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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000404-MR

GEORGE CARPENTER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 15-CI-000458

WAL-MART STORES EAST, L.P.,
D/B/A WALMART — APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** ** ** **

BEFORE: DIXON, NICKELL AND K. THOMPSON, JUDGES.

THOMPSON, JUDGE: George Carpenter appeals from a judgment of the Jefferson Circuit Court entered after a jury found Wal-Mart Stores East, L.P. D/B/A Walmart was not liable for injuries allegedly sustained as a result of a slip and fall at a Walmart store located in Louisville, Kentucky. Carpenter argues the

following errors were committed: (1) the trial court erred in ruling Carpenter's counsel was required to appear at a nonparty's deposition and awarding costs and attorney fees to Walmart for not appearing; (2) the trial court erred in denying Carpenter's motions for a continuance of the trial date; and (3) the trial court erred in permitting Walmart to present eyewitness testimony that Carpenter's fall was staged and/or intentional.

On February 5, 2014, Carpenter and his sister were shopping at the Bashford Manor Walmart. Carpenter was in the self-checkout lane when he allegedly stepped in water on the floor and slipped and fell.

Carpenter filed a complaint against Walmart alleging he suffered serious personal injury from the fall and Walmart knew or should have known in the exercise of ordinary care that water on the floor presented a risk of injury and failed to warn of the unsafe condition. In the instructions provided, the jury was asked as follows:

> Do you believe from the evidence that George Carpenter's injuries on the date in question were caused by slipping on a spot of clear liquid, that Walmart's store premises were not in a reasonably safe condition for use of its business invitees, including George Carpenter, and that the presence of the substance on the floor of Walmart's store was a substantial factor in causing George Carpenter's fall and injury?

The jury unanimously answered "no." After the entry of a trial order and judgment, Carpenter appealed.

The first two issues presented concern pretrial rulings. The initial issue relates to discovery sanctions imposed by the trial court.

Carpenter's and Walmart's counsel agreed to a deposition date of November 23, 2015, for a fact witness, Beverly Carthen, who is Carpenter's cousin and also purported to be an eyewitness to Carpenter's fall. Neither Carpenter nor his counsel appeared at the deposition. Carthen also failed to appear. Walmart filed a motion for relief under Kentucky Civil Rules of Procedure (CR) 37.04 requesting sanctions be imposed against Carpenter for failure to appear at Carthen's deposition or the scheduled hearing date on its motion to compel discovery.

At the trial court's motion hour, counsel for both parties appeared and the trial court instructed them to agree on a hearing date for the motion to compel. Counsels agreed to a hearing date of January 13, 2016. On the date of the hearing, Carpenter's counsel did not appear. The trial court issued an order compelling Carpenter to attend the deposition of Carthen and instructing Walmart's counsel to submit an affidavit of costs. Walmart filed an affidavit itemizing $1,328.50 in costs and expenses incurred.

Carpenter filed a motion requesting that the motion to compel be set aside. The trial court denied that motion noting Carpenter had previously failed to comply with a discovery request and Carpenter had not offered any extraordinary circumstance preventing his or counsel's attendance at the deposition.

Carpenter's initial argument is that the circuit court had no authority to award Walmart costs and expenses for his or his counsel's failure to attend Carthen's deposition. He argues that under CR 37.04, a party cannot be sanctioned for not appearing at a nonparty's deposition.

CR 37.04 addresses the "[f]ailure of [a] party to attend at own deposition or serve answers to interrogatories or respond to request for inspection." It provides that if a party fails to appear for his or her deposition after being served with proper notice, the court in which the action is pending may, on motion, take the following action:

> [It] may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (a), (b) and (c) of Rule 37.02(2). In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

It is well-established that trial courts have broad discretion in managing discovery. *Commonwealth Finance and Administration Cabinet v.*

Wingate, 460 S.W.3d 843, 849 (Ky. 2015). However, as with all discretionary matters, the trial court's management of discovery including the imposition of sanctions for discovery violations will be reversed if that discretion is abused. *S. Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 932 (Ky. 2013). "A trial court has abused its discretion when its ruling reflects arbitrariness, unreasonableness, unfairness, or a lack of support from sound legal principles." *Zewoldi v. Transit Auth. of River City*, 553 S.W.3d 841, 846 (Ky.App. 2018).

"[A]s with statutes, we interpret the civil rules in accordance with their plain language." *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 296 (Ky. 2010). Under the express terms of CR 37.04, it applies to the failure of a party to attend his own deposition. There is no provision in the rule that requires either a party or his counsel to attend the deposition of a nonparty. The limitation of the rule is logical.

There can be no prejudice incurred by the nonattendance of a party or his counsel at a deposition of a nonparty. To the contrary, there is a distinct advantage to deposing a party without cross-examination by the opposing party. We conclude the imposition of costs and expenses for the failure of Carpenter or his counsel to attend the deposition of Carthen was error.[1]

[1] We also point out that it was not Carpenter or his counsel's failure to attend Carthen's deposition that caused Walmart to needlessly incur expenses by scheduling and appearing on the scheduled date. The deposition could not occur because Carthen failed to attend.

