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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000937-MR
NO. 2013-CA-001245-MR
NO. 2013-CA-001304-MR

VELMA HISLE, ELIZABETH GULLEY, DANA JOHNSON; MARY DEAN, DAWN LOWE; AND KATHRYN BURCHETT — APPELLANTS/CROSS-APPELLEES

APPEALS AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CI-05512

CORRECTCARE – INTEGRATED HEALTH, INC. — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

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

LAMBERT, J., JUDGE: Velma Hisle, Elizabeth Gulley, Dana Johnson, Mary Dean, Dawn Low, and Kathryn Burchett (hereinafter the Appellants) appeal from

an action brought pursuant to the Kentucky Wages and Hours Act, Kentucky Revised Statutes (KRS) Chapter 337 (hereinafter the Act). The Appellants appeal from a jury verdict returned on April 17, 2013, and from the amended supplemental civil judgment entered by the Fayette Circuit Court on July 10, 2013, assessing costs against them. CorrectCare Integrated Healthcare, Inc. (CorrectCare) appeals from the same amended judgment denying an allowance to witnesses as part of the costs assessed against the Appellants. After careful review, we affirm in part, vacate in part, and remand.

This action was filed on September 24, 2010, pursuant to the Act and on behalf of three former CorrectCare employees: certified medication aid Velma Hisle, nurse Kelly Goff, and nurse Elizabeth Gulley. All three were employed by CorrectCare at Blackburn Correctional Complex, a Kentucky Department of Corrections (KDOC) penal facility located in Fayette County. The Appellants alleged that CorrectCare denied them their statutory rest and meal breaks over the course of their respective tenures and claimed that they were entitled to compensation. Two other former nurse employees of CorrectCare, Crystal York and Dana Johnson, both of whom had worked at Northpoint Training Center in Boyle County, Kentucky, soon intervened with practically identical substantive complaints concerning overlapping periods of time.

Following discovery, it became clear that the basis for these claims was a KDOC requirement that nurses carry and/or otherwise monitor a handheld two-way radio while working inside the prison facilities, including during their

thirty-minute lunch breaks, which were automatically deducted from their time. The automatic thirty-minute deduction for lunch was a standing CorrectCare policy. It was the Appellants' contention that, by operation of these policies, they had performed compensable work—monitoring or carrying a radio—during their lunch breaks each and every day they worked, for which they should have been paid.

Hisle, Gulley, and Goff quickly moved for a pretrial conference in May 2011, and on June 9, 2011, the trial court entered a pretrial order assigning a January 30, 2012, trial date. Two months later, the Appellants moved the trial court to certify the case as a class action pursuant to Kentucky Rules of Civil Procedure (CR) 23 on behalf of "all persons presently or previously employed by [CorrectCare] since September 25, 2005 at a Kentucky state correctional facility as a nurse or certified medication aide," and sought recovery for CorrectCare's alleged violation of the Act for automatically deducting thirty minutes for a meal break while requiring the nurses to carry and monitor radios during that time.

Despite their pending class action motion, the Appellants continued to add named litigants to their number. In rapid succession, motions to intervene were filed by Kathryn Burchett and Melissa Grate on September 15, 2011; Mary Dean on September 20, 2011; Dawn Lowe on September 22, 2011; Robin Brockman on September 30, 2011; and Karen Barnes on October 6, 2011. A final litigant, Robert Colgan, moved to intervene on July 9, 2012.

In June 2012, the parties filed cross-motions for partial summary judgment solely with respect to whether or not the requirement to monitor radio communications during the Appellants' lunch break constituted time worked under the Act. On July 12, 2012, the trial court held that merely monitoring radio communications during meal breaks did not amount to a denial of a *bona fide* meal break, where the record demonstrated that such a requirement did not impair the employees' ability to comfortably and adequately pass their mealtime, nor was their time or attention devoted primarily to official responsibilities. At the same time, the trial court denied the Appellants' renewed motion to certify a class action. The Appellants' individual claims for wages and/or overtime compensation were allowed to proceed.

