims of fraud; breach of contract and/or promissory estoppel; and the tort of outrage.

Commencing on September 17, 2002, a jury trial was held on appellants' remaining claim for wrongful discharge. On September 23, 2002, the jury returned a verdict in favor of appellees. This appeal followed.

First, appellants contend that the trial court erroneously granted summary judgment on their claim for breach of contract and/or promissory estoppel. While it is undisputed that a formal written contract between Byrd and Packaging Unlimited was never executed, Byrd argues that a November 12, 1998, memorandum from Byrd to Packaging Unlimited president Bob Faller, in combination with a January 4, 1999, letter from Bob Faller to Bellarmine University in support of Byrd's request for a sabbatical leave, constituted an integrated agreement.

In its May 15, 2002, order granting summary judgment, the trial court concluded that because the memorandum was not signed by either party, because the writings did not refer to each other, and because the letter from Faller refers to the academic school year 1999 – 2000 whereas Byrd's employment with Promotional Packaging began in December 1998, that the writings do not constitute an integrated agreement.

Summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). However, a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial. Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992). The circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, supra at 480 (citations omitted). On appeal, the standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996) (citation omitted). Since factual findings are not at issue, deference to the trial court is not required. Id.

Byrd contends that he had an agreement with Packaging Unlimited for a period of employment extending from December 1998 until at least his fifty-eighth birthday, April 25, 2001. Based upon this contention, Byrd alleges that the agreed upon period of employment was for at least two years and four months,

bringing the purported agreement within the statute of frauds. KRS 371.010, the Kentucky Statute of Frauds, provides that

> No action shall be brought to charge any person . . . [u]pon any agreement that is not to be performed within one year from the making thereof . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence.

KRS 371.010(7).

As stated above, Byrd argues that the writing requirement is satisfied by two written documents, a memorandum dated November 12, 199[8],[1] from Byrd to Bob Faller, and a letter dated January 4, 1999, from Bob Faller to Vice President and Dean of Bellarmine College John A. Oppelt in support of Byrd's request for a sabbatical leave. The November 12, 199[8], memorandum states as follows:

> All things seem to working [sic] out for me to assume the responsibility at Promotional. John is leaving on December 18, and the Dean has recommended me for a sabbatical. The following is important to me in order to finalize our plans:

[1] The memorandum is dated November 12, 1999. However, Byrd contends that the actual date of the memorandum was November 12, 1998, and that the mistake was a result of a typographical error. Since we are considering a summary judgment granted against Byrd, the nonmovant, we accept his contention that the actual date of the memorandum was November 12, 1998.

> I need to continue to be paid the way I am currently; that is, via John T. Byrd & Associates, Inc. This allows me to continue the level of retirement contribution, and allows me to stay on the Bellarmine hospitalization program as well as the retirement component at the level of income I will continue to receive. This will decline by $44,000 if I go to Promotional, so I need to make $8,800 monthly plus whatever the fringe percentage would be, in order to stay even. (Bob Haner could figure this amount). However, I would like to switch to the Packaging program at age 58. I need to stay on the Bellarmine system until age 58. Given my years of service, if I quit at 58, they will pay me a meaningful amount toward retirement until age 65, regardless of whether I'm working elsewhere. This also applies to their hospitalization equivalent. It would be stupid for me to give this up since I'm so close.
>
> Bob, if you need to reduce the year end bonus due to the monthly requirements, I understand. I trust you will be fair. I assume my bonus will be the same as John. Also, he stated he has a car plus expense reimbursement. I recently renewed my lease on my car and don't need an extra car – will I get some type of monthly reimbursement for this?
>
> Thanks in advance for your consideration. After you have talked with Bob [Hanekamp] regarding these issues, please advise me accordingly.

The memorandum was unsigned. The second writing relied upon by Byrd, the January 4, 1999, letter from Bob Faller to John A. Oppelt, states as follows:

> I am writing in support of Dr. John T. Byrd's application for sabbatical for the academic year 1999-2000. He will be working

with Packaging Un-limited [sic], and it is my understanding that he will be developing a case study during his sabbatical. He has access to our data, and will be involved in a very relevant area of management. We believe we are leading edge in the area of supply chain management, and two of our largest customers are Colgate Palmolive and 3M. There is much to be learned in this area of management, and we welcome a case study of what we have accomplished. We are supportive of this effort, and look forward to working with him as he pursues this work.

Once again, I recommend he be given this opportunity and will support his effort throughout.