Carpenter also argues that the trial court erred when it denied his motion for a continuance of the trial date. Two weeks prior to the scheduled trial date, Carpenter filed a motion for a continuance stating he recently suffered injuries in a bus accident, which he alleged aggravated the injuries sustained as a result of the slip and fall at Walmart and he was required to wear a neck brace. He argued that the aggravation of the injury impacted his claim for damages and that the jury would likely be confused by the nature of his injuries sustained at Walmart and those sustained as a result of the bus accident. He further claimed it would be difficult to obtain recent medical records by the existing trial date.

The trial court heard arguments from counsel, including Walmart's argument that the trial should not be continued because the trial was previously continued due to the court's schedule, the alleged slip and fall occurred three years earlier, some witnesses could no longer be located and Carpenter had a series of injuries since his alleged slip and fall making it reasonably possible that a continuance would lead to further continuances. After hearing arguments, the trial court observed this was a simple slip and fall case. It found any prejudice to Carpenter by his appearance in a neck brace and any confusion created regarding

Carpenter's injuries at Walmart and injuries caused by the bus accident could be eliminated by trial testimony or, if needed, an admonition.[2]

Two days prior to trial, Carpenter filed a second motion to continue the trial date alleging one of Carpenter's treating medical providers had notified him that he was unavailable to testify. However, before the hearing on that motion, Carpenter informed the trial court a previously disclosed physician was available to testify so that a continuance was no longer needed and to "remand" the motion.

A trial court has broad discretion in granting or denying a continuance. *Abbott v. Commonwealth,* 822 S.W.2d 417, 418 (Ky. 1992). "[W]hether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case." *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991) (overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)). The trial court is required to consider the following factors in making its decision: "length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance

[2] At trial, Carpenter testified regarding the bus accident and medical testimony clarified what injuries Carpenter claimed were attributable to the alleged slip and fall and to the bus accident.

will lead to identifiable prejudice." *Id*. It is apparent from the trial court's oral findings that all relevant factors were considered. We conclude the trial court did not abuse its discretion when it denied Carpenter's first motion for a continuance.

It is basic appellate practice that "a party cannot ask a trial court to do something and, when the court does it, complain on appeal that the court erred." *Tackett v. Commonwealth*, 445 S.W.3d 20, 29 (Ky. 2014). For that reason, we affirm the denial of Carpenter's second motion for continuance without further discussion.

The final issue is whether the trial court erred when it permitted two eyewitnesses to testify as to their personal observations of Carpenter at the time of the alleged slip and fall and their perception that Carpenter intentionally went to the floor. We conclude that under the Kentucky Rules of Evidence (KRE) such testimony was admissible.

Tek Acharya was working as a customer service manager at the Bashford Manor Walmart at the time of Carpenter's alleged slip and fall. Jim Mathis was also working at the store as a meat department associate.

Acharya testified he first noticed Carpenter in the self-checkout area standing beside a register shuffling his feet back and forth and swinging his hands into the air. He pointed out Carpenter's unusual behavior captured on a surveillance video played to the jury. Acharya testified it appeared Carpenter was

practicing something. Shortly thereafter, Acharya saw Carpenter go down to the floor.

Acharya testified that Carpenter bent his knees and slowly went down. He testified Carpenter did this "on purpose" and he could see Carpenter's feet and Carpenter did not slip on anything. Although there was water on other parts of the floor caused by rain, there was no water where Carpenter was standing.

Mathis was on his lunch break and was approaching the self-checkout area when he observed Carpenter approximately ten to twelve feet away. He saw Carpenter shuffle his feet and continued to watch as Carpenter bent his knees, squatted, put his hands and arms behind him and went to the floor. As the surveillance video was played to the jury, Mathis pointed out Carpenter's unusual conduct. Mathis recalled that as Carpenter went down to the floor he loudly said, "there should be no damn water on the floor." Based on what he observed, Mathis testified Carpenter went to the floor on purpose.

Mathis testified there was no water on the floor where Carpenter allegedly slipped and fell. After Carpenter was on the floor, Mathis observed him begin to move his legs around and scoot his foot closer to the water on another part of the floor. Mathis pointed out Carpenter's behavior as the surveillance video was played to the jury.

On appellate review, "[w]e show great deference to a trial court's evidentiary rulings and reverse only upon a finding of an abuse of discretion." *Gray v. Commonwealth*, 480 S.W.3d 253, 266-67 (Ky. 2016). Here, the trial court did not abuse its discretion by permitting Acharya and Mathis to testify as to their personal observations and perceptions that followed from those observations.

> KRE 701 states:
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
>
> (a) Rationally based on the perception of the witness;
>
> (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
>
> (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Although a lay witness is ordinarily not permitted to testify as to another person's intent, under the rule, a lay witness may do so if the witnesses' opinion is based on his or her factual observations or perceptions. *Gabbard v. Commonwealth*, 297 S.W.3d 844, 855 (Ky. 2009).

Acharya and Mathis testified regarding their observations of Carpenter before, during and after Carpenter's alleged slip and fall. We conclude that under KRE 701, it was not an abuse of discretion to permit them to testify that Carpenter intentionally went to the floor of the Walmart store on the date in question.

For the reasons stated, we reverse the trial court's award of costs and expenses for the failure of Carpenter or his counsel to attend Carthen's deposition. In all other respects, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Michael A. Landisman Louisville, Kentucky	Thomas E. Stevens Jennifer Kincaid Adams Louisville, Kentucky