CorrectCare moved the trial court for separate trials on each claim against it. CorrectCare stressed the variance of anticipated proof with respect to the location, times, supervisory practices, and other circumstances of each of the Appellants' shifts over the years. The trial court denied the motion, reasoning that the claims could be managed in a single trial. Eventually, however, at a pretrial conference on March 27, 2013, the trial court ordered the Appellants to "provide information, with specifics and particulars, how the amount claimed for each plaintiff was calculated…." The Appellants then served discovery responses indicating that they were claiming compensation for missed lunches on each and every shift they had worked because they were required to carry or monitor a radio.

This action was tried before a jury for three days beginning on April 15, 2013. The Appellants presented evidence going only to the "reasonable period for lunch" required by KRS 337.355, and they offered no evidence on the ten-minute rest period requirement of KRS 337.365. At trial, the Appellants were unable to demonstrate the specific occasions on which, because of staffing, prisoner traffic, or other work variables at Blackburn and Northpoint over the years, CorrectCare had not afforded them a meal break or taken steps to adjust their pay. The Appellants were unable to identify any particular day or describe the duties they were performing on that day that caused them to miss lunch. Rather, the best they could do was estimate the percentage of missed lunch breaks while working for CorrectCare. When asked about their damages, they could not explain why they sought reimbursement for each and every shift they had ever worked. Further, all except Gulley admitted that they had been reimbursed for certain missed lunches they had reported pursuant to CorrectCare's policy, but none of them could satisfactorily explain why they failed to report missing lunch every single shift.

The Appellants' proposed jury instructions urged the trial court to apply a "completely relieved from duty" or "free from all work" standard for a meal break, relying on 29 Code of Federal Regulations (C.F.R.) § 785.19(a) and 803 Kentucky Administrative Regulations (KAR) 1:065. However, the trial court instructed the jury in accordance with the "predominant benefit" test and the rule articulated in *White v. Baptist Memorial Health Care Corporation*, 699 F.3d 869

(6th Cir. 2012), casting the instruction in the form of legal duties. The instructions were as follows:

> Instruction No. 1:
> It was the duty of the Defendant, CorrectCare-Integrated Health, Inc., to grant its employees, including each of the Plaintiffs herein, a reasonable period for lunch not less than thirty (30) minutes during each work shift. A reasonable lunch period is one which can be used by the employee predominantly for her benefit.
>
> Question No. 1:
> Do you believe from the evidence that the Defendant violated the foregoing duty as to each Plaintiff?
>
> Instruction No. 2:
> 1. It was the duty of each Plaintiff to show that the Defendant, CorrectCare, knew or should have known that this Plaintiff had not been given a lunch period for some particular day or days and had requested compensation for such time period;
>
> AND
>
> 2. It was the duty of each Plaintiff to follow any reasonable time reporting procedures established by the Defendant, CorrectCare, for any employee to timely report uncompensated work time to CorrectCare with a request for compensation for such time period.
>
> Question No. 2:
> Do you believe from the evidence that the individual Plaintiff listed below violated one or both of the foregoing duties?

With respect to three of the Appellants—Johnson, Hisle, and Dean – the jury determined that CorrectCare met its duty to provide them with *bona fide* meal breaks under Instruction No. 1. With respect to the three others—Gulley, Lowe,

and Burchett—the jury found that, while they had not received *bona fide* meal breaks on occasion (perhaps as a result of working single-person shifts), they had nevertheless failed to follow CorrectCare's procedure for reporting uncompensated work time, as required by *White v. Baptist Memorial Health Care Corporation, supra*, so that they might be reimbursed pursuant to CorrectCare's policy.

The jury verdict above was returned on April 17, 2013. Judgment was entered thereon by the Fayette Circuit Court on April 30, 2013. CorrectCare filed a Bill of Costs on May 3, 2013. The Appellants timely objected thereto on May 6, 2013. Prior to resolution of those objections, the Appellants appealed from the jury verdict. Upon the adjudication thereof, the trial court entered a supplemental judgment assessing costs against the Appellants on June 17, 2013. Following the Appellants' motion to alter, amend, or vacate, the trial court entered an amended supplemental judgment on July 10, 2013, amending its earlier assessment of costs. Both parties appealed therefrom.

The Appellants argue that the trial court erred by denying their motion for a directed verdict as to liability and also erred by giving improper instructions to the jury. This Court reviews the trial court's denial of a motion for directed verdict under the clearly erroneous standard. *Aesthetics in Jewelry, Inc. v. Brown*, 339 S.W.3d 489, 495 (Ky. App. 2011). "An appellate court may reverse the denial of a directed verdict if it determines, after reviewing the evidence in favor of the prevailing party, that the verdict is palpably or flagrantly against the evidence so as

to indicate that it was reached as a result of passion or prejudice." *Id*. (Internal citation omitted).