Sincerely,

Bob Faller
/s/
Bob Faller
President

"To satisfy and conform to the requirements of the statute of frauds, it is essential that the material conditions and terms of the contract appear in writing so that it may be established without resort to parol evidence." Gibson v. Crawford, 247 Ky. 228, ___, 56 S.W.2d 985, 988 (1932)(citations omitted). The logic behind the prerequisite of a signed writing has been explained to be: "[E]vid%entiary, to require reliable evidence of the existence and terms of the contract and to prevent enforcement through fraud or perjury of contracts never in fact made." Restatement (Second) of Contracts § 131 cmt. c (1981).

"Separate writings may form the memorandum of contract required by the Statute of Frauds." Lonnie Hayes & Sons Staves, Inc. v. Bourbon Cooperage Co., Ky. App., 777 S.W.2d 940, 942 (1989) (citing Restatement (Second) of Contracts, § 132, and 72 Am. Jur. 2d, Statute of Frauds § 371). The Restatement (Second) of Contracts § 132 (1981) states the rule as "[t]he memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction." However, while it is true that multiple documents may be considered together to satisfy the statute of frauds, the rule in Kentucky is that several writings may be considered together only where the documents refer one to the other without the use of parol evidence. See Antle v. Haas, Ky., 251 S.W.2d 290, 295 (1952), and Nicholson v. Clark, Ky. App., 802 S.W.2d 934, 938 (1990). Further, the contract terms must be ascertainable without resort to parol evidence. Nicholson, supra at 938.

When multiple documents are to be considered together to satisfy the statute of frauds, the initial document to be examined is the one containing the signature of the party to be charged. In this case that is the January 4, 1999, letter from Bob Faller to John Oppelt. That letter does not refer to the

November 12, 199[8][2] memorandum and the two writings may be connected only by the use of parol evidence. Hence, under Antle and Nicholson, supra, the two documents cannot be considered together.

Further, the January 4, 1999, letter alone is insufficient to establish a written contract for the specific period of time asserted by Byrd. The subject matter of that letter is concerned with supporting Byrd's sabbatical leave from Bellarmine for the academic year 1999-2000, which would normally be construed as from August 1999 to May 2000. At best, this letter would support an agreement for employment during this nine-month period. However, the letter contains no language that would indicate the parties had a contract for the employment of Byrd for the period alleged by Byrd, i.e., from December 1998 until April 25, 2001, his 58th birthday. Further, the letter contains no language or indication that Byrd was to be employed by Packaging Unlimited as something other than an at-will employee.

In summary, as the two writings cannot be connected without resort to parol evidence, and because the letter signed by the party to be charged does not evidence a contract for the term of employment alleged by Byrd (December 1998 to April 2001) or the employment status alleged by Byrd (a non-at-will

[2] The November 12, 199[8], memorandum also does not refer to the January 4, 1999, letter.

employee), summary judgment on the breach of contract claim was proper. Steelvest, supra.

In the caption to their first argument appellants also allege that the trial court erred in granting summary judgment on their estoppel theory.

The doctrine of estoppel may, under the proper circumstances, prevent a party from employing the statute of frauds. Smith v. Ash, Ky., 448 S.W.2d 51 (1969).

> The vital principle is that he who by his language or conduct leads another to do, upon the faith of an oral agreement, what he would not otherwise have done, and changes his position to his prejudice, will not be allowed to subject such person to loss or injury, or to avail himself of that change to the prejudice of such other party. The party asserting the estoppel must, therefore, show affirmatively that he has done or omitted some act or changed his position to his prejudice in reliance upon the acts, conduct (active or passive), language, or representations of the person sought to be estopped which he would not have done except for such acts, language or conduct.

Nicholson v. Clark, Ky. App., 802 S.W.2d 934, 939 (1990) (citing 73 Am. Jur. 2d "Statute of Frauds" § 567).

While appellants identify estoppel as an issue in the caption of their first argument, they do not provide any discussion or line of reasoning addressing the merits of their estoppel theory. Further, they do not explain how the elements of estoppel apply in this case, nor have they provided any

citations to the record in support of their estoppel theory. As appellants have failed to present arguments in support of their estoppel theory, we will not disturb the trial court's granting of summary judgment on this issue. Baker v. Commonwealth, Ky., 465 S.W.2d 305, 308 (1971).

