RENDERED: OCTOBER 16, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000088-MR
AND
NO. 2008-CA-000210-MR

JOHN TEST; AND PROFESSIONAL ACCOUNTING SYSTEMS, INC. — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCH PERRY, JUDGE
ACTION NO. 02-CI-002493

EXPRESSBILL, LLC, A WHOLLY-OWNED SUBSIDIARY OF EMDEON CORPORATION D/B/A EXPRESSBILL — APPELLEE

OPINION
AFFIRMING APPEAL NO. NO. 2008-CA-000088-MR
AND AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
WITH DIRECTIONS APPEAL NO. 2008-CA-000210-MR

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

TAYLOR, JUDGE: John Test and Professional Accountings Systems, Inc., bring

Appeal No. 2008-CA-000088-MR from a December 12, 2007, judgment of the Jefferson Circuit Court and bring Appeal No. 2008-CA-000210-MR from a January 23, 2008, order of the Jefferson Circuit Court. We affirm Appeal No. 2008-CA-000088-MR, and we affirm in part, reverse in part, and remand with directions Appeal No. 2008-CA-000210-MR.

These appeals stem from a breach of contract action filed by John Test and Professional Accounting Systems, Inc. (collectively referred to as appellants) against ExpressBill. John Test is the owner of a business called Professional Accounting Systems Company (PASCO), which provides billing services to healthcare providers. ExpressBill is a medical billing service provider.

Appellants claimed that ExpressBill breached an exclusive territory agreement wherein PASCO was the exclusive provider of medical billing services supplied by ExpressBill. Appellants alleged that ExpressBill was supplying its medical billing services to other providers within the exclusive geographical area. Appellants sought damages against ExpressBill for breach of the exclusive territory agreement.

ExpressBill, however, denied the existence of a current exclusive territory agreement with PASCO. Instead, ExpressBill acknowledged a 1982 exclusive territory agreement with PASCO concerning its microfilm billing service. Upon the development of advanced technologies, ExpressBill pointed out that its microfilm billing service was eventually discontinued and replaced *in toto* with its ExpressBill electronic data transfer service (electronic transfer service).

ExpressBill maintained that its exclusive territory agreement with PASCO only involved its microfilm billing service and not its electronic transfer service. Consequently, ExpressBill claimed that it breached no exclusivity contract with appellants by supplying its electronic transfer service to others within the disputed geographical area.

A jury trial was held, and the jury returned a verdict in favor of ExpressBill. The jury found that an exclusive territory agreement existed only as to the microfilm billing service and that no exclusive territory agreement existed as to the electronic transfer service. By a December 12, 2007, judgment, the circuit court dismissed appellants' action against ExpressBill. Appellants then filed a notice of appeal from the December 12, 2007, judgment (Appeal No. 2008-CA-000088-MR). Later, by order entered January 23, 2008, the circuit court awarded ExpressBill costs in the amount of $11,741.01. Appellants also filed a notice of appeal from the January 23, 2008, order (Appeal No. 2008-CA-000210-MR). We shall review these appeals *seriatim*.

APPEAL NO. 2008-CA-000088-MR

Appellants initially argue that the instructions submitted to the jury were erroneous. Specifically, appellants contend that the jury instructions "were overly detailed, contained an excessive number of special interrogatories to the jury, and significantly complicated the jury's deliberations." Appellants' Brief at 11. Appellants complain that the jury instructions "went far beyond the 'bare bones' instructions consistent with Kentucky law." Appellants' Brief at 12.

Jury instructions should only be based upon the evidence introduced at trial and should properly set forth the law. *Howard v. Com.*, 618 S.W.2d 177 (Ky. 1981). In so doing, the instructions should reflect the "bare bones" approach as established in this Commonwealth. *Cox v. Cooper*, 510 S.W.2d 530 (Ky. 1974). This approach requires that jury instructions simply inform the jury of the evidence necessary to decide the dispositive factual issues and to provide enough information to inform the jury of the parties' respective legal duties. *Harp v. Com.*, 266 S.W.3d 813 (Ky. 2008)(citing *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226 (Ky. 2005)). As errors involving jury instructions present questions of law, our review proceeds *de novo*. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440 (Ky. App. 2006).

In this case, appellants do not claim that the jury instructions failed to conform to the law or that the jury instructions failed to conform to the evidence. Instead, appellants simply allege that the jury instructions were overly detailed and did not conform with the "bare bones" approach.