Alleged errors regarding jury instructions, as well as whether a statement is a judicial admission, are questions of law, and this Court reviews such under a *de novo* standard. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 448-49 (Ky. App. 2006). Instructions must be based on the evidence and they must properly and intelligibly state the law. *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981).

> The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict. If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury.

Hamilton v. CSX Transp., Inc., 208 S.W.3d 272, 275 (Ky. App. 2006) (Internal citation omitted). Instructions are reviewed "as a whole to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision." *Gibson v. City of Louisville*, 336 F.3d 511, 512 (6th Cir. 2003) (quoting *Vance v. Spencer County Public Sch. Dist.*, 231 F.3d 253, 263 (6th Cir. 2000)).

In support of their argument that the trial court improperly denied their motion for directed verdict and issued improper jury instructions, the Appellants argue that CorrectCare's personnel policies required them to be paid for their supposed "meal break" unless during this thirty minutes they were "free from

all work," which meant, according to Mellissa Sturgill, the human resources director for CorrectCare, that the employee was "completely relieved" from all work duties, whether active or inactive. The crux of the Appellants' argument is that an employer's policies can establish its obligation to pay wages and/or overtime under KRS Chapter 337, and since the evidence at trial established without challenge that the plaintiffs daily performed work duties at all times during their shifts, the court below should have granted the Appellants' motion for a directed verdict as to liability. The Appellants' urge this Court to reverse the court below and remand the case for a new trial on the issue of damages alone.

CorrectCare argues that the trial court properly denied the Appellants' motion for directed verdict and correctly instructed the jury that, for purposes of KRS 337.355, a *bona fide* meal break is determined by the predominant benefit test. CorrectCare points out that there is not an abundance of Kentucky case law construing the Act, and that many of the trial court's determinations were necessarily informed by reference to the Fair Labor Standards Act (FLSA). CorrectCare contends, and the Appellants agree, that in the absence of Kentucky cases on point, courts look to federal cases interpreting the FLSA. In *City of Louisville, Division of Fire v. Fire Services Managers Association*, 212 S.W.3d 89, 92 (Ky. 2006), the Kentucky Supreme Court held that the Act is the analogue of the FLSA and that because state law does not provide rights more favorable than its federal counterpart, reference to the FLSA is proper to flesh out the meaning and interpretation of the Act. *Id*. at 95.

KRS 337.355 provides:

> Lunch period requirements. Employers…shall grant their employees a reasonable period for lunch, and such time shall be as close to the middle of the employee's scheduled work shift as possible. In no case shall an employee be required to take a lunch period sooner than three (3) hours after his work shift commences, nor more than five (5) hours from the time his work shift commences….

The statute does not define a "reasonable period" of time or what activities may or may not take place during it. The regulation promulgated under KRS 337.355 refers to "*bona fide* meal periods," and suggests that thirty minutes is an appropriate time period. That regulation, 803 KAR 1:065, states:

> Hours Worked.
> Section 4. Rest and Meal Periods.
> ….
>
> (2) Meals. Bona fide meal periods are not work time. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purpose of eating regular meals. Ordinarily, thirty (30) minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

The state regulation is nearly identical to its federal counterpart, 29 C.F.R. § 785.19(a).

The FLSA does not define "work," but merely indicates that to "employ includes to suffer or permit to work." 29 United States Code (U.S.C.) § 203(g).

The Department of Labor defines "compensable time" as time during which an employee is "on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer." 29 C.F.R. § 553.221(b).

CorrectCare urges this Court to consider *Tennessee Coal, Iron & R. Co., v. Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S.Ct. 698, 703, 88 L.Ed 949, (1944) (superseded by statute), where the Supreme Court of the United States interpreted "work" to mean "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id*. That same year the Court decided *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed118 (1944), and explained:

> [a]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. … Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

Armour, 323 U.S. at 133, 65 S.Ct. at 168.