Next, appellants contend that the trial court erred when it denied their motion to amend their complaint pursuant to CR 15.02 and to permit the issue of whether appellants were at-will employees or under contract to be presented to, and decided by, the jury as an issue of fact. Appellants contend that, irrespective of the previous summary judgment, the issue of whether a contract existed between Byrd and Purchasing Unlimited was implicitly tried, and the issues of whether there was a contract and/or whether there had been an oral modification to Byrd's "at-will" employment relationship should have been presented to the jury. CR 15.02 provides as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the

> pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The motion to amend was made following the close of all the evidence. The trial court denied the motion to amend on the basis that the case was not tried as a contract case and that the defendants would be prejudiced to permit the submission of the issue of an oral contract to the jury when the defendants were not on notice that this was an issue in the trial. "The allowance of an amended pleading to conform to the proof is a matter of discretion for the [trial court]." Fella v. Horney, Ky., 316 S.W.2d 62, 64 (1958)(citation omitted). "'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, or at least an unreasonable and unfair decision.'" Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777, 783 (2002)(citation omitted).

First, we note that CR 15.02 applies only to issues not raised in the pleadings. Appellants raised the issue of whether there was an employment contract in their pleadings, and, as noted above, summary judgment was properly granted in

favor of appellees. Appellants do not explain why CR 15.02 is applicable under these circumstances.

Further, appellants have cited us to no specific evidence or testimony presented in the lengthy trial in support of their position that the issue of an oral contract was implicitly tried. Appellants do not cite to any specific oral statement made by Bob Faller, Bob Hanekamp, Pete Hanekamp, or anyone else associated with Packaging Unlimited to the effect that Byrd was being hired as a non-at-will employee pursuant to a contract for a guaranteed period of employment for the period of December 1998 until April 2001.

Appellants do cite to the November 12, 199[8], memorandum from Byrd to Bob Faller; however, as indicated in the discussion concerning summary judgment, that writing does not contain the signature of the party to be charged; does not otherwise comply with the statute of frauds; and does not include language to the effect that Byrd was being hired pursuant to a contract for a guaranteed period of employment for the period of December 1998 until April 2001. In light of this omission, it would not have been appropriate to submit to the jury the issue of whether that memorandum constituted a contract altering Byrd's status as an at-will employee, and we cannot conclude that the trial court abused its discretion by denying appellants' motion to amend.

Next, appellants contend that the trial court erred in holding that the intent to defraud requirement of KRS 517.050 required an intent to defraud a specific victim.

At the conclusion of appellants' expert forensic accountant's testimony, appellees moved for a directed verdict. In the course of the ensuing discussion, the trial court observed that under KRS 517.050 there must be an intent to defraud and, further, there must be an identifiable victim of the intent to defraud.

In their arguments opposing a directed verdict, appellants identified Colgate, Colgate shareholders, the Securities and Exchange Commission, and readers of Colgate's financial reports as potential victims of the alleged altered business records.

The trial court denied appellees' motion for directed verdict, both at this stage of the trial, following the close of the plaintiff's proof, and following the close of defendant's proof. Appellants have not identified any prejudice associated with the trial court's comments that there must be an identifiable victim to prevail on a wrongful discharge action based upon KRS 517.050.[3] Inasmuch as appellants prevailed in the various motions for a directed verdict, including the motion associated with the trial court's comments regarding the

[3] For example, the jury instructions did not contain a requirement that appellants identify a specific victim.

identification of a victim, and appellants have failed to identify any prejudice associated with the comments which could have affected the outcome of the trial, any error was harmless error. CR 61.01.

Finally, appellants contend that the jury instructions for wrongful discharge were erroneous. Specifically, appellants contend that Interrogatory No. 1 was improper.

"The general rule is that an employer may discharge an 'at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible.'" Northeast Health Management, Inc. v. Cotton, Ky. App., 56 S.W.3d 440, 446 (2001) (citation omitted). Only two situations exist where grounds for discharging an employee are so contrary to public policy as to be actionable absent explicit legislative statements prohibiting the discharge: first, where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment"; second, "when the reason for a discharge was the employee's exercise of a right conferred by well-established legislative enactment." Grzyb v. Evans, Ky., 700 S.W.2d 399, 402 (1985) (citing Suchodolski v. Michigan Consolidated Gas Co., 412 Mich. 692, ___, 316 N.W.2d 710, 711-712 (1982)).

Byrd brought his action for wrongful discharge based upon the allegation that he was discharged by Packaging

Unlimited for refusing to violate a law in the course of his employment. Specifically, Byrd alleged that he was dismissed based upon his refusal to violate the law against falsifying business records. This falls squarely within the first exception to at-will employment identified in Gryzb.

KRS 517.050, the statute which codifies the offense of falsifying business records, provides, in relevant part, as follows:

> (1) A person is guilty of falsifying business records when, with intent to defraud, he:
>
> (a) Makes or causes a false entry to be made in the business records of an enterprise; or
>
> (b) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or
>
> (c) Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or
>
> (d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Instruction No. 1 and Interrogatory No. 1 stated, respectively, as follows:[4]

Instruction No. 1

[4] Appellants did not object to this instruction and, in fact, tendered a similar instruction. This instruction is replicated to provide context to the discussion.