Upon review of the jury instructions submitted by the trial court, we are unable to conclude that these instructions were so overly detailed or complicated as to constitute error. Rather, the jury instructions properly stated the law and accurately reflected the evidence submitted at trial. In fact, the jury instructions were readily intelligible and presented understandable questions to the jury. While Kentucky has adopted the "bare bones" approach, jury instructions "must not be so bare bones as to be misleading or misstate the law." *Harp*, 266

S.W.3d at 819 (citing *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226 (Ky. 2005)). Considering the legal and factual issues presented, we simply cannot say that the instructions were improper as being too detailed or complicated. As such, we perceive no error. *See Bartlett v. Vanover*, 260 Ky. 839, 86 S.W.2d 1020 (Ky. 1935).

Appellants next assert that the trial court erroneously excluded the testimony of Russell Scott. Scott was a provider of ExpressBill services in Ohio and would have testified as to an exclusive territory agreement with ExpressBill. Appellants maintain that the trial court erroneously excluded Scott's testimony as irrelevant. We disagree.

As an appellate court, we review the exclusion of evidence under the abuse of discretion standard. *Clephas v. Garlock, Inc.*, 168 S.W.3d 389 (Ky. App. 2004). An abuse of discretion occurs when the trial court's ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). If the trial court abused its discretion, we then determine whether such abuse amounted to prejudicial or reversible error. To constitute prejudicial or reversible error, it must be demonstrated that absent the exclusion of the evidence, there exists a reasonable possibility the jury verdict would have been different. Kentucky Rules of Civil Procedure (CR) 61.01; Kentucky Rules of Evidence (KRE) 103; *Crane v. Com.*, 726 S.W.2d 302 (Ky. 1987).

In this case, appellants neither argue nor prove that exclusion of Scott's testimony was prejudicial. CR 61.01; KRE 103. Instead, appellants merely argue that the exclusion of such testimony amounted to an abuse of discretion by the trial court. It is axiomatic that a trial court's improper exclusion of evidence will only require reversal if the error is shown to be prejudicial. Appellants' failure to even argue such prejudicial effect necessarily precludes an adjudication of reversible error.

Nevertheless, from our review of the record in this case, there does not exist a reasonable possibility the verdict would have been different absent the exclusion of such testimony. *See Crane v. Com.*, 726 S.W.2d 302. The jury heard ample evidence from both appellants and ExpressBill concerning the existence and alleged breach of the exclusive territory agreement. The jury simply chose to believe ExpressBill. Upon the whole, we are unable to conclude that the trial court committed reversible error by excluding Scott's testimony.

Appellants also argue that the trial court "committed reversible error in sending out [the] jury to begin its deliberations late in the day." Appellants' Brief at 14. Appellants maintain that the trial court "placed undue pressure on the jury by having it begin . . . deliberations late in the day." Appellants' Brief at 16. Additionally, appellants believe that the trial court erroneously "told the jury to either decide the case in under two hours or . . . return the next day for additional deliberations." Appellants' Brief at 17.

In the case *sub judice*, the record reveals that the jury began deliberations at 5:10 p.m. Shortly before, the trial court made the following statement to the jury:

> We have had a long effort today to resolve certain matters of law and now I am about to instruct you on what it is that I am going to ask the jury to decide. We may or may not finish today, but I want to hear the closing and ask you to deliberate for a while. We won't go very late into the evening. We will take that up later.

Sometime thereafter, the jury submitted a question to the trial court. After bringing the jury back into the courtroom, the trial court informed the jury that the question could not be answered. Also, the trial court stated that the jury could continue to deliberate or retire for the evening. The court also informed the jury that dinner could be delivered but it usually took forty-five minutes. This occurred at 6:45 p.m. At 7:21 p.m., the jury returned a verdict.

To begin, appellants fail to cite this Court to any Kentucky authority to support this argument. We were, however, pointed to a Pennsylvania case, albeit with an erroneous legal citation. Having reviewed the entire record including the trial proceedings, we cannot conclude that the trial court abused its discretion regarding the jury's deliberations. *See Goodyear Tire*, 11 S.W.3d 575. The jury neither deliberated an extraordinarily long period of time nor deliberated until an unreasonably late hour. Likewise, we cannot conclude that the trial court improperly coerced the jury to return a verdict. *See Boggs, v. Com.*, 424 S.W.2d 806 (Ky. 1966). We, thus, view this contention to be without merit.

Appellant finally asserts that the trial court "applied an incomplete and inaccurate measure of damages." Considering our resolution heretofore of this appeal and given that the jury never reached the damage issue, we view this argument as moot.