The predominant benefit test is applied by nearly all federal circuits, including the Sixth Circuit, and states that a specific period of an employee's time is "work time," and thus compensable, only if the employee spends that time predominantly performing the duties for the employer's benefit. As recently as

2012, the Sixth Circuit recognized it as the standard for determining compensability of meal breaks. *White v. Baptist Memorial Health Care Corporation*, *supra*.

In *F.W. Stock & Sons, Inc. v. Thompson*, 194 F.2d 493 (6th Cir. 1952), the Sixth Circuit Court of Appeals adopted the predominant benefit test in substance when it first addressed compensability of meal periods under the FLSA. There, the meal period was found compensable because the nature of the work required the employees to pay "constant attention" to their machinery, and because their meals were often interrupted by emergencies requiring their immediate attention. The Sixth Circuit refined the standard in *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984), where a letter carrier alleged he was entitled to compensation under the FLSA because he remained responsible for "accountable items" and undelivered mail during his lunch period. In ruling against him, the court reasoned, "As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA." *Id*. at 814.

CorrectCare points out that the Appellants initially conceded that the predominant benefit standard was the appropriate standard to be applied, and it cites the trial court's language in its order of partial summary judgment entered on July 12, 2012. Therein, the court stated, "The parties agreed that the Court's determination of this issue is governed by the application of the 'predominant

benefit test' adopted by the vast majority of courts who have interpreted the federal Fair Labor Standards Act when determining whether non-exempt employees have received a '*bona fide* meal break.'" CorrectCare also points out that the Appellants conceded this was the appropriate standard to be applied in their motion for partial summary judgment, and a review of the record indicates the Appellants did concede such in their motion.

Based on the Appellants' concession that the predominant benefit standard was the correct standard to be applied and with the clear adoption of the predominant benefit standard by the Sixth Circuit and other federal circuits, a directed verdict was not appropriate. Thus, the trial court appropriately instructed the jury that for purposes of KRS 337.355, a *bona fide* meal break is determined by the predominant benefit test.

Furthermore, Jury Instruction No. 2 appropriately informed the jury of the Appellants' burden to prove that they missed specific meal breaks and acted reasonably to be compensated for them. The Appellants argue that reversible error in Jury Instruction No. 2 arises in paragraph 2 of the instruction, which was incorporated as an interrogatory applicable to each of the plaintiffs. They contend this instruction erroneously informed the jury that the plaintiffs, notwithstanding CorrectCare's knowledge that they had performed compensable work, were required to follow some specific procedure requesting compensation or be deemed to have worked for free, unless they could show they worked a specific time on a specific day and asked to be paid for it.

In support of this, the Appellants argue that CorrectCare's obligation to pay them arises from its knowledge that they had performed compensable work, not from any duty of the employees to affirmatively demand payment for the work they have performed. They argue that paragraph 2 of the instruction is contrary to the Court's ruling in *Carolina Metal Products Co. v. Goodlett,* 427 S.W.2d 821 (Ky. App. 1968), and its incorporation into administrative regulation at 803 KAR 1:065 Section 2(3), which prohibits an employer from sitting back and benefitting from an employee's work without compensating the employee for it. According to the Appellants, the employee does not have to both do the work and demand payment for it; it is enough where the employee has done the work and the employer knows it.

The Appellants contend that the instructions impose a burden of proof that requires a specific day, time, and request to be paid, which is contrary to both Kentucky law and law developed under the FLSA. They cite to *UPS v. Rickert*, 996 S.W.2d 464, 469 (Ky. 1999), which states "it is not necessary to prove the amount of damages with certainty, but only to establish with certainty the existence of damages. Thereafter the jury may determine the fair and reasonable estimate of the particular injury."

CorrectCare contends that it was the Appellants' burden to prove specific instances of CorrectCare's violations of KRS 337.355. We agree with CorrectCare. The U.S. Supreme Court and the Sixth Circuit have made it clear that "it is the employee who bears the burden of proving that he or she performs

substantial duties and spends his or her meal time predominantly for the employer's benefit." *Myracle v. General Elec. Co.*, 33 F.3d 55, *4 (6th Cir. 1994) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946)). An FLSA plaintiff must prove by a preponderance of the evidence that he or she performed the work for which he or she was not properly compensated. *White v. Baptist Memorial Health Care Corp., supra*.