> A person is guilty of falsifying business records when, with intent to defraud, he prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.
>
> Interrogatory No. 1
>
> From the evidence you have heard, do you believe the Defendants, Robert Hanekamp and/or Peter Hanekamp and/or an employee or agent of Packaging Unlimited, Inc. falsified the bills of lading from Colgate?

Instruction No. 2 and Interrogatory No. 2 stated, respectively, as follows:

> Instruction No. 2
>
> Under the law of Kentucky, the Plaintiff, John T. Byrd, III & Associates, Inc., was an employee-at-will. His employment could be terminated by his employer at any time for any cause, or even without cause. However, an employer can not discharge an employee for refusing to violate a statute.
>
> You will find for the Plaintiffs, John T. Byrd, III and John T. Byrd, III & Associates, Inc., if you believe from the evidence that the Defendants intended to prevent the Plaintiff from making or having made true entries in the business records of Packaging Unlimited, Inc., and that such intention was a substantial and motivating factor in the decision of the Defendants, Robert Hanekamp and/or Peter Hanekamp and/or Packaging Unlimited, Inc., to discharge the Plaintiff, but for which the Plaintiff would not have been discharged.
>
> Interrogatory No. 2
>
> From the evidence presented to you, do you believe the Defendants intended to prevent the Plaintiff from making or having made

> true entries in the business records of Packaging Unlimited, Inc., and that such intention was a substantial and motivating factor in the decision to terminate the Plaintiff's employment and but for which Plaintiff would not have been discharged?

Appellants contend that the trial court's Interrogatory No. 1 improperly interposed the additional requirement that the jury first find that there had actually been a falsification of Colgate bills of lading by employees or agents of Packaging Unlimited. Appellants contend that this preliminary interrogatory should not have been presented to the jury and, in addition, that the instruction referred to the alteration of bills of lading whereas their theory of the case was that Byrd was fired for refusing to permit false computer entries which resulted in the false tendering of bills of lading.

We must address appellees' argument that this issue is not properly preserved.

At the conclusion of the trial, the trial court provided the parties with a copy of its proposed jury instructions for review and comment. Upon his initial review of the instructions, lead counsel for appellants, Lawrence Zielke, stated ". . . the way you have Number 1 is fine." Appellants then requested unrelated changes to the instructions which were agreed to by the trial court.

After the unrelated changes were agreed to, co-counsel for appellants, Scott Byrd, asked the trial court to revisit Instruction Number 1. The following discussion then occurred:

> Mr. Byrd: Judge, just one point. On Interrogatory Number 1, it appears you're making it a prerequisite to continuing on a finding that one of the defendants falsified bills of lading. And from the case I submitted, granted it was from another jurisdiction, I don't think we have to show that falsification actually took place.
>
> I think we just have to show that the plaintiff or plaintiffs were asked to falsify or not to prevent the falsification. I don't think we have to make an affirmative showing that such falsification took place.
>
> Trial Court: Well you have to go back and look at what Interrogatory Number 1 refers to and that's Instruction Number 1. A person is guilty of falsifying business records when, with intent to defraud, he prevents the making of a true entry.
>
> That's . . . that's . . . were talking about falsifying records.
>
> Mr. Byrd: Ok.
>
> Trial Court: And falsifying records is defined as making a true entry [sic].
>
> Mr. Byrd: I agree.
>
> Trial Court: You don't have to actually falsify the record. All you have to do is stop somebody from putting in a true entry.
>
> Mr. Byrd: Right.
>
> Trial Court: That's what falsifying a record in this particular case is limited to.

> Mr. Byrd: Right.
>
> Trial Court: And if that wasn’t done, if they don’t believe that Dr. Byrd was prevented from . . . entering . . . causing these entries to be made, if they don’t believe that anybody did that, that’s the end of the case. If they believe it then we go on to the next one, and that is . . . was there . . . if they believe that they prevented him was that then a substantial factor but for which he . . . would not . . . he was fired . . . would not have been discharged. Again, it’s a two step process and I think we define . . . that’s how we define falsifying records in this case.
>
> All right, anything else?

Following this discussion, counsel for appellants expressed no disagreement with the trial court’s analysis of the instructions, and, to the contrary, Mr. Zielke can be heard on the tape addressing someone who appears to be affiliated with plaintiffs’ counsel, stating, “It looks all right to me, does it look all right to you?” The associate then appears to nod affirmatively.