APPEAL NO. 2008-CA-000210-MR

Appellants argue that the trial court erred by ordering them to pay ExpressBill costs in the amount of $11,741.01. In the bill of costs, ExpressBill specifically claimed $4,450.70 in deposition costs, $3,944.73 in trial witness costs, $816.90 in trial exhibit costs, $2,225.35 in copy costs, and $303.33 in mediation fees.

In this case, we recognize that an award of costs is controlled by both Civil Rule and statute – CR 54.04, KRS 453.040, and KRS 453.050. CR54.04 provides:

> (1) Costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the Commonwealth, its officers and agencies shall be imposed only to the extent permitted by law. In the event of a partial judgment or a judgment in which neither party prevails entirely against the other, costs shall be borne as directed by the trial court.
>
> (2) A party entitled to recover costs shall prepare and serve upon the party liable therefor a bill itemizing the costs incurred by him in the action, including filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney, and guardian ad litem fees, costs of the originals of any depositions (whether taken stenographically or by other

> than stenographic means), fees for extraordinary services ordered to be paid by the court, and such other costs as are ordinarily recoverable by the successful party. If within five days after such service no exceptions to the bill are served on the prevailing party, the clerk shall endorse on the face of the judgment the total amount of costs recoverable as a part of the judgment. Exceptions shall be heard and resolved by the trial court in the form of a supplemental judgment.

KRS 453.040(1)(a) reads:

> The successful party in any action shall recover his costs, unless otherwise provided by law. If the plaintiff succeeds against part of the defendants, and not against others, he shall recover his costs from the former, and the latter shall recover their costs from the plaintiff.

And, KRS 453.050 states:

> Clerks shall tax one (1) attorney's fee only in the bill of costs of the successful party at the termination of the action, but no attorney's fee shall be taxed in any court if the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars ($50), and no garnishee shall be allowed an attorney's fee. The bill of costs of the successful party shall include, in addition to other costs taxed, the tax on law process and official seals, all fees of officers with which the party is chargeable in the case, postage on depositions, the cost of copy of any pleading or exhibit obtained, the cost of any copies made exhibits and the allowance to witnesses, which the court may by order confine to not more than two (2) witnesses to any one (1) point.

Ordinarily, the prevailing party in a civil action is entitled to an award of costs. In this Commonwealth, allowable costs are generally more circumscribed than that allowed in other jurisdictions. 7 Kurt A. Philipps, Jr. & David V.

Kramer, *Kentucky Practice – Rules of Civil Procedure Annotated* § 54.04 (6th ed. 2005).

Upon review of ExpressBill's bill of costs, we think it was error to award ExpressBill all costs claimed therein. In particular, ExpressBill was entitled to recover "costs of the originals of any depositions" but was not entitled to recover any costs associated with procuring copies of the original depositions. CR 54.04. We believe this rule is mandated by the unambiguous language of CR 54.04. Accordingly, ExpressBill is entitled to recover the costs of the original depositions only.

Additionally, ExpressBill claimed $2,225.35 in copying costs. The itemization of these copying costs submitted by ExpressBill is wholly deficient. It fails to specify what these copying costs were for and fails to afford any basis for such determination by the trial court. We, thus, conclude it was error to award ExpressBill $2,225.35 in copying costs.

As to ExpressBill's claimed costs related to mediation fees, we do not think such are properly taxed as costs. Rather, it seems the better policy and matter of local practice to equally divide such mediation fees between the parties.[1]

ExpressBill also claimed $3,944.73 as trial witness costs. It appears from the record that these costs consisted of hotel, meal, taxi, and airfare expenses for the witnesses. While KRS 453.050 specifically authorizes an "allowance to witnesses" to be taxed as costs, we do not believe such an allowance properly

[1] We refer to the local rules of the Thirteenth Judicial Circuit, specifically Jefferson Rules of Practice 1306.

consisted of the claimed witnesses' expenses submitted by ExpressBill. These witnesses' expenses incurred in conjunction with their testimony in this action should be wholly ExpressBill's responsibility.

In sum, we reverse the trial court's award of costs as particularly set forth herein and affirm in all other respects. Upon remand, we direct the trial court to recalculate its award of costs in conformity with this opinion.

For the foregoing reasons, the December 12, 2007, judgment of the Jefferson Circuit Court in Appeal No. 2008-CA-000088-MR is affirmed and the January 23, 2008, order of the Jefferson Circuit Court in Appeal No. 2008-CA-000210-MR is affirmed in part, reversed in part, and remanded with directions to render an award of costs in conformity with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Peter L. Ostermiller
Louisville, Kentucky

BRIEFS FOR APPELLEE:

Charles J. Cronan IV
Margaret R. Grant
Louisville, Kentucky