The law demands proof as to the date and time of an employer's violation. "In order to prove the meal breaks are compensable under the 'predominant benefit' test, the plaintiffs must establish that the time they spend *on any given meal break* is predominantly for the benefit of the [employer]." *Crawford v. LFUCG,* 2008 WL 2885230, *8 (E.D. Ky. 2008). (Emphasis added). We agree that by definition, the "every shift" theory could not prove "any given meal break" and failed to provide the jury with the necessary "specifics and particulars." In *Barksdale v. E & M Transportation, Inc.*, 2010 WL 4451790 (E.D. Va. 2010), the court rejected "general, conclusory statements that, even as a matter of just and reasonable inference, cannot sustain Plaintiff's burden of producing sufficient evidence showing the amount and extent of overtime work." *Id*. at *3. The *Barksdale* plaintiffs submitted two sworn statements that they worked in excess of forty hours per week, but, like the Appellants, could provide no documentation as to how they arrived at the total estimated hours worked per week. The statements did not "specify any independent or personal verification of time actually worked on any particular week," and contained no "other indicia…suggest[ing]…that

Plaintiffs engaged in even a minimal personal attempt to lay a foundation for actual time worked." *Id*. A review of the record indicates that the Appellants also failed to verify with specificity any time actually worked and instead alleged that they worked through lunch every day of their employment.

In *Lundy v. Catholic Health System of Long Island Incorporated*, 711 F.3d 106 (2nd Cir. 2013), the plaintiffs claimed that their employer's timekeeping system automatically deducted time for meal breaks even though they frequently were required to work through them. *Id*. at 109. The trial court granted the employer's motion to dismiss where, as here, the theory of the case was necessarily devoid of specifics. The trial court observed that the plaintiffs failed to show that they were personally denied overtime by the system:

> Work during meal breaks is compensable under FLSA if "predominantly" for the employer's benefit… Although Plaintiffs alleged that their meal breaks were "typically" missed or interrupted, the Complaint is "void of any facts regarding the nature and frequency of these interruptions during the relevant time period or how often meal breaks were missed altogether as opposed to just interrupted." … Absent such specificity, there is no claim for compensable time.

Id. at 112. The Second Circuit agreed, characterizing one plaintiff's claim that her meal breaks were "typically" missed or interrupted as "low-octane fuel for speculation, not the plausible claim that is required." *Id*. at 115.

In the instant case, the Appellants' claims that they missed lunch practically every day due to the fact that they were carrying around a radio simply did not

establish with specificity a claim for compensable time. The trial court did not err in providing Jury Instruction No. 2 to the jury.

Next, the Appellants argue that the court below lacked jurisdiction to enter the amended supplemental judgment. The Appellants contend that the court did not have jurisdiction to consider the defendant's motion for entry of a supplemental judgment, as it came after the Appellants had appealed the initial judgment. "As a general principle, a judgment becomes final ten days after its entry by the trial court." *Harris v. Camp Taylor Fire Prot. Dist.*, 303 S.W.3d 479, 482 (Ky. App. 2009). *See also* CR 52.02, 59.04, and 59.05. The Appellants argue that, upon the lapse of ten days from the entry of the Trial Verdict, Order of Directed Verdict and Civil Judgment, the trial court lost jurisdiction of the action and was without the power to subsequently determine CorrectCare's Bill of Costs. They rely upon this Court's decision in *Harris v. Camp Taylor Fire Protection District*, 303 S.W.3d 479 (Ky. App. 2009).

In *Harris*, the prevailing plaintiff in a statutory action brought pursuant to the Kentucky Whistleblower Act, KRS 61.102 *et seq*., prepared a judgment that was final and appealable under CR 54, without making any reference to recoverable costs. Thereafter, she filed a motion for attorney's fees thirty six (36) days following entry of that judgment—after the allowable time to move to alter, amend, or vacate or otherwise take an appeal from that judgment. This Court ruled that her motion for attorney's fees and expert witness fees was not controlled by KRS 453.040(1) and CR 54.04(2). *Harris* at 482. Moreover, because her

judgment was against an agency of the Commonwealth, the Court held that her motion was not necessarily controlled by the terms of the Kentucky Whistleblower Act. Accordingly, the procedure set forth in CR 54.04(2), *i.e.,* the filing of a bill of costs, objections to follow within five days, and the same to be resolved by the trial court in the form of a supplemental judgment, did not apply to her. Rather, she was required to timely move to alter, amend, or vacate the judgment, after which time the trial court lost jurisdiction over its judgment. *Harris* at 483.