CR 51(3) provides that a party may not "assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection." In essence this rule requires the lawyers in the case to assist

the judge in giving correct instructions and disallows an *ex post facto* objection as a means of obtaining a reversal of the judgment on appeal. Cox v. Hardy, Ky., 371 S.W.2d 945, 947 (1963). Where a party does not object to the instruction, his complaint to the instruction will not be heard on appeal. Mikkelsen v. Fischer, Ky., 347 S.W.2d 525, 528 (1961). It is necessary to have a specific objection to the giving of or failure to give instructions at the trial level, so as to properly preserve error for appeal. Cobb v. Hoskins, Ky. App., 554 S.W.2d 886, 887-888 (1977).

Appellant’s counsel specifically objected to the instruction. During the trial court’s discussion and explanation of the instruction, Mr. Byrd’s expressions of agreement were regarding general principles of law, not the instruction itself. There is ambiguity regarding appellants’ ultimate objection to the instruction because, at the conclusion of the trial court’s explanation, counsel did not restate an objection or offer a counter-argument. While this could be construed as an indication that counsel accepted the trial court’s explanation and now agreed with the instruction, on the other hand, counsel had clearly stated an objection to the instruction, and we are not persuaded that, following the trial court’s comments, counsel had an obligation to argue with the judge in order to preserve the issue. With regard to Mr.

Zielke’s comment “it looks all right to me,” that comment was not directed to the trial court and it cannot be ascertained with certainty that the comment was even in reference to the instruction. As appellants specifically objected to the instruction and, further, tendered proposed instructions which did not include the instruction, we conclude that the issue is preserved.

On the merits, we agree with appellants that the instruction requiring a preliminary determination that defendants or their agents actually falsified the bills of lading following the dismissal of appellants was an erroneous instruction. In their case in chief, appellants devoted a significant effort into proving that, after Byrd refused to falsify or permit the falsification, and after the dismissal, appellees had proceeded with their alleged plan to falsify business records. However, the relevance of this evidence was to corroborate Byrd’s allegation that he had been asked to permit the falsification of business records. The truth or falsity of whether the alleged plan was actually carried out following Byrd’s dismissal was not an element of his wrongful discharge claim.

To prevail in a wrongful discharge case, an employee need only show that (1) he was asked to violate a law in the course of employment; (2) that he failed or refused to violate

the law; and (3) that his failure or refusal to violate the law was a substantial and motivating factor but for which he would not have been discharged. See Gryzb, supra; First Property Management Corp. v. Zarebidaki, Ky., 867 S.W.2d 185, 186 (1993). He need not, in addition, prove that the law he was asked to break was actually violated at some point.

Interrogatory No. 1, by requiring an initial finding that a violation of law actually occurred, imposed an element upon appellants that they were not required to prove in their wrongful discharge claim. In addition, in the course of the trial there was much testimony concerning the logistics relating to the bills of lading. One theory advanced by appellees was that, if the bills of lading were falsified or forged, the falsification or forgery may have been made by employees of the shipper, Big T Trucking Co. The jury could have believed that Byrd was asked to falsify business records in violation of KRS 517.050, he refused, and was fired as a result thereof. If so, appellants should have prevailed. However, if the jury also believed that personnel at Big T Trucking made the forgeries or falsifications to the bills of lading, or that some other party did, or for some reason believed that there had been no forgeries or falsifications of the bills of lading, under Instruction 1 its deliberations were side tracked and cut short

by an interrogatory imposing an element upon appellants they were not required to prove.

While it would have been proper to include an instruction regarding whether the actions appellees allegedly asked Byrd to take were in violation of KRS 517.050, see Gryzb, supra, that is not what Interrogatory 1 does. The instruction, in effect, required appellants to prove that, after Byrd refused to permit the falsification of the records and was discharged as a result, the plan was nevertheless carried out anyway. Appellants were not required to prove this.

"The rule is that generally an erroneous instruction is presumed to be prejudicial to appellant, and the burden is upon the appellee to show affirmatively from the record that no prejudice resulted; and when the appellate court cannot determine from the record that the verdict was not influenced by the erroneous instruction, the judgment will be reversed." McKinney v. Heisel, Ky., 947 S.W.2d 32, 35 (1997)(citation omitted).

As already noted, the jury could have believed that Byrd was asked by appellees to falsify business records in violation of KRS 517.050, that he refused to do so, and that he was fired as a result. If so, but the jury also did not believe that appellants or their agents subsequently falsified the bills of lading, then the jury was short-circuited from reaching a

decision favorable to appellants on account of Interrogatory 1. Appellees have not overcome their burden of showing that the verdict was not influenced by this erroneous instruction. We accordingly reverse the judgment and remand for a new trial.

The Jefferson Circuit Court is reversed and this case is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

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