The only similarities between the facts set forth in *Harris* and those here are that neither one of the prevailing parties filed a motion to alter, amend, or vacate the judgment, yet both sought an award of "costs" to be determined by the trial court. Otherwise, the remaining facts, and the law applicable thereto, are altogether different. Unlike the prevailing party in *Harris*, CorrectCare was entitled to and did file a bill of costs pursuant to KRS 453.040(1) and CR 54.04(1), not a motion for attorney's fees and expert witness fees against the Commonwealth pursuant to KRS 61.990(4). Upon resolution of the Appellants' objections thereto, CorrectCare was entitled to and did receive a supplemental judgment from the trial court pursuant to CR 54.04(2), and it was not required to either include its costs in the Original Judgment or to reserve the same for later determination by the trial court, or then be forced to move to alter, amend, or vacate that judgment.

We also note that unlike in *Harris*, where the Court stated that the defendant had a number of means to preserve a circuit court's jurisdiction to address costs, but used none of them, in the instant case the original judgment **did** reserve the

issue of costs, and stated, "Based on the foregoing, IT IS HEREBY ORDERED AND ADJUDGED that…Defendant shall recover its costs from Plaintiffs as provided by KRS 453.040, KRS 453.050 and CR 54.04." According to the Appellants' own interpretation of the law, CorrectCare properly reserved its claim for costs. Accordingly, the trial court did not lack jurisdiction to enter the amended supplemental judgment, and we find no error.

As its claim on appeal, CorrectCare argues that a recent decision by this Court entitles it to an award of witness allowances as recoverable court costs. To explain, in its Bill of Costs, CorrectCare sought an award of costs for the original deposition transcript of the eight plaintiffs who proceeded to trial. They were Hisle, Goff, Gulley, Johnson, York, Dean, Lowe, and Burchett. Those costs totaled $2,671.25. CorrectCare also applied for a $100.00 per day allowance to witnesses pursuant to KRS 453.050 for those persons called in the defense of the action. They were Missy Sturgill ($300.00), Shelli Conyers-Votaw ($100.00), Sherri Stearman ($100.00), Bridget Rogers ($100.00), Dolly Hamlin ($100.00), Stacy Fields ($100.00), and Brad Foster ($100.00).

The Appellants objected only to an award of an allowance to witnesses upon the ground that statutory authorization is a necessary predicate for the recovery of witness fees, and that KRS 453.050 did not provide for a $100.00 per day allowance. They relied upon *Harris*, *supra*, for the proposition that witness fees are not recoverable as costs absent statutory authorization. *Harris* at 482.

KRS 453.050 plainly states that some monetary allowance shall be made for witnesses who are required to attend trial, and the only question is how that allowance should be calculated. During the proceedings below, counsel was unable to find any Kentucky authority with respect to the appropriate amount of a witness allowance. CorrectCare notes that since then, the question has been resolved by this Court's holding in *Bryan v. CorrectCare-Integrated Health, Inc.*, 420 S.W.3d 520 (Ky. App. 2013). Therein, we stated that the "allowance to witnesses" found in KRS 453.050 means "a subsistence allowance which would ordinarily include a sum for the witnesses' necessary meals, lodging, and travel." *Id*. at 526. Although a "flat award" of $100.00 per day was disallowed, this Court remanded the matter for a more precise determination.

CorrectCare argues that although *Bryan* permits a *per diem* allowance for both lay and expert witnesses, all of the witnesses for which an allowance is sought here testified as lay witnesses. CorrectCare did not and is not seeking reimbursement for witness "fees," such as expert witness fees and expenses, which were the subject of the *Harris* and *Brookshire* cases cited by the Appellants.

Based upon our recent holding in *Bryan*, we vacate the trial court's judgment in this regard and remand for consideration of a *per diem* allowance for the witnesses who attended trial.

Accordingly, we affirm the trial verdict, order of directed verdict, and civil judgment entered on April 30, 2013, by the Fayette Circuit Court. We vacate and

remand the trial court's amended supplemental judgment entered on July 10, 2013, to the Fayette Circuit Court for further consideration.

ALL CONCUR.

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